

SOUTH AFRICAN LAW COMMISSION

PROJECT 105

**REVIEW OF SECURITY LEGISLATION
(TERRORISM : SECTION 54 OF
THE INTERNAL SECURITY ACT, 1982
(ACT NO. 74 OF 1982))**

AUGUST 2002

**TO DR PM MADUNA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the *South African Law Commission Act, 1973* (Act 19 of 1973), for your consideration the Commission's report on the *review of security legislation (Terrorism : section 54 of the Internal Security Act, 1982 (Act No 74 of 1982))*.

**MADAM JUSTICE Y MOKGORO
JUDGE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA
CHAIRPERSON OF THE SOUTH AFRICAN LAW COMMISSION**

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Madam Justice JY Mokgoro (Chairperson)

The Honourable Mr Justice TC Howie

The Honourable Ms Justice L Mailula

Adv JJ Gauntlett SC

Ms Z Seedat

Mr P Mojaelo

The Secretary is Mr W Henegan. The Commission's offices are on the 12 th floor, Corner of Schoeman and Andries Streets, Pretoria. Correspondence should be addressed to:

The Secretary

South African Law Commission

Private Bag X668

PRETORIA

0001

Telephone: (012) 322-6440

Telefax: (012) 320-0936

E-mail: pvwyk@salawcom.org.za

Internet site: <http://www.law.wits.ac.za/salc/salc.html>

The project leader responsible for this project is the Honourable Mr Justice CT Howie of the Supreme Court of Appeal in Bloemfontein. The other members of the project committee are:

- Mr G Marcus (SC), a senior advocate at the Johannesburg Bar;
- Mr D Nkadimeng, an attorney from Pietersburg; and
- Mr D Tabata, an attorney from East London.

The researcher allocated to this project, who may be contacted for further information, is Mr PA van Wyk.

This report will be made available on the Commission's Internet Website once the report has

been submitted to the Minister.

INDEX PAGE NO.**PART 1**

INTRODUCTION	(v)
SUMMARY OF RECOMMENDATIONS	(xix)
BIBLIOGRAPHY	(lv)

CHAPTER 1

A.	Origin of the investigation	1
B.	Discussion Paper 92	2
C.	The need for legislation dealing with terrorism	4

CHAPTER 2

South Africa's view on terrorism and its international obligations	23
--	----

CHAPTER 3

International terrorism : Theory and definitions	28
A. Basic criteria for definition	28
(a) Domestic terrorism	29
(b) international/transnational terrorism	29

CHAPTER 4

International instruments to combat terrorism and South African domestic law		31
A.	Nations resolutions and Conventions on terrorism	31
(a)	What effect do conventions and resolutions have?	31
(b)	UN Security Council Resolution 1373	36
(c)	International Conventions and measures adopted by South Africa	39
(i)	Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention)	39
(ii)	Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention)	40
(iii)	Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention)	40
(iv)	Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons	42
(v)	International Convention Against the Taking of Hostages (Hostage Convention)	43
(vi)	Convention on the Marking of Plastic Explosives for the Purpose of Identification	44
(vii)	Convention on the Physical Protection of Nuclear Material	45
(viii)	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation	46
(ix)	Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf	46
(x)	Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation	48
(xi)	The International Convention for the Suppression of Terrorist Bombings	48
(xii)	International Convention for the Suppression of the Financing	

- of Terrorism 51
 - (xiii) Draft Comprehensive International Convention on terrorism 52
 - B. Regional Instruments on terrorism 65

CHAPTER 5

- A. Specific legal provisions in South Africa pertaining to terrorism and related offences. 71
- B. The Internal Security Act, 1982: Terrorism 71
- C. The Internal Security Act, 1982: Sabotage 72
- D. The Intimidation Act, 1982 74
- E. Other legislation aimed at the regulation of firearms, explosives, ammunition and other measures to counter acts of terror or violence 74
 - a. The Armaments Development and Production Act, 1968 79
 - b. Non-Proliferation of Weapons of Mass Destruction Act, 1993 82
 - c. The Nuclear Energy Act, 1999 82
 - d. State of Emergency Act, 1997 83
 - e. Defence Act, 1957 83
 - f. National Key Points Act, 1980 83
 - g. Protection of Information Act, 1982 83
 - h. Civil Protection Act, 1977 84
 - i. The Regulation of Gatherings Act, 1993: Films and Publications Act, 1996: and the Riotous Assemblies Act, 1956 84
 - a. Interception and Monitoring Prohibition Act, 1992 85
 - b. The Financial Intelligence Centre Act, 2001 85
- D. Common law 87

CHAPTER 6

- A. United Kingdom 88
 - (a) Introduction 88
 - (b) Definition of terrorism 100
 - (c) Immigration and asylum 103
 - (d) Refugee protection and the right to seek asylum 112
 - (e) Proscription 116
 - (f) Exclusion 127
 - (g) Terrorist property 127
 - (h) Disclosing information 139
 - (i) terrorist investigations 140
 - (j) Power of arrest 143
 - (k) Detention 144
 - (l) Access to *appropriate adults* and legal advisers 152
 - (m) Powers of stop, search, entry and seizure 156
 - (n) Port and border controls 156
 - (o) Terrorist offences 158
 - (p) Terrorist information 165
 - (q) Informing a named person of the detainee's detention and access to a lawyer 167
 - (r) Hoaxes and threats involving noxious substances 170
 - (s) Race and religion 171
 - (t) Weapons of mass destruction 171
 - (u) Control of pathogens and toxins 171
 - (v) Security of nuclear industry 172
 - (w) Aviation security 172
 - (x) Police powers 173

(y)	Retention of communications data	173
(z)	Bribery and corruption	174
(Aa)	Miscellaneous	174
(Ab)	Use of noxious substances	175
(Ac)	Intelligence Services Act 1994	175
(Ad)	Terrorism Act 2000	175
(Ae)	Passenger and freight information	176

CHAPTER 7

United States of America	177
A. Introduction	177
B. The Patriot Act	181
(a) Introduction	181
(b) Title I—enhancing Domestic Security Against Terrorism	181
(c) Title II—enhanced Surveillance Procedures	182
(d) Title III — international Money Laundering Abatement and Anti-terrorist Financing Act of 2001	192
(i) Subtitle A. International Counter-Money Laundering and Related Measures	198
(ii) Subtitle B. Bank Secrecy Act Amendments and Related Improvements	204
(iii) Subtitle C. Currency Crimes	207
(e) Title IV—protecting the Border	207
(i) Subtitle A. Protecting the Northern Border	207
(ii) Subtitle B. Enhanced Immigration Provisions	208
(iii) Subtitle C – Preservation of Immigration Benefits for Victims of Terrorism	214
(f) TITLE V — Removing obstacles to investigating terrorism	216
(g) Title VI — Victims of terrorism, public safety officers, and their families	218
(h) Title VII — Increased information sharing for critical infrastructure protection	218
(i) Title VIII —Strengthening the criminal laws against terrorism	218
(k) Title IX — Improved intelligence	221
(l) Title X — Miscellaneous issues	222
A. Military tribunals	223
B. The US Report to the UN Security Council Committee Established Pursuant to Resolution 1373 of 2001	238
(a) Introduction	238
(b) What measures have been taken to prevent and suppress the financing of terrorists acts?	240
(b) What are the offences and penalties in the US with respect to provision and collection of funds to provide support to terrorists?	246
(b) What legislation and procedures exist for freezing accounts and assets at banks and financial institutions	248
(e) What legislation or other measures are in place to prevent support, recruitment, eliminating supply of weapons and what offences prohibit recruitment and supply of weapons?	250
(f) What other steps are being taken to prevent the commission of terrorist acts	251
(g) What legislation or procedures exist for denying safe haven to terrorists?	252
(h) What legislation or procedures exist to prevent terrorists acting from US territory against other states or citizens?	253

(i)	What steps have been taken to establish terrorist acts as serious criminal offences	254	
(j)	What procedures and mechanisms are in place to assist other states?		255
(k)	How do border controls prevent the movement of terrorists, issuance of identity papers and travel documents and prevention of forgery?	256	
(l)	What legislation, procedures and mechanisms are in place for ensuring asylum seekers not involved in terrorist activity before granting refugee status?	257	
(m)	What procedures are in place to prevent the abuse of refugee status by terrorists	258	
A.	Interrogating A Suspected Terrorist	259	
B.	Anti-hoax Legislation	261	
C.	Legislative Measures Exiting Prior to September 2001		263

CHAPTER 8 270

Canada	270	
A.	Legislative measures in Canada	270
B.	Report of The Government of Canada to Counter-terrorism Committee of UN Security Council on Measures to Implement Resolution 1373 (2001)	287
(b)	Introduction	287
(c)	Implementation of Un Security Council Resolution 1373 (2001)	287
(i)	Prevention and suppression of the financing of terrorist acts	287
(ii)	Criminalize the provision or collection of funds by nationals	288
(iii)	Freeze funds and other financial assets or economic resources	289
(iv)	Prohibit nationals or any persons and entities within Canada from making any funds, financial assets or economic resources or financial or other related services available	291
(v)	Providing any form of support	292
(vi)	Taking of necessary steps to prevent the commission of terrorist acts	292
(vii)	Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens	293
(viii)	Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories	295
(ix)	Measures to ensure person who participate in financing, planning, preparation or perpetration of terrorist acts or supporting terrorist acts is brought to justice	295
(x)	Assistance in connection with criminal investigations or criminal proceedings	295
(xi)	Prevention of movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents	296
(xii)	Ways of intensifying and accelerating exchange of operational information	297
(xiii)	Cooperate through bilateral and multilateral arrangements and agreements to prevent and suppress terrorist attacks and take action against perpetrators of such attacks	298
(xiv)	Become parties to relevant international conventions and protocols, including International Convention for Suppression of the Financing of Terrorism	299
(xv)	Increase cooperation and fully implement the relevant international conventions and protocols	299

(xvi)	Taking appropriate measures before granting refugee status	299
(xvii)	Ensure that refugee status is not abused	300
(xviii)	Money Laundering and Financing Measures	300
(xix)	Chemical, Biological, Radiological and Nuclear Threats (Cbrn)	302
(xx)	International Crime	302
(xxi)	Drugs	303
(xxii)	Illicit Trafficking in Firearms	303

CHAPTER 9

India	304	
A.	THE <i>PREVENTION OF TERRORISM ORDINANCE, 2001 (POTO)</i>	304
(a)	Introduction	304
(b)	The need for a legislative measure	308
(c)	Safeguards	309
(d)	Duty to disclose information to Police	310
(e)	Sweeping powers granted to the Police?	312
(f)	Definition of terrorist act	315
B.	The Law Commission of India's Report	318
(a)	Need for legislation	318
(b)	Definition of terrorist act	320
(c)	Harbouring or concealing a terrorist	321
(d)	Threatening a witness with violence	322
(e)	Obligation to inform Police of knowledge about terrorist activity	322
(f)	Disruptive activities	324
(g)	Seizing and attaching terrorist property	325
(h)	Jurisdiction of courts	328
(i)	Samples of handwriting, finger prints, foot prints, photographs, blood, saliva, semen, hair	329
(j)	Measures for the protection of witnesses	330
(k)	Confessions	332
(l)	Duty on police to inform of arrest	335

CHAPTER 10

Australia	337	
A.	Introduction	337
(b)	New legislative measures	337
B.	The Charter of the UN (<i>Anti-terrorism Measures</i>) Regulations 2001	351
C.	Report of Australia to the Counter-terrorism Committee of the UN Security Council	357
(a)	Introduction	357
(b)	What measures have been taken to prevent and suppress the financing of terrorists acts?	358
(c)	What are the offences and penalties with respect to provision and collection of funds to provide support to terrorists?	359
(d)	What legislation and procedures exist for freezing accounts and assets at banks and financial institutions?	360
(e)	What legislation or other measures are in place to prevent persons from providing any form of support to persons involved in terrorist acts	361
(f)	What other steps are being taken to prevent the commission of terrorist acts, and what early warning mechanisms exist to allow exchange of information?	362
(g)	What legislation or procedures exist for denying safe haven to terrorists?	364
(h)	What legislation or procedures exist to prevent terrorists acting from	

	Australian territory and what steps have been taken to establish terrorist acts as serious criminal offences and to ensure that the punishment reflects the seriousness of such terrorist acts?	366
(i)	Mutual Assistance in Criminal Matters	369
(j)	How do border controls prevent the movement of terrorists	371
(l)	What legislation, procedures and mechanisms are in place for ensuring asylum seekers have not been involved in terrorist activity before granting refugee status?	376
D.	Suppression of the Financing of Terrorism Bill 2002	377
(a)	Introduction	377
(b)	Definitions	380
(c)	Constitutional basis for offences	381
(d)	Financing terrorism	382
(e)	Amendments relating to the reporting of financial transactions	383
(f)	Proposed section 14 definitions	390
(g)	Proposed section 15 - Listing persons, entities and assets	391
(h)	Proposed section 16 - Minister may revoke the listing	391
(i)	Proposed section 17 - Listed person or entity may apply to have the listing revoked	391
(j)	Proposed section 18 - Proscription by regulation	392
(k)	Proposed section 19 - Effect of resolution ceasing to bind Australia	392
(l)	Proposed section 20 - Offence-dealing with freezable assets	392
(m)	Proposed section 21 - Offence-giving an asset to a proscribed person or entity	394
(n)	Proposed section 22 — Authorised dealings	395
(o)	Proposed section 23 — Part prevails over conflicting legal obligations	395
(p)	Proposed section 24 — Indemnity for holder of assets	396
(r)	Proposed section 25 — Compensation for persons wrongly affected	396
(s)	Proposed section 26 — Injunctions	396
T.	Security Legislation Amendment (Terrorism) Bill 2002	397
(a)	Amendments relating to treason and terrorism	397
(b)	Engaging in a terrorist act	403
(c)	Directing organisations concerned with terrorist acts	405
(d)	Possessing things connected with terrorist acts	405
(e)	Collecting or making documents likely to facilitate terrorist acts	406
(f)	Other acts done in preparation for, or planning, terrorist acts	407
(g)	Proscribed organisations	408
(h)	Declarations of proscribed organisations	408
(i)	Revocation of declarations	409
(j)	Offences in relation to proscribed organisations	410
(aa)	Directing activities etc. of proscribed organisations	410
(bb)	Amendments relating to air security officers: Australian Protective Service Act 1987	411
F.	The Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002	412
(b)	Subsection 72.3 (1) - Offence causing death or serious harm	413
(c)	Offence causing extensive destruction	414
(d)	Jurisdiction requirement	414
(e)	Saving of other laws	416
(f)	Bringing proceedings with consent of Attorney-General	416
(g)	Ministerial certificates relating to proceedings	416
(h)	Jurisdiction of State courts preserved	417
(i)	Definitions	417
(j)	Extradition Act 1988	417
G.	Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002	418
(b)	Introduction	418

- (c) Hoaxes: explosives and dangerous substances 420
- (d) Geographical jurisdiction 420
- (e) Amendments commencing on Royal assent 421
- (f) Using a postal or similar service to make a threat 421
- (g) Using a postal or similar service to menace harass or cause offence 422
- (h) Causing a dangerous article to be carried by a postal or similar service 423
- (i) Causing an explosive, or a dangerous or harmful substance, to be carried by post 424
- F. Legislative measures in Australia governing police powers of detention and interrogation 425
- I. The right to silence 430
- J. The right to contact a friend or relative 431
- K. The right to legal assistance 432

CHAPTER 11

- A. Germany 436
- B. Japan 447
- C. The Russian Federation 448
- D. Lebanon 449
- E. Turkey 460
- F. Israel 467
- G. Italy 476
- H. Jordan 482

CHAPTER 12

France 489

- (a) Introduction 489
- (b) Measures taken to prevent and suppress the financing of terrorist acts 490
- (c) What legislation and procedures exist for freezing accounts and assets at banks and financial institutions? 493
- (a) Penal provisions to prohibit recruitment, supply of weapons and other measures? 495
- (b) Prohibiting the provision of arms to terrorists 497
- (c) Other steps taken to prevent terrorist acts, and early warning mechanisms 498
- (d) Specific measures to prevent terrorist acts? 500
- (e) Legislation or procedures for denying safe haven to terrorists, exclusion or expulsion 502
- (a) Granting of residency to and expulsion of asylum seekers 502
- (b) Legislation or procedures to prevent terrorists acting from French soil 504
- (c) Steps taken to establish terrorist acts as serious criminal offences 506
- (d) Procedures and mechanisms to assist other States 509
- (e) How do border patrols prevent movement of terrorists 511
- (f) Steps to intensify and accelerate exchange of operational information 513
- (g) Government's intentions regarding signing/ratifying conventions and protocols 518
- (h) Legislative and/or administrative procedures which prevent claims of political motivation for refusing requests for extradition? 518

CHAPTER 13

Options on reform. 521

- A. Introduction 521
- B. The need for an Anti-Terrorism Bill 524
 - (a) Comment on discussion paper 92 524

	(b)	Evaluation	569	
	(c)	Recommendation	572	
C.		Preamble to the Bill	572	
	(a)	_____Evaluation and proposal contained in discussion paper 92	572	
	(b)	Comment on discussion paper 92	580	
	(c)	Evaluation	582	
	(d)	Recommendation	582	
D.		Definitions	582	
	(a)	Arms	582	
		(i) Comment on discussion paper 92	583	
		(ii) Evaluation and recommendation	583	
	(b)	Combatting terrorism	584	
	(c)	Place of public use	584	
	(d)	Financing	584	
	(e)	Internationally protected persons	585	
	(f)	Law enforcement officer	587	
	(g)	State or government facility	589	
	(h)	Terrorist act	590	
		(i) Evaluation and proposal contained in discussion paper 92	590	
		(ii) Comment on discussion paper 92	592	
		(iii) Evaluation	600	
		(iv) Recommendation	606	
	(d)	Terrorist organisation	606	
		(i) Evaluation and preliminary proposal of discussion paper 92	606	
		(ii) Comment on discussion paper 92	607	
		(iii) Evaluation and recommendation	607	
	(j)	Use of weapons of mass destruction	609	
E.		Clause 2: Terrorist offences	610	
	(d)	Evaluation and preliminary recommendation in discussion paper 92	610	
	(e)	Comment on the discussion paper	610	
	(f)	Evaluation	612	
	(g)	Recommendation	612	
F.		Clause 3: Participation in and facilitation of terrorist acts and harbouring and concealing	612	
	(a)	Evaluation and preliminary recommendation in discussion paper 92	612	
	(b)	Comment on the discussion paper	615	
	(c)	Evaluation and recommendation	617	
G.		Clause 4: Membership of terrorist organisations	624	
	(a)	Evaluation and preliminary proposal contained in discussion paper 92	624	
	(b)	Comment on the discussion paper	625	
	(c)	Evaluation and recommendation	631	
G.		Sabotage	638	
	(a)	Evaluation and preliminary recommendation in discussion paper 92	638	
	(b)	Comment on the discussion paper	640	
	(c)	Evaluation and recommendation	640	
G.		Clause 5: Hijacking	641	
	(a)	Evaluation and preliminary recommendation in discussion paper 92	641	
	(b)	Comment on the discussion paper	642	
	(c)	Evaluation and recommendation	645	
G.		Clause 6: Endangering the safety of marine navigation	646	
	(a)	Evaluation and preliminary recommendation in discussion paper 92	646	
	(b)	Comment on the discussion paper	646	
	(c)	Evaluation and recommendation	647	

G.	Clause 7: Bombing offences	647	
	(a)	Evaluation contained in discussion paper 92	647
	(b)	Comment on the discussion paper	649
	(c)	Evaluation and recommendation	655
G.	Clause 8: Taking of hostages	656	
	(a)	Comment on the discussion paper	656
	(b)	Evaluation and recommendation	657
G.	Clause 9: Internationally protected persons	657	
	(a)	Evaluation contained in discussion paper 92	657
	(b)	Comment on the discussion paper	658
	(c)	Evaluation and recommendation	659
G.	Murder or kidnapping of internationally protected persons	662	
	(a)	Evaluation and recommendation	662
G.	Protection of property occupied by internationally protected persons		663
	(a)	Evaluation contained in discussion paper 92	663
	(b)	Comment on the discussion paper	664
	(c)	Evaluation and recommendation	664
G.	Clause 10: Offences relating to fixed platforms	665	
	(a)	Evaluation contained in discussion paper 92	665
	(b)	Comment on discussion paper 92	665
	(c)	Evaluation and recommendation	666
G.	Clause 11: Offences with regard to nuclear matter or facilities		667
	(d)	Evaluation contained in discussion paper 92	667
	(e)	Comment on discussion paper 92	667
	(f)	Evaluation	668
	(g)	Recommendation	671
H.	Clause 12: Hoaxes	671	
	(a)	Evaluation	671
	(b)	Recommendation	680
G.	Clause 13: Weapons of mass destruction	681	
	(a)	Evaluation	681
	(b)	Recommendation	682
G.	Clause 14: Jurisdiction of the courts of the Republic		682
	(a)	Evaluation contained in discussion paper 92	682
	(b)	Comment on the discussion paper	684
	(c)	Evaluation	686
	(d)	Recommendation	712
H.	Detention for interrogation	715	
	(d)	Justification for detention for interrogation	715
	(iii)	Evaluation contained in discussion paper 92	715
	(iv)	Comment on discussion paper 92	725
	(v)	Evaluation	757
	(vi)	Recommendation	792
	(e)	Withholding information from a law enforcement officer	797
	(i)	Evaluation contained in discussion paper 92	797
	(ii)	Comment on discussion paper 92	798
	(iii)	Evaluation and recommendation	803
	(d)	Should the judiciary be involved in applications for gathering information	803
	(i)	Evaluation contained in discussion paper 92	803
	(ii)	Comment on discussion paper 92	806
	(iii)	Evaluation and recommendation	809
	(d)	Should applications be made by DPPs?	812
	(i)	Evaluation contained in discussion paper 92	812
	(ii)	Comment on discussion paper 92	813

- (iii) Evaluation and recommendation 815
- (d) Limited scope of Bill 815
 - (i) Evaluation contained in discussion paper 92815
 - (ii) Comment on discussion paper 92 815
 - (iii) Evaluation 816
- (d) Conditions of detention 816
 - (i) Evaluation contained in discussion paper 92816
 - (ii) Comment on discussion paper 92 822
 - (iii) Evaluation and recommendation 823
- (d) Oral or written applications 826
- (e) Detainee taken to place of detention furnished with reasons etc 827
 - (i) Evaluation contained in discussion paper 92827
 - (ii) Comment on discussion paper 92 833
 - (iii) Evaluation 836
- (d) Periodic appearances of a detainee before a judge 838
 - (i) Evaluation contained in discussion paper 92838
 - (ii) Comment on discussion paper 92 838
 - (iii) Evaluation 841
- (d) Enquiries by the judge into the detainee's conditions of detention and welfare 841
 - (i) Evaluation and recommendation 842
- (d) DPPs must justify further detention 842
 - (i) Evaluation contained in discussion paper 92842
 - (ii) Comment on discussion paper 92 843
 - (iii) Evaluation and recommendation 844
- (d) Provision for representations 844
 - (i) Evaluation contained in discussion paper 92844
 - (ii) Comment on discussion paper 92 845
 - (iii) Evaluation 846
- (d) Duration of period of detention 846
 - (i) Evaluation contained in discussion paper 92847
 - (ii) Comment on discussion paper 92 851
 - (iii) Evaluation and recommendation 853
- (d) Restricted access to a detainee 854
 - (i) Evaluation contained in discussion paper 92854
 - (ii) Comment on discussion paper 92 854
 - (iii) Evaluation and recommendation 856
- (d) Access to lawyers 856
 - (i) Evaluation contained in discussion paper 92856
 - (ii) Comment on discussion paper 92 865
 - (iii) Evaluation and recommendation 869
- (d) Access to medical practitioner of the detainee's choice 870
 - (i) Evaluation contained in discussion paper 92870
 - (ii) Comment on discussion paper 92 872
 - (iii) Evaluation and recommendation 872
- (d) Communicating with and being visited by the spouse or partner, next of kin and chosen religious counsellor 872
 - (i) Evaluation contained in discussion paper 92873
 - (ii) Comment on discussion paper 92 874
 - (iii) Evaluation and recommendation 874
- (d) Admissibility of evidence against detainee in subsequent criminal proceedings 874
 - (i) Evaluation contained in discussion paper 92874
 - (ii) Comment on discussion paper 92 883
 - (iii) Evaluation and recommendation 884

	(d)	Criteria for detention or continued detention	885
	(i)	Evaluation contained in discussion paper 92	885
	(ii)	Comment on discussion paper 92	886
	(iii)	Evaluation	889
	(d)	Upon expiry of the period of 14 days a detainee shall be released immediately	890
	(i)	Evaluation contained in discussion paper 92	890
	(ii)	Comment on discussion paper 92	890
	(iii)	Evaluation and recommendation	890
	(d)	No bail may be granted to a detainee, nor is such detainee entitled to appear in court to apply for bail	891
	(i)	Evaluation contained in discussion paper 92	891
	(ii)	Comment on discussion paper 92	891
	(iii)	Evaluation and recommendation	891
G.		Applications for imposition of conditions to prevent terrorist act	892
H.		Identification of special offences by a Director of Public Prosecutions	894
	(a)	Evaluation contained in discussion paper 92	894
	(b)	Comment on discussion paper 92	895
	(c)	Evaluation and recommendation	895
G.		Powers of court in respect of offences under the Act	895
	(a)	Evaluation contained in discussion paper 92	895
	(b)	Comment on discussion paper 92	896
	(c)	Evaluation and recommendation	897
G.		Plea at trial of offences under the Act	897
	(a)	Evaluation contained in discussion paper 92	897
	(b)	Comment on discussion paper 92	899
	(c)	Evaluation and recommendation	900
G.		Bail in respect of offences under the Bill	900
	(a)	Evaluation contained in discussion paper 92	900
	(b)	Evaluation and recommendation	901
AA		Duty to report information	901
	(a)	Evaluation contained in discussion paper 92	901
	(b)	Comment on discussion paper 92	902
	(c)	Evaluation and recommendation	905
BB		Powers to stop and search vehicles and persons	907
	(a)	Evaluation contained in discussion paper 92	907
	(b)	Comment on discussion paper 92	909
	(c)	Evaluation and recommendation	914
CC		Clause 64: Amendment and repeal of laws	916
DD		Clause 65: Interpretation clause	917
	(a)	Evaluation contained in discussion paper 92	917
	(b)	Comment on discussion paper 92	926
	(c)	Evaluation and recommendation	927
EE.		Combating the financing of terrorism	927
	(d)	Evaluation	927
	(e)	Recommendation	955

Annexure A: Draft Anti-Terrorism Bill 978

Annexure B: Draft Anti-Terrorism Bill as proposed in *Discussion Paper 92* 1022

Annexure C: List of respondents who responded to *Discussion Paper 92* 1045

SUMMARY OF RECOMMENDATIONS

1. Effective legislation for combatting terrorism is one of the available tools governments can use in fighting terrorism. There are shortcomings in South African legislation and they should be remedied. The South African legislation for combating terrorism should be brought in line with the international conventions dealing with terrorism, our law should provide for extra-territorial jurisdiction, the present terrorism offence is too narrow and financing of terrorism must be addressed. There is therefore a need for legislation dealing with terrorism. The Bill recommended in this report differs fundamentally from the one provisionally proposed in the discussion paper. Detention for interrogation no longer forms part of the Bill. In its place it is suggested that provision should be made for investigative hearings which closely resemble the procedure contained in section 205 of the *Criminal Procedure Act* in order to obtain information from a person suspected of being in possession of information on terrorist acts. Provision is also made for preventative measures. This entails that a person suspected of being about to commit a terrorist act can be brought before a court to enter into an undertaking to refrain from certain activities and the court may impose certain conditions to ensure compliance, such as that the person be prohibited from possessing any weapon or explosive for any period specified in the undertaking. Legislation should be adopted which contains the necessary safeguards and which complies with the South African Constitution. (See par 13.80, 13.361 and 13.522.)

2. The 3rd preambular paragraph of the Bill provides “whereas the States members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardise the friendly relations among States and peoples and threaten the integrity and security of States”. It is accepted that the last part of this paragraph has a highly charged political context in the United Nations, that it is intended to be an oblique reference to State terrorism, usually targeted at the United States and Israel, and in the international context that it is part of a carefully balanced compromise. The words “including those which jeopardise the friendly relations among States and peoples and threaten the integrity and security of States” should therefore be deleted. (See par 13.102 and 13.103.)

2. The reference in the 8th preambular paragraph should be to “terrorism” and not to “urban terrorism” (“Whereas terrorism presents a serious threat to the security of the Republic and the safety of the public”). (See par 13.102 and 13.103.)

2. The Bill should define “firearm as follows: ‘firearm’ means any device as defined in section 1 of the *Firearm Control Act*, 2000(Act No 60 of 2000) and includes a machine gun or machine rifle as defined in the Arms and Ammunition Act, 1969 (Act No 75 of 1969). (See par 13.104.)

2. The Bill should define the Minister administering the Act as follows: ‘Minister’ means the Minister to whom the administration of this Act has been assigned in terms of section 63. Clause 63 provides that the President may by proclamation in the Gazette assign the administration of the Act to any Minister, and may determine that any power or duty conferred or imposed by the Act on such Minister, shall be exercised or carried out by that Minister after consultation with one or more other Ministers. (See par 13.189.)

2. The definition setting out that “‘place of public use’ means those parts of any building, land, street, waterway or other location that are at any time accessible or open to members of the public” would be sufficient. In order to include places to which the general public normally does not have access such as clubs, it was considered whether the words “or any group of members of the public” should be included. The drafters of the *Convention for the Suppression of Terrorist Bombings* included the qualification “whether continuously, periodically or occasionally”. These words should therefore remain part of the definition. (See par 13.107 and 13.108.)

2. There is a need for the insertion of a separate clause dealing with the financing of terrorism but there is no need for a definition of *financing*. (See par 13.109 to 13.111.)

2. The ambit of the legislation should not be broadened to encompass the use thereof by all law enforcement officers and not only police officers. The definition of “law enforcement officer” contained in the discussion paper which provided that “law enforcement officer includes members of the police service and immigration and custom officials”, should therefore be deleted. (See par 13.116.)

2. “State or government facility” should be defined so that it includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State, the Republic or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their

official duties. (See par 13.117.)

2. **Terrorist act** means an act, in or outside the Republic,
 - (a) that is committed —
 - (i) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (ii) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside the Republic, and
 - (b) that intentionally —
 - (i) causes death or serious bodily harm to a person by the use of violence;
 - (ii) endangers a person's life;
 - (iii) causes a serious risk to the health or safety of the public or any segment of the public;
 - (iv) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of subparagraphs (i) to (iii); or
 - (v) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, including, but not limited to an information system; or a telecommunications system; or a financial system; or a system used for the delivery of essential government services; or a system used for, or by, an essential public utility; or a system used for, or by, a transport system, other than as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in any of subparagraphs (i) to (iii),

but, for greater certainty, does not include conventional military action in accordance with customary international law or conventional international law. (See par 13.138 and 13.139.)

11. A definition of “terrorist organisation” should be included in the Bill which provides that “terrorist organisation” means an organisation that has as one of its purposes or activities facilitating or carrying out any terrorist act, which has carried out, or plans carrying out terrorist acts. (See par 13.144.)
12. A definition of weapons of mass destruction should be included in the Bill, namely that contained in the *Non-proliferation of Weapons of Mass Destruction Act 87 of 1993*. (See par 13.146.)

11. A general offence of terrorism should be included in the Bill which provides that any person who commits a terrorist act shall be guilty of an offence and shall be liable on conviction to imprisonment for life. (See par 13.152.)
11. The Canadian provision should be followed on the giving of support to and harbouring and concealing of terrorist organisations. The Bill should set out what constitutes participating in or contributing to an act of a terrorist organisation, inter alia, that it includes facilitating, collecting, providing or making available, directly or indirectly, property or inviting a person to provide or make available property or financial or other related services, on behalf of a terrorist organisation; using property, directly or indirectly, on behalf of a terrorist organisation; and possessing property on behalf of a terrorist organisation. The Bill should also provide that it is not an offence to provide or collect funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights. (See par 13.165.)
11. Provision should be made for the proscription of terrorist organisations, for revocation of proscription and review. (See par 13.189.)
11. The recommended expanded definition of “terrorist act” provides sufficiently for the offences presently constituting sabotage and there is therefore no need for the separate offence of sabotage. (See par 13.193.)
11. Although “any interference” with the navigation of an aircraft is already covered in the *Civil Aviation Offences Act* of 1972, there is still a need for a specific offence of hijacking of an aircraft to be created, in addition to the existing offences under the *Civil Aviation Offences Act*. There is no need to remedy the discrepancy in the sentences regarding highjacking of aircraft and the general clause of a terrorist offence, particularly since it is recommended that the sentence is one of life imprisonment in the case of the general terrorist offence unless otherwise prescribed. There is also no need for setting out the powers of commanders of aircraft and certain other persons on board on aircraft. Section 2 of the *Civil Aviation Offences Act* should also provide that it constitutes an offences if any person unlawfully and intentionally uses any device, substance or weapon and performs an act of violence against a person at a designated airport, airport, heliport or navigational facility, as was proposed in the discussion paper. (See par 13.204.)
11. It should constitute an offence if someone interferes with, seizes or exercises control

over a ship by force or threat, destroys a ship or causes damage to such ship or to its cargo which is likely to endanger the safe navigation of that ship or endangers maritime safety. (See par 13.208.)

11. Provision should be made for an offence of terrorist bombings, and the exception recognising that the clause does not apply to the military forces of a State during an armed conflict, or in respect of activities undertaken in the exercise of their official duties, should be included. (See par 13.224.)
11. Provision should be made for the offence of hostage taking. (See par 13.227.)
11. The international community has identified the protection of internationally protected persons from harm and included these issues in international conventions as actions which constitute terrorism. The Commission agrees with this approach and considers that these issues should be included in the proposed Bill. The issue of attacks on and hijacking of internationally protected persons should be dealt with in one clause. (See par 13.231.)
11. There are instances in the context of property of internationally protected persons where someone enters such property or refuses to depart when requested to do so by authorised persons. These aspects should be provided for by the Bill. (See par 13.238.)
11. Provision should be made for offences involving interference with fixed platforms on the high seas and on the continental shelf. (See par 13.242.)
11. Provision should be made for the following offences with regard to nuclear matter or facilities —
 - the unlawful and intention possession of radioactive material or the design or manufacturing or possession of a device, with the intent to cause death or serious bodily injury; or to cause substantial damage to property or the environment;
 - the use in any way of radioactive material or a device, or the use or damage of a nuclear facility in the manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury; to cause substantial damage to property or the environment; or to compel a natural or juristic person, an international organization or a State to do or refrain from doing an act. (See par 13.249)

25. Following the events of 11 September 2001 in the USA, there has been nationally and internationally a significant number of false alarms involving packages or letters containing apparently hazardous material, which have highlighted the need to have specific offences on the statute book and for tough penalties to deter such malicious and irresponsible actions. There is a need in South African law for a provision setting out that a person would be guilty of an offence if they placed, sent or communicated false information about any substance or article intending to make others believe that it was likely to be toxic substances eg anthrax, smallpox, acids or other similar substances, lethal devices or weapons of mass destruction. Courts should also be empowered in imposing a sentence on a person convicted of such an offence, to order that person to reimburse any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses. (See par 13.254.)
25. The use of weapons of mass destruction warrants a substantive provision setting out that the use of such a weapon constitutes an offence under the Bill. (See par 13.257 - 258.)
25. In order to comply with the requirements imposed by the international conventions to combat terrorism, South Africa has to ensure that its legislation provides for extra-territorial jurisdiction. To effect this a provision based on the clause provisionally proposed in the discussion paper need to be included in the Anti-terrorism Bill for South African courts to have jurisdiction over terrorist offences if -
- (a) the alleged perpetrator of the offence is arrested in the territory of the Republic, in its territorial waters or on board a ship registered in the Republic or an aircraft registered in the Republic; and
 - (b) the offence has been or is committed -
 - (i) in the territory of the Republic, or committed elsewhere, if the act is punishable in terms of the domestic laws of the Republic, including the Act or in terms of the obligations of the Republic under international law;
 - (ii) on board a vessel or a ship or fixed platform registered in the Republic or an aircraft which is registered under the laws of the Republic at the time the offence is committed;
 - (iii) by a citizen of the Republic or a person ordinarily resident in the

- Republic;
- (iv) against a citizen of the Republic or a person ordinarily resident in the Republic;
- (v) outside of the Republic, and the person who has committed the act is, after the commission of the act, present in the territory of the Republic; or
- (viii) on board an aircraft in respect of which the operator is licenced in terms of the Air Services Act 1990 (Act No 115 of 1990) or the International Air Services Act 1993 (Act No 60 of 1993); or
- (c) the evidence reveals any other basis recognised by law. (See par 13.275 and 13.283)

28. The Bill should provide that whenever the National Director receives information that there may be present in the Republic a person who is alleged to have committed an offence under the Act, the National Director must order an investigation to be carried out in respect of the allegation; inform any other foreign State which might also have jurisdiction over the alleged offence promptly of the findings of the investigation; and indicate promptly to other foreign States which might also have jurisdiction over the alleged offence whether he or she intends to prosecute. The Bill should contain criteria to be considered by the NDPP in deciding whether to prosecute. The National Director shall take into account — considerations of international law, practice and comity; international relations, prosecution action that is being or might be taken by a foreign State; and other public interest considerations. (See par 13.278 - 279 and 284.)
28. If a person has been taken into custody to ensure the person's presence for the purpose of prosecution or surrender to a foreign State, the NDPP must, immediately after the person is taken into custody, notify any foreign State which might have jurisdiction over the offence concerned, and any other State the National Director considers advisable to inform or notify either directly or through the Secretary-General of the United Nations, of the fact that the person is in custody; and the circumstances that justify the person's detention. When the NDPP declines to prosecute, and another foreign State has jurisdiction over the offence concerned, he or she must inform such foreign State, accordingly with the view to the surrender of such person to such foreign State for prosecution by that State. (See par 13.279 and 285.)
28. The provisions of the *Extradition Act*, 1962 (Act No 16 of 1962) should also apply in

respect of terrorist offences. Remarks on the desirability of including terrorism as one of the listed offences in the Rome Statute were noted. Since it is not the case yet, the mechanisms for surrender provided for by the South African *Implementation of the Rome Statute of the International Criminal Court Bill* would therefore clearly not be applicable or suited where an offence in terms of the Bill is concerned. (See par 13.280 and 286.)

28. Promptly after being detained as contemplated in section 7 or 9 of the *Extradition Act*, 1962, a person who is not — a South African citizen; a person ordinarily resident in the Republic; or a citizen of any State, must be informed that he or she is entitled, and must be permitted — to communicate without delay with the nearest appropriate representative of — the State of which the person is a citizen; if the person is not a citizen of any State, the State in whose territory the person ordinarily resides; or the State, if any that is otherwise entitled to protect the person's rights; and to be visited by such representative. (See par 13.286.)
28. No prosecution under the Act may be instituted in any court except with the consent of the National Director. Provided that a person alleged to have committed any offence under the Act may be arrested, or a warrant for the person's arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the National Director consent has not been obtained. If a person is prosecuted for an offence under the Act, the National Director must communicate the final outcome of the proceedings promptly to the Secretary-General of the United Nations, so that he or she may transmit the information to other States Parties to the United Nations. (See par 13.287.)
28. It would seem clear that there is no justification for detention for interrogation as was provisionally proposed in the discussion paper. An alternative measure, based on section 205 of the *Criminal Procedure Act* of 1977 and recently enacted Canadian legislation, is proposed. The Constitutional Court found that section 205 of the *Criminal Procedure Act* conforms with the Constitution. The following provision which provides for investigative hearings is proposed, whereby —
 - a police officer may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge of the High Court for an order for the gathering of information;
 - such an application may be made only if the prior written consent of the National Director of Public Prosecutions was obtained;
 - a judge of the High Court to whom an application is made may make

an order for the gathering of information if the judge is satisfied that the consent of the National Director of Public Prosecutions was obtained as required by subsection (2) and that there are reasonable grounds to believe that

- a terrorism offence has been committed, and
- information concerning the offence, or information that may reveal the whereabouts of a person suspected by the law enforcement officer of having committed the offence, is likely to be obtained as a result of the order; or that
- there are reasonable grounds to believe that a terrorism offence will be committed,
- there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and
- reasonable attempts have been made to obtain the information from the person;
- the judge may
- order the examination, on oath or not, of a person named in the order;
- order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (d), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;
- order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;
- designate another judge as the judge before whom the examination is to take place; and
- include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation;
- the judge who made the order, or another judge of the same court, may vary the terms and conditions of the order;
- the judge who made the order, or another judge of the same court, may issue a warrant for the arrest of the person named in the order if the judge is satisfied, on an information in writing and under oath, that the person

-
- is evading service of the order;
 - is about to abscond; or
 - did not attend the examination, or did not remain in attendance, as required by the order.
 - A warrant issued may be executed at any place in the Republic by any police officer having jurisdiction in that place.
 - A police officer who arrests a person in the execution of a warrant shall, without delay, bring the person, or cause the person to be brought, before the judge who issued the warrant or another judge of the same court, and must promptly inform the person of the reason for being detained in custody.
 - The judge in question may, to ensure compliance with the order, order that the person be detained in custody or released on bail, upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail, or released on warning. Such an order may include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order, including the conditions of detention, if detention is ordered.
 - A person named in an order has the right -
 - to retain and instruct a legal practitioner at any stage of the proceedings;
 - to communicate and be visited by that person's -
 - spouse or partner;
 - next of kin;
 - chosen religious counsellor;
 - chosen medical practitioner,
 unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such communication or visit should be refused.
 - A person named in an order shall answer questions put to the person by the National Director of Public Prosecutions or a person designated by the National Director, and shall produce to the judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.
 - The presiding judge shall rule on any objection or other issue relating

to a refusal to answer a question or to produce a thing.

- No person shall be excused from answering a question or producing a thing on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but
 - no answer given or thing produced shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act (Act No 56 of 1955) or on a charge of perjury; and
 - no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the *Criminal Procedure Act* (Act No 56 of 1955) or on a charge of perjury.
- The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any offence under the Act, shall order that the thing be given into the custody of the police officer or someone acting on the police officer's behalf.
- The provisions of section 189 of the *Criminal Procedure Act* of 1977 shall with the necessary changes apply in respect of the person who refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or her or refuses or fails to produce any book, paper or document required to be produced by him or her;
- The person who refuses or fails to give the information shall not be sentenced to imprisonment as contemplated in s 189 of the Criminal Procedure Act unless the judge is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order. (See par 13.361)

34. Since the proposed provisions for investigative hearings are tailored to section 205 of the *Criminal Procedure Act*, the concerns of respondents are addressed. Provision should only be made for police officers applying to a judge for the envisaged investigative hearing. The Bill should therefore make provision for a police officer being able, for the purposes of an investigation of a terrorism offence, to apply *ex parte* to a judge for an order for the gathering of information. (See par 13.371 and 372.)

34. Judicial authorisation should be sought for applications by police officers to apply *ex*

parte to a judge for an order for the gathering of information for the purposes of an investigation of a terrorism offence. Hence, the judiciary should be involved in considering these applications. (See par 13.388.)

34. Directors of Public Prosecution should remain part of the proposed system. In Canada the consent of their Attorney-General has to be obtained for their investigative hearings. The same requirement exists under the proposed Australian legislation. This is a clear indication of how serious an inroad this power is regarded in these jurisdictions. It is apparent that the underlying thinking is that this power will not be used easily. The committee therefore considers that in South Africa the consent of the National Director of Public Prosecutions must be obtained for proceeding with these applications for obtaining information from witnesses. The committee therefore recommends that the Bill should require that a police officer may make an application to a judge only if the prior written consent of the National Director of Public Prosecutions was obtained. (See par 13.394.)
34. The possible detention of a person withholding information is a serious issue, but the power to apply to a judge for making an order to gather or obtain information should apply in regard to all acts of terrorism constituting offences under the proposed Bill. (See par 13.398.)
34. The provisions of the Constitution on the treatment of detainees mean that torture will never be condoned in order to extract information from someone whom one believes possesses information on a terrorist act which has happened or which is about to be committed. Section 35(2)(e) provides that everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment. It is recommended that where a judge orders the detention of a person that he or she may include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order, including the conditions of detention. (See par 13.408.)
34. The focus of the provisions to induce the cooperation of witnesses has shifted in the proposed new clauses. Detention is not the only option available. A potential witness could also be released on warning. The message would however be clear. The witness will have to comply and tender the information known to him or her unless he or she can rely on privilege. (See par 13.425 and 426.)

34. There is no need under the redrafted provision for periodic appearances by the potential witness, as was the case under the clause proposed in the discussion paper. (See par 13.436.)
34. A judge before whom an arrested person appears may, to ensure compliance with the order, order that the person be detained in custody or released on bail, upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail, or released on warning. It is further recommended that an order may include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order, including the conditions of detention, if detention is ordered. (See par 13.439.)
34. The committee discarded the concept of detention for interrogation and the idea that the DPP has an onus to establish the further detention of a witness. The new provisions enable a judge to order a witness to appear at an examination and should the witness fail to appear to remain present or to furnish information, only then the question of detention or imprisonment arises. (See par 13.443.)
34. The proposed new provisions also make provision for an arrested person to be brought before the judge who issued the warrant or another judge of the same court, without delay. The police officer must promptly inform the person of the reason for being detained in custody. Hence the person would be in a position to challenge his or her detention and to make the necessary representations. (See par 13.448.)
34. As the focus of the new provisions changed to ensuring the cooperation of witnesses, that detention for interrogation is therefore no longer the aim, and detention of a witness is only a last resort under a provision similar to section 205 of the Criminal Procedure Act, the necessity for considering an appropriate period of detention ceases to exist. The potential witness, if he or she fails to cooperate and has to be arrested, is brought before a judge who decides whether the person is released or detained. (See par 13.460.)
34. It was proposed in the discussion paper that (subject to what follows in the next paragraph) no person, other than a judge of the high court, an officer in the service of the State acting in the performance of official duties, or a person authorised by the National Director of Public Prosecutions, or a Director of Public Prosecutions may have access to a detainee or is entitled to any official information relating to or

obtained from such detainee. There is no justification to continue to restrict access to detainees as was done in the past. Access to a detainee should only be restricted on good cause shown. (See par 13.465.)

34. There is no doubt that the right to retain and instruct a legal practitioner at any stage of the proceedings cannot be curtailed. The Bill should make provision for this right. (See par 13.485.)
34. The Bill should provide that a witness has the right to communicate and be visited by that person's chosen medical practitioner, unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such communication or visit should be refused. (See par 13.490.)
34. The Bill ought to provide that the witness has a right to communicate with and be visited by his or her spouse or partner, next of kin and chosen religious counsellor unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such visitation or communication should be refused. The witness has the rights set out in section 35(2) of the Constitution provided that a judge may refuse access and communication on sufficient grounds. (See par 13.494.)
34. Respondents noted the right to silence. The witness should only be able to refuse to answer questions put to him or her in the investigative hearings if he or she can rely on privilege. The judge should rule on this question if it arises. No answer given or thing produced shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act of 1955, ie for making conflicting statements or on a charge of perjury; and no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act of 1955) or on a charge of perjury. (See par 13.505.)
34. The grounds proposed in the discussion paper which were to be taken into account by a court in determining the detention or further detention of the person being interrogated were — to compare fingerprints, do forensic tests and verify answers provided by the detainee; to-explore new avenues of interrogation; through interrogation to determine accomplices; to correlate information provided by the person in custody with relevant information provided by other persons in custody; to

find and consult other witnesses identified through interrogation; to hold an identification parade; to obtain an interpreter and to continue interrogation by means of an interpreter; to communicate with any other police services and agencies; to evaluate documents which have to be translated; or any other purpose relating to the investigation of the case approved by the judge. The grounds set out in the discussion paper deal squarely with further investigation to be conducted by the police. As such they do not constitute justification why the witness providing information should be detained. The provision setting out the grounds for detention or further detention proposed in the discussion paper should therefore be deleted. (See par 13.513.)

34. The original clause 16(9) provided that no bail may be granted nor is a person entitled to appear in court to apply for bail, if a judge has ordered his or her custody in terms of clause 16. It should be possible to release on bail or on conditions a witness who is brought before a court for an examination. The redrafted provision therefore makes provision for bail being granted to the witness. (See par 13.521.)
34. Canadian legislation provides for a procedure whereby a police officer may bring an application before a judge if the law enforcement officer believes on reasonable grounds that a terrorist act will be carried out; and suspects on reasonable grounds that the imposition of a release on warning with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist act. The Bill should also make provision for such a procedure:
 4. The consent of the National Director of Public Prosecutions should be required before a police officer may bring such an application. (See par 13.523.)
 5. A judge of the High Court who receives an application may cause the person to appear before him or her or another judge of the High Court. (See par 13.523.)
 6. If either of the grounds for bringing an application exist but, by reason of exigent circumstances, it would be impracticable to bring an application or an application has been brought and a summons has been issued, and the police officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist activity, the police officer should be able to arrest the person without warrant and cause the person to be detained in custody, to be taken before a judge of the High Court. (See par 13.523.)

7. If a police officer arrests a person without warrant the police officer shall, within the time prescribed, bring an application or release the person; and must promptly inform the person of the reason for being arrested and detained. (See par 13.523.)
8. A person detained in custody shall be taken before a judge of the High Court without delay unless at any time before taking the person before a judge the police officer is satisfied that the person should be released from custody unconditionally, and so releases the person. (See par 13.524.)
9. When a person is taken before a judge of the High Court if an application has not been brought by the police officer, the judge shall order that the person be released. If an application has been brought, the judge shall order that the person be released unless the law enforcement officer who brought the application shows cause why the detention of the person in custody is justified on one or more of the following grounds: the detention is necessary to ensure the person's appearance before a judge in order, the detention is necessary for the protection or safety of the public, including any witness, having regard to all the circumstances including the likelihood that, if the person is released from custody, a terrorist act will be carried out, and any substantial likelihood that the person will, if released from custody, interfere with the administration of justice, and any other just cause and, without limiting the generality of the foregoing, that the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the peace officer's grounds, and the gravity of any terrorist act that may be carried out. (See par 13.524.)
10. The judge may adjourn the matter for a hearing, but if the person is not released the adjournment may not exceed forty-eight hours. (See par 13.524.)
11. The rights to legal representation and visits by the spouse or partner, next of kin, chosen religious counsellor; and chosen medical practitioner provisions set out in respect of investigative hearings should also apply. (See par 13.525.)
12. The judge of the High Court before whom the person appears may, if satisfied by the evidence adduced that the police officer has reasonable grounds for the suspicion, order that the person enter into an undertaking to keep the peace and be of good behaviour for any period that does not exceed twelve months and to comply with any other reasonable conditions prescribed in the undertaking, including the conditions that the judge considers desirable for preventing the carrying out of a terrorist activity. (See par 13.525.)

13. If the person was not released the judge shall order that the person be released, subject to the undertaking given, if any, ordered. (See par 13.525.)
 14. The judge of the High Court may commit the person to prison for a period not exceeding twelve months if the person fails or refuses to enter into the undertaking. Before making an order the judge of the High Court shall consider whether it is desirable, in the interests of the safety of the person or of any other person, to include as a condition of the undertaking that the person be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things, for any period specified in the undertaking, and where the judge of the High Court decides that it is so desirable, the judge of the High Court shall add such a condition to the undertaking. (See par 13.526.)
 15. If the judge of the High Court adds a condition to an undertaking, the judge of the High Court shall specify in the undertaking the manner and method by which the things referred to that are in the possession of the person shall be surrendered, disposed of, detained, stored or dealt with; and the authorizations, licences and registration certificates held by the person shall be surrendered. If the judge of the High Court does not add a condition to an undertaking, the judge of the High Court shall include in the record a statement of the reasons for not adding the condition. (See par 13.526.)
 16. The judge of the High Court may, on application of the law enforcement officer, the National Director of Public Prosecutions or the person, vary the conditions fixed in the undertaking. (See par 13.526.)
-
53. The original Bill provided that irrespective of the charge with which someone is charged, if a Director of Public Prosecutions (DPP) considers that an offence constitutes terrorism then it is regarded a special offence. The Bill should not make provision for offences to be labelled special offences by the DPP. (See par 13.530.)
-
53. Comments were received that the proposed provisions setting out when a court should sit on a terrorism offence and the orders to be made by it when the state or accused is not ready to commence with its case should be deleted. These arguments are persuasive for the following reasons: the provision relating to the limitation on the State to bring charges within 60 days, comes from the *Second Criminal Law Amendment Act, 1992*, and it is closely related to special offences; if the special offences part contained in the Bill is deleted, then the limitation should be deleted as well; and in view of the current situation of the court rolls (which seems

unlikely to improve in the immediate future due to the high crime rate) and the (un)availability of legal representatives, it is practically impossible to adhere to the time restraints set out in this clause. (See par 13.534.)

53. There is no need to retain the original clause 19 which dealt with — providing a summary of the substantial facts on which the State relies; empowering a court to bring in a competent verdict; the court recording a plea of not guilty if in doubt about the accused admitting the allegations in the charge to which he or she has pleaded guilty or that the accused should not have tendered a guilty plea; the court requesting the accused to indicate the basis of his or her defence to a charge; and the court recording admissions made by the accused. These provisions do not provide more clearly than the *Criminal Procedure Act* presently does and therefore there is no need for this clause. The Bill should also not contain the provisionally proposed provision on the drawing of inferences when an accused fails to indicate the basis of his or her defence. (See par 13.540.)
53. Where an accused stands trial on a charge under the Bill, the provisions relating to bail in the *Criminal Procedure Act* apply as if the accused is charged with an offence referred to in Schedule 6 of that Act. (See par 13.542.)
53. The original Bill imposed a duty on people having information which may be essential in order to investigate any terrorist act to report such information. The discussion paper noted the utility of the clause and supposed that in the end it is a question of policy whether somebody like a Director of Public Prosecutions (DPP) should have the power to grant an indemnity where ordinarily the exercise of such power is the function of a court. The paper said it is appreciated that the possibility of obtaining indemnity will serve as an incentive to report information but as a policy matter it means that an individual as opposed to a court is actually indemnifying someone from prosecution. Comments were received that section 204 of the *Criminal Procedure Act* rather than the proposed provision should apply. Particularly in view of the reservations already expressed in the discussion paper on the policy issue of the prosecutorial authority granting indemnity instead of the judiciary, the procedure created by section 204 would seem to be more preferable. It was initially thought that the justification for the provision proposed in the discussion paper becomes doubtful in view of the recommended provision enabling police officers to bring witnesses before a court for the purpose of an investigative hearing to ascertain the information which the person holds. It is nevertheless considered that this provision imposing a duty on persons holding information to disclose it to a prosecutor DPP or police

officer, should be retained. (See par 13.551.)

53. The Bill as proposed in the discussion paper contained a provision enabling the police to stop and search persons and vehicles. The following provisions are now recommended: (See par 13.570 to 13.573)
 4. A judge may on application ex parte by a police officer of the South African Police Service of or above the rank of Director, if it appears to the judge that there are reasonable grounds to do so in order to prevent acts of terrorism, grant authority to stop and search vehicles and persons with a view to prevent such acts, and such authorization shall apply for a period not exceeding ten days.
 5. Under such authorisation any police officer who identifies himself or herself as such may stop and search any vehicle or person for articles which could be used or have been used for or in connection with the commission, preparation or instigation of any terrorist act.
 6. The provisions of section 29 of the Criminal Procedure Act apply, with the necessary changes, in respect of the powers conferred upon police officers in terms of this section.
 7. Any person who fails to stop when required to do so by a police officer in the exercise of the powers under this section or wilfully obstructs a police officer in the exercise of those powers, commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding six months.

53. The Bill contained in the discussion paper contained an interpretation clause which provided as follows: "The definition of 'terrorist act' shall be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles". It was proposed that the clause should read: "The provisions of this Act shall be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles". Amending the interpretation clause in the manner suggested would have the added advantage of ensuring that the entire Bill, and not just the definition of terrorist act, is consistent with South African international obligations. (See par 13.586.)

53. At present, South Africa does not have legislation relating specifically to the combating of the financing of terrorism. The provisions of the *Prevention of Organised Crime Act* and the *Financial Intelligence Centre Act* have been developed to counter money laundering in its traditional sense and are not specifically designed

to apply to terrorism or terrorist activities. The provisions of the *Prevention of Organised Crime Act* cannot be applied to property merely because the property belongs to a certain person or organisation, without proof of that person's or organisation's involvement in unlawful activity. These provisions can also not be applied to property which may in future be used to facilitate certain activities or be placed at the disposal of certain persons or organisations. This must be remedied by including appropriate provisions in the *Anti-Terrorism Bill*. Provision must therefore be made for the search, seizure and forfeiture of terrorist property in the *Anti-Terrorism Bill*. (See par 13.587 - 588 and 13.615.)

53. Terrorism financing offences must be created. The terrorist financing offences proposed in the Bill are: the dealing in property for terrorist purposes; collecting, providing or making available, directly or indirectly, property or inviting a person to provide, facilitate or make available property or financial or other related services on behalf of a terrorist organisation; using property, directly or indirectly, on behalf of a terrorist organisation; and possessing property on behalf of a terrorist organisation. The Bill should also make provision for the duty to report forthwith to the Financial Intelligence Centre the existence of property owned or controlled by or on behalf of a terrorist organisation, and information about a transaction or proposed transaction in respect of such property. The Bill must also create a duty for any person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or series of transactions to which the business is a party is related to an terrorist financing offence to report, within the prescribed period after the knowledge was acquired or the suspicion arose, to the Financial Intelligence Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions. (See par 13.615.)
53. The Bill should impose a duty on accountable institutions to determine on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a proscribed organisation: The *Financial Intelligence Centre Act* makes provision in Schedule 1 for a list of accountable institutions. The Bill should also use the term "accountable institution". The Bill therefore provides that "accountable institution" means a person referred to in Schedule 1 of the *Financial Intelligence Centre Act, 2001* (Act No 38 of 2001). The duty of institutions to ascertain whether they are in possession or control of property should be in respect of proscribed organisations. These reports must be submitted within the period specified by regulation or, if no period is specified, monthly, to the Financial

Intelligence Centre. They must report either that they are not in possession or control of any property referred to in the Bill, or that they are in possession or control of such property. Regulations should determine the particulars to be reported. It is also envisaged that regulations may very well determine that nil returns must be submitted quarterly. (See par 13.615.)

53. The Bill provides, as the *FIC Act* does, that no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution or any other person with the reporting duty. This does not apply to the common law right to legal professional privilege as between an attorney and client in respect of communications made in confidence between the attorney and client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or a third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced. The Bill also makes provision, as the *FIC Act* does, that no action, whether criminal or civil, lies against an accountable institution or any other person complying in good faith with the reporting duty, and that a person who has made, initiated or contributed to a report or the grounds for such a report, is competent, but not compellable, to give evidence in criminal proceedings arising from the report. No evidence concerning the identity of a person who has made, initiated or contributed to a report or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of the Act, or the contents or nature of such additional information or grounds, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings. (See par 13.617.)
53. The penalty contained in the *FIC Act* for failure to report in terms of the Act, should also apply for a failure to report under the *Anti-Terrorism Bill*. Any accountable institution or person who fails, within the prescribed period, to report to the Financial Intelligence Centre the prescribed information in respect of property in accordance with the Bill is guilty of an offence and liable on conviction to imprisonment for a period not exceeding ten years or to a fine not exceeding R10 000 000. (See par 13.618.)
53. The procedure for search warrants for searching property should be based on that contained in the *Criminal Procedure Act*, but the application should be made to a judge of the High Court and not a magistrate. Where a police officer believes on reasonable grounds that there is in any building, receptacle or place any terrorist

property (as referred to in clauses 3(3)(c) to (e) or 32 of the Bill), he or she may apply to a judge for a search warrant to be issued for the seizure of such property. If it appears to the judge from information on oath contained in the application that there are reasonable grounds for believing that there is in any building, receptacle or place any such property in the possession or under the control of or upon any person or upon or at any premises the judge may issue a search warrant. The following conditions are to be met for the issue of a search warrant—

- that there are reasonable grounds for suspecting that the property is intended to be used for the purposes referred to in clauses 3(3)(c) to (e) or 32 and that either —
 - its continued seizure is justified while its derivation or its intended use is further investigated or consideration is given to bringing (in the Republic or elsewhere) proceedings against any person for an offence with which the property is connected, or
 - proceedings against any person for an offence with which the property is connected have been started and have not been concluded; or
- that there are reasonable grounds for suspecting that the property consists of resources of an organisation which is proscribed and that either —
 - its continued seizure is justified while investigation is made into whether or not it consists of such resources or consideration is given to bringing (in the Republic or elsewhere) proceedings against any person for an offence with which the property is connected, or
 - proceedings against any person for an offence with which the property is connected have been started and have not been concluded. (See par 13.619.)

66. A search warrant shall require a police officer to seize the property in question and shall to that end authorize such police officer to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person or thing found on or at such premises. If the property seized consists of cash or funds standing to the credit of a bank account, the police officer shall pay such cash or funds into a banking account which shall be opened with any bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990) and the police officer shall forthwith report to the Financial Intelligence Centre the fact of the seizure of the cash or funds and the opening of the account. A judge may direct the release of the whole or any part of the property if satisfied, on an application by the person from whom it was seized, that the conditions for the detention of property are no longer

- met in relation to the property. Property should not to be released —
- if a declaration for its forfeiture, or an application to determine interests of third parties, is made, until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded,
 - if (in the Republic or elsewhere) proceedings are started against any person for an offence with which the property is connected, until the proceedings are concluded. (See par 13.620.)
67. The Bill contains provisions on declarations of forfeiture on conviction which are based on the *Drug Trafficking Act* of 1992. Whenever any person is convicted of an offence under the terrorist property offences set out in clauses 3(3)(c) to (e) and 32, the court in passing sentence shall, in addition to any punishment which that court may impose in respect of the offence, declare any property — by means of which the offence was committed; which was used in the commission of the offence; or which was found in the possession of the convicted person and which was seized or is in the possession or custody or under the control of the convicted person, to be forfeited to the State. (See par 13.621.)
67. The Bill must provide for notice to be given to interested parties of a declaration of forfeiture. The court which makes a declaration of forfeiture of property must therefore order the registrar of the High Court concerned or clerk of the Magistrate's Court for the district concerned to publish forthwith such declaration calling upon interested parties through the media and by notice in the Gazette. Anything forfeited must, if it was seized, be kept or, if it is in the possession or custody or under the control of the convicted person, be seized and kept for a period of 90 days after the date of the notice published in the Gazette or if any third party has within the 90 day period made an application to the court concerned regarding his or her interest in such thing, until a final decision has been rendered in respect of any such application. A declaration of forfeiture shall not affect any interest which any person other than the convicted person may have in the property in question, if the former person proves that he or she acquired the interest in that property in good faith and for consideration, whether in cash or otherwise, and that the circumstances under which he or she acquired the interest in that property were not of such a nature that he or she could reasonably have been expected to have suspected that it was property as referred to in clauses 3(3)(c) to (e) or 32 or that he or she could not prevent such use. (See par 13.622.)
67. The court concerned or, if the judge or judicial officer concerned is not available, any

judge or judicial officer of that court may at any time within a period of three years from the date of the declaration of forfeiture, on the application of any person other than the convicted person who claims that he or she has any interest in the property in question, inquire into and determine any such interest. If a court finds that the property is wholly owned by the applicant, the court shall set aside the declaration of forfeiture in question and direct that the property be returned to the applicant or, if the State has disposed of it, direct that the applicant be compensated by the State. The Bill should provide further that if a court finds that the applicant has an interest in the property, the court shall direct that the property be sold by public auction and that the applicant be paid out of the proceeds of the sale an amount equal to the value of his interest therein, but not exceeding the proceeds of the sale; or if the State has disposed of the property the court shall direct that the applicant be compensated by the State in an amount equal to the value of his interest therein. Any person aggrieved by a determination made by the court may appeal against the determination as if it were a conviction by the court making the determination. Such appeal may be heard either separately or jointly with an appeal against the conviction as a result of which the declaration of forfeiture was made, or against a sentence imposed as a result of such conviction. In order to make a declaration of forfeiture or to determine any interest the court may refer to the evidence and proceedings at the trial or hear such further evidence, either orally or by affidavit, as it may deem fit. (See par 13.623.)

67. The Bill should also provide for preservation and forfeiture orders based on sections 37 to 57 of the *Prevention of Organised Crime Act (POCA)*. The National Director of Public Prosecutions may apply *ex parte* to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property contemplated in clauses 3(3)(c) to (e) or 32 of the Bill. In order to overcome the issues highlighted in the *NDPP v Mohamed* case, recently heard in the Constitutional Court, it is recommended that the following powers be given to courts in making provisional preservation orders: The High Court after examining the application in private, and being satisfied that there are reasonable grounds to believe that there is in any building, receptacle or place any property contemplated in sections 3(3)(c) to (e) or 32, may make a provisional preservation order which has immediate effect and may simultaneously grant a rule nisi calling upon all interested parties upon a day mentioned in the rule to appear and to show cause why the preservation order should not be made final. The Bill should also provide that a High Court making a provisional preservation of property order may include in the order an order authorising the seizure of the property concerned

by a police official, and any other ancillary orders that the court considers on reasonable grounds appropriate for the proper, fair and effective execution of the order. Property seized shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order. (See par 13.624.)

67. The Bill must provide for notice of preservation of property orders to be given. Therefore, if a High Court makes a preservation of property order, the National Director shall, as soon as practicable after the making of the order give notice of the order to all persons known to the National Director to have an interest in property which is subject to the order; and publish a notice of the order in the Gazette, and the court may require publication in the media of the fact of the application. A notice shall be served in the manner in which a summons, commencing civil proceedings in the High Court is served. Any person who has an interest in the property which is subject to the preservation of property order may give notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof. A notice of intention to oppose shall be delivered to the National Director within, in the case of a person upon whom a notice has been served by the NDPP, two weeks after such service, and where there was publication in the Gazette or in the media, two weeks after the date of such publication. A notice of intention to oppose shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings and shall be accompanied by an affidavit stating the full particulars of the identity of the person opposing; the nature and extent of his or her interest in the property concerned; and the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof. (See par 13.625.)
67. The Bill must also set out the duration of preservation of property orders. A preservation of property order shall expire 90 days after the date on which notice of the making of the order is published in the Gazette unless there is an application for a forfeiture order pending before the High Court in respect of the property subject to the preservation of property order; there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation of property order; or the order is rescinded before the expiry of that period. The Bill should also deal with seizure of property subject to preservation of property orders. In order to prevent property subject to a preservation of property order from being disposed of or removed contrary to that order, any police officer may seize any such property if he or she has

reasonable grounds to believe that such property will be so disposed of or removed, and property seized shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order. (See par 13.626.)

67. The Bill should also deal with the appointment of curator bonis in respect of property subject to preservation of property order. Where a High Court has made a preservation of property order, the Court shall, if it deems it appropriate, at the time of the making of the order or at a later time appoint a curator bonis to do, subject to the directions of the Court, any one or more of the following on behalf of the person against whom the preservation of property order has been made, namely to assume control over the property; to take care of the property; to administer the property and to do any act necessary for that purpose; and where the property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and order any person holding property subject to the preservation of property order to surrender forthwith, or within such period as that Court may determine, any such property into the custody of the curator bonis. The Court may make such order relating to the fees and expenditure of the curator bonis as it deems fit, including an order for the payment of the fees of the curator bonis from the forfeited property if a forfeiture order is made; or by the State if no forfeiture order is made. (See par 13.627.)
67. The Bill should also deal with orders in respect of immovable property subject to preservation of property order, such as the registrar of deeds concerned being ordered to endorse restrictions on the title deed of the immovable property, the custody of immovable property, and applications for the rescission of these orders. The Bill must make provision for expenses such as the reasonable living expenses of a person holding an interest in property subject to a preservation of property order and his or her family or household and reasonable legal expenses of such a person in connection with any proceedings instituted against him or her in terms of this Act or any other related criminal proceedings. The Bill should also govern the issue of maximum legal expenses that can be met from preserved property and the taxation of legal expenses. (See par 13.628.)
67. The Bill should also deal with variation and rescission of orders. A High Court which made a preservation of property order may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order, if such order was erroneously sought or erroneously granted in the absence of any party affected

thereby; in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; granted as a result of a mistake common to the parties; and the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation of property order concerned. The party desiring any relief shall make application therefor upon notice to all parties whose interests may be affected by any variance sought. The court shall not make any order rescinding or varying any preservation order or an order authorising the seizure of the property concerned or other ancillary order unless satisfied — that all parties whose interests may be affected have notice of the order proposed; that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred. The court which made the preservation order shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded. When a court orders the rescission of an order authorising the seizure of property the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation of property order concerned. Any person affected by an order for the appointment of a curator bonis may at any time apply for the variation or rescission of the order; for the variation of the terms of the appointment of the curator bonis concerned; or for the discharge of the curator bonis. A High Court which made an order for the appointment of a curator bonis may, if it deems it necessary in the interests of justice, at any time vary or rescind the order; vary the terms of the appointment of the curator bonis concerned; or discharge that curator bonis; shall rescind the order and discharge the curator bonis concerned if the relevant preservation of property order is rescinded. Any person affected by an order in respect of immovable property may at any time apply for the rescission of the order. A High Court which made an order in respect of immovable property may, if it deems it necessary in the interests of justice, at any time rescind the order; or shall rescind the order if the relevant preservation of property order is rescinded. If an order in respect of immovable property is rescinded, the High Court shall direct the registrar of deeds concerned to cancel any restriction endorsed by virtue of that order on the title deed of immovable property, and that registrar of deeds shall give effect to any such direction. (See par 13.629.)

67. *POCA* provides in section 47(4) that the noting of an appeal against a decision to vary or rescind any order referred to section 47 shall suspend such a variation or rescission pending the outcome of the appeal. The project committee was of the

view that Rule 49(11) of the High Court Rules of Court should apply, that the remedies of the Rule should be available and that section 47(4) should not be included in the Bill. (See par 13.630.)

67. The Bill should also deal with forfeiture of property. If a preservation of property order is in force the National Director may apply to a High Court for an order forfeiting to the State all or any of the property contemplated in sections 3(3)(c) to (e) or 32 that is subject to the preservation of property order. The National Director must give 14 days notice of an application to every person who opposed the application for a preservation order. A notice must be served in the manner in which a summons commencing civil proceedings in the High Court, is served. Any person who opposed the application for a preservation order may appear at the application — (a) to oppose the making of the order; or (b) to apply for an order- (i) excluding his or her interest in that property from the operation of the order; or (ii) varying the operation of the order in respect of that property, and may adduce evidence at the hearing of the application. (See par 13.631.)
67. The Bill should also deal with late notice of opposition. Any person who, for any reason, did not give notice of intention to oppose may, within two weeks of becoming aware of the existence of a preservation of property order, apply to the High Court for leave to give such notice. An application may be made before or after the date on which an application for a forfeiture order is made but must be made before judgment is given in respect of such an application for a forfeiture order. The High Court may grant an applicant leave to give notice of intention to oppose within the period which the Court deems appropriate, if the Court is satisfied on good cause shown that such applicant- has for sufficient reason failed to give notice of intention to oppose; and has an interest in the property which is subject to the preservation of property order. When a High Court grants an applicant leave to oppose, the Court — shall make any order as to costs against the applicant; and may make any order to regulate the further participation of the applicant in proceedings concerning an application for a forfeiture order, which it deems appropriate. Notice to oppose after leave has been obtained must contain full particulars of the chosen address of the person who enters such appearance for the delivery of documents concerning further proceedings and shall be accompanied by an affidavit. (See par 13.632.)
67. The Bill must also set out the procedure for the making of forfeiture orders. The High Court shall, subject to a subsequent application for exclusion of interests in forfeited property, make an order applied for by the NDPP if the Court finds on a balance of

probabilities that the property concerned is property as contemplated in sections 3(3)(c) to (e) or 32. The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such an order. The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the High Court from making the order. The validity of an order is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated. The Registrar of the Court issuing a forfeiture order must publish a notice thereof in the Gazette as soon as practicable after the order is made. A forfeiture order shall not take effect before the period allowed for a subsequent application for the exclusion of interests in forfeited property or an appeal against a forfeiture order has expired; or before such an application or appeal has been disposed of. (See par 13.633.)

67. The Bill should also govern notice of reasonable grounds that property is concerned in terrorist offences. The National Director may apply to a judge for an order notifying a person having an interest in or control over property that there are reasonable grounds to believe that such property is property referred to in clauses 3(3)(c) to (e) or 32 of the Bill. The judge shall make an order if the judge is satisfied that there are reasonable grounds to believe that the property concerned is property referred to in clauses 3(3)(c) to (e) or 32. When a judge makes an order the registrar of the High Court concerned shall issue a notice in the prescribed form to the person referred to in the order, informing him or her that there are reasonable grounds to believe that property in which he or she has an interest or over which he or she has control, is property referred to in clauses 3(3)(c) to (e) or 32. A notice shall be served on the person concerned in the manner in which a summons commencing civil proceedings in the High Court is served. (See par 13.634.)
67. The Bill should also deal with exclusion of interests in property. The High Court may, on application by every person who opposed the application for a preservation order, or who is applying for an order excluding his or her interest in that property from the operation of the order or varying the operation of the order in respect of that property, or who gives late notice to oppose and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof. The National Director or the curator bonis concerned, or a person authorised in writing thereto by them, may present evidence and witnesses in rebuttal

and in defence of their claim to the property and may cross-examine a witness who appears at the hearing. In addition to the testimony and evidence presented at the hearing, the High Court may, upon application by the National Director or the curator bonis concerned, or a person authorised in writing thereto by them, order that the testimony of any witness relating to the property forfeited, be taken on commission and that any book, paper, document, record, recording, or other material not privileged be produced at the hearing of such testimony on commission. (See par 13.635.)

67. The High Court may make an order if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is property referred to in clauses 3(3)(c) to (e) or 32; or where the applicant acquired the interest before the commencement of the Act, that the applicant has since the commencement of the Act taken all reasonable steps to prevent the use of the property concerned as property referred to in clauses 3(3)(c) to (e) or 32. A person who testifies under this clause and fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or gives false evidence knowing that evidence to be false or not believing it to be true, shall be guilty of an offence. A person who furnishes an affidavit and makes a false statement in the affidavit knowing that statement to be false or not believing it to be true, shall also be guilty of an offence. A person convicted of an offence shall be liable to the penalty prescribed by law for perjury. (See par 13.636.)
67. If an applicant adduces evidence to show that he or she did not know or did not have reasonable grounds to suspect that the property in which the interest is held, is property referred to in clauses 3(3)(c) to (e) or 32, the State may submit a return of the service on the applicant of a notice issued in rebuttal of that evidence in respect of the period since the date of such service. If the State submits a return of the service on the applicant of a notice issued, the applicant must, also prove on a balance of probabilities that, since such service, he or she has taken all reasonable steps to prevent the further use of the property concerned as an property referred to in clauses 3(3)(c) to (e) or 32. A High Court making an order for the exclusion of an interest in property may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the Court deems appropriate

including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the Court may determine, to prevent the future use of the property as property contemplated in clauses 3(3)(c) to (e) or 32. (See par 13.637.)

67. The Bill must also provide for forfeiture orders by default. If the National Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application by the NDPP for forfeiture is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who gave notice of intention to oppose have knowledge of notices given, the Court may make any order by default which the Court could have made for forfeiture, make such order as the Court may consider appropriate in the circumstances, or make no order. The High Court may, before making an order call upon the National Director to adduce such further evidence, either in writing or orally, in support of his or her application as the Court may consider necessary. Any person whose interest in the property concerned is affected by the forfeiture order or other order made by the Court may, within 60 days after he or she has acquired knowledge of such order or direction, set the matter down for variation or rescission by the court. The court may, upon good cause shown, vary or rescind the default order or give some other direction on such terms as it deems appropriate. (See par 13.638.)
67. The Bill should also provide for subsequent applications for exclusion of interests in forfeited property. Any person affected by a forfeiture order who was entitled to receive notice of the application, but did not receive such notice, may, within 60 days after the notice of the forfeiture order is published in the Gazette, apply for an order excluding his or her interest in the property concerned from the operation of the order, or varying the operation of the order in respect of such property. The application shall be accompanied by an affidavit setting forth the nature and extent of the applicant's right, title or interest in the property concerned; the time and circumstances of the applicant's acquisition of the right, title, or interest in the property; any additional facts supporting the application; and the relief sought. The hearing of the application shall, to the extent practicable and consistent with the interests of justice be held within 60 days of the filing of the application. The High Court may consolidate the hearing of the application with a hearing of any other application filed by a person under this clause. At the hearing, the applicant may testify and present evidence and witnesses on his or her own behalf, and may cross-examine any witness who appears at the hearing. The National Director or the curator bonis concerned, or a person authorised in writing thereto by them, may

present evidence and witnesses in rebuttal and in defence of their claim to the property and may cross-examine a witness who appears at the hearing. In addition to the testimony and evidence presented at the hearing, the High Court may, upon application by the National Director or the curator bonis concerned, or a person authorised in writing thereto by them, order that the testimony of any witness relating to the property forfeited, be taken on commission and that any book, paper, document, record, recording, or other material not privileged be produced at the hearing of such testimony on commission. (See par 13.639.)

67. The High Court may make an order in relation to the forfeiture of the property, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and where the applicant had acquired the interest concerned after the commencement of the Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is property referred to in clauses 3(3)(c) to (e) or 32; or where the applicant acquired the interest before the commencement of this Act, that the applicant has since the commencement of the Act taken all reasonable steps to prevent the use of the property concerned as property referred to in clauses 3(3)(c) to (e) or 32. A person who testifies under this clause and fails to answer fully and to the best of his or her ability any question lawfully put to him or her or gives false evidence knowing that evidence to be false or not believing it to be true, shall be guilty of an offence. A person who furnishes an affidavit and makes a false statement in the affidavit knowing that statement to be false or not believing it to be true, shall be guilty of an offence. A person convicted of an offence under this clause shall be liable to the penalty prescribed by law for perjury. (See par 13.640.)
67. Section 55 of the *POCA* which deals with appeal against forfeiture order was noted. It provides that any preservation of property order and any order authorising the seizure of the property concerned or other ancillary order which is in force at the time of any decision regarding the making of a forfeiture order shall remain in force pending the outcome of any appeal against the decision concerned. The remedies granted by Rule 49(11) of the High Court Rules of Court should be available, and the wording of section 55 of the *POCA* should not be included in the Bill. (See par 13.641.)
67. The Bill should also deal with the effect of forfeiture orders. Where a High Court has made a forfeiture order and a curator bonis has not been appointed in respect of any

of the property concerned, the High Court may appoint a curator bonis to perform certain functions in respect of such property. On the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the curator bonis on behalf of the State. Upon a forfeiture order taking effect the curator bonis may take possession of that property on behalf of the State from any person in possession, or entitled to possession, of the property. (See par 13.642.)

67. The Bill should also deal with fulfilment of forfeiture orders. The curator bonis must, subject to any order for the exclusion of interests in forfeited property and in accordance with the directions of the Criminal Assets Recovery Committee as contemplated in the *POCA* — deposit any moneys declared forfeited into the Criminal Assets Recovery Account; deliver property declared forfeited to the Account; or dispose of property declared forfeited by sale or any other means and deposit the proceeds of the sale or disposition into the Account. Any right or interest in forfeited property not exercisable by or transferable to the State, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect. (See par 13.643.)
67. The Bill must also provide that no person who has possession, or was entitled to possession, of forfeited property immediately before the forfeiture order took effect, or any person acting in concert with, or on behalf of that person, shall be eligible to purchase forfeited property at any sale held by the curator bonis. The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs shall be defrayed out of moneys appropriated by Parliament for that purpose. (See par 13.644.)
67. The Bill should also empower the Minister to make, repeal and amend regulations concerning — any matter that may be prescribed in terms of the Act; and any other matter which is necessary or expedient to prescribe to promote the objectives of this Act. Regulations may include specifying the reporting by accountable institutions and specifying how the proceeds of property forfeited are to be distributed. (See par 13.645.)
67. Amendments to the *Financial Intelligence Centre Act* of 2001 are also recommended: (See par 13.646.)

- References to financing of terrorist acts and terrorist act financing offences

are included in the long Title of the Financial Intelligence Centre Act.

- A definition of “terrorist act financing offence” is inserted which provides that “terrorist act financing offence” means an offence under section 3(3)(c) to (e) or 32 of the Anti-Terrorism Act.
- Section 3(1) is amended to state that the principal objective of the Financial Intelligence Centre is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities and terrorist act financing offences as well.
- Section 18(1)(a)(i) is amended by adding a reference to terrorist act financing offences in order to provide: “policies and best practices to identify the proceeds of unlawful activities and to combat money laundering activities and terrorist act financing offences;”
- 5. The heading to Chapter 3 of the Act is substituted for the following:
MONEY LAUNDERING AND FINANCING OF TERRORIST ACTS CONTROL MEASURES
- Provision is made in section 35 of the Act also for monitoring orders for terrorist act financing offences whereby accountable institutions must report to the Financial intelligence Centre all transactions concluded by a specified person with the accountable institution or all transactions conducted in respect of a specified account or facility at the accountable institution.

BIBLIOGRAPHY

A. INTERNATIONAL CONVENTIONS

-] UN Convention on Transnational Organised Crime.
-] UN Resolution on the Declaration on Measures to Eliminate International Terrorism of 1994.
-] UN Convention on Offences and Certain Other Acts committed on Board Aircraft of 1963.
-] UN Convention for the Suppression of Unlawful Seizure of Aircraft of 1972.
-] UN Convention for the Suppression of Unlawful Acts, against the Safety of Civil Aviation of 1971.
-] UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Personnel of 1973.
-] Vienna Convention on Diplomatic Relations of 1961.
-] Vienna Convention on Consular Relations of 1963.
-] International Convention against the Taking of Hostages.
-] International Convention for the Suppression of Terrorism Bombings of 1997.
-] Montreal Convention on the Marking of Plastic Explosives for the Purpose of Identification of March 1, 1991.
-] Convention on the Physical Protection of Nuclear Material of 1979.
-] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988.
-] Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf of 1988.
-] Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, supplementary to the Montreal Convention, signed in Montreal on 24 February 1988.
-] Convention Relating to Extradition Between the Member States of the European Union of 27 September 1996
-] Resolution 1269 (1999): Adopted by the Security Council on 19 October 1999
-] Draft International Convention for the Suppression of Terrorist Financing of 1998.
-] Draft International Convention for the Suppression of Acts of Nuclear Terrorism of 1998.
-] Discussion Paper for the 10th Congress of the United Nations Commission for Crime Prevention and Criminal Justice.

B. LEGISLATION

1. *England*

-] *Prevention of Terrorism (Temporary Provisions) Act of 1974.*

-] *Nuclear Material Offences Act*, 1983.
-] *Explosive Substances Act*, 1983.
-] *Aviation and Maritime Security Act*, 1990.
-] *Criminal Justice (International Co-operation) Act*, 1990.
-] *Criminal Justice (Terrorism and Conspiracy) Act*, 1998.
-] *Terrorism Act* 2000.
-] *The Anti-Terrorism, Crime and Security Act*, 2001 .

2. Canada

-] *Criminal Code* of Canada.
-] *The Anti-Terrorism Act* of 2001

3. France

-] *Code Pénal*.
-] *French Anti-Terrorist Law*, 1986.

4. Northern Ireland

-] *Northern Ireland Emergency Provisions Act*, 1996.

5. United States of America

-] Title 18 of the United States Code.
-] *Comprehensive Anti Terrorism Act*, 1995.
-] *Terrorism Prevention Act*, 1996.
-] *Act to Combat International Terrorism*, 1983.
-] *Comprehensive Crime Control Act*, 1984.
-] *Omnibus Diplomatic Security and Anti-Terrorism Act*, 1986.
-] *Anti-Terrorism and Effective Death Penalty Act*, 1996.
-] *Protection of Foreign Officials and Official Guests of the United States Act*, 1972.
-] *Prevention and Punishment of Crimes against Internationally Protected Persons Act*, 1976.
-] *Prevention and Punishment of the Crime of Hostage Taking Act*, 1984.
-] *Immigration and Nationality Act*, 1990.
-] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act* of 2001

6. SOUTH AFRICA : STATUTORY LAW

-] *Internal Security Act*, 1982 (Act No 74 of 1982).
-] *Safety Matters Rationalisation Act*, 1996 (Act No 90 of 1996) .

-] Riotous Assemblies Act, 1956 (Act No 17 of 1956).
-] Explosives Act, 1956 (Act No 26 of 1956).
-] Intimidation Act, 1982 (Act No 72 of 1982).
-] Demonstrations in or near Court Buildings Prohibition Act, 1982 (Act No 71 of 1982).
-] Regulation of Gatherings Act, 1993 (Act No 205 of 1993).
-] Civil Aviation Offences Act, 1972 (Act No 10 of 1972).
-] Diplomatic Immunities and Privileges Act, 1989 (Act No 74 of 1989).
-] Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996).
-] Nuclear Energy Act, 1999 (Act No 46 of 1999).
-] Regulation of Foreign Military Assistance Act, 1998 (Act No 15 of 1998).
-] Merchant Shipping Act, 1951 (Act No 57 of 1951).
-] Arms and Ammunition Act, 1969 (Act No 75 of 1969).
-] Second Criminal Law Amendment Act, 1992 (Act No 126 of 1992).
-] Judicial Matters Amendment Act, 1998 (Act No 34 of 1998).
-] Armaments Development and Production Act, 1968 (Act No 57 of 1968).
-] Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No 87 of 1993).
-] Prevention of Organised crime Act, 1998 (Act No 121 of 1998).
-] Financial Intelligence Centre Act, 2001 (Act No 38 of 2001).

7. CASE LAW

De Lange v Smuts 1998 (3) SA 785 (CC)

Harksen v President of the Republic of South Africa 2000 (2) SA 825 (CC)

Investigating Directorate: Serious Economic Offences And Others v Hyundai Motor Distributors (Pty) Ltd And Others 2000 (10) BCLR 1079 (CC)

Levy v National Director of Public Prosecutions 2002 (1) SACR 162 (W)

Mohamed No and Others v National Director of Public Prosecutions and Others 2002 (2) SACR 93 (W)

Mohamed and Another v President of the RSA and Others 2001 (7) BCLR 685 (CC)

National Director of Public Prosecutions v Basson 2002 (2) SA 419 (SCA)

National Director of Public Prosecutions v Bathgate 2000 (1) SA 535 (C)

National Director of Public Prosecutions and Others v Mohamed No and Others (CC)

<http://www.concourt.gov.za/date2002.html>

National Director of Public Prosecutions v Rebuszi 2002 (2) SA 1 (SCA)

Nel v Le Roux 1996 (1) SACR 572 (CC) see also 1996 (4) BCLR 592 (CC)

South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC).

State v Hoare and Others 1982(4) SA 865 (NPD)

8. OTHER SOURCES

1. Akehurst's *Modern Introduction to International Law* 7th edition by Peter Malanczuk London: Routledge 1997
2. Alexander Y *Behaviour and Quantive Perspectives on Terrorism* London: Oxford 1981
3. Anderson Kevin "Hawala system under scrutiny" 8 November 2001 *BBC News Online* at http://news.bbc.co.uk/hi/english/business/newsid_1643000/1643995.stm
4. Baxter Prof Lawrence "Doctors on Trial: Steve Biko, Medical Ethics, and the Courts" 1985 *SAJHR* 137 - 151
5. Bester Bert "Negotiating the Financial Intelligence Act " *De Rebus* June 2002 at 22 - 25
6. Boaz Ganor "Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?" <http://www.ict.org.il/>
7. Boaz Ganor "Terrorism: No Prohibition Without Definition" 7 October 2001 <http://www.ict.org.il/articles/articledet.cfm?articleid=393>
8. Boule Prof LJ "Detainees and the Courts: New Beginnings: *Hurley v Minister of Law and order* (D&CLD 11 September 1985 Case no 5685/85 unreported) 1985 *SAJHR* 251 - 260
9. *Compilation of Intelligence Laws and Related Laws and Executive Orders of Interest to the National Intelligence Community* Prepared for the use of the Permanent Select Committee on Intelligence of the House of Representatives July 1995
10. Cowling Michael "The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" 2000 *South African Journal of Criminal Justice* Vol 13 (3) 344 - 359
11. Doyle Charles *Terrorism at Home and Abroad: Applicable Federal and State Criminal Laws* 1995.
12. Dugard Prof John "A Triumph for Executive Power - An Examination of the Rabie Report and the Internal Security Act 74 of 1982" 1982 *SALJ* 589 - 604
13. Dugard Prof John *International Law: A South African Perspective* 2nd edition Kenwyn: Juta 2000
14. Ellmann Stephen *In a time of Trouble: Law and Liberty in South Africa's State of Emergency* Clarendon Press: Oxford 1992
15. *Final Report of the Truth and Reconciliation Commission* Volume 5 Chapter 8 see <http://www.polity.org.za/govdocs/commissions/1998/trc/index.htm>
16. Foster Don, Dennis Davis and Diane Sandler *Detention and Torture in South Africa: Psychological, Legal and Historical Studies* David Philip: Cape Town 1987.

17. Foster Don, Diane Sandler and Dennis Davis *A study of Detention and Torture in South Africa: Preliminary Report* 1985 published by the Institute of Criminology of the University of Cape Town
18. Ganor Boaz "Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?" <http://www.ict.org.il/>
19. Goredema Charles "Implications of suspects' and other detainees' rights to legal assistance before the first appearance in court in South Africa" 1997 *South African Journal of Criminal Justice* 237 - 253
20. Hough Prof Mike "Urban Terror 2000: Some Implications for South Africa" *ISSUP Bulletin* 6/2000 University of Pretoria.
21. *International Terrorism: A Compilation of Major Laws, Treaties, Agreements, and Executive documents* Report prepared for the Committee on Foreign Affairs, US House of Representatives by the Congressional Research Service Library of Congress Washington: US Government Printing Office December 1994
22. Johnston Philip "Detention of terror suspects is ruled unlawful" *telegraph.co.uk* 31 July 2002
<http://www.portal.telegraph.co.uk/news/main.jhtml?xml=%2Fnews%2F2002%2F07%2F31%2Fterr31.xml>
23. Jordaan L "Confiscation of the proceeds of crime and the fair-trial rights of an accused person" 2002 15 *South African Journal of Criminal Justice* 41 - 60
24. *Legislation Against Terrorism : A summary of the Government's proposals* Organized and International Crime Directorate London
25. Levin Jay "Torture without Violence: clinical and ethical issues for Mental Health Workers in the Treatment of Detainees" 1986 *SAJHR* 177 - 185
26. Lyddall Martin D *A Review of Notable International Events and Terrorist Activity During the Year and Significant Incidents Against Civil Aviation Interests. Annual Report* 1998.
27. Marcus Gilbert "Safeguarding the Health of Detainees" in *Emergency Law Papers* presented at a workshop in Johannesburg, April 1987 Centre for Applied Legal Studies of the University of the Witwatersrand at 137 - 156
28. Mathews Prof Anthony *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* Kenwyn: Juta 1986
29. Mathews Prof Anthony "The newspeak of sabotage" 1988 *SACJ* 175 - 186
30. McQuoid-Mason Prof David "Detainees and the Duties of District Surgeons" 1986 *SAJHR* 49 - 59 at p 57
31. Mendlovitz Saul "Crime(s) of Terror: Developing Law and Legal Institutions" in *BOMBS AWAY!* Fall 2001 Vol 13 No 2 Newsletter of the Lawyers' Committee on Nuclear Policy at <http://www.lcnp.org/pubs/Bombsaway!SPE01/article3.htm>

32. Nugent Judge RW "Self-incrimination in perspective" SALJ 1999 501 - 520
33. Obote-Odora Alex "Defining International Terrorism"
<http://www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61.html>
34. Osofsky Hari M "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice" Yale Law Journal Oct 1997 191 - 226.
35. Patterns of Global Terrorism 1994, 1995, 1996 and 1997 Department of State Publication, Office of the Secretary of State and the Office of the Co-ordinator for Counter Terrorism
36. Rayner Mary Turning a Blind Eye: Medical Accountability and the Prevention of Torture in South Africa Committee on Scientific Freedom and responsibility American Association for the Advancement of Science 1987
37. Report on the Rabie Report: An Examination of Security Legislation in South Africa March 1982 Centre for Applied Legal Studies, University of the Witwatersrand
38. Research Paper No. 12 2001-2002: Terrorism and the Law in Australia: Legislation, Commentary and Constraints Parliament of Australia.
39. Riekert Julian "The Silent Scream: Detention without Trial, Solitary Confinement and Evidence in South African 'Security Law' Trials" 1985 SAJHR 245 - 250
40. Risen James "Money Transfers by Hijackers Did Not Set Off Alarms for Banking Regulators" New York Times 16 July 2002
<http://www.nytimes.com/2002/07/17/national/17TERR.html?todaysh headlines>
41. Rozenberg Joshua "Detention without trial unjustified, says law lord" telegraph.co.uk 1 Dec 2001
<http://www.portal.telegraph.co.uk/news/main.jhtml?xml=/news/2001/12/01/ndet01.xml>
42. Rudolph Harold Security, Terrorism and Torture. Detainee's Rights in South Africa and Israel - A comparative study Cape Town: Juta 1984
43. Schönteich Martin Fear in the City, Urban Terrorism Published in Monograph No 63 Institute for Security Studies 2001
<http://www.iss.org.za/Pubs/Monographs/No63/Content63.html#Anchor-CONTENTS-36680>
44. Steyn Esther "The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?" 2001 SACJ Vol 14 179 - 194
45. Terrorism in the United States 1994 Terrorist Research and Analytical Centre National Security Division
46. Van Buuren Jelle "Politieke uitleveringen binnen europa..." Kleintje Muurkrant nr 305, januari 1997 see www.contrast.org/eurostop/articles/uitlever.html
47. Van Buuren Jelle van Buuren "De donkere kamers van Europa : D'66 en de democratie in Europa" see www.xs4all.nl/~konfront/europa/jelle0397.html
48. Vaknin Sam "To Stop Bin Laden, Follow the Money"

- <http://www.the-idler.com/IDLER-01/10-22.html>
49. Van Zyl Smit Prof D "Presence of legal advisers at the interrogation of suspects by the police" 1988 SACJ 295 - 300 at 299 and 300 on the review of the publication by Cyrille Fijnat's *De toelating van raadslieden tot het politieke verdachtenverhoor*.
 50. Wadham John "Terror law takes liberties" *Guardian Unlimited Observer* 10 March 2002.
 51. Wilkinson Paul *Terrorism and the Liberal State* New York: New York University Press Second Edition 1986
 52. Wilkinson Paul "Current and Future trends in Domestic and International Terrorism: Implications for Democratic Government and the International Community" in *Strategic Review for Southern Africa* Vol XXIII November 2001 Institute for Strategic Studies University of Pretoria.

CHAPTER 1

A. ORIGIN OF THE INVESTIGATION

1.1 In November 1995 the South African Law Commission considered a request from the Minister for Safety and Security that the Commission undertake a review and rationalisation of South Africa's security legislation. The Minister of Safety and Security stated that in view of the history of security legislation, and changed circumstances in South Africa, all existing legislation in South Africa, such as the Internal Security Act, 1982 (Act No. 74 of 1982), and similar Acts in the former TBVC states should be repealed, a new Act be enacted which conforms to international norms, the Constitution, and the country's then current circumstances and requirements. The then Chairperson of the Commission, Mr Justice HJO van Heerden, informed the Minister that the Commission was willing to undertake a review of security legislation and requested logistical support from the Department of Safety and Security or the Department of Justice. The Chairperson also suggested that a project committee be appointed to advise the Commission and to consider the papers which were to be published during the investigation. On 23 and 24 February 1996 at the meeting of the reconstituted Commission, under the chairmanship of the late Chief Justice Mahomed, both the views expressed by the Commission in the past on the investigation and the establishment of a project committee composed of experts were endorsed. The Minister of Justice was subsequently requested to approve the inclusion of the investigation into security legislation in the Commission's programme. He approved the inclusion on 22 March 1996.

1.2 The Minister of Justice appointed a project committee to take charge of this investigation consisting of the following persons:

- Mr Justice CT Howie of the Supreme Court of Appeal in Bloemfontein (Chairperson of the project committee).
- Madam Justice Y Mokgoro, of the Constitutional Court and Chairperson of the Commission.¹
- **Ms P Jana, a member of Parliament at the time.**²
- **Mr G Marcus (SC), a senior advocate at the Johannesburg Bar.**

¹ Due to Madam Justice Mokgoro's commitments since having become Chairperson, and due to her workload, she requested the Commission to be relieved from committee commitments at the Commission, which the Commission agreed to.

² Ms Jana is presently the Ambassador to the Netherlands. Ambassador Jana handed over her credentials to Her Majesty Queen Beatrix on Wednesday the 28th of March 2001 and also assumed her official duties as the South African Head of Mission in The Hague on this day.

- Mr D Nkadimeng, an attorney from Pietersburg.
- Mr D Tabata, an attorney from East London.

1.3 At its first meeting in October 1998 the project committee noted that the SA Police Service suggested that in the investigation into security legislation the Commission consider the following matters as its investigation progresses:³

- The protection of classified information in possession of the State.
- Regulation of Private Intelligence Companies.
- Economic espionage as a threat to national security.
- Protection of the property and personnel of foreign governments and international organisations, including intimidation, obstruction, coercion and acts of violence committed against foreign dignitaries, foreign officials and their family members.
- Hostage taking in order to compel any government to do or abstain from doing any act.

B. DISCUSSION PAPER 92

1.4 The SA Police Service (SAPS) conducted the initial research on terrorism and drafted a document containing a Bill which was submitted to the Commission in October 1999. The SAPS hosted a workshop attended by a number of Government Departments to obtain their comments on the draft Bill before submitting this document to the Commission. That version, however, did not contain clause 16 which governs detention for purposes of interrogation and special offences. The SAPS based its decision for the inclusion of clause 16 on the spate of bombings which occurred during the last half of 1999.

³ In 1999 the project committee finalised an investigation into interception of communications which dealt with the provisions of the Monitoring and Interception Prohibition Act, 127 of 1992. The Commission approved the report during August 1999 and it was submitted to the Minister of Justice during November 1999. The report is available on the Commission's Internet site at <http://www.law.wits.ac.za/salc/report/seclegsum.html> Parliament started its deliberations on the Monitoring and Interception Bill during August 2001. See <http://www.pmg.org.za/viewminute.asp?id=804>

1.5 The SAPS's draft document formed the basis of the discussion paper which was considered by the project committee at meetings held on 12 February and 29 April 2000. The draft document was enhanced by additional research focussing, inter alia, on the issues relating to detention for interrogation. The project committee effected substantive amendments to the discussion paper and the draft Bill. The working committee of the Commission (which is the executive committee of the Commission) considered a draft discussion paper on 8 June 2000 and approved its publication for general information and comment subject to certain amendments which had to be effected.¹ **The Commission hosted a media conference on 8 August 2000 to announce its preliminary recommendations and the availability of discussion paper 92 for general information and comment.² The media gave extensive coverage to the preliminary recommendations contained in discussion paper 92³ even months after the**

¹ There are references in this report to "the original Bill", "the original clause" or the "original proposal" meaning the Bill as submitted by the Police Service to the Commission and its project committee. (The words which are struck out in the Bill (contained in Annexure "B" to this paper) are those amendments which the project committee and working committee considered should be made. The Bill was published in this format to facilitate comment and to reflect the original and the amended wording.)

² A report on the Commission's investigation into Juvenile Justice (see <http://www.law.wits.ac.za/salc/report/project106.html>) was submitted to the Minister and a discussion paper on succession in customary law (see <http://www.law.wits.ac.za/salc/discussn/paper93sum.html>) was also made available at the media conference .

³ "New anti-terror laws expected" *Sowetan* 8 August 2000 at p 2; "Draconian anti-terror laws mooted: concern over provisions reminiscent of apartheid-era legislation" *The Star* 9 August 2000 at p1; "Return of detention without trial mooted" *Mail and Guardian* 9 August 2000 see <http://www.mg.co.za/news.html>; "Concern over SA ant-terror bill" *BBC News* 9 August 2000 at http://news.bbc.co.uk/hi/english/world/africa/newsid_872000/872751.stm; "Anti-terror bill is not like the old days, says Maduna: Detention without trial sought" *Cape Argus* 9 August 2000 at p 2; "New terrorism law 'will not curtail rights'" *Pretoria News* 9 August 2000 at p 5; "Kommissie ten gunste van terrorismewet" *Beeld* 9 August 2000 at p 5; "Laws inadequate to deal with acts of terror, hijacks" *The Citizen* 9 August 2000 at p 3; "Proposed law 'may lead to violations'" *The Citizen* 10 August 2000 at p 2; "Law Commission rejects terror Bill" *Sowetan* 10 August 2000 at p 3; "Terror laws not a catch-all" *The Citizen* 10 August 2000 at p 12; "Comment wanted on draft Bill" *Pretoria News* 10 August 2000 at p 4; "Caution, concern over new terror bill" *Cape Argus* 10 August 2000; "Police need to be empowered" *Business Day* 10 August 2000 at <http://www.bday.co.za/bday/content/direct/0,3523,674565-6079-0,00.html>; "Hateful reminder of bad old days" *Sunday Tribune (Perspectives)* 13 August 2000 at p 4; "Aanhouding" *Beeld* 15 Augustus 2000 at http://news24.co.za/Beeld/Hoofartikels/0,1776.3-65_897355,00.html; "throw out the anti-terror Bill" *Sowetan Sunday World* 27 August 2000 at p 17; "New legislation will ban Pagad: Anti-terrorism law will give police more power" *The Mercury* 11 September 2000 at p 2; "Tshwete to reveal anti-Pagad strategy" *Daily News* 11 September 2000 at p 2; "Govt manoeuvres for legislation to ban Pagad" 12 September 2000 at <http://www.woza.co.za/news00/sep00/terror12.htm>; "Anti-terrorism laws get approval: Move required as attack campaign escalates" *Business Day* 14 September 2000; "Back to detention without trial?" *Mail and Guardian* 15 -21 September 2000 at p 16; "'Terror' Bill outcry: Bid to deal with Pagad angers Muslim, Hindu organisations" *Tribune Herald* 17 September 2000 at p 1; "'Pagad goes on offensive against new terror laws" *Sunday Times* 17 September 2000; "Nuwe wet kan terreur só stuit" *Rapport* 17 September 2000 at p 2; "Terror laws won't stop Cape bombers" *City Press* 17 September 2000 at p 9; "SA needs special

discussion paper was originally published.

C. THE NEED FOR PROPOSING LEGISLATION DEALING WITH TERRORISM

measures to fight terror" *Business Day* 19 September 2000 at p 13; "Muslim group wants Bill halted: Suspicion, fear generated against Islam" *Pretoria News* 20 September 2000; HRC slates terror law" *Daily News* 21 September 2000 at p 3; "Pityana concern about terrorism law plan" *Pretoria News* 21 September 2000 at p 4; "Rights body uneasy about anti-terrorism laws" *Business Day* 21 September 2000 at p 5; "Concern over terror Bill" *Tribune Herald* 24 September 2000 at p 3; "Clean up the cops first" *Mail and Guardian* 29 September 2000; "How bomb suspects could evade terrorism raps" *Independent Newspapers Online* 6 November 2000; "Amnesty concern over anti-terror Bill" *Pretoria News* 6 December 2000 at p 4; George Bizos "Never, never and never again: Our police have set in motion a Bill that aims to bring back detention without trial" *Sunday Times* 10 December 2000 at 17; "Maduna backs detention law" *Sunday Times* 18 February 2001 at p 1; "Ant-terrorism Bill 'infringes on rights'" *Pretoria News* 19 February 2001 at p 2; "No right to remain silent" *The Citizen* 19 February 2001 at p 5; and "'Draconian' anti-terror Bill slammed" *Sunday Times* 25 February 2001 at p 2.

1.6 The events in the USA in New York, Washington, DC, and Pennsylvania on 11 September 2001 when the World Trade Centre and the Pentagon was attacked¹ prompted the whole world to take stock of available measures to combat terrorism. European Justice and Home Affairs Ministers met on 20 September 2001 and agreed to make urgent progress on plans for fast-track extradition, backed by an EU arrest warrant, and improved practical and legislative co-operation against terrorism. On 28 September 2001 the Security Council of the United Nations also adopted a wide-ranging, comprehensive resolution with steps and strategies to combat international terrorism. By resolution 1373 (2001) the Council also established a Committee of the Council to monitor the resolution's implementation and called on all States to report on actions they had taken to that end no later than 90 days from that day. The Council decided that all States must prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. Funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists must also be frozen without delay.

1.7 The South African media reported that Safety and Security Minister Steve Tshwete said that the South African government is under pressure from the UN to finalise its proposed anti-terrorism legislation.² Justice Minister Penuell Maduna was also quoted as saying that South Africa would make the necessary contribution to combat terrorist attacks such as had struck New York and Washington DC; that the

¹ *The Guardian* reported as follows: "Two hijacked airliners smash into the twin towers of the World Trade Centre in New York. A third hijacked plane slams into the Pentagon in Washington, and a fourth crashes in Pennsylvania, apparently out of control. The world watches the horrific rapid fire sequence of horror as the WTC towers blaze, then collapse, killing thousands still trapped inside. Within hours, President George Bush addresses the nation, vowing that those responsible will be hunted down. The world echoes with condemnation of the suicide bombers. . . . Tony Blair calls for a worldwide campaign against terror, declaring that Britain stands shoulder to shoulder with the American people. Meanwhile, the finger of suspicion instantly points to Osama bin Laden, hiding in Afghanistan. See <http://www.guardian.co.uk/wtccrash/0,1300,550197,00.html>

² "Terrorism Bill must be finalised" http://www.news24.co.za/contentDisplay/level4Article/0,1113,2-7-832_1082747,00.html see also <http://www.bday.co.za/bday/content/direct/1,3523,955510-6099-0,00.html> Parliamentary Editor "SA has to speed up terrorism law" *Business Day* 26 Oct 2001 "Fast-tracking of terrorism legislation had become necessary so that SA could comply with counter-terror measures demanded by resolution of the United Nations Security Council, Deputy Foreign Minister Aziz Pahad said yesterday. Since it was first published for information, the draft legislation has blown hot and cold with cabinet ministers. At the height of urban terror bombings in Western Cape it was deemed to be urgently needed, but was largely put on the back burner when incidents abated. Since the September 11 attacks on the US there has been speculation that the legislative process would be speeded up. . . ."

government believes that everyone who participated in the attacks should be punished; and that South Africa was part of UN deliberations on finding an agreed definition of what constituted terrorism. He also remarked on the issue of a new terrorism Act for South Africa that it was unthinkable that the South African Parliament would pass a law which was not in tune with the Constitution's limitation clauses, and it would not pass a terrorism law "out of desperation".³ He added government hoped that by 2002 there would be United Nations consensus on a definition of what constituted terrorism with which South Africa could agree. Concern was raised from a number of quarters not to be overhasty in implementing measures in combatting terrorism.⁴

1.8 The question as to the need to adopt anti-terrorism legislation in South Africa was not as prominent during the last months of 2000 as it became as a result of the September 2001 events in the USA. It was noted in the discussion paper that the question why it is necessary to review legislation relating to terrorism may be well asked. It was pointed out in the discussion paper that apart from organized crime, the combatting of international terrorism is one of the issues pursued vigorously by the United Nations and Interpol and that the United Nations recently stated: "Terrorism is a global threat to national and international security, introducing a random violence that challenges the ability of States to protect their citizens. As terrorism transcends national boundaries and changes its patterns and methods of operations, making full use of modern technologies, no region or country remains immune."⁵

³ "Terrorism must be stamped out"
http://www.news24.co.za/contentDisplay/level4Article/0,1113,2-7-832_1083324,00.html

⁴ Matthew Engel "Liberty curtailed in land of the free: Civil rights Concern as US seeks to update 'antique' laws" *The Guardian* United Kingdom; Sep 19, 2001 noted that American civil liberties organisations were desperately trying to regroup as John Ashcroft, the attorney general, prepared to put a draconian set of counter-terrorism proposals to Congress in response to the September 2001 attacks. He quoted Mr Ashcroft as saying that America needs some upgrades in terms of the legislative framework and to make sure that its capacity to track criminals hasn't been rendered antique by the advances in technology. He noted that early leaks of the proposals alarmed campaigners by suggesting that they could give the administration even broader powers than expected. He pointed out that Professor David Cole of the University of Georgetown Law Centre expressed concern that the US has historically over-reacted in times of fear, indulging in guilt by association and giving government the power to act against individuals without procedures necessary to distinguish the guilty from the innocent. Precedents include not only the long-discredited round-up of Japanese-born Americans after Pearl Harbour and the anti-communist excesses of the McCarthy era in the 1950s but the lesser-known Red Scare roundup of 1920, as well as the response to the Oklahoma City bomb of 1995. This first widened the definition of aiding terrorism so that, according to Prof Cole, anyone sending a textbook to a West Bank school which turns out to be run by Hamas could face a 10-year jail sentence, and if apartheid still existed, supporters of the African National Congress would have been equally vulnerable. He warned that the lesson of history is that the consequences of ill-considered legislation usually outlast the danger - however extreme - it is designed to combat.

⁵ Discussion Paper for 10th Congress of the United Nations Commission for Crime Prevention and Criminal Justice, page 8.

1.9 One might wish to have an answer to the question what is understood by the term “terrorism” as this is the central theme of this investigation. Much attention will be given to defining the term and how it is defined in other jurisdictions in the chapters to follow. According to the definition used by the Australian Defence Force (ADF), *terrorism* is:⁶

The use or threatened use of violence for political ends, or any use or threatened use of violence for the purpose of putting the public or any section of the public in fear.

1.10 It was thought that the attacks carried out on American soil on 11 September 2001 meet this definition. A distinction need to be made between purely criminal acts and those criminal acts which are terrorist acts:

It might be tempting to classify terrorists by what they do, rather than why it is done. This, however, neglects the fundamental distinction between the common criminal and the terrorist. The former perpetrates atrocities for profit, or personal vengeance, whereas the latter does the same thing for what he or she believes to be a higher cause - for example, liberation from perceived oppression, reform of an allegedly unfair political or economic system, and so on. The distinction is important because it affects behaviour. Criminals - unless mentally unsound - are rarely prepared to sacrifice their lives: they are fundamentally self-interested cowards. As such, when cornered by authority they are more likely to give up than is a terrorist, who may be only too happy to take a few of the 'enemy' along in a final exchange of fire, or to die in order to achieve an important objective. The spate of suicide bombings in Israel has recently demonstrated the truth of this assessment.

... The attacks on New York and Washington have shown that even the world's unchallenged top military power is in some ways still very vulnerable. . . . Its enemies . . . have been able to strike with devastating effect at the heart of its greatest city and at the very headquarters of the United States Armed Forces, the Pentagon near Washington. In the event, all the trillions of dollars that the United States spends on defence and security availed nothing. President George W. Bush's missile defence system, were it in place, would likewise have been powerless against this attack.

This attack in one sense merely reconfirms what has long been understood about terrorism, that it is an effective strategy where there is a massive disparity of conventional military or economic power. States, or even non-state groups, which have no hope of successfully engaging the US in open combat – considering for example the disaster which befell Saddam Hussein's Iraq in 1991 – can nevertheless strike effective blows by resorting to unconventional, irregular or terrorist tactics, so-called 'asymmetric threats' . . .

1.11 The United Nations Office for Drug Control and Crime Prevention (ODCCP) indicates that terrorism is a unique form of crime, that terrorist acts often contain elements of warfare, politics and propaganda. For security reasons and due to lack of popular support, terrorist organizations are usually small, making detection and

⁶ “Blackest September: the 2001 Terrorist Attacks on the United States” Australian Parliamentary Library 14 Sept 2001 (updated 24 Sept 2001 at <http://www.aph.gov.au/library/intguide/fad/usterror.htm>)

infiltration difficult.⁷ Although the goals of terrorists are sometimes shared by wider constituencies, their methods are generally abhorred, and while the issues behind terrorism are usually national or regional, the impact of terrorist campaigns is often international. Their form of psychological warfare is "propaganda by deed". It is thus not possible to look at "international terrorism" in complete isolation from domestic terrorism, which is considered an internal matter of sovereign states. ODCCP notes that domestic terrorism often has spill-over effects into other countries and linkages with foreign terrorist groups are not uncommon. Innovations in global communications have given some local groups international standing, while internationally operating groups use today's rapid international transportation to hit, run and hide. Perpetrators of terrorism in one country frequently use other states as safe havens or for fund-raising. They sometimes receive training abroad and use foreign countries for staging terrorist acts or as launching bases for their operations elsewhere. Victims of domestically oriented acts of terrorism are often foreign business people, diplomats or tourists.

1.12 The ODCCP explains that terrorists sometimes hide among emigrant diasporas and refugee communities, and that some terrorist organizations are partly engaged in legitimate trade or in illicit smuggling of drugs and weapons. Most do not operate in a vacuum, but rather side-by-side with non-violent militant groups pursuing the same objectives but by peaceful means. Han Seung- Soo , the President of the General Assembly, said recently in the General Assembly of the United Nations that the fight against terrorism is an issue that transcends cultural and religious differences, while threatening people of all cultures and religious faiths, and that it must never be forgotten that terrorism is not a weapon wielded by one civilization against another, but rather an instrument of destruction through which small bands of criminals seek to undermine civilization itself.⁸

1.13 Existing United Nations treaties on terrorism have relied on an "operational" definition of terrorism in a specific circumstance as opposed to a political one, and each treaty has dealt exclusively with a particular manifestation of terrorist activity. There are separate treaties to address such issues as bombings, hijackings, hostage-taking and covert financing of terrorist activities. The following list identifies the major terrorism conventions and protocols. Most of these conventions provide that state parties must establish criminal jurisdiction over offenders (e.g., the state(s) where the offence takes place, or in some cases the state of nationality of the perpetrator or

⁷ <http://www.odccp.org/terrorism.html>

⁸ Debate on Measures to Eliminate International Terrorism on 1 October 2001.

victim).

- The Convention on Offences and Certain Other Acts Committed On Board Aircraft ("Tokyo Convention", 1963--safety of aviation) —
 - applies to acts affecting in-flight safety;
 - authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, when necessary to protect the safety of the aircraft;
 - requires contracting states to take custody of offenders and to return control of the aircraft to the lawful commander.
 - The Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention", 1970 aircraft hijackings) —
 - makes it an offence for any person on board an aircraft in flight [to] "unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft" or to attempt to do so;
 - requires parties to the convention to make hijackings punishable by "severe penalties;"
 - requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution;
 - requires parties to assist each other in connection with criminal proceedings brought under the convention.
 - The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("the Montreal Convention" of 1971 applies to acts of aviation sabotage such as bombings aboard aircraft in flight) —
 - makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft; to place an explosive device on an aircraft; and to attempt such acts or be an accomplice of a person who performs or attempts to perform such acts;
 - requires parties to the convention to make offences punishable by "severe penalties;"
 - requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution.
 - The Convention on the Prevention and Punishment of Crimes

Against Internationally Protected Persons of 1973, outlaws attacks on senior government officials and diplomats —

- .. defines internationally protected person as a Head of State, a Minister for Foreign Affairs, a representative or official of a state or of an international organization who is entitled to special protection from attack under international law;
- .. requires each party to criminalize and make punishable "by appropriate penalties which take into account their grave nature," the intentional murder, kidnapping, or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act "constituting participation as an accomplice;"
- .. The International Convention Against the Taking of Hostages ("Hostages Convention" of 1979) provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention".
- .. The Convention on the Physical Protection of Nuclear Material ("Nuclear Materials Convention") of 1980 combats unlawful taking and use of nuclear material, criminalizes the unlawful possession, use, transfer, etc., of nuclear material, the theft of nuclear material, and threats to use nuclear material to cause death or serious injury to any person or substantial property damage.
- .. The Protocol for 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 of 1988 extends and supplements the provisions of the Montreal Convention on Air Safety to encompass terrorist acts at airports serving international civil aviation.
- .. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 1988 applies to terrorist activities on ships and —
- .. establishes a legal regime applicable to acts

- against international maritime navigation that is similar to the regimes established against international aviation;
- makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships;
- The Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of 1988 applies to terrorist activities on fixed offshore platforms) establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation.
- The Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1991 provides for chemical marking to facilitate detection of plastic explosives, eg, to combat aircraft sabotage and —
- is designed to control and limit the used of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am 103 bombing);
- parties are obligated in their respective territories to ensure effective control over "unmarked" plastic explosive, ie, those that do not contain one of the detection agents described in the Technical Annex to the treaty;
- generally speaking, each party must, among other things: take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of its territory; exercise strict and effective control over possession and transfer of unmarked explosives made or imported prior to the entry-into-force of the convention; ensure that all stocks of such unmarked explosives not held by the military or police are destroyed or consumed, marked, or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or police, are destroyed or consumed, marked, or rendered permanently ineffective within fifteen years; and, ensure the destruction, as soon as possible, of any unmarked explosives manufactured

- after the date-of-entry into force of the Convention for that state.
- .. The International Convention for the Suppression of Terrorist Bombings of 1997 creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.
 - .. The International Convention for the Suppression of the Financing of Terrorism of 1999 —
 - .. requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, though groups claiming to have charitable, social or cultural goals or which also engage in such illicit activities as drug trafficking or gun running;
 - .. commits states to hold those who finance terrorism criminally, civilly or administratively liable for such acts;
 - .. provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other states on a case-by-case basis. Bank secrecy will no longer be justification for refusing to cooperate.

1.14 A number of the international conventions or instruments on terrorism still has to be acceded to, signed or ratified by South Africa. As a responsible member of the United Nations, South Africa not only has to consider to become part of such international instruments, but the country's legislation must be effective in order to address terrorism. Incidents of terrorism happens unprovoked, and could be expected at any place, at any time, as was recently demonstrated in the USA. No country can expect to be immune in this regard. The bombings of United States embassies in Dar Es Salaam, Tanzania, and Nairobi, Kenya, and the 11 September 2001 events bear testimony of this fact, and that no country should wait until such a devastating act occurs before it ensures that it has the necessary legislative measures in place in order to address such acts. The UN Secretary- General, Mr Kofi Annan, recently pointed out¹ that all states are in a moral struggle to fight an evil that is anathema to all faiths, that every state and every people has a part to play and that the 11th September 2001 attack was an attack on humanity, and humanity must respond to it as one. He remarked that the Member States have a clear agenda before them which begins with ensuring that the 12 conventions and protocols on

¹ In his address to the General Assembly on Terrorism in New York on 1 October 2001.

international terrorism already drafted and adopted under United Nations auspices, are signed, ratified and implemented without delay by all states.

1.15 The threat of criminal acts, such as heists and highway robberies committed in a precision, military type of fashion, as well as periodic pipe bomb explosions, and acts such as the Planet Hollywood explosion in Cape Town have in South Africa been likened to acts of terrorism. Hundreds of incidents have occurred since May 1994, in which explosive devices were discharged, causing damage or injury. From 1 January 1994 until 24 December 1999, 414 criminal detonations of explosives occurred. Railway lines, offices of political parties, powerlines, schools, taxi ranks, police stations, post offices, houses, mosques, mine hostels, shebeens, restaurants, vehicles, etc. were targeted. The following types of explosive devices were used: improvised explosives devices, commercial explosives, pipe bombs, hand grenades, rifle grenades, car bombs, a landmine, and petrol bombs, apart from capped fuses, stun grenades, thunder flashes and ammonium nitrate.² It was said in the discussion paper that one should keep in mind numerous violent crimes, which could, in view of the number of perpetrators, type of weapons used and their *modus operandi* be classified as terrorist acts.

1.16 Parliament has, since the Commission was requested to conduct this investigation, adopted the Safety Matters Rationalization Act, 1996 (Act No. 90 of 1996), which repealed all the security legislation of the Republic, including the legislation of the former TBVC states, which was clearly inconsonant with the interim Constitution. A total number of 34 laws were repealed in the process, whilst the operation of the following Acts of the Republic of South Africa were extended to the whole national territory of the Republic:

- Riotous Assemblies Act, 1956 (Act No. 17 of 1956) Explosives Act, 1956 (Act No. 26 of 1956).
- Intimidation Act, 1982 (Act No. 72 of 1982).
- Internal Security Act, 1982 (Act No. 74 of 1982) (as amended by section 1 of the Safety Matters Rationalization Act, 1996).
- Demonstrations in or near Court Buildings Prohibition Act, 1982 (Act No. 71 of 1982).
- Regulation of Gatherings Act, 1993 (Act No. 205 of 1993).

² The discussion paper listed these incidents in detail setting out the dates and locations as well as the devices used.

1.17 The only provisions of the Internal Security Act of 1982 which remain in force, are sections 54(1) and (2). The current South African statutory and common law provisions criminalising conduct constituting terrorism and related activities are analysed and compared in this report with legislation enacted in foreign jurisdictions to deal with terrorism. A comparative analysis is made of the South African legislative and common law provisions and the International Conventions relating to terrorism. This report includes recommendations for the adoption of legislation addressing terrorism as part of a holistic legislative overview. The weaknesses within the current South African law are identified and the adoption of new legislative measures are recommended. This report seeks to comply with South Africa's ongoing commitment to harmonise its legislation with international law.

1.18 The offence of terrorism which is currently set out in section 54(1) of the Internal Security Act, 1982, relates only to terrorism in respect of the South African Government or population. The international threat of terrorism is, however, often directed at foreign officials, guests, embassies and the interests of foreign states. The question is hence whether the offence of terrorism as it exists in South African law is adequate. It can be argued that any act of terrorism can in any event be prosecuted in terms of the existing law as such an act would constitute an offence, whether under statute or under the common law. The worldwide trend, however, is to create specific legislation based on international instruments relating to terrorism. The reason for this is twofold: firstly to broaden the normal jurisdiction of the courts to deal with all forms of terrorism, especially those committed outside the normal jurisdiction of courts, and secondly to prescribe the most severe sentences in respect of terrorist acts.

1.19 The Commission wishes to express its profound concern from the outset that South Africa has a terrible history of abuse in detention, and wants to note that the country now has a Constitution which is a product of that history. The Discussion Paper therefore noted that the most compelling justification needs to be advanced for detention for the purposes of interrogation as was suggested in the original Bill. The Commission wishes to remind readers of the wording of sections 12, 35(2) and 36 of the Constitution since in the context of contemplated detention for interrogation one finds oneself squarely in the realms of justification:

12 Freedom and security of the person.

(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

35 Arrested, detained and accused persons

35(2) Everyone who is detained, including every sentenced prisoner, has the right-

- (a) to be informed promptly of the reason for being detained;
- (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
- (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
- (f) to communicate with, and be visited by, that person's-
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.

36.(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

1.20 The Commission wishes to emphasise that the Bill recommended in this report differs drastically from the one provisionally proposed in the discussion paper. Detention for interrogation no longer forms part of the Bill. In its place it is suggested that provision should be made for investigative hearings which closely resemble the procedure contained in section 205 of the Criminal Procedure Act in order to obtain information from a person suspected of being in possession of information on terrorist acts. Provision is also made for preventative measures. This entails that a person suspected of being about to commit a terrorist act can be brought before a court where he or she enters into an undertaking to refrain from certain activities and the court may impose certain conditions to ensure compliance.

1.21 When considering the measures to be implemented in combatting terrorism in South Africa, the South African history of security legislation and the abuses committed under it

should constantly be kept in mind. The Final Report of the Truth and Reconciliation Commission gives the following insightful overview of the abuses committed in South Africa in the past:¹

58 ... security legislation introduced in the 1960s ... amounted to a sustained assault on the principles of the rule of law. The suspension of the principle of *habeas corpus*, limitations on the right to bail, the imposition by the legislature of minimum gaol sentences for a range of offences and limitations on the ability of the courts to protect detainees all contributed to a mounting exclusion of the authority of the courts from the administration of justice, thereby seriously eroding their independence.

59 Security legislation also introduced into the law a definition of sabotage so broad and all encompassing as to render virtually all forms of dissent illegal or dangerous. ...

1.22 The Truth and Reconciliation Commission reflected on torture and death in custody in South Africa during the period 1960 to 1994:²

91 The period 1960 to 1994 saw the systematic and extensive use of detention without trial in South Africa. Such detention was frequently conducive to the commission of gross abuses of human rights. The Human Rights Committee estimated the number of detentions between 1960 and 1990 at approximately 80 000, of which about 10 000 were women and 15 000 children and youths under the age of 18. Detention without trial represented the first line of defence of the security forces. It was only when this strategy began to fail that the killing of political opponents increased.

92 Allegations of torture of detainees form a large percentage of all violations reported to the Commission. Most people who told the Commission they had been detained said also that they had been subjected to some form of assault or torture associated with detention.

93 Evidence before the Commission shows that torture was used systematically by the Security Branch, both as a means of obtaining information and of terrorising detainees and activists. Torture was not confined to particular police stations, particular regions or particular individual police officers — although certain individuals' names came up repeatedly. Torture was used by the security police and by other elements of the security forces, including the Reaction Unit, the Municipal Police, the CID and, to some extent, by the military intelligence unit of the SADF.

94 Many former detainees who experienced torture did not come forward to make statements to the Commission. At least one of the reasons for this was the deep shame and humiliation often associated with the experience of torture, something the security police understood well and exploited. ...

99 The 'silence of vulnerability' was the greater when sexual forms of torture were used. The Commission is aware of individual deponents who made statements about other forms of torture but were unable to discuss their experience of sexual torture.

1.23 The Truth and Reconciliation Commission noted the applicable security legislation which provided for detention during their mandate period as follows:³

a Detention for interrogation: section 21 of General Laws Amendment Act (1963); section 6 of Terrorism Act (1967); and section 29 of Internal Security Act (1982).

¹ Final report of the Truth and Reconciliation Commission Volume 1 Chapter 2 see <http://www.truth.org.za/report/index.htm>

² Final report of the Truth and Reconciliation Commission Volume 2 Chapter 3.

³ Final report of the Truth and Reconciliation Commission Volume 2 Chapter 3.

- b Preventative detention: section 10 of Internal Security Act (1950); section 28 of Internal Security Act (1982).
- c Short-term detention: section 22 of General Law Amendment Act (1966); section 50 of Internal Security Act (1982).
- d Detention of state witnesses: section 12 of the Suppression of Communism Act (1950); Criminal Procedure Act (1965); section 31 of Internal Security Act (1982).
- e State of emergency detention: Public Safety Act (1953); Proclamation R121 (1985).

134 With the introduction of the ninety-day detention clause provided for by the General Laws Amendment Act of 1963 that torture became far more prevalent. Section 17 authorised any commissioned officer to detain without a warrant any person suspected of political activities and to hold them in solitary confinement, without access to a lawyer, for ninety days. In practice, people were often released after ninety days only to be re-detained on the same day for a further ninety-day period. The Minister of Justice said the intention was to detain uncooperative persons 'until this side of eternity'. Ms Helen Suzman was the only Member of Parliament to vote against the amendment.

135 The ninety-day law came into effect on 1 May 1963 and the first detentions took place eight days later. Between 1 May 1963 and 10 January 1965, when it was withdrawn and replaced with a 180-day detention law, it was used to detain 1 095 people, of whom 575 were charged and 272 convicted.

143 Section 17 of the General Laws Amendment Act was revoked as of 11 January 1965. The Minister of Justice said that it would be re-invoked should the need arise. The Criminal Procedure Amendment Act was enacted in the same year. This provided for 180-day detention and re-detention thereafter. Detainees could be held in solitary confinement but, unlike the ninety-day provision, interrogation was not specified as part of the detention. Nevertheless, it appears that the 180-day provision was used for interrogation as well.

144 In response to guerrilla activities on the northern borders of South West Africa, the General Laws Amendment Act was amended in 1966 to provide for up to fourteen days' detention of suspected 'terrorists' for interrogation purposes. The commissioner of police could apply to a judge to have the detention order renewed. This clause was a forerunner of the Terrorism Act (1967) which authorised indefinite detention without trial on the authority of a policeman of or above the rank of Lieutenant Colonel. The definition of terrorism was very broad. No time limit was specified for detention, which could be continued until detainees had satisfactorily replied to all questions. Detentions under the Act were generally for the purposes of extracting information and the practice of routine 'purposive torture' appears to have accompanied most interrogations.

145 Section 6 of the Terrorism Act was first used to detain ten South West Africans arrested during the attack on the SWAPO base at Omgulumbashe. The captives vanished from view and were brought to trial in Pretoria after two years of interrogation, intermittent torture and many months of solitary confinement. Section 6 was subsequently used in a series of detentions of suspected ANC members in 1968.

160 As these cases indicate, torture was used expressly to extract information and admissions, and interrogation was in some instances followed by a trial. Detainees, 'broken' by torture, were frequently used as state witnesses. In some instances, despite the presence of perpetrators in court, such witnesses withdrew their statements, alleging that they had been made under duress. Court cases were increasingly characterised by 'trials within trials' to test the admissibility of such statements. Few judges ruled in favour of detainees. In many cases, however, detainees were eventually released after lengthy spells in detention without having been charged.

162 During the 1976 unrest, the government amended the Internal Security Act in order to provide for what was termed 'preventive detention'. Theoretically, the detention was not meant to exceed twelve months. Proclamation R133 of 16 July 1976 applied the

provisions of the Internal Security Amendment Act to the Transvaal, while Proclamation R159 of 11 August 1976 extended its applicability country-wide. This was extended for a further year.

163 The Internal Security Act (1982) attempted to consolidate security legislation into one act. Detentions were covered by the following clauses:

a Section 28: Indefinite preventive detention;

b Section 29: Indefinite detention for interrogation, with detainees held in solitary confinement;

c Section 29(2): No court could challenge the validity of a detention order;

d Section 31: Detention of potential witnesses for not longer than six months or for the duration of a trial;

e Section 50: A low-ranking police officer could detain a person deemed to be threatening public safety for fourteen days' preventive detention. For the detention to be extended, the permission of a magistrate was needed.

164 Detainees held under section 28 were sometimes questioned, but were primarily detained in order to keep them out of circulation. Section 29 was used chiefly for detention of those suspected of links with the underground, and particularly military, structures. Detainees held under this clause were subjected to torture. In the mid-1980's, the Internal Security Act continued to be used for specific cases of suspected terrorism and for intensive interrogation. However, detention happened far more widely under the state of emergency provisions.

165 State of emergency regulations gave police powers to detain individuals for an initial period of fourteen days on little more than a suspicion that they may have been a 'threat to the safety and security of the state'. The period of detention could be extended almost indefinitely. Thousands of people, mostly black men, were incarcerated under these provisions during the states of emergency in the mid- to late 1980's. The wide-ranging powers given to the police, including extensive indemnity provision, and the lack of any censure for excesses, reinforced their understanding that they enjoyed impunity for extensive abuses committed in the interests of state security.

1.24 By the end of 1999 and beginning of 2000 concern was raised in the South African media⁴ on measures suggested by Minister Steve Tshwete on aspects such as detention, interrogation and bail.⁵

⁴ "Change Constitution to fight urban terror, says Tshwete" by Henry Ludski *Sunday Times* 2 January 2000 see <http://www.suntimes.co.za/suntimesarchive/2000/01/02/news/news02.htm>
SAFETY and Security Minister Steve Tshwete may ask Parliament to aid the war against urban terrorism by amending the Constitution.

Tshwete said that a tough new law being planned to counter terrorism would be effective only if certain constitutional rights were limited. In cases of urban terrorism, he wants suspects to be held for questioning for more than 48 hours and their access to legal representation to be restricted. Tshwete and Justice Minister Penuell Maduna have given a special drafting team until next month to come up with the legislation. 'It's no longer a case of if we need it but when,' said Bulelani Ngcuka, National Director of Public Prosecutions.

Tshwete said that when the integrity of the state was threatened, South Africa needed tough laws to fight 'armed bandits' who had no respect for life. But he added: 'We will not do it by reverting to old apartheid laws.' The proposed anti-terrorism law is also expected to give police greater powers for search and seizure. Courts are expected to be given greater discretion to penalise suspects who refuse to co-operate with investigators. At least 63 people have been injured in bomb attacks in the Cape Peninsula in the past few weeks. Tshwete said the bombings were, for now, confined to the Western Cape but could spread to other parts of South Africa. Police are convinced they have caught a suspect involved in the manufacturing of the pipebombs which have wreaked havoc in the Western Cape. A senior investigator said police believed one of the men being held in custody in connection with the recent spate of bombs had been involved in making the explosive devices.

⁵ "Short cuts take us into dangerous territory" Editorial in the *Sunday Times* on 9 January 2000 <http://www.suntimes.co.za/suntimesarchive/2000/01/09/insight/in10.htm>
IF SOCCER and rugby were not so popular, the compulsion to fix that which is not broken

- Urban terrorism is a terrible form of crime, partly because it is repeated like other serial murders, partly because many of its victims are so clearly innocent and because it seems to pose a direct challenge to the authority of the state. But it should be treated no differently from any other form of extreme violence against people. All crime poses a threat to the authority of the state in its first duty to uphold law and order. No doubt the attacks are an acute embarrassment to the government in its legislative capital. But we need to measure them within the 25000 murders we suffer every year. Most of the victims are innocents by any normal measure and police officers are at the greatest risk everywhere. There is no special reason to believe that reducing the rights contained in Section 12 — which deals with detention, access to the courts, and the right not to be tortured — will make it easier to convict terrorists, unless we repeal the whole section and allow extreme methods. We have travelled that route and it gained us nothing.

would easily qualify as our national sport. Take the latest proposal by the Minister of Safety and Security, Steve Tshwete, that the Constitution be changed to make it easier to fight terrorism.

Tshwete's motives are honourable, if a little expedient. The police have manifestly failed to arrest those responsible for the series of bombings which have hit the Western Cape over the past three years. Countless units, super-units and supercops have been created and disbanded, but the core organisation behind the bombers has remained elusive.

. . .

But his conclusion that the Constitution must be altered to diminish the rights of those detained without trial is an attempt to fix that which is not broken to deal with a problem of inadequate detective work that must be solved in other ways. . . . The Constitution could be amended - it could even be scrapped - without having the slightest effect on the capture and prosecution of the Cape bombers.

Deficiencies in detective work, in personnel and in the co-ordination of intelligence resources will not benefit from constitutional amendments. Real solutions involving planning, training, co-ordinated action and intelligence are needed. The fact that these bombers hide among people who do not co-operate with the security forces is the essence of the policing problem. It is the first, vital nettle that must be grasped if the problem is to be solved. Terrorism will not be overcome by doing away with human rights that were born of the struggle to free South Africa. More so when the terrorists are seeking to do away with such rights in the first place. The Constitution is in no need of repair. Our policing strategies are.

Amending the Constitution should not be a short cut to effective policing and prosecution. Until we have done the conventional things properly it should not even be considered. Indeed, police believe they have the bomb-maker. If so, they appear to have done it without special legislation, without brutal measures, and without diminishing our Constitutional rights. So they should. The very purpose of the Constitution is to protect our democracy and our freedom in the face of extreme threats.

- A new anti-terror law for people suspected of being potential urban terrorists is neither necessary nor desirable. Such 'handlangers' (accomplices) of criminal gangs could easily be put away for up to six years under legislation already in existence. There is no need to pass detention laws reminiscent of the security era.¹ There are two types of bombers. There are those who belong to some sort of gang or organisation which seeks to make a political or other point by engaging in terrorism. Then there is the loner who, in an entirely unpredictable moment of rage, jealousy, spite, lust or anarchist angst, goes out and sets off a bomb. Such a person could be you or me in a moment of stress. Any state that claims to have forewarning or foreknowledge of such a bomber is a dishonest state. There is little that can be done about such a bomber, other than to encourage the public to be vigilant. But the potential bomber attached to a cause or a gang is a different matter. It is likely and, indeed, even expected that the state has an idea of which person attached to what organisations is likely to be engaged in urban terror in the future.
It is these people whom certain law-enforcement officials, in the aftermath of the St Elmo's bomb, wanted to lock away without trial 'for questioning', and for which purpose the Minister of Safety and Security, Steve Tshwete, wants new anti-terror laws. But it is precisely these sorts of people who can be convicted - before even engaging in any violent act - in terms of the Prevention of Organised Crime Act. The Act has a number of provisions which effectively criminalise gang membership coupled with merely the threat to commit violent acts. To my knowledge, no prosecutor has yet invoked these provisions. The provisions are designed for easy conviction of those who could slip through the net for lack of evidence on other charges, or who have threatened to but have not yet committed a serious crime. As such, the Act is a useful device not yet being utilised against urban terror and gang warfare.
What do the suspects wear? With whom do they hang out? Have they spoken loosely about acts of violence or revenge? The wrong answers to these questions could put such suspects in prison. According to the Act, anyone who participates in, or is a member of, a 'criminal gang' and who threatens to commit any criminal activity by or with the assistance of a criminal gang, or who threatens retaliation in any manner or by any means in response to any act or alleged act of violence, is guilty of an offence. Such an offence holds a penalty of up to six years' imprisonment. All a prosecutor needs to show, therefore, is that the suspect is either a gang member or participates in a gang, and that the suspect has threatened violence by the gang. Alternatively, that the gang member suspect has threatened retaliation by any means.
A 'criminal gang' is defined in an open-ended way. It includes any established group of three or more persons, which group commits one or more criminal offences, and which has a name, sign or symbol, and whose members have engaged in a pattern of criminal gang activity. The word 'includes' is used, which means that groups which do not have all the listed characteristics may not necessarily be excluded. A 'pattern of criminal gang activity' includes the commission of two or more criminal offences covered by the Act (basically any offence carrying a penalty of more than one year's imprisonment). At least one offence must have occurred after the law came into force. The most recent offence must have occurred within three years of the previous offence. The offences must have been committed on separate occasions. If they were committed on the same occasion, they must have been committed by two or more persons who are members of, or belong to, the same criminal gang.
Given these definitions, most of the known Western Cape gangs, as well as Pagad,

¹ "Trial better than detention for urban terror suspects" Jean Redpath
<http://www.suntimes.co.za/2000/01/09/insight/in14.htm>

would probably easily be proved to be a 'criminal gang'. To assist the courts in determining whether a particular person is a member of a criminal gang, the Act says the court may have regard to certain factors. These are whether such a person:

- * Admits to criminal gang membership;
- * Is identified as a member of a criminal gang by a parent or guardian;
- * Resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of a criminal gang (the gang associate);
- * Has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activities (note: no conviction, only arrests required); and
- * Is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

Obviously these provisions are not specifically enacted with potential bombers in mind, but the possible application of the Act to such persons linked to criminal gangs is clear.

It may be argued that convicting a person who simply associates him- or her-self with a gang and is heard to threaten violence is constitutionally suspect. Of course, these provisions are open to constitutional challenge on the basis of freedom of association and freedom of expression - but they may yet pass the limitation test.

Such provisions, which at least require a person to be charged and heard in a court of law, are far more preferable to detention laws. Detention for any length of time without trial is far more prone to constitutional challenge.

Of course, none of this may have been of any use if and when the truth about Deon Mostert's involvement in the St Elmo's bombing is revealed. But that is another issue entirely.

1.25 As early as February 1999 the foreign and local press started reporting that measures are being planned in South Africa to combat terrorism in this country and pointed out that the envisaged measures have serious constitutional implications:

- Security ministers are strongly divided over proposals for special anti-terrorist laws, with the intelligence community backing them but safety and security opposing them because of their constitutional implications.¹ . . .
Police sources said senior policemen in the Western Cape have 'lobbied hard' for special legislative measures, including a seven- or 14-day period of detention without trial for terror suspects. However, the Western Cape lobby was 'coolly received' by police commissioner George Fivaz and safety and security secretary Azhar Cachalia, a police source said.
'The recommendations drafted by police management for Mufamadi's consideration ended up being very light on legislative reform,' the source said. "The document was far more concerned with operational problems than the need for more laws. It implied that the primary problems lay in investigative and intelligence methods. 'This is essentially the position Mufamadi took to the cabinet committee: extreme caution on the legislative front.' However, it is understood that Nhlanhla was adamant that special legislative measures were required. 'Every western democracy faced by a terror threat allows police to interview terror suspects for at least seven days,' said an African National Congress (ANC) official who supported Nhlanhla's position.
'The drafters of SA's constitution made a mistake in insisting that suspects for all categories of crime be charged or released within 48 hours. An amendment to deal with terror suspects will not be controversial. The fact is that the heart

¹ Jonny Steinberg "Ministers divided over new anti-terrorism laws " 05 February 1999 see <http://www.bday.co.za/99/0205/news/news3.htm>
 See also "Apartheid-era laws for war on terrorism" Tuesday, February 16, 1999 *The Sydney Morning Herald* <http://www.smh.com.au/news/9902/16/world/world9.html>

of intelligence work happens after the suspect is detained.'

A senior ANC source said: 'Ultimately, it is the legal advisers who will clinch the issue. Anything the advisers believe will require either a constitutional amendment or a Constitutional Court test will probably not be tabled. Anything below that threshold is fair game.'

1.26 Justice JS.Verma, Chairperson of the National Human Rights Commission of India, recently emphasised that combating terrorism under the rule of law must mean compliance with the Indian constitutional mandate:²

Terrorism results in gross violation of human rights and must, no doubt, be dealt with a heavy hand. However, the methods to counter terrorism must not violate the human rights of innocents or else the innocents would be exposed to double jeopardy and suffer twin violation of their human rights. Experience worldwide has shown that state terrorism to combat terrorism is counter productive.

. . . any weapon to combat terrorism which is not tempered with 'tolerance' and 'justice' may, itself, amount to an act of terrorism and be not within the ambit of 'rule of law'. Terrorism is a dastardly crime. In the case of crime, the rule of law requires finding the perpetrators and bringing them to justice under the law. In doing so, innocent people are not exposed to any danger or violation of human rights. If a criminal hides somewhere, the law does not contemplate assault on people all around to isolate and apprehend the criminal. The requirement of the rule of law in combating terrorism is similar.

. . . Terrorism regardless of motivation has to be condemned and countered but this has to be done taking "all necessary measures in accordance with the relevant provisions of international law and international standards of human rights to prevent, combat and eliminate terrorism, whenever and by whomever committed". This has to be achieved within the framework of rule of law.

The responsibility for the security of our land, and the fight against terrorism, are patriotic duties and the integrity of the state must be preserved and the terrorism – the sworn enemy of civil society – which respects neither life, nor law nor any human rights, must be suppressed. Yet we must fight this just war using means that are righteous, that are in conformity with our Constitution, our law, and our treaty obligations. This is no easy task. But then it is never easy to live by ideals and it is the ideals that distinguish civilized people from barbarians.

It must be remembered that there is a clear and emphatic relationship between national security and the security and integrity of the individuals who comprise the state. Between them, there is a symbiosis and no antagonism. The nation has no meaning without its people. John Stuart Mill emphasized that the worth of a nation is the worth of the individuals constituting the nation. This is the emphasis laid in the Constitution of India which holds out the promise to secure both simultaneously.

Often doubt is raised about the possible conflict between respect for human rights and combating terrorism. There is really no such conflict. International humanitarian law is a part of human rights law applicable even in armed conflict. There is a growing convergence between the two since the object of both is the same and that is to respect human dignity and abjure needless violence. The fundamental concepts of laws of war are based on the balance between military necessity and humanity which includes proportionality of the force used. Military necessity does not admit of cruelty or wounding except in fight nor of torture to extract confessions. Geneva Conventions are for humane treatment even of the POWs. How a party to a conflict is to behave in

² Second Bodh Raj Sawhny Memorial Oration on "Combating Terrorism Under the Rule of Law" 4 December 2001 see <http://www.geocities.com/notopoto/views/jverma.html>.

relation to people at its mercy is governed by humanitarian laws. If humane considerations prevail even in armed conflict with an enemy, the treatment of persons dealt with in low intensity conflict cannot be harsher because they are often not even enemies of the nation. The whole regimen of Hague laws and Geneva laws covers the field and there is growing convergence between them.

No person who supports human rights can support terrorism which is a grave violation of human rights. There is no conflict between respect for human rights and combating terrorism. Ms. Mary Robinson, the UN High Commissioner for Human Rights, recently in India to receive the Indira Gandhi Prize for Peace, Disarmament and Development, emphasized this fact when she stressed that "government action must be guided by human rights principles, which strike a balance between the enjoyment of freedoms and the legitimate concerns for national security." She added, 'I am concerned that some governments are now introducing measures that may erode core human rights safeguards.'

It is essential to bear this in mind.

Current Scenario: The recent dastardly terrorist attacks in America on September 11, 2001 have generated world wide panic and triggered the call for stricter laws to combat terrorism. Our own country is no exception even though in effect the situation here remains substantially the same as before September 11. Incidentally, some Judges of the US Supreme Court were in India when America suffered the terrorist attacks on September 11. It is significant that the US Judges did not exhibit any panic reaction and said that the terrorists must be tried under the rule of law and no stricter laws are needed to deal with them and to do justice. Ms. Mary Robinson also said recently, 'In a world which has changed not for the better after the September 11 attacks, there is need to reinforce the rule of law and international human rights and for ensuring that tolerance was not looked upon as luxury but a way of life.' In these difficult times there is need to check expression of anger. We must not be carried away by the knee jerk different reaction of other countries.

1.27 The project committee held meetings on 27 April 2002 and on 18 May 2002, respectively to consider the comments on the discussion paper and the legislation resulting from various countries to finalise its draft report for submission to the Commission. On 17 August 2002 the Commission considered and approved this report.

CHAPTER 2

SOUTH AFRICA'S VIEWS ON TERRORISM AND ITS INTERNATIONAL OBLIGATIONS

2.1 The South African Government participates actively in the international arena where counter-terrorism measures are being elaborated, and particularly in the Non Aligned Movement (NAM), the Organisation of African Unity (OAU) and the United Nations (UN). It has joined the international community in unequivocally condemning terrorism in all its forms and manifestations and condemned recent terrorist attacks such as the Nairobi (Kenya) and Dar-Es-Salaam (Tanzania) bombings unequivocally. In these international fora the South African Government has reaffirmed its principled position that all acts methods and acts of terrorism are unjustifiable and reiterated its support for the efforts of the international community to eliminate terrorism. The Government has also confirmed its support for strengthening the international co-operation that will eliminate terrorism and recognises that it is only with the full and committed support of all members of the international community that terrorism can be eradicated.

2.2 Presently there are different approaches to the terrorism issue depending on the international fora in which it is discussed. The UN has adopted an approach of legislating for specific crimes that are normally associated with terrorism and the UN has adopted twelve treaties using this specific format. The OAU and the NAM on the other hand favour a comprehensive approach to terrorism by adopting an overarching convention on terrorism. South Africa as member of both the OAU and NAM (and chair of the NAM) supports this latter approach and has actively participated in the recent elaboration and adoption of the Convention of the OAU on the Prevention and Combating of Terrorism, which is a comprehensive regional convention on terrorism. South Africa also supports the call of NAM for an International Summit Conference under the auspices of the UN to formulate a joint organised response of the international community to combat terrorism in all its forms and manifestations. Although South Africa favours the approach of the OAU and the NAM it does participate actively in the elaboration of individual conventions under the auspices of the UN as bona fide attempts to combat international terrorism.

2.3 Generally the purpose of the international conventions, whether adopted under the auspices of the UN or OAU, is to ensure international co-operation in prosecuting or extraditing the offenders thus ensuring that there is no safe-haven for terrorists. As an active and respected member of the international community South Africa should join with other states in strengthening the legal framework for combating terrorism. In order to give practical effect to South Africa's commitment to combating terrorism it is thus necessary for

South Africa to become party to these international conventions on terrorism and to give effect to the obligations contained therein in its domestic law. The following chapters of this report will examine the provisions of the various international conventions in more detail and examine how these obligations can be given effect to in the domestic law.

2.4 Mr Thabo Mbeki, the President of the Republic of South Africa, made the following remarks, inter alia, on the occasion of the Debate of the 56th Session of the United Nations General Assembly in New York, on 10 November 2001:

. . . There can be no doubt but that the peoples of the world have to unite in action to defeat terrorism. There can be no hesitation among any of us in the resolve to work together to ensure that those responsible for the heinous actions of September 11 are brought to justice. This is so not only because many nations lost their citizens on that terrible day, important as this is. It is so because terrorism has demonstrated that it has no respect for borders. It has shown in a very graphic, tragic and painful manner, as it did also in Kenya and Tanzania, that our very humanity renders all of us, without exception, into potential targets of cold-blooded murder.

Where we might have used the concept of a global village loosely in the past, on September 11 terrorism taught us the abiding lesson that we do indeed belong to a global village. None within this village will be safe unless all the villagers act together to secure and guarantee that safety. All must act to promote the safety and security of one and all on the basis of a shared responsibility born of a shared danger. Accordingly, we have no choice but to get together in the village square to agree on the threat that confronts us all. Together, in that village square, we have to determine what we do about this commonly defined threat. This is the ineluctable conclusion we must draw from the terrorist attacks of September 11. To guarantee world peace and security in the light of the threat posed by terrorism requires that this organisation, the United Nations, must discharge its responsibility to unite the peoples of the world to adopt an International Convention against Terrorism. Necessarily, all of us must experience a shared sense of ownership of this Convention, precisely because the Convention would not merely be a statement of principles, but a set of injunctions or prescriptions that will be binding on all of us as states. Thus should each one of us be ready to integrate our respective sovereignties within a global human sovereignty defined and governed by all of us, with none treated as superior and another inferior. The challenge to unite the peoples of the world to fight the common threat of terrorism brings to the fore the need to speed up the transformation of the United Nations so that it is able to respond to the global challenges we face together, in an equitable manner. This means that it needs to be efficient, effective and responsive to the needs of humanity as a whole.

September 11 emphasised the point that even as the democratic system of government is being consolidated throughout the world, even as we all work to sustain the possibility of a serious and meaningful global dialogue, there are some who are prepared to resort to force in pursuit of their goals. Clearly, there must be a response. But what should that response be? Immediately, it is correct that we must achieve global security cooperation so that the perpetrators of the September 11 acts of terrorism are apprehended and punished. Correctly, the Government of the United States has emphasised that all action that is carried out must be clearly targeted against the terrorists. It has stated that such actions, including military actions, should not degenerate into collective punishment against any people on any grounds whatsoever, including those of religion, race or ethnicity. Accordingly, it is necessary that humanitarian assistance should be extended to the people of Afghanistan. We fully agree with the approach. The US Government has also said that these actions should be of the shortest duration possible, consistent with the objective that must be achieved. Again, we agree with this without reservation. The call has gone out that all governments and countries should contribute whatever they can to ensure that the common effort to find and punish the terrorists responsible for September 11 meet their just deserts. We have responded positively to this call because it is timely, correct and just. All these are important elements of what has to be done to respond to those who committed the mass murders of September 11. But they also indicate the way forward as we consider the rules that should guide us as we confront the threat of terrorism over the longer term and beyond the critically important operations and activities focused on the events of September 11. They put the matter firmly on our common agenda that we must also achieve global cooperation for the speedy resolution of conflict situations everywhere in the world. In this regard, it is clear that the situation in the Middle East cries out for an urgent and lasting solution. In this context, we might recall the words of the Irish poet, William Butler Yeats, when he said, "too long a sacrifice can make a stone of the heart." The sacrifice of the Palestinian people should not be allowed to drag on any longer. Whatever these long-suffering people might themselves think and feel, it is clear that there are some in the world who will justify their destructive rage by claiming to be front-line fighters for the legitimate rights of the Palestinian people. Beyond this, we must act together to determine the issues that drive people to resort to force and agree on what we should do to eliminate these. At the same time, we must make the point patently clear that such determination does not in any way constitute an attempt to justify terrorism. Together we must take the firm position that no circumstances whatsoever

can ever justify resort to terrorism.

The need to realise the goal of determining the matters that make for peace, together, once again underlines the need for properly representative international institutions to build the necessary global consensus.

It would seem obvious that the fundamental source of conflict in the world today is the socio-economic deprivation of billions of people across the globe, co-existing side-by-side with islands of enormous wealth and prosperity within and among countries. This necessarily breeds a deep sense of injustice, social alienation, despair and a willingness to sacrifice their lives among those who feel they have nothing to loose and everything to gain, regardless of the form of action to which they resort.

As the Durban World Conference concluded, racism, racial discrimination, xenophobia and related intolerance remain a critical part of the practices that serve to alienate billions of people and contribute to mutual antagonisms among human beings. The international community should spare no effort to ensure that this affront to human dignity is totally eradicated.

Last year, we convened in this very hall in the historic Millennium Summit. Solemnly, and with serious intent, we adopted the Millennium Declaration. The heavy and urgent obligation we now face is to implement the programme of action spelt out in that Declaration. This constitutes and must constitute the decisive front of struggle against terrorism. Africa for its part has developed a New Partnership for Africa's Development, which is a product of the consciousness among the African people that they, themselves, hold the key to the continent's development, security and stability. Africans across the continent have arrived at the correct determination that human rights, democracy, peace, stability and justice are the fundamental building blocks for a prosperous continent. Concomitantly, African countries are taking measures, jointly and severally, to improve the conditions for the much-needed investment, economic renewal and development. Naturally, the United Nations has a pivotal role to play in this regard. . . .

2.5 The South African Government released the following statement on 19 September 2001 on developments surrounding terrorist actions in the USA:

South Africa condemns terrorism without any equivocation. Attacks against civilians cannot be justified. This approach is integral to the humanitarian values that inspired our struggle and governed its conduct. These principles inform the core values of our constitution.

South Africa will co-operate with all efforts to apprehend the culprits and bring them to book. Justice must be done and it must be seen to be done.

South Africa therefore recognises the right of the US government to track down the culprits and bring them to justice. Any action taken should be informed by thorough investigations and

incontrovertible evidence.

Acts of vengeance or mobilisation directed against individuals, communities or nations, simply because of their faith, language or colour cannot be justified. They go against the humanitarian and civilised norms that the terrorists seek to undermine and destroy. They can in fact play into the hands of these wicked forces. Whatever the pain the world may be going through, we should avoid temptations of racism, Islamophobia, anti-Semitism and any other forms of prejudice and discrimination that the recent World Conference Against Racism so eloquently warned against.

The world should unite in the fight against terrorism. In this effort, the immediate task is to ensure that the perpetrators meet their just desserts. In the medium-term, the challenge is to understand the root causes of these despicable acts and to eradicate them worldwide.

In the least, the terrorists should be isolated through international co-operation to build an equitable world order. This medium-term challenge includes concerted efforts to resolve conflicts in all parts of the globe, including the search for lasting peace in the Middle East. It includes a joint commitment throughout the world to eradicate poverty and under-development.

South Africa has, like many other countries, offered such support and assistance as may be required and within the limits of our capacity. Morally and spiritually, we are with the victims as well as the people and government of the US and other nations that lost their citizens in these events.

Government, through its Mission in the US, and working with relevant US authorities, is continuing the search for South Africans who have as yet not been traced, who may have been in the hijacked planes or in the vicinity of the affected areas.

To the extent that the current investigations into these acts of terror may require concrete intelligence information that South Africa may have at its disposal, our security agencies will continue to co-operate with their US counterparts.

South Africa has not considered any military involvement in the operations envisaged by the US administration. The matter has not been raised; and, within the context of our approach to both the immediate and longer-term challenges in dealing with the scourge of terrorism, the issue does not arise.

South Africa will take part in discussions on the course of world action on this issue, within the context of regional and other multilateral organisations to which we belong, including the United Nations. Further, working together with other countries within the UN system, we will continue to make our contribution to the development of relevant international conventions on the fight against terrorism.

Our approach to this matter is informed by our values as a nation; and government is of the full conviction that it is in the national interest.

CHAPTER 3

INTERNATIONAL TERRORISM : THEORY AND DEFINITIONS

A. BASIC CRITERIA FOR DEFINITION

3.1 An analysis of most definitions of international terrorism indicates that an effective definition must at least deal with the following elements of terrorism:

- * Nature of the act: Violence or threat of violence; other criminal, unlawful, politically subversive, or anarchic acts; piracy; hijacking of aircraft; and taking of hostages.
- * Perpetrators: Governments sponsoring terrorism must be identified as perpetrators, along with individuals and private groups.
- * Hidden agendas of perpetrators: Certain governments sponsor terrorism as part of a campaign of geographic expansion of political control, at the expense of existing state structures, based on political pluralism and representative government.
- * Objectives: Most often, fear, extortion and in some cases radical socio-economic change are the expected results.
- * Targets: National symbols of the state, as well as human beings and property are usually targets for terrorist acts, with special focus on heads of state, diplomats, public officials, airlines and national security keypoints.
- * Methods: Threats, as well as the actual resort to sabotage, assassinations, hostage-taking, murder, kidnapping and bombing (involving the use of a variety of weaponry) are common methods of terrorists.

3.2 It might thus be useful to depart from the one ingredient of terrorism on which there is general consensus: terror. Terror is the tool used by terrorists to achieve their objective(s) and can be defined as an overwhelming impulse of fear, or the dread of it, created by terrorists and usually aimed at a specific target group or individual(s).

3.3 Generally speaking, terrorism implies the use of violence or a threat of violence as a method to obtain political, social, religious or other goals. Such violence or the threat thereof, may be directed at symbols of the state, human beings or property. Popular targets in this regard are heads of state and other political office-bearers, diplomats, public officials, air-lines and security key-points. International terrorism usually involves citizens or the territory of more than one country.

3.4 To analyse the state's legal mechanisms to combat terrorism, it should be recognised that the phenomenon manifests in different ways which makes it necessary to differentiate between domestic acts of terrorism and acts of terrorism that occur on a global or an international scale.

(a) Domestic terrorism

3.5 Acts of terrorism can be classified as domestic (national or internal) when the violence and terror are confined within the national boundaries of a state and do not involve foreign targets abroad. In practice, it is however, very difficult to find any intensive terrorist campaign that remains purely internal as politically motivated terrorists/groups will eventually look across their national borders for support, weapons, financial assistance and find/seek a safe haven.

(b) International/transnational terrorism

3.6 Theoretically, a distinction could be made between acts of international and transnational terrorism. When violence and terror are employed or directed internally and abroad, against the nationals or the belongings of one or several foreign countries, it is qualified as transnational. Attacks against foreign diplomats and other representatives of foreign countries and the hijacking of a foreign aircraft are good examples of such acts of terror, which also includes terrorist acts by governments against their own citizens when perpetrated on foreign territory.

3.7 Terrorist activities may be regarded as international, when the interests of more than one state are involved, as, for example, when the perpetrator or the victim is a foreigner in the country where the act is committed, or the perpetrator has fled to another country.

3.8 In this respect, the Central Intelligence Agency (CIA) differentiates between international terrorism and transnational terrorism by stating that the latter is terrorism "carried out by basically autonomous non-state actors, whether or not they enjoy some degree of support from sympathetic states", and "international terrorism, which is terrorism carried out by individuals or groups controlled by a sovereign state".³

3.9 The emphasis in this document is on acts of terrorism perpetrated by individuals and legislative measures to counter it. These acts include the hijacking of

³ Alexander Y *Behavioural and Quantitative Perspectives on Terrorism* Oxford 1981.

aircraft and ships, taking hostages, violent acts against embassies and/or diplomatic personnel, sabotage, etc.

CHAPTER 4

INTERNATIONAL INSTRUMENTS TO COMBAT TERRORISM AND SOUTH AFRICAN DOMESTIC LAW

A. UNITED NATIONS RESOLUTIONS AND CONVENTIONS ON TERRORISM

(a) What effect do Conventions and Resolutions have?

4.1 Terrorism is an issue that has been on the United Nations agenda for many years. In addition to adopting international conventions on aspects of terrorism, the UN has also passed a number of resolutions on this matter which reaffirms the international community's commitment to eliminate terrorism. It was recently said that terrorism will be defeated if the international community summons the will to unite in a broad coalition, or it will not be defeated at all; and that the United Nations is uniquely positioned to serve as the forum for this coalition, and for the development of those steps Governments must now take — separately and together — to fight terrorism on a global-scale.¹ **The question of what are the sources of international law needs to be asked in order to understand the status and effect of United Nations conventions and resolutions.**² Prof John Dugard³ notes

¹ By the United Nations Secretary- General, Mr Kofi Annan in his Address to the General Assembly on Terrorism New York, 1 October, 2001. He said that the urgent business of the United Nations must now be to develop a long-term strategy, in order to ensure global legitimacy for the struggle ahead, and that the legitimacy that the United Nations conveys can ensure that the greatest number of states are able and willing to take the necessary and difficult steps - diplomatic, legal and political.- that are needed to defeat terrorism. He noted that the Member States have a clear agenda before them and that it begins with ensuring that the 12 conventions and protocols on international terrorism already drafted and adopted under United Nations auspices, are signed, ratified and implemented without delay by all states.

² Robert O Keohane (James B Duke Professor of Political Science) "The United Nations: An Essential Instrument against Terror" 1 October 2001 <http://www.duke.edu/web/forums/keohane.html>

The United Nations has often been criticized, but events after the terrorist attack of September 11 show how essential it is to international peace and security. The United Nations Security Council, in particular, has proved its value in the present crisis.

To combat terrorism, and specifically Osama bin Laden's network and the Taliban government of Afghanistan, a broad and diverse coalition is necessary. President Bush quickly realized that the active cooperation of other countries, including Muslim countries, was essential to the intelligence and policy work needed to find terrorists and destroy their networks. The support of these countries was also important to avoid a severe political backlash against the use of military force in Afghanistan.

To secure such cooperation and support, country-by-country negotiations were necessary, but they were not sufficient. The campaign against terrorism needed to be rendered legitimate in the eyes of the world - particularly in countries whose governments and people are suspicious of the United States. Unilateral American action could have too easily been portrayed as lashing-out by the powerful "hegemon" at the expense of the poor and the weak.

To be legitimate, action had to be authorized collectively, in a public forum representing the whole world. No such forum exists except the Security Council of the United Nations. Its fifteen members currently include three Muslim countries - Bangladesh, Mali, and Tunisia.

Hence unanimous resolutions by the Security Council belie the claim that efforts against terrorism are "anti-Muslim."

The Security Council has passed two unanimous resolutions on terrorism since September 11. Meeting in New York the very next day, it adopted Resolution 1368, which unequivocally condemned the terrorist attacks on the United States, and called on the international community to redouble its "efforts to prevent and suppress terrorist acts." Resolution 1368 also referred to the "inherent right of individual or collective self-defense," in accordance with Article 51 of the United Nations Charter. In effect, it declared that military action by the United States against those responsible for the attacks would be lawful.

. . . September 28, the Security Council passed a more specific and equally far-reaching resolution, Resolution 1373. In this resolution it acted under Chapter VII of the UN Charter,

which gives the Security Council authority to order states to carry out "the measures decided upon by the Security Council." In other words, the measures enumerated in Resolution 1373 are mandatory.

Resolution 1373 uses strong language. It calls upon all states to "deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens." It also calls upon all states to cooperate "to prevent and suppress terrorist attacks and take action against perpetrators of such attacks."

In other words, a unanimous Security Council, including three Muslim states, has not only recognized the right of the United States and its allies to self-defense, but has ordered all other states to cooperate in rooting out terrorism. Resolution 1373 constitutes extraordinary evidence of a global resolve to defeat terrorism. After its passage, no one can seriously declare that the fight against terrorism is merely an American struggle.

Resolutions 1368 and 1373 build on two years of United Nations resolutions against terrorism. In 1999 the Security Council called upon all states to fight terrorism and demanded that the Taliban turn over Bin Laden to authorities in a country where he had been indicted. In December 2000 it specifically condemned the Taliban's sheltering and training of terrorists, and demanded, under the mandatory provisions of Chapter VII, that it "cease the provision of sanctuary and training for international terrorists." These resolutions, defied by the Taliban, established a record that justified focusing responses to the September 11 attack on that regime and on Osama bin Laden.

If the United Nations did not exist, obtaining such a collective endorsement of the struggle against terrorism would be impossible. Osama bin Laden and his supporters could more

that international law consists of the following sources —

- international conventions or treaties;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognised by civilised nations;
- judicial decisions and teachings of highly qualified publicists as subsidiary means for the determination of rules of law.

4.2 Prof Dugard explains that a number of treaties have been entered into between states which codify existing rules of customary international law or which create new rules of law. He states that the basic rule governing treaties or conventions is that they do not confer obligations or benefits upon non-signatory states. However, law-making treaties, if they are codifications, may afford evidence of a wide-spread customary rule. He points out that in such a case these treaties will provide a basis for a legal obligation under custom binding upon non-signatory states. Prof Dugard says that the extent to which recommendations or resolutions of the political organs of the United Nations play a part in the formation of custom is a matter of much debate. He notes that a resolution of either the General Assembly or the Security

easily claim that attacks against them are "crusades" by the hegemonic United States and its clients.

We should draw a long-term lesson from these events. Global international organizations are potentially valuable resources in crises. It is fair of us to criticize their shortcomings, but myopic to withhold our financial and political support from these institutions because we are irritated at criticism of United States policy. On the contrary, during peaceful and prosperous periods we should seek to expand the capacity of international organizations such as the United Nations, so that in difficult times we can call upon them for support, such as the Security Council has shown during the past three weeks.

If the United Nations Security Council did not exist, it would have to be invented. But it could not be invented at a moment's notice. Without its continuing presence, our struggle against terrorism would be more difficult, and less likely to succeed.

³

International Law: A South African Perspective 2nd edition Kenwyn: Juta 2000

Council categorized as a recommendation is clearly not binding on states *per se*. He remarks that it is, however, suggested that an accumulation of resolutions, or a repetition of recommendations on a particular subject, may amount to evidence of collective practice on the part of states. While it is possible that recommendations may indeed contribute to the formation of a customary rule in this way, it is difficult to indicate the precise point at which such a practice becomes a customary rule. He notes that there are problems relating to the extent of the support required for such resolutions, the weight to be attached to the votes of the major actors in the field (for example, the votes of the major maritime powers in a resolution on the law of the sea) and the amount of repetition required.

4.3 The International Court of Justice said in the its advisory opinion on the case the *Legality of the Threat or Use of Nuclear Weapons*:¹

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well.

69. States which consider that the use of nuclear weapons is illegal indicated that those resolutions did not claim to create any new rules, but were confined to a confirmation of customary law relating to the prohibition of means or methods of warfare which, by their use, overstepped the bounds of what is permissible in the conduct of hostilities. In their view, the resolutions in question did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the "envelope" or *instrumentum* containing certain pre-existing customary rules of international law. For those States it is accordingly of little importance that the *instrumentum* should have occasioned negative votes, which cannot have the effect of obliterating those customary rules which have been confirmed by treaty law.

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

71. Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations"; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the

¹ Advisory opinion of 8 July 1996 see <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm>

illegality of the use of such weapons.

72. The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

4.4 On 8 July 1996 in his dissenting opinion Vice-president Schwebel of the International Court of Justice held, *inter alia*, as follows in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* case:

The General Assembly has no authority to enact international law. None of the General Assembly's resolutions on nuclear weapons are declaratory of existing international law. The General Assembly can adopt resolutions declaratory of international law only if those resolutions truly reflect what international law is. If a resolution purports to be declaratory of international law, if it is adopted unanimously (or virtually so, qualitatively as well as quantitatively) or by consensus, and if it corresponds to State practice, it may be declaratory of international law. The resolutions of which resolution 1653 is the exemplar conspicuously fail to meet these criteria. While purporting to be declaratory of international law (yet calling for consultations about the possibility of concluding a treaty prohibition of what is so declared), they not only do not reflect State practice, they are in conflict with it, as shown above. Forty-six States voted against or abstained upon the resolution, including the majority of the nuclear Powers. It is wholly unconvincing to argue that a majority of the Members of the General Assembly can 'declare' international law in opposition to such a body of State practice and over the opposition of such a body of States. Nor are these resolutions authentic interpretations of principles or provisions of the United Nations Charter. The Charter contains not a word about particular weapons, about nuclear weapons, about *jus in bello*. To declare the use of nuclear weapons a violation of the Charter is an innovative interpretation of it, which cannot be treated as an authentic interpretation of Charter principles or provisions giving rise to obligations binding on States under international law. Finally, the repetition of resolutions of the General Assembly in this vein, far from giving rise, in the words of the Court, to 'the nascent *opinio juris*', rather demonstrates what the law is not. When faced with continuing and significant opposition, the repetition of General Assembly resolutions is a mark of ineffectuality in law formation as it is in practical effect.

4.5 The general rule is thus that as is the case with most UN resolutions, these do not create legal obligations for states, as legal obligations are created in the specific conventions. The resolutions, however, are an important indication of developments in the international community's efforts to combat terrorism. In some instances, as is argued above, they can be said to create moral or political obligations for States. In addition, the resolutions are valuable as they can be drafted in vaguer language than legally enforceable documents thus enabling greater consensus on some of the more sensitive issues associated with terrorism. By doing this the resolutions also create a framework and a mandate for future negotiations on international conventions on terrorism thereby expediting the negotiation process.

4.6 It is not possible to look at "international terrorism" in complete isolation from domestic terrorism, which is considered an internal matter of sovereign states. Domestic terrorism often has spill-over effects into other countries and linkages with foreign terrorist groups are not uncommon. Innovations in global communications have given some local groups international standing, while internationally operating groups use today's rapid international transportation to hit, run and hide. Perpetrators of terrorism in one country frequently use other states as safe havens or for fund-raising. They sometimes receive training abroad and use foreign countries for staging terrorist acts or as launching bases for their operations elsewhere. Victims of domestically oriented acts of terrorism are often foreign business people, diplomats or tourists.

UN Security Council Resolution 1373

4.7 As was noted above, on 28 September 2001 the Security Council of the United Nations adopted resolution 1373. It is a wide-ranging, comprehensive resolution which contains measures and strategies to combat international terrorism.¹ **This resolution was preceded by a number of resolutions which not only identified the international conventions dealing with certain aspects of terrorism but also placed an onus on states to refrain from supporting international terrorism, and also to co-operate actively with other members of the international community in formulating and enforcing measures to eliminate terrorism. The Security Council noted in its Resolution 1189 (1998) of 13 August 1998 that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts. By resolution 1373 (2001) the Council established a Counter-Terrorism Committee (the CTC) of the Council to monitor the resolution's implementation. It called on all States to report on actions they had taken to that end no later than 90 days from that day. The Council decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. The funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists must also be frozen without delay.**

4.8 The work of the CTC is concerned with the medium- to long-term end of the fight against terrorism. The intention was to establish the broadest possible legislative and executive defence against terrorism in every Member State of the United Nations. The CTC's work is not to get into short-term political interests, or to do the work of the General Assembly in defining terrorism or passing a resolution against terrorism. It is there to help the world to upgrade its capability to deny space, money, support, or haven to terrorism, and to establish a network of information sharing and cooperative executive action to make an effective global mechanism to deny space for terrorism anywhere. The resolution requires Member States to cooperate in a wide range of areas — from suppressing the financing of terrorism to

¹ A practice developed in the UN to adopt an annual resolution on terrorism. In addition to reiterating the principles contained in the *Declaration on Measures to Eliminate Terrorism* the subsequent resolutions also identify areas that are ready for codification by way of an international convention as well as identifying and elaborating on areas of international co-operation to combat terrorism. The other resolutions adopted in its fight against terrorism are: Resolution 50/53 (1995), Resolution 51/210 (1996), Resolution 52/165 (1997), Resolution 53/108 (1998).

providing early warning, cooperating in criminal investigations, and exchanging information on possible terrorist acts. All Member States must make greater efforts to exchange information about practices that have proved effective, and lessons that have been learned, in the fight against terrorism — so that a global standard of excellence can be set.

4.9 It is necessary to answer the question whether South African legislative measures are sufficient or should be augmented to remedy deficiencies. It is therefore necessary to consider the requirements set out in resolution 1373. (South Africa's report to the Counter-Terrorism Committee will be considered in chapter 13.) It was decided by Resolution 1373 that all UN member States shall:

- (b) Prevent and suppress the financing of terrorist acts;
- (c) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (d) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (e) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.

4.10 It was decided further that all States shall:

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing

recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
- (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.

4.11 The Resolution called upon all States to:

- Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;
- Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;
- Cooperate, particularly through bilateral and multilateral

arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

- Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;
- Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);
- Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
- Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

4.12 The Resolution stated that the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials was noted with concern, and it emphasized the need to enhance the coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security. The Resolution declared that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.

(c) **International Conventions and Measures Adopted by South Africa**

- (i) Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention)

4.13 The Convention-

- applies to acts affecting in-flight safety;
- authorizes the aircraft commander to impose reasonable measures, including

restraint, on any person he or she has reason to believe has committed or is about to commit such an act, when necessary to protect the safety of the aircraft and for related reasons;

- requires contracting states to take custody of offenders and to return control of the aircraft to the lawful commander.

4.14 South Africa acceded to this Convention on 20 May 1972.

(ii) Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention)

4.15 The Convention-

- makes it an offence for any person on board an aircraft in flight [to] “unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft” or to attempt to do so;
- requires parties to the convention to make hijackings punishable by “severe penalties”;
- requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution;
- requires parties to assist each other in connection with criminal proceedings brought under the convention.

4.16 South Africa ratified the Convention on 30 May 1972. The Convention entered into force on 29 June 1972.

(iii) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention)

4.17 The Convention

- makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft; to place an explosive device on an aircraft; and to attempt such acts or be an accomplice of a person who performs or attempts to perform such acts;
- requires parties to the convention to make offenses punishable by “severe penalties”;
- requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution;
- requires parties to assist each other in connection with criminal proceedings

brought under the convention.

4.18 South Africa ratified this Convention on 30 May 1972. The *Civil Aviation Offences Act*, 1972 (Act No 10 of 1972), was adopted by Parliament in order to give effect to the abovementioned Conventions. The Act criminalizes, in general, the interference with aircraft in flight or endangering flight crew, passengers, aircraft and aviation facilities.

4.19 The following remarks by Judge James in the case of *S v Hoare and Others* 1982(4) SA 865 (NPD) reflects the approach followed in the Act: (p.871 F-H:

“.... the Civil Aviation Offences Act 10 of 1972 does not make hi-jacking (as such) a specific offence nor does it seek to distinguish between differing types of unlawful interference in the operations of civil aviation, for example, between cases where the motive is self-preservation and cases involving political or financial blackmail or violent intimidation. The Act treats virtually every unlawful interference with the smooth operation of civil aviation with the utmost seriousness and takes little or no account of the motive for such interference, as can be readily appreciated when it is observed that the Act imposes a minimum sentence of five years imprisonment for any contravention of section 2(1) of the Act regardless of the motives of the perpetrator.”

4.20 The *Civil Aviation Offences Act*, 1972, further deals with the following matters:

- Prohibition and control of carriage of persons and harmful articles in aircraft;
- Prohibition and control of persons and harmful articles in restricted areas;
- Prohibition and control of persons and harmful articles in air navigation facilities;
- Search of persons and other things;
- Seizure or retention of harmful articles;
- Powers of arrest;
- Powers of Minister of Transport to take action in respect of threats to safety to any person on or in any aircraft or at any designated airport, heliport or air navigation facility;
- Acts or omissions taking place outside the Republic;
- Jurisdiction;
- Extradition;
- Powers of a commander of an aircraft and certain other persons on board an aircraft;
- Aircraft to which the Act does not apply.

(iv) Convention on the Prevention and Punishment of Crimes Against Internationally

Protected Persons

4.21 The Convention defines an internationally protected person as a Head of State, a Minister for Foreign Affairs, a representative or official of a state or of an international organization who is entitled to special protection from attack under international law. It requires each party to criminalize and make punishable “by appropriate penalties which take into account their grave nature”, the intentional murder, kidnapping, or other attack upon the person or liberty or an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act “constituting participation as an accomplice”. It also requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution, and to assist each other in connection with criminal proceedings brought under the convention.

4.23 The *Vienna Convention on Diplomatic Relations* 1961, and the *Vienna Convention on Consular Relations*, 1963 were incorporated in South African law by means of the *Diplomatic Immunities and Privileges Act*, 1989 (Act No 74 of 1989). These Conventions require that the South African Government “take all appropriate steps to prevent any attack on the person, freedom and dignity of diplomatic agents.”

4.24 In terms of the South African common law any person, including heads of State representatives of Government or of international organizations, etc enjoy the same extent of protection under the law, meaning that the murder, abduction or assault of any person constitutes a punishable offence. Section 12 of the Constitution of the Republic of South Africa guarantees the fundamental rights of everyone, in particular the right of everyone to freedom and security which includes the right -

- not to be deprived of freedom arbitrarily or without just cause;
- not to be detained without trial;
- to be free from all forms of violence from either public or private sources;
- not to be tortured in any way; and
- not to be treated or punished in a cruel, inhuman or degrading way.

4.25 Accession to the Convention means that specific offences need to be created by statute relating to the intentional commission of -

- the murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

- a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
- any threat, attempt or participation in an act as mentioned above.

4.26 All these crimes are covered by the South African common law. South Africa's accession to the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents*, ought to be considered. Specific offences to give effect to the Convention, are proposed in the draft Bill. These provisions are based on legislation enacted in the United States of America where specific offences were created in respect of assault, murder and kidnapping of internationally protected persons.

(v) International Convention Against the Taking of Hostages (Hostage Convention)

4.27 The Convention provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offense of taking of hostages within the meaning of this Convention". It requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution, and to assist each other in connection with criminal proceedings brought under the convention.

4.28 In terms of the common law the crime of "kidnapping" is committed when a person is unlawfully and intentionally deprived of his/her freedom of movement and/or, if such person is a child, his custodians of their control over him. Hostage taking for that matter is not a separate crime, but merely a species of kidnapping. The wording of section 1 of the *Intimidation Act, 1982 (Act No. 72 of 1982)* is so wide that one can also include the taking of hostages under the *Intimidation Act*.

(vi) Convention on the Marking of Plastic Explosives for the Purpose of Identification

4.29 The Convention is designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the Pan Am 103 bombing). It obligates parties in their respective territories to ensure effective control over "unmarked" plastic explosive, i.e., those that do not contain one of the detection agents described in the Technical Annex. It requires that each party, among other things, take necessary and effective measures to —

- prohibit and prevent the manufacture of unmarked plastic explosives;
- prevent the movement of unmarked plastic explosives into or out of its territory
- exercise strict and effective control over possession and transfer of unmarked explosives made or imported prior to the entry-into-force of the convention;
- ensure that all stocks of such unmarked explosives not held by the military or police are destroyed or consumed, marked, or rendered permanently ineffective within three years;
- ensure that unmarked plastic explosives held by the military or police, are destroyed or consumed, marked, or rendered permanently ineffective within fifteen years; and
- ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date-of-entry into force of the convention for that state.

4.30 The Convention does not itself create new offenses that would be subject to a prosecution or extradition regime, although all states are required to ensure that provisions are complied within their territories.

4.31 South Africa ratified this Convention. The Convention was incorporated in the South African Law by its inclusion as a schedule to the *Explosives Amendment Act*, of 1997. The *Explosives Act* 26 of 1956 Act makes it compulsory, in line with the requirements of the Convention, for the chemical marking of plastic explosives. Plastic explosives is a popular weapon used by international terrorists, especially terrorism involving civil aviation. The chemical marking entails the mixing of highly vaporous chemical agents into the explosives making it detectable by detection devices at airports, etc. Plastic explosives are pliable, can be formed into innocuous looking objects and is otherwise undetectable.

(vii) Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention)

4.32 The Convention criminalizes the unlawful possession, use, transfer, etc., of nuclear material, the theft of nuclear material, and threats to use nuclear material to cause death or serious injury to any person or substantial property damage. It requires parties that have custody of offenders either to extradite the offender or submit the case for prosecution, and to assist each other in connection with criminal proceedings brought under the convention.

The Convention was signed by South Africa on 18 May 1981, but has not yet been ratified. 45 Parties had signed the Convention by 2 January 2002. The Convention entered into force on 8 February 1987 on the thirtieth day following the deposit of the twenty-first instrument of ratification, acceptance or approval.

4.33 In terms of section 34 of the *Nuclear Energy Act*, 46 of 1999), no person, institution, organisation or body may, without the Minister for Mineral and energy Affairs —

- (a) be in possession of any source material, except where-
 - (ii) the possession has resulted from prospecting, reclamation or mining operations lawfully undertaken by the person, institution, organisation or body; or
 - (iii) the possession is on behalf of anyone who had acquired possession of the source material in the manner mentioned in subparagraph (i); or
 - (iv) the person, institution, organisation or body has lawfully acquired the source material in any other manner;
- (b) be in possession of the following, namely-
 - (i) special nuclear material;
 - (ii) restricted material;
 - (iii) uranium hexafluoride (UF₆);
 - (iv) nuclear fuel;
 - (v) nuclear-related equipment and material;
 - (f) acquire, use or dispose of any source material;
 - (g) import any source material into the Republic;
 - (h) process, enrich or reprocess any source material;
 - (i) acquire any special nuclear material;
 - (j) import any special nuclear material into the Republic;
 - (k) use or dispose of any special nuclear material;
 - (l) process, enrich or reprocess any special nuclear material;
 - (m) acquire any restricted material;
 - (n) import any restricted material into the Republic;
 - (o) use or dispose of any restricted material;
 - (p) produce nuclear energy;
 - (q) manufacture or otherwise produce or acquire, or dispose of, uranium hexafluoride (UF₆);
 - (r) import uranium hexafluoride (UF₆) into the Republic;
 - (s) manufacture, or acquire, or dispose of, nuclear fuel;
 - (t) import nuclear fuel into the Republic;
 - (u) manufacture or otherwise produce, import, acquire use or dispose of nuclear- related equipment and material;
 - (v) dispose of, store or reprocess any radioactive waste or irradiated fuel (when the latter is external to the spent fuel pool);
 - (w) transport any of the abovementioned materials;
 - (x) dispose of any technology related to any of the abovementioned materials or equipment.

4.34 The Minister may after consultation with the South African Council for the Non-Proliferation of Weapons of Mass Destruction on any matter affecting the proliferation of

weapons of mass destruction grant any authorisation required by subsection (1), after application made to the Minister in the prescribed manner for that purpose. The authorisation may be granted subject to conditions (if any) that the Minister may determine. Sections 44 to 50 of the Act deal with the Minister's responsibilities regarding acquisition by the State of source material and special nuclear material; authority over management of radioactive waste, and storage of irradiated nuclear fuel; discarding of radioactive waste and storage of irradiated nuclear fuel; provision of certain restricted matter for research, development and training purposes; and his or her responsibility for the institutional obligations of the Republic. Section 47 deals with the reporting of information on occurrence of source material to the Minister.

(viii) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

4.35 The Convention establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes against international aviation. It makes it an offence for a person to seize or exercise unlawfully and intentionally control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships. The Convention requires parties that have custody of offenders either to extradite them or to submit the case for prosecution, and requires parties to assist each other in criminal proceedings brought under the Convention.

(ix) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

4.36 The Protocol establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation. It requires parties that have custody of offenders either to extradite them or submit these cases for prosecution, and to assist each other in criminal proceedings brought under the Protocol. Article 3 of the *Convention for the Suppression of unlawful Acts against the Safety of Maritime Navigation* makes it an offence if a person unlawfully and internationally -

- seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

- destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage so that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
- destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
- communicates information which he/she knows to be false, thereby endangering the safe navigation of a ship; or
- injures or kills any person, in connection with the commission or the attempted commission of any of the offences set out above.

4.37 The *Merchant Shipping Act*, 1951 (Act No 57 of 1951), provides in section 320 that:

“No person shall without reasonable excuse do anything to obstruct or injure any of the equipment of any ship where ever registered, or obstruct, impede or molest any of the crew in the navigation and management of the ship or otherwise in the execution of their duties about the ship.”

4.38 Section 327 of the Act extends the jurisdiction of South African courts in respect of any offence which is punishable under the criminal law in force in the Republic to South African ships on the high seas.

4.39 In terms of section 235 of the Act, it constitutes an offence to send by or carry in any ship, except in accordance with the prescribed regulations, any dangerous goods as cargo or ballast. “Dangerous goods” are defined as —

“goods which by reason of their nature, quantity or mode of storage, are either singly or collectively liable to endanger the lines or the health of persons on or near the ship or to imperil the ship, and includes all substances within the meaning of the expression ‘explosives’ as used in the *Explosives Act*, 1956 (Act No 26 of 1956), and any other goods which the Minister by notice in the Gazette may specify as dangerous goods.”

4.40 It is considered that the *Merchant Shipping Act*, 1951, provides an adequate mechanism to enforce the provision of the *Convention for the Suppression of Unlawful Acts against Safety of Maritime Navigation*.

(x) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation

4.41 The Protocol extends the provisions of the Montreal Convention to encompass

terrorist acts at airports serving international civil aviation. The Convention entered into force on 6 August 1989 and South Africa ratified the Convention on 21 September 1998.¹ **Section 2(1)(g) of the *Civil Aviation Offences Act, 1972 (Act No. 10 of 1972)* partly addresses the supplement to article 1 of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* as extended by the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*. It reads as follows:**

“Any person who performs any other act which jeopardizes or may jeopardize the operation of an air carrier or the safety of a designated airport, heliport, aircraft in service or of persons or property thereon or therein or which may jeopardize good order and discipline at a designated airport, airport or heliport or on board an aircraft in service . . .”

(xi) The International Convention for the Suppression of Terrorist Bombings²

4.42 So far 58 states have signed the Convention. It states that the States members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among states and peoples and threaten the territorial integrity and security of states.” The purpose of the Convention is to enhance international co-operation in eliminating the increasingly widespread use of terrorist attacks using explosive or other lethal devices. The Convention reflects a unified determination at international level to eradicate terrorism globally. This Convention binds each State Party thereto to adopt effective measures in its domestic legislation so as to ensure that acts falling within the scope of the Convention are punishable by punitive measures, that are consistent with the gravity of their nature. The Convention, in seeking to achieve this directive, places a legal obligation on each State Party to establish the offences set out in article 2 of the Convention as criminal offences in its domestic law, and to make such offences punishable by appropriate penal provisions.

4.43 In terms of article 2, a person commits an offence if he or she unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal

¹ In its comment on the discussion paper Mr H Wildenboer, legal adviser of the Civil Aviation Authority comments that the 1963 Convention was acceded to by South Africa while the 1970 and 1971 Conventions were ratified by South Africa, that the three mentioned Conventions have not been made part of South African Law, although parts of the three Conventions have been included in the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972).

² Adopted by the General Assembly of the United Nations on 15 December 1997. It entered into force on 23 May 2001.

device in, into or against a place of public use, a State or government facility, a public transportation systems or infrastructure facility, with the intent to cause —

- death or serious bodily injury; or
- extensive destruction of such place, facility or system, where the destruction results in or is likely to result in major economic loss.

4.44 An explosive or other lethal device is defined as —

- (a) an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or
- (b) a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.

4.45 The Convention also provides for the liability of participants to such crimes where they are accomplices and in terms of the doctrine of common purpose. The Convention directs State Parties to adapt their domestic legislation to prevent and counter these offences within or outside their geographical territories. The Convention suggests that legislation seeking to achieve this objective include measures to prohibit the illegal activities of persons, groups and organizations who encourage, instigate, organize, knowingly finance, engage or participate in the perpetration of offences within or outside the territory of the State Party.

4.46 The Convention requires of each State Party to adopt such measures as may be necessary, including, where appropriate, domestic legislation to ensure that criminal acts within the scope of the Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.

4.47 The Convention sets out grounds upon which State Parties may found jurisdiction to try perpetrators of and participants to offences. State Parties have to take the necessary measures to establish jurisdiction over these offences, including legislative measures. The Convention directs State Parties to afford one another mutual legal assistance and co-operation in the investigation, prosecution,

extradition, scientific research and development, and the obtaining of evidence pertaining to offences. State Parties must take such measures as may be necessary to establish jurisdiction over offences when —

- an offence is committed in the territory of the State; or
- an offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
- an offence is committed by a national of that State.

4.48 A State Party may also establish its jurisdiction over any such offence when —

- the offence is committed against a national of that State; or
- the offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or
- the offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or
- the offence is committed in an attempt to compel that State to do or abstain from doing any act; or
- the offence is committed on board an aircraft which is operated by the Government of that State.

4.49 An article 2 offence is deemed an extraditable offence and is automatically included in any extradition treaty existing between any of the States Parties prior to the Convention entering into force. States Parties also undertake to include article 2 offences in any and every subsequent extradition treaty concluded between them. The provisions of article 2 do not apply to nationals who commit these offences within the territorial boundaries of their own State. The Convention also does not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under the provisions of the Convention to exercise jurisdiction.

(xii) International Convention for the Suppression of the Financing of Terrorism

4.50 The Convention was adopted in New York on 9 December 1999. The Convention applies to the direct involvement or complicity in the intentional and

unlawful provision or collection of funds. The intention or knowledge required is that any part of the funds may be used to carry out any of the offences described in the Conventions listed in the Annex,¹ or an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act. The provision or collection of funds is an offence whether or not the funds are actually used to carry out the proscribed acts. The Convention does not apply where an act of this nature does not involve any international elements as defined by the Convention. The Convention requires each State Party to take appropriate measures, in accordance with its domestic legal principles, for the detection and freezing, seizure or forfeiture of any funds used or allocated for the purposes of committing the offences described. The offences referred to in the Convention are deemed to be extraditable offences. States Parties have obligations to establish their jurisdiction over the offences described. They must make the offences punishable by appropriate penalties. They must take alleged offenders into custody, prosecute or extradite alleged offenders, and cooperate in preventive measures and countermeasures. They must also exchange information and evidence needed in related criminal proceedings. The offences referred to in the Convention are deemed to be extraditable offences between States Parties under existing extradition treaties, and under the Convention itself. A number of 132 parties have signed the Convention.

(xiii) Draft Comprehensive International Convention on Terrorism

4.51 In 1996 the General Assembly decided² to establish an Ad Hoc Committee to

- ¹ 1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
3. 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.
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.
6. Protocol for 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, done at Montreal on 24 February 1988.
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
8. 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.
9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

² In resolution 51/210 of 17 December 1996.

elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism. The aim was to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism. Delegates began negotiations on the 27-article draft comprehensive convention, submitted by India, at the Ad Hoc Committee's fifth session held from 12 to 23 February 2000. The text seeks to define terrorism, to urge domestic legislation and the establishment of jurisdiction, and to ensure that States parties not grant asylum to any person involved in a terrorist act. The text also addresses questions of liability, extradition and custody. Among other provisions, States parties would offer the greatest measure of assistance in connection with investigations or criminal or extradition.

4.52 The Chairman of the Working Group of the Ad Hoc Committee said in his informal summary of the general discussion in the Working Group that at its 1st meeting, held on 25 September 2000, all delegations stressed their unequivocal condemnation of terrorism in all its forms and manifestations, and that some delegations placed particular emphasis on Security Council resolution 1269 (1999) on the responsibility of the Security Council in the maintenance of international peace and security.³ He noted that some delegations stressed the need to elaborate the definition of terrorism and underscored the distinction between terrorism and the legitimate struggle for national liberation, self-determination and independence of all peoples under colonial and other forms of alien domination and foreign occupation. It was also highlighted that State terrorism was the most dangerous form of terrorism.

4.53 The importance of the *International Convention for the Suppression of Terrorist*

³ Which called upon all States to take, inter alia, in the context of such cooperation and coordination, appropriate steps to —

- cooperate with each other, particularly through bilateral and multilateral agreements and arrangements, to prevent and suppress terrorist acts, protect their nationals and other persons against terrorist attacks and bring to justice the perpetrators of such acts;
- prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism;
- deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition;
- take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts;
- exchange information in accordance with international and domestic law, and cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts.

Bombings and the International Convention for the Suppression of the Financing of Terrorism, as effective instruments to counter international terrorism, was emphasized. States were urged to take the appropriate steps with a view to becoming parties to those conventions so as to strengthen the effectiveness of the international legal regime against terrorism. The hope was expressed that both conventions would receive the required number of ratifications and enter into force in the near future.⁴ The Chairperson explained that at the meeting of the Working Group, held on 25 September 2000, the sponsor delegation, India, introduced the draft comprehensive convention on international terrorism.⁵ Reference was made to several of the key provisions, including articles 2 (scope of the draft convention),⁶ 5 (non-justification

⁴ It was also explained that support was expressed for the finalization of a consensus text of the draft *International Convention for the Suppression of Acts of Nuclear Terrorism* and that concern was voiced by some delegations about the lack of progress in the finalization of the instrument. The hope was expressed that agreement would be reached and that the draft convention would be concluded in the near future. The point was also made that the draft convention should not address issues relating to disarmament that were better dealt with in other forums. Others remained convinced that the specific character of the subject matter of the draft convention did not permit the exclusion of armed forces from its scope. The view was expressed that the scope of the proposed convention should cover acts of State terrorism, as well as the unlawful use of radioactive materials, including the dumping of radioactive wastes, resulting in serious damage to the environment. These delegations reaffirmed their support for the position of the Movement of Non-Aligned Countries and their concerns on the scope of the draft convention.

⁵ The draft text was based on the initial proposal presented by India to the General Assembly at its fifty-first session in 1996, which had subsequently been revised in the light of the adoption of the *International Convention for the Suppression of Terrorist Bombings* and the *International Convention for the Suppression of the Financing of Terrorism* and comments and suggestions received from delegations.

⁶ 2(1). Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause —

- death or serious bodily injury to any person; or
- serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss;

when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

(2). Any person also commits an offence if that person attempts to commit an offence or participates as an accomplice in an offence as set forth in paragraph 1.

3. Any person also commits an offence if that person:

- Organizes, directs or instigates others to commit an offence as set forth in paragraph 1 or 2; or
- Aids, abets, facilitates or counsels the commission of such an offence; or
- In any other way contributes to the commission of one or more offences referred to in paragraphs 1, 2 or 3 (a) by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

clause),⁷ 6 (jurisdictional clause),⁸ 7 (limitation on the granting of asylum),⁹ 8 (obligation to cooperate in the prevention of terrorist acts)¹⁰ and 11 (extradite-or-

3 This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 6, paragraph 1, or article 6, paragraph 2, to exercise jurisdiction, except that the provisions of articles 10 to 22 shall, as appropriate, apply in those cases.

4 Each State Party shall adopt such measures as may be necessary:

- To establish as criminal offences under its domestic law the offences set forth in article 2;
- To make those offences punishable by appropriate penalties which take into account the grave nature of those offences.

⁷ 5 Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

⁸ 6(1) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 2 in the following cases:

- When the offence is committed in the territory of that State or on board a ship or aircraft registered in that State;
- When the alleged offender is a national of that State or is a person who has his or her habitual residence in its territory;
- When the offence is committed wholly or partially outside its territory, if the effects of the conduct or its intended effects constitute or result, within its territory, in the commission of an offence referred to in article 2.

(2) A State may also establish its jurisdiction over any such offence when it is committed:

- By a stateless person whose habitual residence is in that State; or
- With respect to a national of that State; or
- Against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or
- In an attempt to compel that State to do or to abstain from doing any act; or
- On board a ship or aircraft which is operated by the Government of that State.

(3) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 2 in cases where the alleged offender is present in its territory and where it does not extradite such person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.

4. When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

⁹ 7 States Parties shall take appropriate measures, before granting asylum, for the purpose of ensuring that asylum is not granted to any person in respect of whom there are reasonable grounds indicating his involvement in any offence referred to in article 2.

¹⁰ 8 States Parties shall cooperate in the prevention of the offences set forth in article 2, particularly:

- By taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission, by whomsoever and in whatever manner, of those offences within or outside their territories, including:
 - (a) Measures to prohibit in their territories the establishment and

prosecute principle),¹¹ as well as to the proposed annexes to the draft convention containing, inter alia, optional procedures in relation to extradition and mutual legal assistance. It was observed that the proposed draft convention had received the support of the Movement of Non-Aligned Countries, as well as that of the Group of Eight Ministers for Foreign Affairs, at their meeting held at Miyazaki, Japan, in July 2000.

4.54 The view was expressed in the Working Group that the draft text before it was a good basis for discussion and that an article-by-article consideration was timely. Furthermore, it was stated that a comprehensive convention would be a valuable contribution to, and a useful tool in, the struggle against terrorism. It was also suggested that the provisions and approach of several anti-terrorism instruments developed at the regional level, aimed at strengthening cooperation among States, should be taken into consideration by the Working Group in finalizing the provisions of the draft convention. A clarification was sought as regards the scope of the draft convention and its relationship to existing treaties regulating aspects of international terrorism. Different views were expressed as to whether the draft should add to the existing sectoral terrorism conventions or whether it should be more of an “umbrella” convention. It was observed that care had to be exercised to ensure that the new convention did not adversely affect the existing legal framework, or separate initiatives being undertaken in related fields. As such, a preference was expressed for a treaty that would close any gaps in the existing legal framework, while

operation of installations and training camps for the commission, within or outside their territories, of offences referred to in article 2; and

(b) Measures to prohibit the illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or engage in the commission, within or outside their territories, of offences referred to in article 2;

•• By exchanging accurate and verified information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to prevent the commission of offences as referred to in article 2.

¹¹ 11(1) The State Party in whose territory the alleged offender is found shall, if it does not extradite the person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and that State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

preserving past achievements. Others maintained that the comprehensive convention should reinforce, complement and complete the existing legal framework, and therefore would necessarily overlap with existing treaties. It was therefore proposed that a provision should be included in the draft convention clarifying its relationship to existing treaties. The absence of such a provision, it was observed, would create uncertainty as to whether article 30 of the *Vienna Convention on the Law of Treaties* would apply, as there was room for disagreement on whether the draft convention and any of the existing treaties constituted “treaties relating to the same subject matter”.

4.55 The point was made that the comprehensive approach raised the issue of the definition of terrorism. Failure to address that important issue in the draft comprehensive convention would bring into question the necessity and utility of the exercise. In particular, it was proposed that provision should be made for the recognition of the existence of State terrorism. It was also suggested that the draft comprehensive convention should unequivocally draw a distinction between terrorism and the legitimate struggle of peoples in the exercise of the right to self-determination as well as the right of self-defence against aggression and occupation. The point was also made that the term “terrorism” was inapplicable to the conduct of States, which was governed by other rules, namely those relating to the use of force, for example, Article 2, paragraph 4, and Article 39 of the Charter of the United Nations.

4.56 The Working Group subsequently undertook, at its 3rd to 7th meetings, held from 26 to 28 September 2000, the first reading of the draft convention (except for the final clauses and article 23 relating to dispute resolution), including the preamble.¹²

Article 6 was also considered on the basis of the revised proposal of the sponsor delegation. It was reported that agreement had been reached on the major part of the text.¹³ Article 8 had been considered on the basis of a revised text prepared by the sponsor delegation.¹⁴ With regard to article 11, which had been

¹² Views had been divided on the reference to “causes” in the chapeau of paragraph 1, which had replaced the phrase “does an act intended to cause” in the original version. Regarding article 3, it was observed that the discussions, which had proceeded on the basis of a revised draft prepared by India, had focused largely on drafting suggestions to accommodate the concerns of delegations. It was also noted that there was general support for the inclusion of the reference to victims.

¹³ It was observed that a general preference had been expressed for not including a reference to “habitual residence” in paragraph 1 (c); that, despite some concerns, paragraph 2 (a bis) did not create many problems since it was optional for States; and that general support existed for paragraphs 2 bis, 3, 4 and 5, which were based on existing precedents. The only remaining parts of article 6 to be considered were subparagraphs (b), (c) and (d) of paragraph 2, for which two proposals had been submitted. It was suggested that those remaining issues should be considered at the next session of the Ad Hoc Committee.

¹⁴ As regards paragraph 1, it was reported that various views had been expressed on the new

considered on the basis of the revised text prepared by the delegation of India, it was reported that no objections had been raised to the replacement of the original phrase “is found” with “is present”. Support had also been expressed for the new phrase “without undue delay”, although it was queried as being too vague and its legal value questionable.¹⁵

4.57 On the question as to the relationship between the draft comprehensive convention on international terrorism and the earlier “sectoral” or “specific” conventions, it was observed that, generally speaking, three different concepts of the purpose of the draft convention had emerged:

- (a) that the draft convention should be truly comprehensive in nature, i.e. that it should be an “umbrella” convention covering all aspects of terrorism, including aspects already governed by existing

phrase “and areas under their jurisdiction”; that a proposal to delete the words “by whomsoever and in whatever manner” had received support; and that several views had been expressed with regard to subparagraphs (i) and (ii). In connection with paragraph 2, while the revised text had received support, some doubts had been expressed about subparagraph (ii) of paragraph 2 (b) since it seemed to be more suited to the *International Convention on the Suppression of the Financing of Terrorism*. With regard to the alternative proposal it was stated that while strong doubts had been expressed in the light of article 20, the proposal had received some support.

¹⁵ It was further observed that support had been expressed for the inclusion of the phrase “in cases to which article 6 applies” in the first line after the word “shall” or at the beginning of the paragraph. Nevertheless, it was noted that the view had also been expressed that the addition was not appropriate because it omitted cases where article 6 did not apply. Furthermore, general support had been expressed for replacing the words “any ordinary offence” in the last line of paragraph 1 with “any other offence”. Two alternative proposals relating to article 11, had also been considered. However, while many views had been expressed, only a preliminary debate had been possible, and it was therefore suggested that the consideration of the proposals should continue at a later stage.

conventions and areas not yet covered, and thereby superseding existing conventions;

- (b) that the draft convention should fill in the gaps in existing conventions, for example, by extending the ancillary offences and cooperation provisions found in the most recent conventions (such as the *International Convention for the Suppression of Terrorist Bombings* and the *International Convention for the Suppression of the Financing of Terrorism*) to the earlier conventions as well; and
- (c) that the draft convention should provide a framework to cover existing and future activity not already covered in the existing conventions, thereby complementing the existing conventions by filling in the gaps with regard to offences not already defined in those conventions, including new types of offences that might be committed in the future.

4.58 The view had also been expressed that the draft convention should be seen as a composite proposal to be examined on its own merit. It was, however, generally agreed that, while the discussion on the relationship issue had been inconclusive, the matter would need to be reconsidered once key draft articles, such as article 2, had been finalized; and that a provision that would govern the relationship issue should be included in the final text.

4.59 In the informal summary of the general discussion in the Working Group, prepared by the Chairman on the meetings held in October 2001, he pointed out that all delegations stated their unequivocal condemnation of terrorism in all its forms and manifestations and underscored that international terrorism posed a global threat to international peace and security and to basic human values. They also emphasized that acts of terrorism were criminal and unjustifiable, wherever and by whomsoever committed, and regardless of their form, motive or origin. Delegations strongly condemned the terrorist attacks which had taken place in New York, Washington, DC and Pennsylvania on 11 September 2001, and which were characterized as heinous crimes against the entire human civilization and democratic societies. It was observed that the fight against terrorism required a global effort based on international cooperation and international law, with due regard for human rights, and that it must go hand in hand with the search for lasting solutions to the human tragedies and political problems contributing to the instability which nurtured terrorist groups. In addition to reporting various activities being undertaken at the national, regional and international levels aimed at combating the scourge of terrorism,

delegations expressed support for the role of the United Nations as the main multilateral mechanism for mobilizing the international community in its fight against terrorism. Delegations underscored the importance of the establishment of an effective international legal regime, in line with Security Council resolutions 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001, and recalled the various statements made during the General Assembly debate on measures to eliminate international terrorism, held from 1 to 5 October 2001. States were urged to become parties to the existing sectoral anti-terrorism conventions, to the extent that they had not already done so, including those elaborated within the framework of the Ad Hoc Committee, and to fully implement all such instruments.

4.60 The Chairperson noted that delegations reiterated the urgency of adopting a comprehensive convention on international terrorism with the aim of extending and strengthening the existing legal regime against terrorism. He noted that there was agreement that, in the light of the recent terrorist acts in the host country, it was of vital importance that the Working Group should conclude its work on the comprehensive convention with a view to its adoption at the current session of the General Assembly. He pointed out that at the same time, concerns were expressed regarding the effectiveness of a future comprehensive convention if it was not universally accepted and if the underlying causes of terrorism were not addressed, and that the view was expressed that consistency with existing norms of international law, including those relating to international terrorism, was a necessary precondition for such universal acceptance.

4.61 Support was expressed for the draft text of the comprehensive convention which was considered to be a solid basis for discussion. The hope was also expressed that all delegations would demonstrate the necessary political will and commitment, in a spirit of cooperation, so as to resolve outstanding issues. He said that with respect to the scope of the convention, several speakers favoured its broad application, and suggestions were made, *inter alia*, to include in the list of offences within the coverage of the convention terrorism in all its forms and manifestations, terrorist threats, acts causing serious damage to the environment and economy, as well as various derivative offences such as the undertaking of preparatory acts. It was also suggested that the acts of armed forces of States should not be excluded from the scope of the convention. Conversely, the view was expressed that the convention should not duplicate the provisions of the Charter of the United Nations or other norms of international law governing the conduct of States or replace the norms of international humanitarian law applicable to armed conflicts. It was observed that

the main objective of the Working Group should be to further develop international rules concerning individual liability for terrorist crimes so that the perpetrators of such crimes could be brought to justice throughout the world.

4.62 The Chairperson explained that support was expressed for the approach taken in the draft text, ie opting for an operational definition of the perpetration of terrorist acts rather than attempting to define the phenomenon of terrorism. He noted however, that others, in calling for a more comprehensive and exhaustive definition, pointed to some of the shortcomings of the draft text, for example that the proposed definition did not sufficiently cover certain offences and means for their commission, and that it failed to provide for the liability of legal persons. It was also suggested that the definition should be formulated in clear and specific terms so as to avoid ambiguity, politically motivated interpretations and selective application of the convention. The concern was expressed that the terms used for defining offences within the meaning of the convention were excessively broad, allowing for the criminalization of activities which otherwise would not have been considered to be a violation of international law. Several delegations insisted that the convention should unequivocally distinguish terrorism from the legitimate struggle in the exercise of self-determination and independence of all peoples under foreign occupation.

4.63 The Chairperson noted that support was expressed for the inclusion of a provision clarifying the relationship of the comprehensive convention with existing sectoral conventions. It was suggested that the comprehensive convention should contribute added value to existing sectoral conventions by, inter alia, overcoming their shortcomings, while preserving the achievements of those conventions. The view was also expressed that the convention would be an important instrument in its own right and should be sufficiently forward-looking, so as to provide more efficient ways of combating existing and new forms of terrorism. He said that it was suggested that the convention should provide for an effective mechanism for cooperation among States in order to bring to justice the perpetrators of terrorist acts. In particular, it was observed that States should ensure the apprehension and prosecution or extradition of such persons. States were also called upon to prevent abuse of the right of asylum and not to provide refuge to persons involved in terrorist acts. It was reiterated that political motivations should not constitute grounds for States to refuse requests for extradition of the perpetrators. At the same time, it was noted that the relevant provisions of the convention should be carefully drafted so as to conform with universally recognized human rights and the right of States to grant asylum in conformity with international law.

4.64 Human Rights Watch said that it believes that it is crucial that the Comprehensive Convention's text uphold longstanding and universally-recognized international human rights standards.¹ They recommended that the text should include an operative provision that takes fully into account the context of international humanitarian law and human rights law. They noted that it should be made clear that nothing in the Comprehensive Convention should be construed as impairing, contradicting, restricting or derogating from the provisions of the Universal Declaration of Human Rights, the International Covenants on Human Rights and other international instruments, commitments of human rights law, refugee law, and international humanitarian law applicable to the specific situations and circumstances dealt with by the convention. Human Rights Watch urged that Article 15 of the Convention make specific reference to the binding principle of non-refoulement as stipulated under the Refugee Convention, international customary law, the Convention against Torture, and the European Convention on Human Rights. They remarked that the right of a refugee not to be returned to a country where his or her life or freedom would be threatened on account of her race, religion, nationality, membership of a particular social group or political opinion, is the cornerstone of international refugee protection. They explained that non-refoulement not only means that a refugee cannot be sent to his country of origin, but also means that he cannot be sent to any other country where his life or freedom is under threat.²

4.65 Human Rights Watch suggested that Article 7 should stipulate that all measures must be adopted in accordance with relevant provisions of international refugee and human rights law. Provisions already exist under international refugee law to exclude certain individuals from international refugee protection. Individuals are excludable under the Refugee Convention if there are serious reasons for believing that they have committed certain kinds of acts. These provisions should be sufficient to prevent organizers and perpetrators of terrorist acts and other serious crimes from abusing the asylum system to enter a country.³

¹ See *Human Rights Watch Commentary on the Draft Comprehensive Convention on Terrorism* October 17, 2001 <http://www.hrw.org/press/2001/10/terrorcom1017.htm>

² Human Rights Watch said that the phrase "any manner whatsoever" should prevent a government from sending a refugee to a second country when it is known that the second country intends to send the refugee to a third country where his life or freedom is threatened, and where a government has not determined refugee status for a particular person, and is considering sending that person to a place where his life or freedom is under threat, then that government must first determine whether the individual concerned is a refugee before taking any other action against him or her. They noted that the Refugee Convention clearly defines those categories of individuals who should be excluded from international refugee protection.

³ They noted that the principle of non-refoulement has evolved beyond the Refugee Convention. Article 3 of the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* also stipulates that no State Party "shall expel, return

4.66 Human Rights Watch recommended in regard to Article 14 and expulsion of refugees that the Article should contain language to ensure that any measures regarding extradition are fully in compliance with international refugee protection standards, in particular non-refoulement obligations. They were concerned that the Article could undermine fundamental principles of non-refoulement and international refugee protection. They explained that the Refugee Convention allows for the expulsion of a refugee from a country of asylum to any country other than one where his or her life or freedom would be threatened, but only if he or she is considered to pose a serious danger to the security or community of that country, and that that Convention allows states to expel a refugee on “grounds of national security or public order,” but stipulates certain procedural guarantees must be applied in such cases.⁴ They said that it is important to note that the two exceptions provided in Article 33 (2) only apply to impacts *in* the country of asylum and do not, for example, apply to a past political crime that does not endanger the security of the country of asylum. They noted that a government cannot, for example, agree to the extradition request for a refugee who is *not* a danger to the host government’s community when honouring that request would send the refugee to a place where her life or freedom would be threatened.

4.67 In addressing the General Assembly on terrorism in New York on 1 October 2001 the United Nations Secretary- General ⁵ remarked that it will be important to obtain agreement on a comprehensive convention on international terrorism. He noted that in the post-11 September era, no one can dispute the nature of the terrorist

(“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture, and when determining whether there are such grounds, States should take into account all relevant considerations including “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights.” They stated that non-refoulement protections are also provided under the 1951 *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Other international human rights standards clearly establish that even an individual that does not benefit from refugee protection should not be returned to a place where he or she would be subjected to torture or inhuman or degrading treatment or punishment, summary or arbitrary execution, or prolonged arbitrary detention.

⁴ They pointed out that the decision to expel must be “reached in accordance with due process of law” and “except where compelling reasons of national security otherwise require” the refugee must be able to submit evidence to clear himself, to appeal to a competent authority and receive legal representation, and have a reasonable period to seek legal admission into another country.

The only instance under which a refugee who has *not* been excluded from refugee protection under Article 1(f) can be returned to a country where his or her life or freedom is threatened, is when Article 33(2) of the Convention applies.

⁵ His Excellency Mr Kofi Annan.

threat, nor the need to meet it with a global response. He pointed out that there are outstanding issues, which until now have prevented agreement on this convention, and that some of the most difficult issues relate to the definition of terrorism. He understood and accepted the need for legal precision, but considered that there is also a need for moral clarity and that there can be no acceptance of those who would seek to justify the deliberate taking of innocent civilian life, regardless of cause or grievance. He noted that if there is one universal principle that peoples can agree on, surely it is this. He said that even in situations of armed conflict, the targeting of innocent civilians is illegal, as well as morally unacceptable, and yet, as he has stated in two reports on the protection of civilians in armed conflict, civilian populations are more and more often deliberately targeted, civilians having become the principal victims of conflict, accounting for an estimated 75 percent of all casualties. He said that this demands an increased attention to the civilian costs of conflict, and requires Member States to live up to their responsibilities under international law and States having to deal firmly with the reality of armed groups and other non-state actors who refuse to respect common principles of human dignity.

4.68 Mr Anan considered that it is hard to imagine how the tragedy of 11 September could have been worse, yet the truth is that a single attack involving a nuclear or biological weapon could have killed millions. He noted that while the world was unable to prevent the 11 September attacks, there is much that can be done to help prevent future terrorist acts carried out with weapons of mass destruction. He pointed out that the greatest immediate danger arises from a non-state group -- or even an individual -acquiring and using a nuclear, biological, or chemical weapon, and that such a weapon could be delivered without the need for any missile or any other sophisticated delivery system. He said that in addition to measures taken by individual Member States, the global norm against the use or proliferation of weapons of mass destruction should be strengthened. He noted that this meant, among other actions,

- (a) redoubling efforts to ensure the universality, verification and full implementation of key treaties relating to weapons of mass destruction, including those outlawing chemical and biological weapons and the nuclear non-proliferation treaty;
- (b) promoting closer cooperation among international organizations dealing with these weapons;
- (c) tightening national legislation over exports of goods and technologies needed to manufacture weapons of mass destruction and

their means of delivery;

- (d) and developing new efforts to criminalize the acquisition or use of weapons of mass destruction by non-state groups.

4.69 The Secretary General also pointed out that controls over other types of weapons that pose grave dangers through terrorist use need to be strengthened, meaning that more must be done to ensure a ban on the sale of small arms to non-state groups; making progress in eliminating landmines; improving the physical protection of sensitive industrial facilities, including nuclear and chemical plants; and increased vigilance against cyberterrorist threats.

4.70 It was reported on 31 January 2002 that completion of the comprehensive international treaty on terrorism, to fill in many of the gaps left by the other sectoral treaties on terrorism, hinged upon elusive agreement on an article covering who would be entitled to exclusion from the treaty's scope.¹ It was noted that Richard Rowe who has been presiding over informal consultations on the treaty, said the few other outstanding matters on the treaty would fall into place if divergent views could be reconciled on wording concerning acts of "armed forces" or "parties" to a conflict, on inclusion of a reference to foreign occupation, and also at issue in the same article 18 -- on the treaty's scope of application -- was whether the activities of military forces in exercise of their official duties should be "governed" by international law or "in conformity" with it. It was noted that the majority of the treaty's 27 articles were preliminarily agreed upon at the Committee's last two sessions, and, in addition to article 18, still outstanding are the preamble, article 1 on a definition of phrases in the draft convention, and article 2 on a definition of terrorism. Mr. Rowe reported that some progress had been made on the preamble and article 1 but final positions would depend on the outcome of article 18.

4.71 On 1 February 2002 it was reported that the Ad Hoc Committee concluded its current session, and that finalizing a comprehensive international treaty on terrorism that would fill in many of the gaps left by the other sectoral treaties on terrorism depended primarily on the resolution of an article covering who would be entitled to exclusion from the treaty's scope.² It was noted that the Chairman of the Committee had earlier said that perhaps the time had come for delegates to be innovative and

¹ <http://www.un.org/News/Press/docs/2002/L2992.doc.htm> "Agreement on comprehensive international convention on terrorism 'elusive', ad hoc committee is told."

² <http://www.un.org/News/Press/docs/2002/L2993.doc.htm> "Finalizing treaty requires agreement on 'armed forces', 'foreign occupation', Anti-Terrorism Committee told."

creative in exploring new approaches to find an acceptable compromise. It was noted that the few other outstanding matters on the treaty would fall into place if the divergent views could be reconciled on wording in article 18, concerning acts of “armed forces” or “parties” to a conflict as well as whether a reference to foreign occupation should be included., and whether the activities of military forces in exercise of their official duties should be “governed” by international law or “in conformity” with it. Still outstanding was the preamble, article 1 on a definition of phrases in the draft convention and article 2 on a definition of terrorism. Some progress had been made on the preamble and article 1 but final positions would depend on the outcome of article 18.³

B. REGIONAL INSTRUMENTS ON TERRORISM

4.72 The Organisation of African Unity adopted the *OAU Convention on the Prevention and Combatting of Terrorism* at the 35th Ordinary Session of the Assembly of Heads of State and Government of the OAU on 13 July 1999. South Africa signed the Convention immediately after adoption together with the following 30 countries:

Algeria, Benin, Botswana, Burundi, Chad, Comoros, Congo, Cote d'Ivoire, Egypt, Equatorial Guinea, Eritrea, Gabon, Gambia, Ghana, Guinea Bissau, Lesotho, Libya, Madagascar, Mali, Mauritania, Mozambique, Namibia, Rwanda, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, Swaziland, Tanzania, Togo and Tunisia.

4.73 Member States of the OAU must now ratify the Convention in accordance with their respective constitutional processes. The OAU Convention will enter into force upon receipt of 15 instruments of ratification.

4.74 During the 35th Ordinary Session the Heads of State and Government of the OAU

³ It was also reported on the draft convention on the suppression of acts of nuclear terrorism that discussions centred on the treaty's scope, and that the Committee has recommended, in its report on the session, that the Sixth Committee (Legal) consider establishing a working group, preferably to be convened from 14 to 18 October, to continue to work, as a matter of urgency, on the elaboration of a comprehensive convention, and to allocate appropriate time for the continued consideration of the outstanding issues on the nuclear terrorism convention.

also adopted the Algiers Declaration, which deals with a number of issues, including terrorism, and quoted the following extract on terrorism, which reads as follows:

“We the Heads of State and Government of the Member States of the Organisation of African Unity, meeting in Algiers, Algeria from 12 to 14 July 1999, solemnly declare as follows:

... terrorism, which is a transnational phenomenon, represents today a serious challenge to the values of civilisation and a flagrant violation of human rights and fundamental freedoms. It also poses serious threats to the stability and security of states and their national institutions as well as to international peace and security. While reiterating our profound attachment to the struggle waged by peoples for freedom and self-determination, in conformity with the principles of international law, we call for an effective and efficient international co-operation which should be given concrete expression, under the auspices of the OAU, through a speedy conclusion of a Global International Convention for the Prevention and Control of Terrorism in all its forms and the Convening of an International Summit Conference under the auspices of the UN to consider this phenomena and the means to combat it. Africa wants to make its full contribution by adopting its own Convention on this matter.”

4.75 The following definition of “terrorist act” is contained in the Convention:

“Terrorist act” means -

- (a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of or cause serious injury or death to any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
 - (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
 - (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
 - (iii) create general insurrection in a State;
- (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).

3

In terms of the Convention, States Parties undertake to -

- (a) review their national laws and establish criminal offences for terrorist acts as defined in this Convention and make such acts punishable by appropriate penalties that take into account the grave nature of such offences;
- (b) consider, as a matter of priority, the signing or ratification of, or accession to, the international instruments listed in the Annexure, which they have not yet signed, ratified or acceded to; and
- (c) implement the actions, including enactment of legislation and the establishment as criminal offences of certain acts as required in terms of the

international instruments referred to in paragraph (b) and that States have ratified and acceded to and make such acts punishable by appropriate penalties which take into account the grave nature of those offences;

- (d) notify the Secretary-General of the OAU of all the legislative measures it has taken and the penalties imposed on terrorist acts within one year of its ratification of, or accession to, the Convention.

7

States Parties also undertake to refrain from any activities aimed at organizing, supporting, financing, committing or inciting to commit terrorist acts, or providing havens for terrorists, directly or indirectly, including the provision of weapons and their stockpiling in their countries and the issuing of visas and travel documents. States Parties must adopt any legitimate measures aimed at preventing and combatting terrorist acts in accordance with the provisions of this Convention and their respective national legislation, in particular, they shall do the following:

- (a) prevent their territories from being used as a base for the planning, organization or execution of terrorist acts or for the participation or collaboration in these acts in any form whatsoever;
- (b) develop and strengthen methods of monitoring and detecting plans or activities aimed at the illegal cross-border transportation, importation, export, stockpiling and use of arms, ammunition and explosives and other materials and means of committing terrorist acts;
- (c) develop and strengthen methods of controlling and monitoring land, sea and air borders and customs and immigration check-points in order to pre-empt any infiltration by individuals or groups involved in the planning, organization and execution of terrorist activities;
- (d) strengthen the protection and security of persons, diplomatic and consular missions, premises of regional and international organizations accredited to a State Party, in accordance with the relevant conventions and rules of international law;
- (e) promote the exchange of information and expertise on terrorist acts and establish data bases for the collection and analysis of information and data on terrorist elements, groups, movements and organizations;
- (f) take all necessary measures to prevent the establishment of terrorist support networks in any form whatsoever;
- (g) ascertain, when granting asylum, that the asylum seeker is not involved in any terrorist activity;
- (h) arrest the perpetrators of terrorist acts and try them in accordance with

national legislation, or extradite them in accordance with the provisions of this Convention or extradition treaties concluded between the requesting State and the requested State and, in the absence of a treaty, consider facilitating the extradition of persons suspected of having committed terrorist acts; and

- (i) establish effective co-operation between relevant domestic security officials and services and the citizens of the States Parties in a bid to enhance public awareness of the scourge of terrorist acts and the need to combat such acts, by providing guarantees and incentives that will encourage the population to give information on terrorist acts or other acts which may help to uncover such acts and arrest their perpetrators.

3 States Parties must co-operate among themselves in preventing and combatting terrorist acts in conformity with national legislation and procedures of each State in the following areas:

- States Parties undertake to strengthen the exchange of information among them regarding:
 - (a) acts and crimes committed by terrorist groups, their leaders and elements, their headquarters and training camps, their means and sources of funding and acquisition of arms, the types of arms, ammunition and explosives used, and other means in their possession;
 - (b) the communication and propaganda methods and techniques used by the terrorist groups, the behaviour of these groups, the movement of their leaders and elements, as well as their travel documents.
- States Parties undertake to exchange any information that leads to:
 - (a) the arrest of any person charged with a terrorist act against the interests of a State Party or against its nationals, or attempted to commit such an act or participated in it as an accomplice or an instigator;
 - (b) the seizure and confiscation of any type of arms, ammunition, explosives, devices or funds or other instrumentalities of crime used to commit a terrorist act or intended for that purpose.
- States Parties undertake to respect the confidentiality of the information exchanged among them and not to provide such information to another State

that is not party to this Convention, or to a third Party State, without the prior consent of the State from where such information originated.

- States Parties undertake to promote co-operation among themselves and to help each other with regard to procedures relating to the investigation and arrest of persons suspected of, charged with or convicted of terrorist acts, in conformity with the national law of each State.
- States Parties shall co-operate among themselves in conducting and exchanging studies and researches on how to combat terrorist acts and to exchange expertise in control of terrorist acts.
- States Parties shall co-operate among themselves, where possible, in providing any available technical assistance in drawing up programmes or organizing, where necessary and for the benefit of their personnel, joint training courses involving one or several States Parties in the area of control of terrorist acts, in order to improve their scientific, technical and operational capacities to prevent and combat such acts.

9 In respect of jurisdiction, the Convention provides that each State Party has jurisdiction over terrorist acts as defined in Article 1, when -

- (a) the act is committed in the territory of that State and the perpetrator of the act is arrested in its territory or outside it if this is punishable by its national law;
- (b) the act is committed on board a vessel or a ship flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
- (c) the act is committed by a national or a group of nationals of that State.

) A State Party may also establish its jurisdiction over an offence when -

- (a) the act is committed against a national of that State; or
- (b) the act is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises, including any other property, of that State;
- (c) the act is committed by a stateless person who has his or her habitual residence in the territory of that State; or
- (d) the act is committed on board an aircraft which is operated by any carrier of

that State; and

(e) the act is committed against the security of the State Party.

1 The Convention also addresses matters such as extradition, commissions *rogatoire* and mutual legal assistance.

CHAPTER 5

SPECIFIC LEGAL PROVISIONS IN SOUTH AFRICA PERTAINING TO TERRORISM AND RELATED OFFENCES

There are a substantial number of statutory provisions that can, to a greater or lesser extent, be used to combat terrorism and related offences. These are:

- the Internal Security Act, 1982 (Act No 74 of 1982);
- the Intimidation Act, 1982 (Act No 72 of 1982);
- the State of Emergency Act, 1997 (Act No 64 of 1997);
- the Arms and Ammunition Act, 1969 (Act No 75 of 1969);
- the Explosives Act, 1956 (Act No 26 of 1956);
- the Judicial Matters Amendment Act, 1998 (Act No 34 of 1998);
- the Criminal Law Amendment Act, 1992 (Act No 126 of 1992);
- the Regulation of Foreign Military Assistance Act, 1998 (Act No 15 of 1998);
- the Civil Aviation Offences Act, 1972 (Act No 10 of 1972);
- the Merchant Shipping Act, 1957 (Act No 57 of 1957);
- the Diplomatic Immunities and Privileges Act, 1989 (Act No 74 of 1989);
- the Nuclear Energy Act, 1993 (Act No 131 of 1993);
- the Armaments Development and Production Act, 1968 (Act No 57 of 1968);
- the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No 87 of 1993);
- the Defence Act, 1957 (Act No 44 of 1957);
- the National Key Points Act, 1980 (Act No 102 of 1980);
- the Protection of Information Act, 1982 (Act No 84 of 1982);
- the Civil Protection Act, 1977 (Act No 67 of 1977);
- the Regulation of Gatherings Act, 1993 (Act No 205 of 1993);
- the Films and Publications Act, 1996 (Act No 65 of 1996);
- the Riotous Assemblies Act, 1956 (Act No 17 of 1956) and;
- the Interception and Monitoring Prohibition Act, 1992 (Act No 127 of 1992);
- the Financial Intelligence Centre Act, 2001 (Act No 38 of 2001).

Internal Security Act, 1982 (Act no 74 of 1982) Terrorism

Section 54(1) of the Internal Security Act, 1982 (Act No 74 of 1982) provides as follows:

“Any person who with intent to -

- (a) overthrow or endanger the State authority in the Republic;
- (b) achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic; or
- (c) induce the Government of the Republic to do or to abstain from doing any act or to adopt or to abandon a particular standpoint;

in the Republic or elsewhere -

- (i) commits an act of violence or threatens or attempts to do so;
- (ii) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act;
- (iii) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (i) or act referred to in paragraph (ii), or to aid in the commission, bringing about or performance thereof; or
- (iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,

shall be guilty of the offence of terrorism and liable on conviction to the penalties provided for by law for the offence of treason.”

The offence of terrorism is widely framed and includes any act of violence committed with the specified intent. Although the present offence is therefore intended to cover a broad spectrum of classical acts of terrorism, such as bombings and attacks with fire-arms, it is doubted whether section 54(1) is sufficient to combat all instances of modern day terrorism. It excludes, for instance, international or transnational terrorism. Currently the required intent must be directed at the Government of the RSA or the constitutional or political dispensation in South Africa. South African citizens who, for example, murder, injure or kidnap a high-profile US politician in view of USA hostilities towards Iraq, will therefore not be convicted of terrorism in a South African court. The conduct element of the present definition of terrorism is wide enough to fulfil our obligations in terms of the International Conventions on Terrorism. What needs to be expanded however, is the element of intent to provide for violence/threats of violence aimed at States, international organizations, persons or groups of persons other than the South African Government or the South African constitutional dispensation. The persons referred to above should include ordinary natural or juridical persons, as well as heads of States and official representatives or officials of States. The trend in other countries is to create, apart from general offences, specific offences related to the specific obligations in terms of International Conventions.

Internal Security Act, 1982 (Act no 74 of 1982) Sabotage

Section 54(3) deals with sabotage and provides as follows:

“Any person who with intent to -

- (a) endanger the safety, health or interests of the public at any place in the Republic;
- (b) destroy, pollute or contaminate any water supply in the Republic which is intended for public use;
- (c) interrupt, impede or endanger at any place in the Republic the manufacture, storage, generation, distribution, rendering or supply of fuel, petroleum products, energy, light, power or water, or of sanitary, medical, health, educational, police, fire-fighting, ambulance, postal or telecommunication services or radio or television transmitting, broadcasting or receiving services or any other public service;
- (d) endanger, damage, destroy, render useless or unserviceable or put out of action at any place in the Republic any installation for the rendering or supply of any service referred to in paragraph (c), any prohibited place or any public building;
- (e) cripple, prejudice or interrupt at any place in the Republic any industry or undertaking or industries or undertakings generally or the production, supply or distribution of commodities or foodstuffs; or
- (f) impede or endanger at any place in the Republic the free movement of any traffic on land, at sea or in the air,

in the Republic or elsewhere -

- (i) commits any act;
- (ii) attempts to commit such act;
- (iii) conspires with any other person to commit such act or to bring about the commission thereof or to aid in the commission or the bringing about of the commission thereof;
or
- (iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit such act,

shall be guilty of the offence of sabotage and liable on conviction to imprisonment for a period not exceeding twenty years.”

The present definition of sabotage, as contained in section 54(3) of the *Internal Security Act*, 1982, is sufficient to counter a broad spectrum of acts such as bombings, damage to, or the destruction of property forming part of the public infrastructure. According to the present provisions of section 54(3) it is required that the intent of the saboteur should be aimed at the public interest or public service. The current provisions of section 54(3) do not require that a saboteur must have the intention to harm the State *per se*. Acts of fear aimed at organizations or individuals, such as the placing of a bomb in the residence of a diplomat, will not qualify as an act of sabotage. It is proposed that all State or Government facilities (South African and foreign) as well as private residences, such as the house of a government representative or diplomat, that are situated in South Africa, be specifically included in the Act. Such a provision should be in line with the Terrorist Bombing Convention and Conventions relating to protection of diplomatic personnel, foreign dignitaries, etc.

Intimidation Act, 1982 (Act no 72 of 1982) : Sections 1 & 1A:

Sections 1 and 1A of the *Intimidation Act*, 1982 (Act No 72 of 1982) read as follows:

“Any person who -

- (a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint -
 - (i) assaults, injures or causes damage to any person; or
 - (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or
- (b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication fears for this own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of livelihood of any other person shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.

1A Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere -

- (a) commits an act of violence or threatens or attempts to do so;
- (b) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act;
- (c) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (a) or act referred to in paragraph (b), or to aid in the commission, bringing about or performance thereof; or
- (d) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,

shall be guilty of an offence and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.”

Sections 1 and 1A of the *Intimidation Act*, 1982 can be an effective tool to combat acts of terrorism. It is suggested that the element of intent of these provisions be expanded to make provision for intimidation of South African or foreign Governments and organizations.

OTHER LEGISLATION AIMED AT THE REGULATION OF FIREARMS, EXPLOSIVES, AMMUNITION & OTHER MEASURES TO COUNTER ACTS OF TERROR OR VIOLENCE

There are a large number of statutes aimed at the regulation and of control weapons, firearms, explosives and ammunition that can be utilised to suppress or prevent to acts of terrorism. There are also effective measures on the Statute book ranging from the safeguarding of South Africa's borders to so-called “hate speech” provisions, that can be utilised to combat large scale or isolated terrorist attacks. These provisions will be briefly discussed *infra*.

The *Arms and Ammunition Act*, 1969 (Act No 75 of 1969) prohibits the possession, manufacturing and sale of firearms and ammunition without a permit/licence. Control over firearms is exercised by means of a central firearms register. The Department for Safety and Security is presently engaged in the adoption of a Fire Arms Control Act.¹

1) ***The Explosives Act*, 1956 (Act No 26 of 1956), prohibits the possession, sale and manufacturing and use of explosives without a permit. An Inspector of Explosives and his personnel regularly inspects the use of explosives by the mining and other industries where the use of explosives is necessary. This Act is presently being reviewed by the Department for Safety and Security.**

1) **Other matters which relates to terrorism, are the provision of paramilitary training and the issue of recruiting and training of mercenaries and providing military assistance to foreign countries by e.g. private security companies. Section 199(2) of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), provides that the South African National Defence Force is the only military force in the Republic. Section 199(3) further provides that armed organizations or services may only be established in terms of national legislation.**

2) **Section 13 of the *Criminal Law Second Amendment Act*, 1992 (Act No 126 of 1992), prohibits any person -**

- **from taking part in the control, administration or management of any organization;**
- **from organizing, training, equipping or arming members or supporters of any organization; or**
- **from undergoing training in any organization,**

if the members or supporters of that organization are organized, trained, equipped or armed in order to usurp some or all of the functions of the Police or the Defence Force.

3) **In practice, the provisions of section 13 proved to be of little value because of the specific intent, namely usurpation of police or defence force functions, that has to be proved. This loophole will be closed if section 54 is broadened.**

¹ See <http://www.geocities.com/CapitolHill/Lobby/3743/FirearmsBillBeforeNCOP.pdf>

4 An amendment to the *Criminal Law Second Amendment Act, 1992* has recently been enacted to expand the prohibition on para-military training. In terms of this amendment, contained in the *Judicial Matters Amendment Act, 1998* (Act No. 34 of 1998), no person may train any other person or undergo training in the conducting of military or paramilitary training or in the construction, manufacture or use of any weapon, ammunition or explosives *for purposes of endangering life or causing serious damage to property, promoting political objectives or for military or paramilitary purposes.*

5 Section 16A of the *Judicial Matters Amendment Act* reads as follows:

“No person shall -

- (a) in any manner train any other person or undergo any training -
 - (i) in the conducting of any military, paramilitary or similar operation; or
 - (ii) in any tactical or other procedure applicable to, or required in, the preparation for any such operation or the execution thereof;
- (b) instruct or train any other person or undergo any instruction or training in the construction, manufacture or use of any weapon, ammunition, explosive or other explosive device -
 - (i) for the purpose of endangering life or causing serious damage to property;
 - (ii) for the purpose of promoting any political objective; or
 - (iii) for military, paramilitary or similar purposes;
- (c) assist in any instruction or training contemplated in this subsection, or equip any other person who is so instructed or trained or intended to be so instructed or trained with any such weapon, ammunition, explosive or explosive device or organize or employ two or more such other persons, whether they are so equipped by him or her or not -
 - (i) for the purpose of endangering life or causing serious damage to property;
 - (ii) for the purpose of promoting any political objective; or
 - (iii) for military, paramilitary or similar purposes.”

3 Section 16(2) exempts certain persons from the provisions of the Act. This exemption applies to members of certain occupations, who undergo training as authorized under the applicable Acts in terms of which they were appointed, and relates to the exercise by such persons of their official and lawful duties as performed in terms of the Constitution or any other law. The following persons are, amongst others, exempt from these provisions:

- Members of the South African National Defence Force, any reserve, corps or service as established under the Defence Act, 1957 (Act No. 44 of 1957).
- Members of the South African Police Service and municipal police services as established under the South African Police Service Act, 1995 (Act No. 68 of 1995).
- Correctional officials of the Department of Correctional Services and other persons

authorized to act in terms of the Correctional Services Act, 1959 (Act No. 8 of 1959).

- Employees of armament manufacturing factories, such as Denel, who manufacture and distribute armaments under licence and in compliance with domestic legislation.
- Any person who lawfully undergoes training and instruction relating to explosive devices under any law for the protection of persons or property.

7 Although section 16B of the Act, which makes provision for the offences and penalties, has not been put into operation yet, it is foreseen that the legislation will put an end to paramilitary training being received or provided in order to be used for political purposes.

3 Legislation regulating the provision of military assistance by private companies and citizens to foreign countries has recently been put into operation.

9 The *Regulation of Foreign Military Assistance Act*, 1998 (Act No. 15 of 1998), regulates the rendering of foreign military assistance by South African persons, both natural and juristic, including citizens, permanent residents and foreign citizens rendering such assistance from within the borders of the Republic of South Africa. This Act promotes the preclusion of South African citizens in armed conflict, either nationally or internationally.

) Foreign military assistance is defined in section 1 of the Act as follows:

“foreign military assistance” means military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of -

- (a) military assistance to a party to the armed conflict by means of -
 - (i) advice or training;
 - (ii) personnel, financial, logistical, intelligence or operational support;
 - (iii) personnel recruitment;
 - (iv) medical or para-medical services; or
 - (v) procurement of equipment;
- (b) security services for the protection of individuals involved in armed conflict or their property;
- (c) any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state;
- (d) any other action that has the result of furthering the military interests of a party to the armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict.”

1 The term “foreign military assistance” includes the following forms of conduct:

- The rendering of military services;

- The attempt, encouragement, enticement or solicitation to render such services.

2 The rendering of military assistance may take the following forms:

- Military assistance to a party involved in the armed conflict.
- The supply of security services for the protection of individuals so involved or for the protection of their property.
- Any action aimed at overthrowing a government, undermining the constitutional order, sovereignty or territorial integrity of a state.
- Any other action that results in furthering the interests of parties involved in armed conflict, excluding humanitarian aid aimed at alleviating the plight of uninvolved civilians to such conflict.

3 The participation in mercenary activities is expressly prohibited in section 2. Section 3 prohibits the unauthorized rendering of foreign military assistance as outlined above. Sections 3-7 prescribe the administrative formalities and criteria for the approval and granting of authorization of foreign military assistance otherwise prohibited by the Act.

4 Section 9 provides for the extraterritorial application of the Act in respect of South African citizens committing offences as set out in section 8 outside the Republic of South Africa.

5 Notwithstanding the approval and authorization of foreign military assistance in terms of the Act, section 11 empowers the Minister of Defence, in consultation with the NCACC Committee to exempt any person from the provisions relating to authorizati

on in
section 4
and
approved
in section
5, subject
to such
condition
as the
Minister
may
determine.

The relevant South African legislation is the following:

The Armaments Development and Production Act, 1968 (Act No 57 of 1968) and its implementing regulations

Parliament is currently considering the *National Conventional Arms Control Bill*.² The

²

The memorandum on the objects of the *Conventional Arms Control Bill*, no 50 of 2000 explained the objects of the Bill as follows (the title was subsequently changed to the *National Conventional Arms Control Bill*): (see <http://www.polity.org.za/govdocs/bills/2000/b50-00.pdf>)

1.1 Section 3(2)(IA) of the Armaments Development and Production Act, 1968 (Act No. 57 of 1968), authorises the Armaments Development and Production Corporation of South Africa, Limited, to exercise control over the development, manufacture, acquisition, supply, export or marketing of armaments. In terms of section 4C of that Act, the Minister of Defence has particular powers in relation to the export, marketing, import, conveyance in transit, development and manufacture of armaments. Section 4E of that Act provides for certain offences in connection with those acts.

1.2 In August 1995 the Government approved the establishment of the National Conventional Arms Control Committee ("the NCACC") to provide a broad political oversight over the transfer of conventional arms. It was also approved that until such time that the relevant legislation was in place the Minister of Defence, on the advice of the NCACC, permits all transactions relating to the sale and transfer of conventional arms.

2. The object of the Bill is therefore to give effect to the Government's decisions by formally providing for a system of control over transfers of conventional arms and associated services that have evolved since the establishment of the NCACC in 1995.

3. Key proposals in the Bill are the following:

3.1 The Bill establishes the NCACC and set out its objectives.

3.2 The main function of the NCACC is the regulation and control over the transfer of conventional arms.

3.3 Work incidental to the performance of the functions of the NCACC will be performed by a secretariat consisting of administrative personnel and inspectors. Inspectors are empowered to do routine inspections, to enter and search premises with or, under certain circumstances, without a warrant and to seize any article or material that might be relevant to a prosecution under the Bill.

3.4 Provisions of the *Armaments Development and Production Act*, 1968 (Act No. 57 of

Minister of Defence controls the export, marketing, import, conveyance through the Republic, development and manufacture of certain conventional defence material.³ Permits are administered by the Secretary for Defence, and the National Conventional Arms Control Committee (NCACC) has been instituted to act in the interim as an advisory body to provide political oversight with arms trade controls, vested in the collective leadership of several Ministers.⁴

1968), now being covered by the Bill, are repealed.

See <http://www.polity.org.za/govdocs/bills/2000/b50-00.pdf> for the original text of the *Conventional Arms Control Bill* and for the recommitted version of the *National Conventional Arms Control Bill* see <http://www.pmg.org.za/docs/2002/appendices/020625ncacbill.htm> It was reported that Education Minister Kader Asmal said that SA will not sell arms to all comers and countries violating human rights, and that he rejected claims that the National Conventional Arms Control Bill did not provide for transparent reporting to Parliament. It was noted that the Bill had been criticised during its progress through Parliament for failing to provide transparent reports on arms sales to a parliamentary committee and therefore the public. (See "SA will not sell arms to just anyone, says Asmal" 21 Aug 2002 *Business Day* at <http://www.bday.co.za/bday/content/direct/1,3523,1156952-6078-0,00.html>)

- ³ In its October 2000 report the Human Rights Watch was highly critical of South African practices of arms export: (see http://www.hrw.org/reports/2000/safrica/Sarfio00.htm#P107_14776)
- "The South African government has made remarkable strides in transforming its arms export policy since the African National Congress (ANC) assumed power following multiracial elections in April 1994. Nevertheless, in important respects, the transformation of the arms control regime in South Africa is incomplete. In practice, the government's arms export decisions have not consistently reflected the ethical principles and policies that it has proclaimed. Much remains to be done, therefore, to institutionalize and provide a statutory backing for the framework set out in policy statements, and thereby to ensure that the guidelines are as strong in practice as they are in principle. . . .
- Human Rights Watch acknowledges the remarkable progress made by South Africa in adopting a set of human rights friendly policies in relation to arms transfers. At the same time, it believes that the South African government must urgently address the inconsistencies that have emerged between its arms export policies and practices, and deny all human rights abusers its weapons, the tools with which such abuses have been committed. In particular, Human Rights Watch believes four areas need attention. To help ensure that the rights its citizens enjoy in their own country are not assaulted elsewhere in the world, South Africa should:

- B. establish a statutory framework for the current system of arms export control and associated policy commitments;
- C. strengthen the capacity of government officials to provide human rights input into the process of decision making;
- D. increase the involvement of parliament and civil society in decisions relating to arms exports;
- E. make a greater commitment to full transparency."

- ⁴ Note the following recommendations the Human Rights Watch made to the South African Government:

- B. Repeal the Armscor Act of 1968, and adopt new legislation inclusive of all the NCACC policy guidelines, principles, control measures, and mechanisms also defined in the White Paper on Defence and the subsequent White Paper on Defence Related Industries. The new legislation should include explicit provisions regarding the role of the NCACC chairperson, who should continue to be a cabinet level minister with no direct interest in the arms trade. It also should unify oversight of the arms trade under a single organization and ensure that the customs agency is granted membership in this body.

ough the NCACC did not exist in 1968 when the Act was promulgated, this now forms the most

-
- C. In the interim, strictly adhere to the principles, control measures, and mechanisms contained in the White Paper on Defence and the White Paper on Defence Related Industries.
 - D. Create an inspectorate general for defense-related industries with the clear mandate to ensure that all levels of the NCACC process are subject to independent scrutiny and are conducted strictly in accordance with the principles, policies, and guidelines of the NCACC, and the above-mentioned white papers. The inspectorate should also report regularly to the appropriate parties and parliamentary oversight bodies, as called for in the White Paper on Defence and the White Paper on Defence Related Industries, and monitor implementation of legislation (the Conventional Arms Control Bill) that, once adopted, is expected to provide a legal framework for South Africa's arms trade controls.
 - E. Ensure that any arms transfers resulting from South Africa's participation in joint licensing and co-production agreements between South African companies and foreign partners strictly adhere to arms export criteria regarding human rights.
 - F. Train human rights experts in the Department of Foreign Affairs and the customs agency to better understand the connection between human rights, international humanitarian law, and the arms trade.
 - G. Report in full to the UN Register of Conventional Arms, without any reservation pertaining to client confidentiality.
 - H. Provide the quantities and detailed descriptions of type of weapons in annual reports and statistics currently published by the Directorate of Conventional Arms Control. Report all completed transfers, irrespective of client confidentiality considerations.
 - I. Grant parliament prior oversight of arms transfers, especially when these are directed to recipients with a record of human rights abuses.
 - J. Publish the list of countries to which weapons transfers are proscribed.
 - K. Consult the South African Human Rights Commission about the human rights implications of arms transfers.
 - L. Make public those demarches issued by the government of South Africa against weapons recipients who have violated commitments not to divert or re-export weapons without authorization. In each case, also make public details of any responses and release a statement indicating the government's commitment to bar further weapons transfers to the named recipient.
 - M. Work with other governments to develop standardized and difficult-to-forge end-user documentation, building on an effort initiated by Southeast European governments in December 1999.
 - N. Prosecute violators of national and international arms trade regimes, particularly of U.N. arms embargoes. Prohibit convicted violators from engaging in arms transfers. Publish a list of companies, individual brokers, and/or countries barred from arms trade activities.
 - O. Adopt nationally and promote at the international level adoption of a binding code of conduct on arms transfers that would prevent violators of human rights and international humanitarian law from receiving weapons. The code should also include a prohibition against trade in weapons with governments and military forces that deny access to humanitarian organizations and to governments and military forces that deny access to human rights monitors.
 - P. Promote a regional register for small arms and light weapons production, import, and export, and support the creation of an international register for such weapons.
 - Q. Include arms trade issues in the periodic foreign policy reviews held by the Department of Foreign Affairs.
 - R. Adopt legislation to ensure that legal constraints on access to information do not unduly limit transparency and public accountability with regard to arms transfers. Explicitly authorize legal challenges to the implementation of such regulations, including when information about arms-related transactions is required to demonstrate a breach of applicable law. Extend the provisions of the Promotion of Access to Information Act to the activities of arms trade control bodies, including the NCACC.

important conventional arms control body in South Africa.

- 3 Government control of armaments and related equipment is effected at national level in five separate areas. Each area has its own set of enabling legislation and resulting structures. The areas of government control at national level are:

Conventional armaments;
Weapons of Mass Destruction and Dual-use items;
Firearms, Ammunition and Teargas;
Explosives;
Nuclear Related Technology.

- 9 The National Conventional Arms Control Committee (NCACC) evaluates, against national considerations, applications for the research, development, manufacturing, marketing, contracting, export, import and transit of armaments. The purpose of the National Conventional Arms Control Committee is to exercise political control over arms trade and transfers. The functions of the National Conventional Arms Control Committee include the implementation of management and control processes to register companies that manufacture and develop armaments; to prescribe rules and criteria to effect conventional arms control and the rendering of services related to conventional arms; to regulate the transfer of armaments through the authorisation of permits and to conduct investigations into any trade relating to conventional arms or services.

Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No 87 of 1993) and its implementing regulations

- 9 This Act is administered by the Department of Trade and Industry., and a Non-Proliferation Council (NPC) has been established which controls all imports, exports and transfers of dual-use technologies, dual-use materials and dual-use items that can be used in the production and operation of weapons of mass destruction (i.e. Chemical, Biological and Nuclear weapons as well as delivery systems for such weapons) as defined by the Chemical Weapons Convention, the Bacteriological Weapons Convention, the Nuclear Non-Proliferation Treaty and the Missile Technology Control Regime.

The Nuclear Energy Act, 1999 (Act No 46 of 1999)

- 1 The Nuclear Energy Act provides that no person, organisation or body may be in possession of special nuclear material, restricted material, uranium hexafluoride, nuclear fuel,

nuclear-related equipment and material, or may acquire, use or dispose of any source material, import any source material into the Republic, or process, enrich or reprocess, acquire or import, use or dispose of any special nuclear material or restricted material, process, enrich or reprocess any special nuclear material, or acquire any restricted material. The Minister of Mineral and Energy Affairs is empowered to control the possession of or acquisition or import or export of specified nuclear-related material and equipment. (See discussion in Chapter 4 above on this Act and the relevant international instruments on this issue.)

State of Emergency Act, 1997 (Act No.64 of 1997)

- 2 The State of Emergency Act provides for the declaration of a state of emergency in SA. This Act can be used to combat acts of terrorism if, according to section 37 of the Constitution, “the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or public emergency; and the declaration is necessary to restore peace and order.”

Defence Act, 1957 (Act No. 44 of 1957)

- 3 Chapter X of the *Defence Act* contains various provisions pertaining to the combatting of terrorism. This includes the mobilization of the Citizen Force, the Reserve and commandos for service in the prevention or suppression of terrorism (section 92), compulsory service outside the RSA for the prevention or suppression of terrorism (section 95), the safeguarding of the borders of the RSA for the prevention or suppression of terrorism (section 99A), commandeering of buildings, vehicles, etc. for the prevention or suppression of terrorism (section 100), censorship as well as the assumption of control over transport systems for the prevention or suppression of terrorism (sections 101 and 102).

National Key Points Act, 1980 (Act No. 102 of 1980)

- 4 The *National Key Points Act* empowers the Minister of Defence to declare a place or area as a National Key Point if it appears to the Minister that such place or area is so important that its loss, damage, disruption or immobilization may prejudice the Republic, or whenever he or she considers it necessary or expedient for the safety of the Republic or in the public interest. The National Key Point Act also provides for the safeguarding of National Key Points.

Protection of Information Act, 1982 (Act No. 84 of 1982)

- 5 The *Protection of Information Act* contains provisions pertaining to prohibited places and certain acts prejudicial to the security or interests of the Republic that could be used to combat acts of terrorism. An example of the conduct that will be covered by this Act is the terrorist who enters or inspects a military establishment with the aim to commit an act of terror.

Civil Protection Act, 1977 (Act No 67 of 1977)

- 3 The Civil Protection Act empowered the Minister of Planning and Provincial Affairs to declare a state of disaster if it appears to him that extraordinary measures are necessary to assist and protect the Republic and its inhabitants and to combat civil disruption. The concept “disaster” includes “ any consequences arising out of terrorism . . . contemplated in the Internal Security Act,1982.”

The Regulation of Gatherings Act, 1993 (Act No. 205 of 1993), Films and Publications Act,1996 (Act No. 65 of 1996) and the Riotous Assemblies Act,1956 (Act No. 17 of 1956)

- 7 All three the above Acts contain so-called “hate speech” provisions. Hate speech may be of such a serious nature that it could encourage persons to act in a violent manner.

- 3 Section 8(5) of the Regulation of Gatherings Act, 1993 prohibits persons present at a gathering or demonstration to incite hatred of other persons on account of differences in culture, race, sex, language or religion. Section 8(6) of the same Act also prohibits persons present at a gathering or demonstration to “perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons”

- 9 The Films and Publications Act, 1996 contains a prohibition on the distribution of publications and films and the presentation of public plays which “incites to imminent violence or advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm.”

-) Section 17 of the Riotous Assemblies Act, 1956 reads as follows:

“A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner , or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed.”

Interception and Monitoring Prohibition Act,1992 (Act No. 127 of 1992)

1 In terms of section 3 of the Interception and Monitoring Prohibition Act, a judge may issue a direction for the interception of mail or the monitoring of conversations by means of a monitoring device if he or she is convinced that “the security of the Republic is threatened or that the gathering of information concerning a threat to the security of the Republic is necessary.”¹

2 **In practice, the designated judge will also issue a direction for interception or monitoring if a “serious offence” has been or is being or will probably be committed. “Serious offence”** is defined in the Act and will include the common law offences of treason, murder, culpable homicide and public violence that may be applied to combat acts of terrorism.

3 Other Acts that have already been dealt with in Chapter 4, above, are the following:

- (i) *Civil Aviation Offences Act, 1972 (Act No. 10 of 1972);*
- (ii) *Merchant Shipping Act, 1957 (Act No. 57 of 1957);*
- (iii) *Diplomatic Immunities and Privileges Act, 1989 (Act No. 74 of 1989) and*
- (iv) *Nuclear Energy Act, 1999 (Act No. 46 of 1999).*

The Financial Intelligence Centre Act, 2001 (Act 38 of 2001)

4 The principal objective of the Financial Intelligence Centre Act is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities. The other objectives of the Financial Intelligence Centre (FIC) are —

- to make information collected by it available to investigating authorities, the intelligence services and the South African Revenue Service to facilitate the administration and enforcement of the laws of the Republic;
- to exchange information with similar bodies in other countries regarding money laundering activities and similar offences.

5 To achieve its objectives the Financial Intelligence Centre (FIC) must —

¹ Parliament is presently considering amendments to this Act. This Act will in all likelihood be replaced by the Interception and Monitoring Act.

- process, analyse and interpret information disclosed to it, and obtained by it;
- inform, advise and cooperate with investigating authorities, supervisory bodies, the South African Revenue Service and the intelligence services;
- monitor and give guidance to accountable institutions, supervisory bodies and other persons regarding the performance by them of their duties and their compliance with the provisions of the Act;
- retain information in the manner and for the period required by the Act.

3 The Act imposes a duty on accountable institutions to identify their clients. Institutions must keep records of business relationships and transactions. The Act prescribes the periods for which records must be kept, access to records, and prescribes the reporting duties of institutions. Institutions must report cash transactions above a prescribed limit to the FIC. Institutions must also report to the FIC suspicious and unusual transactions. The Act also contains provisions on search, seizure and forfeiture of cash and property. A judge is also empowered to make monitoring orders whereby accountable institutions are ordered to report to the Centre all transactions concluded by a specified person. Such an order may be given if there are reasonable ground to suspect that —

that person has transferred or may transfer the proceeds of unlawful activities to the accountable institution; or

that person is using or may use the accountable institution for money laundering purposes; or

that account or other facility has received or may receive the proceeds of unlawful activities or is being or may be used for money laundering purposes.

7 Such an order in terms lapses after three months unless extended. An order may be extended for further periods not exceeding three months. The Act says that “money laundering” or “money laundering activity” means an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds.

F. COMMON LAW

3 Apart from statutory provisions, the South African common law can in many instances also be applied to combat terrorism, e.g. in cases where it is difficult to prove the specific intent required by statutory provisions. For this reason the statutory offences of terrorism, and, to a lesser extent, sabotage have rarely been heard by the South African Courts after 1994.

9 Common law crimes that have been and could be used to combat acts of terrorism are the following:

- Treason;
- Murder;
- Arson;
- Culpable homicide;
- Malicious injury to property;
- Kidnapping.

CHAPTER 6

A. United Kingdom (UK)

(a) Introduction

6.1 The *Terrorism Act* of 2000 came into operation in the United Kingdom on 19 February 2001.¹ **The events which took place on 11 September 2001 in America however also lead to the UK government announcing in October 2001 that new powers of detention, tighter airline security and lengthy jail sentences for inciting religious hatred were among a package of anti-terrorism measures to be introduced. The *Anti-Terrorism, Crime and Security Bill* was introduced into the House of Commons on 12 November 2001. It was explained that the purpose of this Bill is to strengthen legislation in a number of areas to ensure that the Government, in the light of the new situation arising from the September 11 terrorist attacks on New York and Washington, have the necessary powers to counter the increased threat to the UK²**

¹ See "Civil groups protest terror laws" *The Times* Monday February 19 2001 <http://www.thetimes.co.uk/article/0,,2-87481,00.html>

It was pointed out that under the new law, organisations such as the Palestinian organisation Hamas and the Islamic group Hezbollah could be outlawed. Cyber-terrorists who hack into computers to undermine governments or threaten lives are also targeted. The Act allows ministers to add groups to a list of proscribed organisations, which currently includes Irish terror groups such as the IRA and the Ulster Volunteer Force. Groups which could be banned include the Tamil Tigers of Sri Lanka, the Kurdistan People's Party (PKK) of Turkey and the Palestinian Islamic Jihad. It was explained that once an organisation is on the list, it is illegal to be a member of the group, support it financially, display its emblems or share a platform with a member at a meeting of three or more people. Jack Straw, the Home Secretary, said the new legislation strengthened civil liberties as well as increasing police powers to clamp down on terrorism. He denied that moves to outlaw groups using Britain as a base for terrorist action abroad could be seen as anti-Islamic, saying he was one of the Government's leading campaigners against "Islamophobia". Although he would not say which particular groups could be proscribed under the new powers, he insisted that they would not be used to silence all protest. It was noted that Mr Straw told the BBC: "In this country we have a very clear tradition by which people are fully entitled to engage in all kinds of peaceful, sometimes very noisy, protest. They are not, and almost everybody accepts this, entitled to engage in seeking to disrupt the way our democracy operates by violence." One reason for introducing the new law was to strengthen the position of individuals by making the law comply with the new Human Rights Act, he said.

Liberal Democrat home affairs spokesman Simon Hughes was reported to have said his party had serious reservations about some parts of the legislation. Most worrying was the wide definition of terrorism, which Mr Hughes believed could easily be used to stifle legitimate protest. It was also noted that a Reclaim the Streets spokesman said: "Activists and other campaigning groups are taking action to demonstrate that those working towards social and environmental justice will not be deterred by this Act."

² Paul Harris and Martin Bright "How the armada of terror menaces Britain" *The Guardian Unlimited Observer* 23 December 2001 <http://www.observer.co.uk/waronterrorism/story/0,1373,624278,00.html> paint the following picture in their article:

"Twenty ships have been linked to bin Laden - and any one of them could be sailing towards our shores. A huge ship, packed with explosives or carrying a cargo such as oil or gas, docks in the centre of a large city. It has been hijacked by terrorists and explodes. Thousands of

civilians are killed. It sounds like sick fantasy - but so did bringing down the World Trade Centre. . . . the hunt for at least 20 boats linked to Osama bin Laden, it is a prospect being taken seriously. 'It could make a terrible mess of a city and would be relatively easy to do,' said David Cockcroft, general secretary of the International Transport Workers Federation. 'It is perfectly possible and there are clearly people who want to do it.'

Targets would be cities where large residential areas are sited near to docks, ideally docks that carry gas or oil. . . . Despite the bridges across the Thames, London would also be vulnerable as large ships could easily penetrate as far as Canary Wharf - which has been the target of IRA terrorist attacks. Terrorism experts believe the ships could even be fitted with primitive radioactive 'dirty bombs' or hijackers could take over boats carrying nuclear or chemical waste. Spies across the world are hunting the world's oceans for the flotilla of terror ships, dubbed 'bin Laden's phantom fleet', that are suspected to have been chartered or bought by people linked to the al-Qaeda terrorist network. They have been looking for them since the end of September, working closely with international maritime organisations and scouring log books and cargo registers to try to trace their movements. The ships' names are known, but have not yet been disclosed out of a fear of forcing them into hiding.

The existence of the ships is a new chink in the armour of security precautions thrown up in the wake of the 11 September attacks. In America strict regulations governing ship movements near ports have been rushed into place. Ships must now give at least 96 hours' notice before docking and the identity of every single member of crew must be passed on to the security authorities.

However, that such a threat is now posed to the world's ports has not come as a surprise to campaigners for reforms in the way the international shipping industry regulates itself. It is a murky world of corruption, bribes, lawlessness and flags of convenience. It is an industry ripe for penetration by hardened terrorist cells bent on finding new ways of wreaking havoc. Central to the problem are the states that shipping firms use as flags of convenience. 'A lot of the industry itself is based on quite a lot of corruption and deceit that fosters anonymity and allows unscrupulous operators,' said Andrew Linnington of the National Union of Marine Aviation and Shipping Transport Officers.

The world's largest fleets belong to the Bahamas, Panama and Liberia. Liberia alone maintains a fleet of 1,557, despite the fact that it is a country devastated by civil war with a barely functioning infrastructure. But, of course, the ships are registered on paper only. That allows them to avoid taxes and other costs and lines the pockets of corrupt port officials. Tiny island nations, such as the Marshall Islands and St Vincent & the Grenadines, also maintain huge registries, having fleets much bigger than Britain or the United States. Industry sources also point to the practice of 'flag-hopping', whereby ships will be taken off the registry of one country at the first signs of a crackdown by authorities and re-registered under a different flag with no threat.

Some countries' regulations are shockingly loose. In the case of Cambodia, ship owners can even register their vessels online, meaning there is an absolute minimum of regulation. It ensures that vetting of cargos and crews is kept to a minimum. Shipping sources say that most boat owners often have little idea who is manning their vessels. On many badly-run boats, crews are brought in from developing countries and paid low wages and housed in poor conditions. It would not be hard to infiltrate them. Fake papers for boats and crew members can also be bought and sold easily. Several investigations by industry bodies have proved that licences for even senior crew members can be quickly obtained with no security vetting. Cockcroft said that he bought a senior mate's licence from Panama for just \$4,000 and two passport photos. 'I am not qualified for that, but it was easy,' he said. Piracy is also endemic and on the rise. That raises the real possibility that al-Qaeda cells would not have to infiltrate a crew, but could simply hijack the boat, take it over and steer it to their target. It would be a grim water-borne mirror image of the hijacked planes crashing into New York and the Pentagon.

The International Maritime Bureau Piracy Reporting Centre has logged 253 attacks on ships in the first nine months of this year. So dangerous is the Strait of Malacca, between Indonesia and Malaysia, that many companies now refuse to send vessels there unarmed or without an escort.

If hijackers took over a small private yacht it would be unlikely to come to the attention of the authorities. It, too, could be turned into a floating bomb and piloted down rivers or through docks and into large Western cities. Despite US naval patrols stopping traffic in the

and that the measures are intended to:

- **Cut off terrorist funding;**
- **Ensure that government departments and agencies can collect and share information required for countering the terrorist threat;**
- **Streamline relevant immigration procedures;**
- **Tackle those who seek to stir up religious and racial hatred or violence;**
- **Ensure the security of the nuclear and aviation industries;**
- **Improve the security of dangerous substances that may be targeted or used by terrorists;**
- **Extend police powers available to relevant forces;**
- **Ensure that the UK can meet its European obligations in the area of police and judicial co-operation and our international obligations to counter bribery and corruption;**

Mediterranean and Arabian waters, such craft could easily evade capture. They are already widely used by international drug-smuggling rings and other criminal organisations.”

.. **Update parts of the UK's anti-terrorist powers.¹**

6.2 David Blunkett, the Home Secretary, told Members of Parliament he proposed to bring forward an *Emergency Anti-Terrorism Bill* that would strike a balance between respecting fundamental civil liberties and ensuring they are not exploited. It was reported that he surprised MPs - and angered civil rights campaigners - by proposing that Britain should suspend a vital article in the European Convention on Human Rights in order to detain suspected terrorists without trial. Mr Blunkett invoked Article 15 of the convention, which allows rights to be set aside in time of war or other public emergency. These measures lead to concerns being raised also by the organisation Human Rights Watch (HRW). HRW said that it is deeply concerned that the measures included in the Bill contravene fundamental European and international human rights guarantees. They explained that while they understand the need to enhance internal security in the aftermath of the 11 September attacks in the

¹ The Telegraph reported as follows: "Blunkett seeks powers to remove terrorist suspects" Philip Johnston, Home Affairs Editor (*Filed: 16/10/2001*)

"Mr Blunkett said stronger powers were needed to remove suspected terrorists from the country, while continuing to offer a safe haven to those genuinely fleeing persecution. "Our moral obligation and love of freedom does not extend to offering hospitality to terrorists," he said. But John Wadham, the director of Liberty, said: "We'd question whether the UK should be seeking to withdraw in haste from commitments that over 40 other European countries remain signed up to. "It also appears that the Government wants to do this as a means to create internment - locking up people without any charge or trial, on the basis of mere suspicion."

The emergency Bill will also include:

- .. Laws to stop supporters based in Britain conspiring with terrorist groups abroad or providing them with funds, goods or service. A requirement on air and shipping companies to hand over passenger and freight information.
- .. Powers allowing the Inland Revenue and Customs and Excise to share information with the police.
- .. Tighter security at airports and on aircraft.
- .. Extra powers and wider jurisdiction for the Ministry of Defence police, British Transport police and the police force of the Atomic Energy Authority.
- .. An extension of laws against inciting racial hatred to include religious hatred. Maximum penalty increased from two years' jail to seven years.
- .. Simpler and faster extradition of suspects and the rejection of asylum where the applicant is considered a threat to national security. No judicial review of deportation decisions made on national security grounds.

Oliver Letwin, the shadow home secretary, said the Conservatives supported the broad thrust of the Government's proposals. "We wish to see changes in our law which will increase the effectiveness of our domestic measures against terrorism," he said. But he cautioned the Government not to rush the legislation through Parliament. "Too often in the past there has been over-hasty legislation that has proved inoperable in practice," Mr Letwin added. In a statement to the Commons, Gordon Brown, the Chancellor, said a new anti-terrorist finance unit would be set up within the National Criminal Intelligence Service to cut off the funds to terrorist organisations. The Treasury had frozen £63 million in 35 suspect bank accounts using existing legislation. New laws would be brought forward to require banks and other financial institutions to alert authorities to funds they suspect could have terrorist links. Customs and Excise will be able to seize suspect funds and bureaux de change - often used to launder money for criminals or terrorists - would face a new supervisory regime from next month. "Those who finance terror are as guilty as those who commit it," said Mr Brown."

United States and in the context of on-going armed conflict in Afghanistan, we are dismayed by U.K. proposals that would permit the arbitrary detention of persons suspected of terrorist activity, as well as the denial of the right to seek asylum, the exclusion, and indefinite detention of certain individuals without adequate safeguards contrary to the 1951 Refugee Convention. HRW considered that public statements by the Home Secretary suggest that a public emergency was declared in the U.K. to avoid compliance with certain human rights obligations—threatening basic rights in the U.K. and providing a dangerous model for other states.

6.3 The *Terrorism Act* which was adopted in the UK in 2000 replaced the *Prevention of Terrorism (Temporary Provisions) Act* 1989 (the PTA), the *Northern Ireland (Emergency Provisions) Act* 1996 (the EPA) and the *Criminal Justice (Terrorism and Conspiracy) Act* 1998. The adoption of the *Terrorism Act* was preceded by an inquiry conducted by Lord Lloyd of Berwick. Lord Lloyd's report of inquiry concluded that there would be a continuing need for permanent United Kingdom-wide legislation. He recommended changes to the definition of terrorism, the powers to proscribe terrorist organisations and the powers of the police to prevent acts of terrorism and to investigate and arrest those suspected of being involved in terrorism. The UK Government agreed with Lord Lloyd that there would be a continuing need for counter-terrorist legislation for the future, regardless of the threat of terrorism related to Northern Ireland. It was believed that the time had come to put that legislation onto a permanent footing. In his speech to the UN General Assembly in September 1998 the British Prime Minister said:

"The fight against terrorism has taken on new urgency. The past year's global toll includes Luxor, Dar es Salaam, Nairobi, Omagh and many others. Each one is a reminder that terrorism is a uniquely barbaric and cowardly crime. Each one is a reminder that terrorists are no respecters of borders. Each one is a reminder that terrorism should have no hiding place, no opportunity to raise funds, no let up in our determination to bring its perpetrators to justice."

6.4 In its consultation paper entitled *Legislating Against Terrorism*² the UK Government noted that Lord Lloyd of Berwick's recommendations were predicated on there being a lasting peace in Northern Ireland, and that there was no doubt that the Belfast Agreement, endorsed by 71% of the people of Northern Ireland, and the subsequent elections to the new Northern Ireland Assembly, would provide the means to take Northern Ireland on the road to lasting peace. It was explained that

² *Legislation Against Terrorism* A consultation paper Presented to Parliament by the Secretary of State for the Home Department and the Secretary of State for Northern Ireland by Command of Her Majesty December 1998.

while there would be obstacles along that road, the Government was committed to making as early a return as possible to normal security arrangements. It was explained that the proposals directed at Irish terrorism were designed to tackle what was hoped and expected would be an ever diminishing threat. It was also said that Irish terrorism forms only one element of the review, and that the UK Government was committed to changing the climate in which terrorists operate. The Government recognised that the threat from international terrorist groups (and to a lesser extent other groups within the UK) meant that permanent UK-wide counter-terrorist legislation would be necessary even when there is a lasting peace in Northern Ireland, and it also recognised that proposals for new legislation must take account of the fact that the nature of terrorism is ever changing with new methods and technologies being deployed within and across national boundaries.

6.5 The consultation document noted that terrorism is a global threat and international co-operation is essential to counter it. It was stated that lessons could, and have been, learnt from the experience of other governments, and the UK and other governments and their agencies would need increasingly to exchange information and expertise in helping one another combat terrorism. It was said that the UK in its Presidencies of the EU and G8 in 1998 has sought to encourage and reinforce the importance of such co-operation so that international terrorists cannot act with impunity. It was pointed out that the UK Government's aim was to create legislation which is both effective and proportionate to the threat which the United Kingdom faces from all forms of terrorism — Irish, international and domestic — which is sufficiently flexible to respond to a changing threat, which ensures that individual rights are protected and which fulfils the United Kingdom's international commitments. The paper noted that the Government recognised that it is not easy to strike the right balance in seeking to achieve these objectives.

6.6 The then Home Secretary Mr Straw made the following remarks on 14 December 1999 on the UK *Terrorism Bill*:

The Bill provides for permanent anti-terrorist powers for the police, other law enforcement agencies and the courts. Let me first explain to the House why we judge that such powers — powers additional to those of the general criminal law — are needed.

Terrorism involves the threat or use of serious violence for political, religious or ideological ends. It is premeditated, and aims to create a climate of extreme fear. While the direct victims may be specific or symbolic targets, they may also be selected at random. In any event, terrorism is aimed at influencing a wider target than its immediate victims.

Although all crime to some degree plainly threatens the stability of the social and political order, terrorism differs from crime motivated solely by greed in that it is directed at undermining the foundations of government. It poses special difficulties for

those of us who live in liberal democracies. Our sense of outrage is all the greater because in such democracies the overwhelming majority of the population believe that there are adequate non-violent means for expressing opposition and dissent. However, we will have handed the terrorists the victory that they seek if, in combating their threats and violence, we descend to their level and undermine the essential freedoms and rule of law that are the bedrock of our democracy.

... Under the previous Government, Lord Lloyd of Berwick carried out a detailed inquiry into legislation against terrorism and reported to Parliament in October 1996. He opened the third chapter of his report by complimenting Gearty and Kimbell's publication "Terrorism and the Rule of Law". He said that the authors had identified three general principles that should govern any code of laws designed to counter violent subversion — equality of treatment before the law; fairness in application of the law; and, respect for certain basic principles of human dignity.

In paragraph 3.1, Lord Lloyd went on to say:

'I favour the authors' approach in beginning from a set of principles, and these seem to me perfectly sound as far as they go. But they are not sufficiently descriptive for a review of this kind, so I have formulated my own as follows:

- .. Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure;
- .. Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual;
- .. The need for additional safeguards should be considered alongside any additional powers;
- .. The law should comply with the UK's obligations in international law.'

In preparing the Bill, I have sought carefully to follow those four principles.

There is, however, a wider issue, particularly now, which is whether the threat of terrorism today is such that it justifies any specific legislation. The counter-terrorist legislation currently in force goes back to 1974, to the Prevention of Terrorism (Temporary Provisions) Bill introduced into this House in late November of that year, a week after the terrible bombings in Birmingham in which 21 people were killed and 180 injured. On Second Reading, the then Home Secretary, Roy Jenkins, said:

'I do not think that anyone would wish these exceptional powers to remain in force a moment longer than is necessary" [*Official Report*, 25 November 1974; Vol. 882, c. 642.] '

To underline that, the powers in the Bill were subject initially not to yearly, but to six-monthly review.

Despite the hope in 1974 that the need for counter-terrorist legislation would be short-lived, those powers — with amendments and additions — remain in force a quarter of a century later. In the interim, more than 2,000 people have died in the United Kingdom as a result of Irish and international terrorism, and thousands more have been injured. The toll would unquestionably have been greater without the anti-terrorist powers, and above all without the courage and commitment shown by members of the police and security forces over 25 years.

...

The Government have accepted the central conclusion and recommendation of Lord Lloyd's inquiry: that even when what we judged to be a lasting peace had been achieved, there would remain a requirement for specific counter-terrorist legislation. ...

In preparing the legislation, I have kept much in mind the four principles set out by Lord Lloyd, and the need to act fairly and proportionately. The Bill is not intended to threaten in any way the right to demonstrate peacefully — nor will it do so. It is not designed to be used in situations where demonstrations unaccountably turn ugly. Should any unlawful activities occur in such circumstances the powers available under the ordinary criminal law will, as now, suffice.

6.7 Concern was expressed that the proposed 2001 legislation was meant to be an anti-terrorist measure, but that instead it has been widened to a catch-all Bill

embracing a wide category of run-of-the-mill criminals too.³ Criticism was also raised that it is likely to become a much greater threat to Burglar Bill than any budding Bin Laden acolyte in Britain. It was noted that no wonder that Amnesty, Liberty and other civil rights groups were complaining. It was explained that it is not all bad news, and that to his credit, David Blunkett has dropped his proposal to include widely drawn conspiracy clauses, with their notorious scatter-gun reputation, from the Bill. There was also a promised sunset clause: the new act would be reviewed and have to be renewed every year, and there is a tightening of anti-bribery regulations. The Bill gave British courts a new jurisdiction over UK companies behaving corruptly overseas, although it contained a serious loophole by excluding foreign subsidiaries of British companies. The most serious infringement of civil rights, it was pointed out, remained the new internment proposal for the indefinite detention without trial of suspected foreign terrorists.⁴ It is this provision which required the UK to declare a state of emergency and opt out of article five of the European Convention on Human Rights. It was noted that the home secretary was unable to come up with any credible explanation of why the UK was pursuing this course when the other 42 member states of the Council of Europe were not. It was suggested that parliament will need to stem the erosion of civil rights across a much broader front. Other controversial aspects of the Bill were also criticised from the outset: Internet service providers were to be

³ "Big Brother rides again: And freedom of information is delayed" *The Guardian* Monday November 19, 2001 <http://politics.guardian.co.uk/attacks/comment/0,1320,597312,00.html>

⁴ Matthew Tempest "Blunkett plays down fears over anti-terror Bill" *The Guardian* Tuesday November 13, 2001 <http://politics.guardian.co.uk/attacks/story/0,1320,592690,00.html> The home secretary, David Blunkett, today pledged that Draconian new anti-terrorism measures being introduced today would only be used against a "handful" of people. The new Bill, which Mr Blunkett will present to MPs this afternoon, will enable the government to detain indefinitely any foreign national suspected of terrorist activity. Despite cross-party support, it has attracted the ire of both backbench Labour MPs and civil liberties groups. But Mr Blunkett insisted today: "Because we are only talking about a handful of people we are not threatening the civil liberties of this country, but we are ensuring those handful don't threaten those civil liberties." Detention without trial would be limited to six months and would be used only where deportation was impossible - often because suspects would face the death penalty if sent home. Mr Blunkett said: "I find the contradiction very strange, namely that with one breath people cry civil liberties, with the next breath they want to send people to almost certain death in countries that would not allow them a fair trial of process of law." The anti-terrorism, crime and security Bill includes measures to put the squeeze on terror groups' funding, improve the sharing of information between security authorities and tighten loopholes in asylum law. Mr Blunkett yesterday had to apply for an opt-out from the European Convention on Human Rights to allow the Bill to include provisions for the detention without trial of terror suspects. The opt-out comes into effect from today. The move was greeted with horror by civil rights group Liberty, which is to launch a legal challenge against the government. The shadow home secretary, Oliver Letwin, last night said the proposals were "flawed", while the Liberal Democrat leader, Charles Kennedy, warned there would be no "blank cheque" of support. But the prime minister, Tony Blair, insisted that a tightening of security was necessary to deal with the increased threat from terrorists since September 11. He said: "We have got to remain vigilant and make sure that our laws and processes give us the ability to deal with the threat against the liberty of our own citizens."

required to become a supporting arm of the police by retaining Internet and email traffic details for 12 months to help not just terrorist inquiries but criminal investigations too. It was noted that Ministers tried to introduce this measure in the *Regulation of Investigatory Powers Act* in 2000 but were stopped by parliament. It was also noted that similarly, another attempt is being made to erode Big Brother safeguards that prevent government departments which have collected confidential information on individuals for one purpose (tax, immigration) passing it on to another and that this was also tried and rejected in the last parliament.

6.8 Concern was also expressed that new anti-terrorist measures agreed by EU ministers will no longer need primary legislation, as this was said to be "time consuming". It was pointed out that protecting civil rights often is and that, for example, the Europe-wide arrest warrant is supported, but that it is believed that parliament must insist on maintaining vigilant scrutiny of such measures. It was noted that new shackles on the media - including a ban on reporting the transport of nuclear materials - will be reinforced by the delay in the introduction of the *Freedom of Information Act*, a reform which has been promised for 25 years has been deferred by a further and unacceptable four more years.

6.9 The emergency anti-terrorist legislation was expected to be made retrospective, so action can be taken to detain indefinitely suspected terrorists already living in Britain.⁵ It was reported that the home secretary, has dropped plans to include in the Bill a much more widely drawn conspiracy law that would have made it a criminal offence to train, engage in communication networks with, or provide goods and services to, known terrorists. It was explained that the measure would have enabled the police to charge, for example, a flying school instructor who trained a suicide bomber as a pilot. It was pointed out that the shadow home secretary, Oliver Letwin, offered his party's reluctant support while warning that the new form of internment would make Britain an even bigger target for terrorist attacks. It was said that the Liberal Democrat leader, Charles Kennedy, warned that his party's support was not "a blank cheque for any draconian constraint on civil liberties". He hinted that the legislation would face a rough ride in the House of Lords if it came without "sunset clauses" which would ensure it lapsed if Members of Parliament did not make the effort of renewing it every year.

6.10 The Bill was expected to include retrospective clauses so that action can be

⁵ Alan Travis "Suspects already in UK face detention: Blunkett seeks retrospective measures"
The Guardian Tuesday November 13, 2001
<http://politics.guardian.co.uk/attacks/story/0,1320,592470,00.html>

taken against suspected terrorists already in Britain whose unresolved applications for asylum have enabled them to remain, and not just against those picked up at airports on arrival. It was said that the Egyptian government in particular has made allegations about several individuals alleged to have been involved in the Luxor tourist massacre and the assassination of a former Egyptian prime minister who fall into this category. The misgivings of some opposition and Labour politicians over particular clauses, especially the indefinite detention of suspected foreign terrorists who cannot be deported back home or to safe third countries, was noted and it was predicted that it will spark considerable debate.

6.11 It was also reported that Mr Blunkett laid before parliament and the European court of human rights in Strasbourg a "designated derogation order", which is an official declaration that the events of 11 September 2001 and Britain's involvement in the war in Afghanistan mean that there is a "threat to the life of the nation" which justifies such emergency measures. It was noted that the derogation order began the process of suspending the operation of article five of the European convention on human rights, which prevents the indefinite detention of suspected terrorists and that Members of Parliament would be asked to vote to confirm the decision. This measure met, however, strong opposition in the House of Lords.⁶ It was noted that views were

⁶ See Patrick Wintour "MPs savage terror Bill: Both houses keep up pressure to dilute legislation as angry Blunkett gives ground" *The Guardian* Tuesday November 20, 2001 <http://www.guardian.co.uk/ukresponse/story/0,11017,602298,00.html>
David Blunkett, the home secretary, was under severe pressure to dilute his emergency anti-terrorism Bill last night after 10 Labour MPs joined a 74-vote cross-party revolt against his plans to rush the Bill through the Commons in just three days. When the Bill got its second reading after a stormy six-hour Commons debate, the government got a 458-5 vote majority, with four Labour MPs and one Tory . . . voting No, backed by two Tory tellers . . . But when the motion to subject detailed debate on the Bill to a tight timetable - completed by next Monday - was voted on, 74 MPs demanded extra time. . . . Under a hail of criticism in both Lords and Commons, Mr Blunkett had earlier endured his most gruelling parliamentary session since becoming a minister. In frustration he said he despaired at the inability of some people to remember the scale of the threat posed by the September 11 terrorist attacks. But the measures were criticised as going too far and being too wide by the chairman of the home affairs select committee, Chris Mullin, and his predecessor Lord Corbett. Although the Labour majority will ensure that the wide-ranging Bill is quickly passed by MPs, the measures face a difficult ride in the Lords. Peers sent a warning shot yesterday when the Liberal Democrats voted against a derogation, or opting out, from the European convention on human rights and the Conservatives abstained. A derogation would let the government detain suspected foreign terrorists without trial: the most controversial of the 120 clauses in the Bill.
In his first, as yet minor, concessions yesterday Mr Blunkett promised to amend the Bill so that he would only arrest suspected terrorists if his suspicion was based on reasonable grounds. He also promised that aspects of the Bill would fall after five years, and promised to make the Ministry of Defence police subject to normal complaints procedures. But he will come under pressure to concede a full judicial review of any detention decision, and to drop clauses unrelated to terrorism, including proposals for an offence of inciting religious hatred and allowing public bodies to disclose information to each other in criminal investigations.
. . . Mr Blunkett . . . insisted that the Bill was necessary because the terrorist threat has increased dramatically since September 11: "they have declared that it is open season on all

expressed that the legislation package was "a poor substitute" for even stricter measures which would see suspected terrorists prevented from entering Britain in the first place and for their swift deportation if they did manage to enter the country. It was noted that there were real dangers in imprisoning terrorist suspects in the UK indefinitely and that it would be inviting reprisals in which British subjects could be taken hostage and attempts made to trade their freedom for the release of suspects. It was thought that the UK would be far better off, and far safer, if the home secretary had the power to deport people who pose a danger to UK national security.⁷

6.12 Ministry of Defence police (MoD police) would have sweeping new powers, allowing its officers to arrest people anywhere in the country.⁸ The Bill said that MoD police would have the same powers as officers in regional forces in "any police area", and they would be able to arrest anyone "whom they suspect on reasonable grounds of having committed, being in the course of committing, or being about to commit, an offence". At present, MoD police have jurisdiction inside or near bases, including US bases, and personnel working or living there. Elsewhere they have to seek

of us".

But Lord Corbett, a former chairman of the home affairs select committee, said the new powers smacked of "the worst aspects of the Soviet Union and other repressive states".

⁷ See also Matthew Tempest "Mullin brands anti-terror Bill 'gesture politics'" *The Guardian* Monday November 19, 2001 <http://politics.guardian.co.uk/commons/story/0,9061,597432,00.html> who wrote that the home affairs select committee chairman, Chris Mullin, was reported as throwing cold water on the home secretary's far-reaching anti-terrorism Bill. He explained that the Bill includes a provision against "inciting religious hatred", as well as powers to opt out of parts of the European Convention on Human Rights, and intern suspected foreign terrorists. He noted that Mr Mullin said the proviso on religious hatred was "gesture politics" and that he said that Britons have not seen sufficient evidence to justify the proposition that extending the law of incitement to include religious as well as racial hatred will work in practice. Mr Mullin's principal reservations were the difficulty of making it work - that it is really possibly more gesture politics than it is substantial - and also that he suspects some of the first people against whom it may be used are Muslims. It was envisaged that the committee will back the home secretary over other controversial aspects of the proposed legislation, such as detaining foreign nationals suspected of terrorism without charge. Mr Mullin said that they have reluctantly accepted that and they think in view of the circumstances, which are that there are a number of people who have plans for very drastic terrorist action, it is acceptable as a short-term measure. He considered that this will apply to a very small number of people, who are not British citizens, some of them seeking to enter the country, some of them already in the UK and their cases will be reviewed every six months. It was also reported that Fair Trials Abroad raised concerns about measures in the Bill to enable the introduction of a Europe-wide arrest warrant. A spokesman said that they are concerned about the lack of civil liberty safeguards in the impending framework decision on the European warrant. So far as they could see, any inhabitant of the UK can be designated a terrorist or member of an illegal organisation by the security forces of any member state of the EU and will be whisked off to face interrogation, detention or trial under local conditions, whatever they may be and if the paperwork is in order, British judicial authorities will be unable to intervene. He was of the view that under these circumstances, special safeguards for those on British soil are in danger of being rather like trying to hold water in a sieve.

⁸ Richard Norton-Taylor "Terrorism Bill gives new powers to MoD police" *The Guardian* Friday November 16, 2001 <http://politics.guardian.co.uk/attacks/story/0,1320,595451,00.html>

permission of local police forces before intervening. It was explained that increased powers for the MoD police were included in the armed forces Bill which fell before the general election as a result of opposition to the measure and lack of parliamentary time. It was also pointed out that that move, prompted in part by the MoD force's inability under existing law to intervene in the 2000 fuel protests, was also opposed by MPs because it is less accountable than local police forces. Concern was raised that it would transform the MoD police into a kind of national paramilitary force. It was reported that opponents of the armed forces Bill believed the government wanted to use the 3,700 officers in the MoD police to help make up the shortfall in local police forces and deploy them, in particular, during demonstrations.

6.13 It was also noted that the new anti-terrorism Bill went further than the armed forces Bill which gave the MoD police new powers only in "life threatening" situations. The Bill also increased the powers of British Transport police and Atomic Energy Authority special constables. It was pointed out that the MoD police are not formally subject to police complaints authority investigations, to the inspectorate of constabulary, or to the same disciplinary procedures as local police and it is not accountable to an elected police authority.

6.14 It was also reported that peers served notice that they would tear up aspects of the government's emergency anti-terror Bill, warning that swaths of the legislation had nothing to do with terrorism or an emergency.⁹ It was stated that criticisms came from senior judges, churchmen, the former Labour home secretary Lord Jenkins, and distinguished Labour lawyers. It was pointed out that the government had set aside eight days for the committee and report stages of the Bill in a bid to take the heat out of what could be a wide ranging rebellion, and that the Bill was given only three days in the Commons, with some key clauses rushed through in less than half an hour close to midnight. It was pointed out that the Bill's second reading in the Lords came as two Lords committees - the constitution committee and delegated powers committee - published reports criticising the speed with which the Bill was being pushed through parliament.¹⁰ It was pointed out that the government has no overall

⁹ Patrick Wintour "Peers warn of terror Bill cuts: Lords line up to criticise measures" *The Guardian* Wednesday November 28, 2001
<http://politics.guardian.co.uk/attacks/story/0,1320,608018,00.html>, chief political correspondent

¹⁰ Andy McSmith "Judgment day for law against blasphemy" 20 November 2001 telegraph.co.uk
 The speed with which the law is being enacted provoked complaints from all sides, forcing Mr Blunkett to make his hour-long speech against constant interruptions. Mark Fisher, a former Labour arts minister, warned him: "When this House acts quickly, it seldom acts wisely."
 Mr Blunkett told MPs: "Circumstances and public opinion demanded urgent and appropriate action after the September 11 attacks on the World Trade Centre and the Pentagon." He said

majority in the Lords and knew that it would have to make concessions to save controversial aspects, including detention of foreign terrorists without trial, extension of disclosure rules to police and incitement to religious hatred. One comment likened the Bill to "a premature baby and in need of some intensive care", that it contained "the good, the bad and the not relevant", and with the lack of proper scrutiny in the Commons, the House of Lords have a clear duty to do better. It was said that many of the measures properly targeted at terrorism had wrongly been extended to generality of crime. It was reported that indefinite detention without trial would be opposed and that it was feared that innocent Britons could be kidnapped in revenge for the detention of suspected terrorists in British jails.

6.15 Another comment was that the Bill reflected a Whitehall habit of shelf-clearing at a time of emergencies, that some officials liked to slip through measures that had failed before, or that would fail if they were given proper scrutiny, and that it contained measures that would normally be offered in 10 Bills of their own. It was also said that an emergency powers Bill should address the emergency at hand and should certainly be time limited. The Bishop of Manchester said he could not be sure the detention powers would not undermine the human rights of asylum seekers and so have a negative effect on fragile community relations in Britain. He questioned why asylum seekers' fingerprints should be kept for 10 years, even if no offence had been committed, and argued that centuries of legal tradition were being thrown away by introducing detention without trial.

6.16 Lord Rooker, the Home Office minister, was reported as claiming that on September 11 the terrorists rewrote the rule book, and the UK has to do the same. It was said that he insisted that the Bill was proportionate, measured and a moderate response to the terror attacks. It was noted that Lord Rooker was not willing to make concessions at second reading, but said he was already looking again at aspects of

that if the Government had responded to the immediate sense of outrage after the attacks, it might have brought in more "draconian" measures. "I don't believe 10 weeks is a hurried period, given the necessity for putting in place substantial safeguards that may be required at any day and any time," he added. The most controversial measure would give the Home Secretary power to intern a suspected terrorist indefinitely without trial, if the alternative is to deport him to a country which used torture and judicial killing.

To give himself this power, Mr Blunkett had to push through a special order overriding one of the articles in Labour's Human Rights Act, which incorporated the European Convention on Human Rights into British law. Liberal Democrat peers tried to use the House of Lords yesterday to block the order, but were defeated 148-69. They were supported by Lord Corbett, a former Labour chairman of the Commons Home Affairs committee. He said: "This order smacks to me of all the worst aspects of the former Soviet Union and other repressive states. "What the Government is saying is: 'Trust us, trust our judgment, there are circumstances where we want to stand above the law.' This is not a good enough basis on which to base human rights." . . .

the Bill. Under pressure from two Labour peers he said he was sure the special immigration appeals commission could look at its procedures. It is said that he hinted that he might consider the rights of appellants to be legally represented and receive better access to evidence. The House of Commons passed the Bill on 14 December 2001.¹¹

(b) Definition of terrorism

6.17 The *Terrorism Bill* proposed that 'terrorism' means the use or threat, for the purpose of advancing a political, religious or ideological cause, of action which - involves serious violence against any person or property, endangers the life of any person, or creates a serious risk to the health or safety of the public or a section of the public."¹² **"Domestic" terrorism would be included as well as Irish and international terrorism. The definition would enable the legislation to cover actions which might not be violent in themselves but which could have devastating impact, such as disrupting key computer systems or interfering with the supply of water or power where life, health or safety might be put at risk.**¹³

¹¹ "Terror bill rushed to statute book" *Guardian* December 14, 2001
see <http://politics.guardian.co.uk/attacks/story/0,1320,618698,00.html>
The government last night salvaged its emergency anti-terror Bill - but had to climb down over its controversial plans for a criminal offence of inciting religious hatred. The Bill became law in the early hours of this morning after clearing all its Commons stages, with a final vote at 1am.
MPs were kept at Westminster for more than four hours after the scheduled close of business to rush the Bill onto the statute book. . . .

¹² The definition proposed in the consultation paper *Legislation Against Terrorism* provided as follows: "the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public for political, religious or ideological ends." See *Research Paper 99/101: The Terrorism Bill 10 of 1999-2000* House of Commons Library 13 December 1999 at p 15 - 20.

¹³ Amnesty International commented that the proposed definition of "terrorism" widens the existing legal definition to include "the use or threat ... of action which involves serious violence against any person or property" for the purpose of advancing a "political, religious or ideological cause". Amnesty International considers that the definition as such is vaguely worded and could be extended to include supporters of, for example, animal liberation or anti-nuclear campaigns and others. Amnesty International says that the inclusion of "violence to property" as opposed to the existing criminal offence of "damage to property" appears to equate people and property, whereas in the past terrorism provisions have been reserved for crimes involving the most serious injury to people, including injury resulting in death. They remark that whole notion of "violence to property" remains unclear; it is not spelt out and therefore could lead to abuse. Amnesty International states that the lack of a clear definition gives cause for concern because the decision to bring a prosecution for such offences could be seen to be political. (See Amnesty International's report EUR 45/43/00 April 2000 United Kingdom: Briefing on the Terrorism Bill at <http://www.amnesty.org/ailib/aipub/2000/EUR/44504300.htm>)

6.18 The following definition was adopted in the *Terrorism Act*.¹⁴

- 1(1) In this Act "terrorism" means the use or threat of action where-**
- (a) the action falls within subsection (2),**
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and**
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.**

¹⁴ Amnesty International commented when the Terrorism Act came into operation. It said that it considers that the legislation contains provisions which either directly contravene international human rights treaties to which UK is a party, or may result in violations of the rights not to be subjected to torture or ill-treatment, to fair trial and to freedom of expression and association. Amnesty International said that some of these provisions were drawn from previous emergency or temporary legislation, which in the past facilitated serious abuse of human rights, as extensively documented by the organization throughout the years, and as a result, Amnesty International has grave concerns about this Act and will monitor its implementation. Amnesty International noted that the creation of a permanent distinct system of arrest, detention and prosecution relating to "terrorist offences" may violate the internationally recognized right of all people to be equal before the courts. They consider that this different treatment is not based on the seriousness of the criminal act itself but rather on the motivation behind the act, defined in the Act as "political, religious or ideological". Amnesty International is, inter alia, concerned about the wide definition of "terrorism" as it includes not only the use but also the threat of action involving serious violence against a person or serious damage to property or designed to seriously interfere or disrupt an electronic system. They consider that the purpose of qualifying such an action or threat as terrorist, i.e. advancing a "political, religious or ideological cause", is also very wide and open to subjective interpretation, the definition is vaguely worded and could be extended to include supporters of, for example, animal liberation or anti-nuclear campaigns and others and that the lack of a clear definition gives cause for concern because the decision to bring a prosecution for such offences could be seen to be political.

- (2) Action falls within this subsection if it-
- (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.¹
- (4) In this section-
- (a) "action" includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

¹ The explanatory notes to the Act explains that where action involves firearms or explosives, it does not have to be designed to influence the government or to intimidate the public or a section of the public to be included in the definition, and that this is to ensure that, for instance, the assassination of key individuals is covered.

(d) **"the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.¹**

(5) **In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.**

¹ The explanatory notes to the Act points out that subsection (4) provides for the definition to cover terrorism not only within the United Kingdom but throughout the world, that this is implicit in the PTA definition but that the Act makes it explicit.

6.19 In its comment on the *UK Anti-Terrorism, Crime and Security Bill* Human Rights Watch noted that Clause 21 of the Bill would task the Home Secretary with certifying a “suspected international terrorist.”¹ They pointed out that under the Bill the Home Secretary may certify a “suspected international terrorist” if he believes that the person’s presence in the UK is a risk to national security and he suspects that the person is an international terrorist. They considered that the definition of a “suspected international terrorist” is vague and over-inclusive. Of particular concern to them was clause 21(2)(c), which states that a person is a suspected international terrorist if he or she “has links with a person who is a member of or belongs to an international terrorist group.” A “link” with a member of a terrorist group is too tenuous a relationship to signify that a person has been involved in the commission of terrorist activities. Broad, undefined terms such as “links” could result in findings of “guilt by association” for persons sharing the same political ideology, nationality, ethnicity, social grouping or even family with persons who commit acts of terrorism.

(c) Immigration and Asylum

¹ *Commentary on the Anti-Terrorism, Crime and Security Bill 2001* 16 November 2001 see <http://www.hrw.org/backgroundunder/eca/UKleg1106.htm>

6.20 The provisions of Part 4 of the *Anti-terrorism, Crime and Security Act 2001* are intended to prevent terrorists from abusing United Kingdom immigration and asylum procedures and the safe haven offered to refugees. Sections 21 to 32 which deal with suspected international terrorists allow the detention of those the Secretary of State has certified as threats to national security and who are suspected of being terrorists where their removal is not possible at the present time.¹ **Such detention would be subject to regular independent review by the Special Immigration Appeals Commission (SIAC). These provisions change the current law, which allows detention with a view to removal only where removal is a realistic option within a reasonable period of time.**² They require a

¹ See however Joshua Rozenberg, Legal Editor "Detention without trial unjustified, says law lord" *telegraph.co.uk* 1 Dec 2001
<http://www.portal.telegraph.co.uk/news/main.jhtml?xml=/news/2001/12/01/ndet01.xml>

It was reported that Lord Steyn, a serving law lord, told law students and lecturers at the Holdsworth Club at the University of Birmingham that respect for human rights should be upheld. It was pointed out that Lord Steyn said that David Blunkett's decision to allow detention without trial for foreign terrorist suspects was unjustified, and that he also criticised Lord Irvine, the Lord Chancellor, for refusing to give up his power to sit as a judge: "In my view, the suspension of Article 5 of the European Convention of Human Rights - which prevents arbitrary detention - so that people can be locked up without trial when there is no evidence on which they could be prosecuted is not justified." It was noted that Lord Steyn recalled the famous dissenting judgment of Lord Atkin, one of his predecessors, in 1942: "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace." Quoting a report on the Home Secretary's Anti-Terrorism Bill from the Joint Parliamentary Committee on Human Rights, he said Parliament should resist the temptation to compromise the rights of individuals, and that the apparent justification was temporary but the loss of freedom often permanent. "Too many ill-conceived measures litter the statute book as a result of such rushed legislation in the past," the committee had said. Turning to the role of the Lord Chancellor, Lord Steyn said that Lord Irvine, a Cabinet minister, sat as a law lord - "admittedly rarely and only in the most unimportant private law cases". It was reported that Lord Steyn stated that Lord Irvine's right to do so was controversial, and something on which the law lords might have to rule at any time. He added: "Furthermore, it is no longer acceptable that alone among constitutional democracies our country does not have a supreme court. Public confidence in the administration of justice would be enhanced and the public interest would be advanced if the highest court in the land ceased to be a committee of the legislature." Lord Irvine had already rejected the idea of replacing the law lords with a supreme court, he noted. It was also noted that this is not surprising because such a step would necessarily mean that there is no place for the Lord Chancellor in the highest court, and that powerful politicians do not readily give up power.

² See also John Wadham "Terror law takes liberties" *Guardian Unlimited Observer* 10 March 2002 who commented that the Anti-Terrorism, Crime & Security Act attacks basic rights and freedoms. He said that most dramatically, it creates the power for indefinite detention (of foreigners) without charge or trial, on the basis merely of suspicion. In practice, people are interned not for anything they have done but for what some intelligence expert (often relying on foreign governments' intelligence) thinks they might do. He noted that at appeal, an interned prisoner and his or her lawyer cannot hear - and so refute - all the evidence against him or her, the case will not have to be proved beyond reasonable doubt, the presumption of innocence and normal evidence standards will not apply, and therefore it is not a fair trial. He explained that in fact, it's all so obviously contrary to the basic right to freedom that the UK had to opt out of the Convention on Human Rights. He noted that the Government argued that this was necessary - there was a 'public emergency threatening the life of the nation' but several European countries have faced direct terrorist threats; several have troops in Afghanistan. He asked why did only the UK, of the 40-plus countries signed up to the Convention, deem such extreme measures essential? He pointed out that seven people had

limited derogation from Article 5 of the ECHR (right to liberty and security). Such derogation is permitted during a time of public emergency, but any derogation must be limited to the extent strictly necessary as a result of that emergency. It was explained that the government has concluded that there is a state of public emergency, and the derogation is a necessary and proportionate response to that emergency. The detention provisions in section 21 to 23 will need to be reviewed by Parliament in March 2003, and annually thereafter, otherwise they will lapse. These provisions will cease to apply in November 2006, if they have not lapsed by that date because they have not been used.³

at that stage been interned under this Act for nearly three months, and that their conditions - in a high-security prison, without proper access to legal assistance and, of course, no charge or trial for any offence - so alarmed the Council of Europe that anti-torture investigators flew to the UK in February 2002. He remarked that the investigators' visit shows how far Britain has stepped beyond the normal bounds of justice here - and how out of step the UK is with the rest of Europe in terms of protecting people's rights while still tackling terrorism. He considered that even before December's Act, the UK had one of the most comprehensive - arguably draconian - anti-terrorism regimes in the West, yet the extensive powers created by the Terrorism Act 2000 were barely explored at all before the Government rushed again to make more law - some of it allegedly to cover 'loopholes' that the 2000 Act had already filled. He suggested that people could already be prosecuted for all manner of 'terrorist' offences, whether committed here or abroad, and that the UK does not lack for legal powers to tackle terrorism - far from it — and that the new power is simply about imprisoning people where there is no quality evidence that they have committed any crime. He explained that the rest of the Anti-Terrorism Act smuggled in other powers that have little or nothing to do with terrorism - or that have a far more wide-ranging remit, and that several, for example, allow the police to acquire more information - from the person directly, from other government files, from telecoms companies and so on - with virtually no controls or safeguards, the person does not have to be a terrorist suspect - use of these powers is nowhere near that restricted. He considered that the Government has created powers that clash with some of the bedrock values of British society - justice, the idea of innocence until proven guilty, protection against imprisonment without trial and the sovereignty of Parliament, and that all have been undermined by a rush to make a new law without a clear-eyed assessment of existing anti-terrorism laws, nor of the relevance and wider consequences of new powers. He commented that even in the wake of September's atrocities, such an approach must be seen for what it is - ill-judged, counter-productive in the longer term and wholly unacceptable.

3

Philip Johnston "Detention of terror suspects is ruled unlawful" *telegraph.co.uk* 31 July 2002
<http://www.portal.telegraph.co.uk/news/main.jhtml?xml=%2Fnews%2F2002%2F07%2F31%2Fnterr31.xml>

It was reported that a court ruled on 30 July 2002 that nine suspected foreign terrorists are being unlawfully detained in Britain under emergency powers introduced in response to the September 11 attacks in America. Their internment was deemed to be discriminatory under the Human Rights Act because it applies only to aliens and not British nationals. However, the Special Immigration Appeals Commission, headed by a High Court judge, backed the Government's decision to introduce the Anti-terrorism, Crime and Security Act, noting that Parliament granted the special powers on the grounds that there was a "public emergency threatening the life of the nation". This threat allowed Britain to suspend human rights restrictions on detaining people without trial. The commission said the Government "was entitled to form the view that there was and still is a public emergency threatening the life of the nation and that the detention of those reasonably suspected of being international terrorists involved with or with organisations linked to al-Qa'eda is . . . required". It was pointed out that the nine suspects, being held in two high security prisons, will remain in detention pending an appeal by David Blunkett, the Home Secretary and that the Home Office said the court had upheld the principle of detention and ruled that it was unlawful only on the narrow point that it applied only to foreign nationals. A spokesman reportedly said that they are disappointed as the law has always distinguished between UK citizens and foreign

6.21 The Act speeds up the asylum process for suspected terrorists. It excludes substantive consideration of asylum claims where the Secretary of State certifies that their removal would be conducive to the public good, and that it would not be in breach of the 1951 *Refugee Convention* because they are excluded from the protection of that Convention. The Act makes SIAC a superior court of record. SIAC is the body that deals with suspected terrorists' appeals against immigration decisions. It has three members hearing an appeal, one of whom holds, or has held, high judicial office and another of whom has been an immigration judge. There remains an avenue of appeal from SIAC to the Court of Appeal on a point of law, and from there to the House of Lords. The Act allows for the retention, for 10 years, of fingerprints taken in asylum and certain immigration cases. This will help prevent applicants who have had their case resolved from re-applying and creating multiple identities, which can be used in the perpetration of terrorism or other serious crimes. It is necessary because fingerprints are the only sure way of establishing a person's identity beyond doubt.

6.22 These measures gave rise to various parties expressing their concern when

nationals. The court held that Article 14 of the European convention on human rights prohibited discrimination on the grounds of nationality: "The Act permits the detention of non-British citizens alone and it is quite clear from the evidence that there are British citizens who are likely to be as dangerous as non-British citizens and who have been involved with al-Qa'eda . . . It is not only discriminatory and so unlawful under Article 14 to target non-British citizens, but it is also disproportionate." It was explained that most of the suspects have spent more than seven months in detention, and that although some can leave Britain - two others have - they cannot be deported to a country where they might face torture or death. However, Article 5 of the human rights convention forbids the detention of suspects for any length of time unless they are to be deported, extradited or tried. It was noted that to get around this, the Government opted out of the article, using the risk of a public emergency as justification and that lawyers for the suspects disputed the Government's claim that the life of the nation was under threat. However, the three judges were shown secret intelligence reports that convinced them of a real danger. They said: "It would be absurd to require the authorities to wait until they were aware of an imminent attack before taking the necessary steps to avoid it. "Otherwise, those who are planning such an outrage could not be stopped until their plans had reached a stage when it was about to occur." Civil liberties campaigners said the ruling had left the legislation in "tatters". But the Home Office said it would make no practical difference. It was reported that John Wadham, the director of Liberty, said that the Government did not have the guts to say it was going to intern British people because it did not think it would get it through Parliament, and that it took the easy option and said it was only going to intern foreigners. It was also stated that Oliver Letwin, the shadow home secretary, said that this is exactly the sort of legal problem they foresaw and about which they warned during the debates in Parliament about the anti-terrorism legislation. It was pointed out that he said that they shall have to find a way of making it legal to repatriate some of these people instead of trying to detain them. It was further reported that Simon Hughes, the Liberal Democrat home affairs spokesman, said that the Home Secretary refused to listen to warnings that he was taking powers beyond justification, as heinous as the events of September 11 were. Amnesty International reportedly said those being held under the laws should either be charged or set free.

the Bill was introduced⁴ and also after it was passed by Parliament.⁵ Human Rights

4

See Patrick Wintour "MPs savage terror Bill: Both houses keep up pressure to dilute legislation as angry Blunkett gives ground" *The Guardian* Tuesday November 20, 2001 <http://www.guardian.co.uk/ukresponse/story/0,11017,602298,00.html>.

"At least 20 Labour rebels, backed by some opposition MPs, are expected to support an amendment this week giving suspects the right to seek judicial review of internment. The Tories and Liberal Democrats will also vote to delay Britain's opt-out from the European Convention on Human Rights - essential to allow internment. . . . But civil rights organisations fear potential miscarriages of justice, concerns which will be reflected when Blunkett's Anti-Terrorism, Crime and Security Bill has its second reading and committee stages in the Commons this week." see

<http://politics.guardian.co.uk/commons/story/0,9061,596917,00.html>

See also Michael Sontheimer *Britisches Anti-terror-gesetz* "Staat der Hysterie" "Tony Blairs Regierung hat ein Anti-Terror-Gesetz vorgelegt, nach dem unter anderem Ausländer ohne Gerichtsverfahren unbegrenzt interniert werden können. Das verstößt gegen die europäische Konvention für Menschenrechte und bringt Liberale auf die Barrikaden."

(<http://www.spiegel.de/politik/ausland/0,1518,167673,00.html>)

The Select Committee on Home Affairs noted that they were concerned at the reported number of foreign nationals, who have been suspected of involvement in terrorism and who are either at liberty in, or have passed through, this country. We asked about the number of people likely to be detained under this new power and were told:

"Under existing powers to detain people for shorter periods of time when we have suspicions about their behaviour, in the year for which we have figures, which is 2000, there were 39 non-Irish people detained, but 23 of those were in connection with one incident, which was the hi-jack of the Afghan airline at Stansted. Taking those figures into account, we feel that we are talking about a small number of people. It may go into double figures but we are talking about a small number of tens rather than hundreds. That is our view."

The Committee pointed out that the case against a power of indefinite detention was expressed by John Wadham, Director of Liberty: *"...what seems to be being suggested by the Government and in this Bill is that we can somehow avoid the usual presumption of innocence which will apply to British citizens and that because these people are foreigners we can lock them up for indefinite periods. The reason that the Government can get away with that is because of the procedures which exist in the Immigration Act. We say that the foreigners who are in this country should be treated no differently from British citizens in the context of indefinite detention, in the context of internment, in the context of a presumption of innocence. Otherwise it seems to me that we are suggesting that somehow people who just do not happen to have obtained British citizenship have fundamentally fewer rights than others."*

The Committee also noted that Professor Conor Gearty asked why it was necessary to detain these people: *"Why can they not bring criminal proceedings under section 56, directing terrorist activities, or incitement to commit terrorist acts abroad? These provisions were very controversial when they were introduced, they were presented precisely to deal with the alleged problem, that there were persons within the jurisdiction on whom you could not fix exact criminal offences, whom you needed to deal with through the criminal process. Those pieces of legislation were achieved. Terrorism is extremely broadly defined. They represented a massive victory for those who argued precisely for the need to act. Now we are being told that even these crimes are not sufficient to underpin prosecutions, that we need to pre-empt these persons before they engage in any conduct within the jurisdiction and effectively intern them."*

The Government said that they reluctantly accept that there may be a small category of persons who are suspected international terrorists who cannot be prosecuted, extradited or deported and therefore will have to be detained. (See <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmhaff/351/35105.htm>)

5

Frances Gibb "Civil liberties lawyers to challenge detentions" 20 December 2001 *The Times* <http://www.thetimes.co.uk/article/0,,2-2001585668,00.html> reported that the first legal challenge to the new terrorism laws will follow the detention of foreign nationals under the

Watch noted that Clauses 22 and 23 of the proposed *Anti-Terrorism, Crime and Security Bill* deal with problems related to removal or deportation of a suspected terrorist. Clause 23 would permit the indefinite detention of foreign nationals suspected of terrorism-related activities who cannot be returned to their own country or to a different country because of practical problems related, for example, to securing proper documentation or because they might be subject to torture or to inhuman or degrading treatment or punishment in violation of Article 3 of the European Convention on Human Rights (ECHR). They explained that the Bill would require that such persons be detained as national security threats and released only when they no longer pose such a risk or at such time when a country agrees to accept them and protect them from Article 3 violations. They noted that appeals to the Home Secretary's certification of a person as a suspected terrorist would have to be made to the Special Immigration Appeals Commission (SIAC) within three months of the certification, and the SIAC could cancel a certificate if it disagreed with the Home Secretary's belief or suspicion, or it could dismiss an appeal if it found in favour of the Home Secretary. The SIAC would also be tasked with reviewing each certificate every six months to determine if the person is still a national security threat and thus subject to the certification. Appeals against a decision by SIAC regarding the initial certification and on-going review of certification could be lodged only on points of law to the Court of Appeal. The HRW pointed out that it is well-established in European and international law that detention without adequate recourse to effective judicial review by a court or other quasi-judicial body is a violation of fundamental human

Anti-Terrorism, Crime and Security Act and that lawyers who had been waiting for the first suspects to be detained confirmed the day before that they would conduct a legal challenge over what is the first use of internment for 30 years. She noted that John Wadham, director of Liberty, said that arrests under these powers stamp all over basic principles of British justice and the European Convention on Human Rights, and that by locking people up without clear evidence or access to a proper trial, the Government is violating those traditions. She explained that the challenges will be brought in the British courts and then in the European Court of Human Rights on the ground that there is not a state of emergency which justifies the taking of such powers and the suspending of part of the European convention. She noted that at the same time, lawyers for the foreign nationals will go through the limited steps available to them to seek the men's release, and that they were preparing bail applications, although without the benefit of a copy of the law under which the men have been held: the *Anti-Terrorist, Crime and Security Act*, which received Royal Assent the previous week, had still not been published. She stated that the men can make a bail application to a member of the Special Immigration Appeal Commission within days, and if, as is likely, bail is refused, the suspect can appeal to a full hearing of the commission, which is likely to go before its chairman, Mr Justice Potts, who will sit with two other members, who must be either chief adjudicators or members of the Immigration Appeals Tribunal. She noted that the hearing process is partially in secret, and the suspect and his or her lawyer is excluded from the hearing when it deals with any sensitive material or evidence, instead, the case is handled at that stage by a barrister appointed from a panel by the Attorney-General, who then reports back. She also explained that counsel for Liberty, said that the burden of proof is very stiff: it is for the suspect to demonstrate beyond reasonable doubt that there was no reasonable suspicion to detain the suspect, and the presumption of innocence does not apply.

rights guarantees.⁶ They commented that the Bill's detention provision would violate Article 5 of the ECHR, which guarantees the right to liberty and security of person. The HRW remarked that Article 9 of the International Covenant on Civil and Political Rights (ICCPR), provides key procedural guarantees to ensure that no person is detained arbitrarily, and that indefinite detention has been determined to be a form of arbitrary detention in violation of these treaties. The HRW said that it is important to note that the prohibition against arbitrary detention has risen to the level of customary law, meaning it is such a fundamental and widely accepted principle that even states that have not ratified regional or international human rights instruments are obliged to observe the prohibition. The HRW pointed out that the United Nations Human Rights Committee, established to monitor compliance with the ICCPR, has determined that Article 9 applies to immigration control measures and other cases where public security is at issue.

6.23 The HRW said that although the proposed Bill provides for oversight of the certification and on-going detention of a person suspected of terrorist activity, the UK courts have already substantially limited the authority of the SIAC to overrule Home Secretary decisions in terrorist cases. They noted that in a May 2000 decision, the Court of Appeal rejected a decision by the SIAC in the case of Shafiq Ur Rehman, a Pakistani national subject to deportation on order of the Home Secretary for involvement with an alleged Islamic terrorist organization. They explained that the

⁶ Andrew Sparrow "Blunkett attacks judiciary in fight over terrorism" *The Guardian* 04/10/2001 <http://www.portal.telegraph.co.uk/news/main.jhtml?xml=/news/2001/10/04/nlab04.xml>
It was reported that David Blunkett took a swipe at the judiciary yesterday as he outlined his plans for new anti-terrorism laws. It was noted that the Home Secretary complained that judicial review had become "a lawyers' charter" and he suggested that the courts were paying too much attention to the rights of minorities. It was said that he remarked that the law should protect the community as a whole as well as individuals. His new measures would include an overhaul of the extradition system that would be designed to speed up the removal of terrorist suspects. He was reported as saying what a farcical situation we face that it can take five, seven or 10 years to extradite someone known to have been engaging in or perpetrating terrorism, and that removing the constant use of judicial review, which has become a lawyers' charter, will not remove the basic freedom to apply due process of law. It was pointed out that his plans would not threaten basic freedoms but they do threaten those who seek to take away our freedoms. It was stated that his speech reflected the concern felt by many in government about the way judges can overturn decisions taken by ministers. The Home Secretary was particularly angry when a court ruled that detaining asylum seekers in the Oakington reception centre went against the Human Rights Act. It was reported that Mr Blunkett told the conference that it was not the lawyers and judges who secured democracy and freedom for the people, but that it was political action by those who sought to bring about change. It was reported that John Wadham, of Liberty, the human rights group, said judicial review in the extradition procedure was essential in preventing people from being wrongly returned to persecution overseas and that it is hard for politicians always to protect the minority from the majority when they need the majority's votes to be re-elected. It was noted that he said that that is why there are human rights and judges to ensure that in times of panic and fear impartiality and fairness survive for everyone.

SIAC ruled that the Home Secretary did not prove that Rehman's actions were directed against the U.K. or its citizens. They noted that the Court of Appeal overturned SIAC's decision, holding that in any national security case, the Home Secretary was entitled to examine the case as a whole and to make a decision to deport not only on the basis that a person had in fact endangered national security, but that he presented a danger to national security—even if it could not be proved to a high degree of probability that the person had engaged in any individual act that could justify such a conclusion. They also explained that in October 2001, the House of Lords upheld the Court of Appeal decision stating that decisions in the interest of national security are not for the judiciary, but should be entrusted to the executive. The HRW pointed out that although the SIAC is empowered to reject a certification if it does not agree with the Home Secretary's belief or suspicion about a person, the Rehman case thus suggests that the SIAC has little effective discretion to overrule the Home Secretary.

Human Rights Watch was concerned, moreover, that SIAC's operational procedures violate basic due process guarantees. They said that national security certifications could be made by the Home Secretary on the basis of secret evidence that would not be available to the person appealing certification or to her or his counsel, and the SIAC would also be empowered to hold appeals in camera, without the certified person or his counsel permitted to make representations to the committee. They noted that in such closed proceedings, an advocate would be appointed to appear for the certified person, and the use of secret evidence in closed proceedings without the ability of the person subject to certification to confront the evidence against him in person with assistance of counsel of his choice violates fundamental due process standards. They considered that the absence of such key procedural guarantees coupled with the lack of transparency in SIAC's proceedings raises further concerns regarding its status as an impartial and effective forum for appeals.

6.24 Human Rights Watch commented that the use of indefinite detention in the absence of basic procedural guarantees—including adequate recourse to appeal against arbitrary detention—violates international human rights law. They considered that administrative detention for reasons of national security should be subject to a substantive and prompt review by an independent judicial or other authority, and that any on-going periodic review of detention should occur at reasonable intervals. Human Rights Watch believed that review at six-month intervals leaves too long a period between evaluations and that reviews should be provided at shorter intervals. They suggested that administrative detainees under states of emergency should enjoy as a minimum the following rights and guarantees:

- the right to be brought before a judicial (or other) authority promptly after arrest;
- the right to receive an explanation of rights upon arrest in their own language or soon thereafter and to be informed of the reasons for the deprivation of liberty; specific, detailed and personalized reasons for the deprivation of liberty should be offered by the authorities,
- the right of immediate access to family, legal counsel and a medical officer;
- the right to communicate with and be visited by a representative of an international humanitarian agency, such as the International Committee of the Red Cross (ICRC) ;
- the right to challenge, in a fair hearing and periodically if necessary, the lawfulness of the detention and to be released if the detention is arbitrary or unlawful;
- the right to complain to a judicial authority about mistreatment;
- the right to seek and obtain compensation if the detention proves to be arbitrary or unlawful.

6.25 HRW stated that the Bill correctly noted that implementing the extended immigration detention provision would require the UK to invoke its ability to derogate from the European Convention on Human Rights (ECHR) under Article 15 and then to derogate officially from Article 5 of the convention and Clause 30 of the Bill would provide for the U.K.'s derogation from Article 5 of the ECHR. They pointed out that derogation from obligations voluntarily undertaken as a state party to regional and international human rights instruments requires that certain objective circumstances giving rise to a public emergency obtain and that it is necessary for the state party to take exceptional measures to restore order, and that Article 15 of the ECHR states that:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

6.26 HRW noted that the European Court of Human Rights has stated that a public emergency is an exceptional state of crisis affecting the entire population and

threatening “the organized life of the community.” They remarked that any measures taken to meet the challenge of such an emergency must be narrowly tailored “to the extent strictly required by the exigencies of the situation”, and although the court generally affords a contracting state a wide “margin of appreciation” to determine what constitutes an emergency and what measures are necessary to avert it, the court retains oversight of whether a state has departed from its convention obligations only to the extent strictly required by the exigencies of the situation. HRW pointed out that Article 4 of the ICCPR also permits derogation from certain convention provisions “in time of public emergency which threatens the life of the nation...[and] to the extent strictly required by the exigencies of the situation.” However, a state’s ability to derogate from the ICCPR is not unlimited. They explained that according to the U.N. Human Rights Committee’s interpretation of article 4, “This condition requires that States parties provide careful justification not only for a decision to proclaim a state of emergency but also for any specific measures based on such a proclamation...[T]hey must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measure derogating from the Covenant are strictly required by the exigencies of the situation.” They also noted that the committee states that:

States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance. . .through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

6.27 HRW remarked that in its concluding observations on UK compliance with the ICCPR, the U.N. Human Rights Committee expressed concern that any derogation from the UK’s obligations under the ICCPR be in conformity with its international obligations:

The Committee notes with concern that the State Party, in seeking inter alia to give effect to its obligations to combat terrorist activities pursuant to Resolution 1373 of the Security Council, is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant, and which, in the State Party’s view, may require derogations from human rights obligations. The State Party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant.

6.28 Human Rights Watch noted that the UK thus must meet a high burden to show that rights circumscribed under the proposed Bill meet the standards of derogation required by the ECHR and under international law. They also pointed out that on November 12, Home Secretary David Blunkett announced that the UK would officially

declare a “state of emergency” thus permitting it to derogate from certain provisions of the ECHR, and that Blunkett assured the public that the declaration was a legal technicality—necessary to ensure that certain anti-terrorism measures that contravene the ECHR could be implemented—and not a response to any possible imminent terrorist threat. HRW commented that in a statement to parliament on October 15 announcing the broad outlines of the emergency anti-terrorism measures, Blunkett stated that “[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom.” They noted that these public pronouncements raise the concern that the UK is seeking to derogate from its human rights obligations in the absence of conditions amounting to a bona fide state of emergency. Human Rights Watch therefore urged the UK to justify any derogation from the ECHR and the ICCPR according to the substantive and procedural requirements of ECHR Articles 15 and ICCPR Article 4—and in the absence of any sufficient justification, decline to legislate a derogation.

(d) Refugee Protection and the Right to Seek Asylum

6.29 Human Rights Watch believed that clauses 33 and 34 of the Anti-Terrorism, Crime and Security Bill would unduly restrict the individual right to seek asylum and violate international standards of refugee protection. They pointed out that these clauses would empower the Home Secretary to make a determination that an individual does not have the right to substantive consideration of his or her application for asylum if the Home Secretary considers that Articles 1(F) or 33(2) of the Refugee Convention apply. They explained that Article 1(F) of the Refugee Convention contains the so-called “exclusion clauses” and ensures that perpetrators of gross human rights violations (e.g. war crimes and crimes against humanity), serious non-political crimes outside the country of refuge, and acts contrary to the principles of the United Nations are excluded from refugee status. They pointed out that Article 33(2) allows for the return of a refugee who is considered a danger to the national security of a country and is the only exception in the Refugee Convention to the fundamental principle of nonrefoulement that protects refugees from return to a country where their life or freedom would be threatened. They said that given that the Bill’s definition of a terrorist suspect extends to those who have “links with a person who is a member of or belongs to an international terrorist group”, it appears that the Bill would empower the Home Secretary to exclude from refugee status and detain as national security threats refugees who have had no direct involvement with terrorist activities. As such, the Bill contravenes both the spirit and the letter of the Refugee Convention. HRW considered said that the *Refugee Convention*’s exclusion clauses are of an exceptional nature and should be applied strictly and in full accordance with their terms. HRW remarked that Article 1(f) indicates a

high evidentiary standard (“serious reasons”) and the requirement that the crimes were committed by the individual being considered for exclusion prior to reaching a country of asylum—not simply by an organization or other individual with which the asylum seeker might be associated, and that Article 1(F) does not refer to any perceived future threat as sufficient grounds for exclusion.

6.30 HRW further explained that Clause 33(1) of the draft Bill empowers the Home Secretary to issue a certificate excluding a person from refugee status for activities that are not excludable offenses under the Refugee Convention—for example, association with a member of a terrorist organization or the perceived future national security threat posed by an individual rather than past criminal activity. HRW considered that due to the nature of the appeals process provided in the Bill, SIAC’s review of a certification may be based on incomplete information regarding an asylum seeker’s past activities since only the information used by the Home Secretary to certify a person as a suspected terrorist can be considered by the committee. Human Rights Watch believed that, given the grave consequences that the denial of refugee status may have, exclusion should only be considered following a full review of all the facts pertaining to an individual’s application for asylum, as such an approach is consistent with the UN High Commissioner for Refugees guidelines on the application of the exclusion clauses and with more recent interpretations decided during the UNHCR Global Consultation on International Protection discussions on exclusion in May 2001. They explained that they are presumed to apply after a determination of refugee status is made to ensure that an individual’s circumstances are considered in full.

6.31 Human Rights Watch remarked that the fundamental principle guiding the Refugee Convention’s protection mandate is the presumption of inclusion on the basis of a full review of all the relevant facts surrounding an individual’s asylum claim before evidence is adduced of past criminal activity that would exclude an individual from being granted refugee status. They pointed out that this process is intended to cull all relevant facts from an asylum seeker’s past—for example, false criminal charges against an asylum seeker as a result of systematic discrimination or persecution of a political or ethnic group to which the individual belonged. In this way, they pointed out, evidence of alleged past criminal conduct can be fully reviewed to determine the authenticity of such charges or allegations and to evaluate whether or not such charges or allegations were part and parcel of the same type of persecution that the asylum seeker would face if he or she were returned to his or her country. They considered that the UK Bill would reverse the “inclusion before exclusion” approach advocated by UNHCR, and it would rather empower the Home Secretary to deny protection as a matter of first course, without benefit of a full determination of an individual’s

asylum claim, and thus this provision threatens to undermine the Refugee Convention's protection mandate.

6.32 Human Rights Watch noted that the guiding principle underpinning international refugee protection standards is the prohibition against *refoulement*, enshrined in Article 33(1) of the Refugee Convention which states that no convention party "shall expel, or return (*"refouler"*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." They explained that the principle of *nonrefoulement* applies both to direct return to a particular country and to indirect measures that may effectively return a refugee to a country where his life or freedom would be threatened. Under the Refugee Convention, HRW said that the only instance in which a host country could expel a refugee who has not been excluded from refugee protection under Article 1(F) and return him or her to a place where his or her life or freedom would be threatened is under Article 33(2). They explained that Article 33(2) states that protection against *refoulement* "may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he or she is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." They pointed out that the two qualifications included in this provision require a direct link between the presence of the refugee within a territory and an existing national security threat to that country, and thus do not apply to a past political crime that does not endanger the security of the country of asylum, and therefore, a refugee is still protected against *refoulement* if he or she does not constitute a threat to the security of the country of asylum.

6.33 Human rights Watch pointed out that it is important to note that Article 33(2) of the Refugee Convention would generally apply to a person who has already been recognized as a refugee in the country of refuge. They stated that the consequences of overruling *nonrefoulement* protections are so serious that it would necessarily require a full and fair assessment of an individual's fear of persecution before Article 33(2) could be applied. They noted, however, that clauses 33 and 34 of the proposed Bill would deny a full determination of refugee status in favor of a certification procedure for those suspected of terrorist activities. Human Rights Watch believed that it is not appropriate to make a certification when it is clear that the application of Article 33(2) requires an individual assessment. They considered, moreover, that an individual's fear of persecution should always be balanced against the possible threat to national security. They were of the view that Clause 34 of the Bill would raise particular concern as it prevents the SIAC from balancing an individual's fear of persecution if returned to his own country against the government's perceived threat to

national security, an approach strongly advocated by the UNHCR.

6.34 Human Rights Watch pointed out that recent jurisprudence from the European Court of Human Rights in the case of *Chahal v. United Kingdom*, held that certain procedural guarantees enshrined in Article 32(2) of the Refugee Convention—which governs the expulsion of a refugee from the country of asylum on national security grounds—should also apply to those potentially subject to *refoulement* under Article 33(2). They pointed out that Article 32(2) provides that “Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority” and the refugee shall be permitted a reasonable time period within which to seek legal admission into another country. They considered that the same procedural guarantees should pertain to any decision to certify a recognized refugee as a suspected terrorist under Article 33(2). Human Rights Watch remarked that all of these proposed restrictions on asylum rights would be compounded by clause 33(8) of the draft Bill which restricts the right of appeal to a higher court for persons certified by the Home Secretary to pose a threat to national security when the SIAC has upheld that certification. They explained that appeal in such cases would be permitted only on a point of law, thus essentially requiring the court to accept the facts as presented by the Home Secretary, and that such a narrow right of appeal would prevent any higher court from examining the substantive part of a person’s asylum application or the factual and evidentiary issues regarding the SIAC’s decision to uphold a certificate. HRW commented that the Home Secretary also loses the right to appeal should a certificate be quashed by the SIAC, but the draft Bill would allow the Home Secretary to issue another certificate under clause 27(9) “on the grounds of circumstance or otherwise.” They believed that given the complex nature of an asylum application, particularly one in which issues of national security are considered a factor, all facts, not just those presented by the Home Secretary should be subject to judicial scrutiny in any appeals process. They considered that denial of the possibility of further appeal unduly disadvantages the asylum seeker or refugee.

6.35 Human Rights Watch also noted that the Universal Declaration of Human Rights (UDHR) states in Article 14 that “everyone has the right to seek and enjoy in other countries asylum from persecution”, and that the preamble to the 1951 Refugee Convention requires states to have regard for the UDHR when interpreting the convention’s provisions. HRW considered that the right to seek asylum has been increasingly at risk in recent years both in the UK and the EU as a whole, and that a range of border control measures—visa requirements, security checks, and other barriers to entry—often effectively prevent persons from applying for asylum. They remarked that the right to seek asylum is violated, often

together with the principle of *nonrefoulement*, when individuals cannot access fair and impartial asylum determination procedures.

6.36 Human Rights Watch believed that denial of full and fair asylum determination procedures under the proposed certification procedure; use of the exclusion clauses and Article 33(2) of the Refugee Convention to justify keeping people out, expelling them, or detaining them indefinitely; and the severe restrictions on appeals against the Bill's proposed procedures further restrict the right to seek asylum. HRW commented that these measures represent a departure from established refugee protection standards and undermine the purpose and intent of the Refugee Convention. They considered that it is particularly ironic that in the year the UK marked the 50th anniversary of the Refugee Convention and prepared to meet with other State parties in Switzerland to reaffirm its commitment to upholding the convention, it at the same time introduced legislation that seeks to weaken its obligations under this treaty.

(e) Proscription

6.37 In its *Consultation document* the UK Government explained that under the *Prevention of Terrorism (Temporary Provisions) Act* of 1989 (the PTA), the Secretary of State was empowered by order to proscribe any organisation which appeared to him to be concerned in Irish terrorism, or in promoting it or encouraging it. The Irish Republican Army (IRA) and the Irish National Liberation Army (INLA) were proscribed under this section but no provision was made under the law for proscribing international terrorist organisations active in the UK. The PTA made it an offence to belong to or solicit support, other than money or other property, for a proscribed organisation. (Fund-raising for, or contributing money or property to, a proscribed organisation was an offence under the PTA.) The PTA also made it an offence to display support for such an organisation in public. The explanatory notes to the Act explains that the proscription regime under the Terrorism Act differs from those it replaces as follows: Firstly, the PTA and EPA provide separate proscription regimes for Great Britain and Northern Ireland. Under the Act proscription will no longer be specific to Northern Ireland or Great Britain, but will apply throughout the whole of the UK. Secondly, under the PTA and EPA proscription was only applicable to organisations concerned in Irish terrorism, but under the Act it will also be possible to proscribe organisations concerned in international or domestic terrorism. Thirdly, under the PTA and EPA an organisation or an affected individual wishing to challenge a proscription can only do so in the UK via judicial review (no proscribed organisation has ever done this). Under the Act, organisations and individuals will be able to apply to the Secretary of State for deproscription and, if their application is refused, to appeal to the Proscribed Organisations

Appeal Commission.

6.38 Equivalent provisions in Northern Ireland were set out in the EPA, meaning that 12 organisations were proscribed.⁷ **The Criminal Justice (Terrorism and Conspiracy) Act 1998 made further provision about the offence of belonging to a proscribed organisation, so that where a person was charged with the offence of membership of a proscribed organisation, a statement of opinion from a senior police officer that the person is or was a member of a "specified" organisation was admissible as evidence. Where membership of a "specified" organisation was at issue, and provided that the accused had been permitted to consult a solicitor, certain inferences could be drawn from any subsequent failure to mention a fact material to the membership offence when being questioned or charged. However, neither the statement by the police officer, nor any inferences drawn, would alone be sufficient to convict an accused. Similar provisions were inserted into the EPA by the 1998 Act. A "specified" organisation was an Irish terrorist organisation which the Secretary of State did not believe to be observing a complete and unequivocal ceasefire. The provisions of the new Act only apply to organisations which are both proscribed and specified in the relevant jurisdiction.**

6.39 The *Consultation document* noted that Lord Lloyd acknowledged in his report that the offences associated with the proscription powers are used relatively infrequently, but that he nevertheless recommended the retention of proscription in permanent legislation, and its extension to non-Irish terrorist groups. It was explained that his reasons were twofold: First, he suggested that proscription, particularly if the powers were to be extended to include international terrorist groups, would facilitate the burden of proof in terrorist related cases. (This proposal stems from Lord Lloyd's argument that a specific raft of terrorist offences should be created.) Secondly, Lord Lloyd argued that proscription could provide a useful paving mechanism for extending the current controls on terrorist fund-raising to international groups.

6.40 The *Consultation document* explained that in Northern Ireland, in particular, proscription had come to symbolise the community's abhorrence of the kind of

⁷

Including the Irish Republican Army (IRA); Cumann na mBan; Fianna na hEireann; the Red Hand Commando; Saor Eire; the Ulster Freedom Fighters (UFF); the Ulster Volunteer Force (UVF); the Irish National Liberation Army (INLA); the Irish People's Liberation Organisation (IPLO); the Ulster Defence Association (UDA); the Orange Volunteers; the Red Hand Defenders, and more recently, the Loyalist Volunteer Force (LVF) and the Continuity Army Council.

violence that has blighted society there for over 30 years. It was said that the indications were that the proscription provisions have made life significantly more difficult for the organisations to which they have been applied. It was pointed out that whilst the measures might not in themselves have closed down terrorist organisations, a knock on effect has been to deny the proscribed groups legitimate publicity and with it lawful ways of soliciting support and raising funds. It was argued that many activities by, or on behalf of, such groups were made more difficult by proscription, and that in itself aids the law enforcement effort in countering them. It was explained that perhaps more importantly the provisions have signalled forcefully the Government's, and society's, rejection of these organisations' claims to legitimacy.

6.41 The Consultation paper noted that there had been no convictions for proscription-related offences in GB since 1990, though, in the same period, 195 convictions in Northern Ireland (usually as the second count on the charge sheet). It pointed out that the indications, however, were that the provisions have produced some less quantifiable but still significant outcomes, and that in particular it was suggested they have led proscribed organisations to tone down overt promotion and rallies. It was remarked that although it is less easy to measure what has not happened because the proscription provisions have been in place, or to calculate the numbers deterred from supporting proscribed organisations because of the penalties if convicted (up to 10 years' imprisonment and an unlimited fine), the Government still believed these factors to be very important.

6.42 The Consultation document explained that one reason why there have been relatively few convictions for proscription-related offences is that they can be difficult to prove in practice, and that this particular concern was addressed in the Criminal Justice (Terrorism and Conspiracy) Act of 1998 in respect of those "specified" terrorist groups not observing a full and unequivocal cease-fire, by provision for a statement of opinion of a senior police officer to be admissible as evidence in court. It was noted that in the wake of the Omagh bombing, and in line with similar action by the Irish Government, the UK Government rapidly introduced tough additional measures to tackle the difficulty of proving membership, targeted against the Real IRA and other terrorist groups who had not satisfied the Secretary of State that their cease-fire was complete and unequivocal. The document pointed out that the fact that the Government chose in doing so to build upon the existing proscription powers underlined its conviction that these measures were useful - both as a means to tackle membership of and support for proscribed organisations - and also as a way for

society as a whole to voice its rejection of such groups and all they stand for.

6.43 The Consultation document stated that whilst optimistic that lasting peace will come to Northern Ireland, the Government did not believe that it would be right to repeal the power to proscribe Irish terrorist groups. It explained that the hope was that the existing terrorist organisations would continue to lose support and not be replaced - but that there are no guarantees and the proscription measures had proved themselves to be fundamental to an effective response to the emergence of new terrorist groups. The Government therefore believed that the power of proscription in relation to Irish terrorism should be retained in future permanent counter-terrorism legislation, and it proposed that, as then, the power to decide which groups should be proscribed should rest with the Secretary of State who has access to all the relevant intelligence on which decisions need to be based.

6.44 It was pointed out that the additional proscription-related provisions introduced in the *Criminal Justice (Terrorism and Conspiracy) Act* of 1998 constituted a specific and tightly defined response to the threat from small splinter groups opposed to the peace process in Northern Ireland. The Government hoped that well before any new permanent counter-terrorist legislation would come into force, the threat from Irish terrorism would have continued to reduce to the extent that the need to retain these provisions will have diminished. Therefore, a decision on whether or not the provisions should be retained in the new legislation would need to be taken at that time, in the light of the security situation. The Consultation document explained that even if the threat from Irish terrorism were to diminish significantly, the UK would need to have at its disposal the tools to combat terrorism connected with other political, religious and ideological ends, arising from both domestic and international causes, and it was argued that a new definition of terrorism in legislation was required to cover all organisations (or individuals) committed to serious violence against persons or property to further such ends.

6.45 The question posed was whether proscription, or equivalent powers, should be one of the tools to counter terrorism. The document explained that experience from other countries on the issue of banning terrorist organisations did not all point in one direction, as some EU Member States rely primarily on action against individuals rather than organisations, although others have laws which allow the courts to dissolve groups which use or instigate violence or threaten public order, whilst some international terrorist groups and their front organisations have been banned in

recent years under such legislation.⁸ It was pointed out that the US, under the *Terrorism Prevention Act 1996* had taken powers to designate international (though not domestic) terrorist groups, and that the effect was that it is an offence to solicit, donate, or otherwise provide money and other resources to such organisations and it empowers the authorities to seize the assets of any designated organisation. The US Act did not, however, make it illegal to be a member of a designated organisation. Thus the question of proving membership does not arise, and although thirty organisations have been designated under the Act up to that stage (the list was only issued in October 1997). It was therefore considered perhaps a little too early to judge what long-term impact the American legislation would have.

6.46 The Consultation document said that an advantage in extending the then current UK proscription powers so that the whole range of terrorist groups covered by the proposed new definition of terrorism could be caught is that it would provide a mechanism to signal clearly condemnation of any terrorist organisation whatever its origin and motivation. It was explained that these provisions, under which only Irish terrorist groups could at the time be proscribed, could be construed by some as indicating that the Government did not take other forms of terrorism as seriously, furthermore a wider provision could deter international groups from establishing themselves in the UK. It was said that arguably, such groups could, to a greater extent than indigenous groups, choose their centres of operation, and proscription

⁸ The House of Commons' *Research Paper 99/101 The Terrorism Bill* [Bill 10 of 1999-2000] 13/12/99 noted that in the report of his *Inquiry Into Legislation Against Terrorism* Lord Lloyd of Berwick pointed out that in Germany it is an offence to participate in a terrorist organisation, that under Article 129A of the German Penal Code it is illegal to form or be a member of an association which engages in murder or other specified criminal activities, and that article 129A is the foundation of all terrorist prosecutions in Germany. He also explained that in Italy there is a similar crime of "association with the aims of terrorism and subversion of democratic order", that in the USA the new Terrorism Prevention Act empowers the Secretary of State to designate foreign terrorist organisations, and that the purpose of the power is to deny material support to the designated organisation, and to seize its assets. He noted that it is not an offence as such to belong to a designated organisation, although membership of a designated organisation is a ground for deportation proceedings and the denial of entry. He stated that the point is the importance which the US administration attaches to designation, that terrorist organisations are notoriously fissile, although this does not cause the US administration to question the need for designation, or to doubt its efficacy as they believe it will work. He considered that the terrorist organisation is the key concept, that "terrorist organisation" will have been defined in section 1 of the new Act, and that it should then be made an offence under the Act to direct at any level or participate in the activities of a terrorist organisation within the United Kingdom, whether or not proscribed and that the former will carry the heavier sentence. "Participation in the activities of a terrorist organisation" is, he thought, a better test than membership, although he noted that Gearty and Kimbell favour an offence of being a member of a proscribed organisation. He pointed out that membership might be taken to include nominal membership, but he thought nominal membership of a foreign terrorist organisation should not, carry with it criminal sanctions, but taking an active part in the UK should and that "membership" no doubt could be defined in such a way as to limit the offence to active participation.

could send an unequivocal message that they were not welcome in the UK.

6.47 It was also argued that, as for Irish terrorist groups, proscription or designation could, moreover, make it easier to tackle terrorist fund-raising, noting that Lord Lloyd placed particular weight on this point in his argument that proscription powers should be retained and extended to all forms of terrorism. It was noted that it is often difficult to prove that funds are being used for terrorist purposes and even more so if they are raised in one country for a cause in another, although criminalising fund-raising activity of any kind for a particular group would remove the requirement to prove end use of funds. It was however acknowledged that the provisions could of course be circumvented by changing the group's name (especially in cases where the group does not have an overriding incentive to preserve that particular identity), or by creating front organisations.

6.48 The Consultation document remarked that although the UK Government recognised that there would appear to be some advantage in extending proscription-type powers to non Irish terrorist groups, it was also aware that there could be attendant difficulties. It was explained that the practical and policy difficulties involved in drawing up and then maintaining an up to date list of international and domestic groups to be covered would be formidable. It was pointed out that for a start, the potential scope of the list would be very wide (literally scores of groups could be possible candidates) and there would be a real risk of the list quickly becoming out of date - particularly if, as then, additions to, or deletions from, the list could only be made after debate by, and with the explicit agreement of, Parliament. It was also noted that the Government might, moreover, be exposed to pressure to target organisations that it might not regard as terrorist or to take action against individuals whom it would not regard as terrorists. It was explained that in the light of these considerations, the Government recognised that the arguments were finely balanced for and against including in future counter-terrorist legislation a power for the Secretary of State to proscribe or designate terrorist organisations connected with domestic or international terrorist activities.

6.49 On the issue of conspiring in the United Kingdom to commit terrorist attacks abroad, the Consultation document noted that proscription and designation are of course not the only means by which the activities of international terrorist groups in the UK could be combated. It stated that the UK Government condemns terrorism of any sort wherever it takes place and whatever or whoever is its target, and that it will take whatever steps are necessary both to prevent terrorism in the UK and abroad

and to prevent people there planning terrorist acts elsewhere. It pointed out that this is why the Government took the opportunity in the *Criminal Justice (Terrorism and Conspiracy) Act* of 1998 to introduce provisions to fulfil its commitment to make it an offence in the UK to conspire to commit crimes abroad. It was explained that the Government believed that these provisions strike the right balance between ensuring it is possible to take decisive action against those plotting terrorist and other criminal acts elsewhere from the UK, whilst building in safeguards to prevent prosecutions going ahead when broader considerations indicate that this is not in the public interest. The document noted that this has been achieved by providing that the crime which it is believed is being plotted in the UK must be a crime both under UK law and in the "target" country and by requiring that, in most cases, the Attorney General must give his personal consent, having regard to the public interest, before the case can proceed. It was stated that the Government believed that these provisions on conspiracy would continue to play an important role in deterring international terrorists from using the UK country as a base for their operations, although it also recognised the doubts that were expressed about the breadth of the provisions in the 1998 Act, and welcomed further views in the consultation exercise.

6.50 It was also pointed out in the *Consultation document* that in introducing the 1998 Act, the Government decided that although the original Private Members Bill on conspiracy, introduced in 1996, also included incitement provisions, it would not carry these across into the 1998 Act. It was explained that the Government came to this view because it recognised these measures raised separate complex and sensitive issues which it would not have been possible to address adequately in the time available. These included concerns that the incitement offence could be difficult in practice to prove and concerns that in certain circumstances the effect of the creation of the offence could be to constrain freedom of expression. On the other hand, there was no question that considerable concern could be caused by the sort of statements which could be made with impunity, encouraging and glorifying in acts of terrorism. The Consultation paper pointed out that this can make it difficult to define where the boundary of free speech should lie, and that the UK Government would look at these, and the related, issues very carefully and would keep under review whether incitement measures should be included in appropriate legislation at some point in the future.

6.51 In its analysis of the comments on the consultation paper, the Terrorism Bill Team noted that 37 respondents commented and of those 23 supported the issue of the retention and extension of proscription. The Team explained that respondents

made the following points: there are practical difficulties in identifying foreign groups; proscription need to be even handed; there are concerns about revealing sensitive information; and proscription for foreign groups should be based on acts which are unlawful in the UK. They pointed out that the reasons given for rejection included: that it will drive the groups underground; it is undesirable to have convictions based solely on membership of an organisation; there was concern that proscribing an organisation will have adverse affects on juries by prejudicing the view of jury members; groups will change names to avoid proscription; and freedom of expression and association are important. They noted that a further 5 respondents made the following points: proscription should be defined and placed on a statutory basis to allow the courts to determine what has up to that stage essentially been a political decision; and that they would be concerned if the courts were to decide who should be proscribed. The Terrorism Bill Team said that of the 8 respondents who commented on the issue of incitement, 5 supported and 3 rejected the proposal.

6.52 The *Research Paper* points out that a respondent⁹ said that the question of whether or not the power to proscribe organisations would be compatible with Article 11 of the European Convention on Human Rights¹⁰ was not mentioned in the paper, and that the point was not clear-cut, even in respect of the then existing proscription power, much less the new expanded power considered by the Government:

The key question is as to the inextricability of any such proscribed groups in campaigns of violence and terror. This probably what makes the current proscriptions both in Britain and Northern Ireland secure from review, at least until the current cease-fires are firmly embedded, but what of the “literally scores of groups” that could potentially be brought within the remit of the new power? It is not obvious that there are this many IRA-style organisations currently operating within Britain. But the more attenuated the connection between a proscribed group and violence is, the greater the likelihood that the control on association entailed in any such ban would be found wanting under art. 11, as not being based on a sufficiently pressing need or as being disproportionate to the aim that the ban pursues. Particularly vulnerable would be bans on ostensibly political associations that the authorities decide are in fact “terrorist” according to its expanded meaning of the term.

6.53 The following procedure for proscription was finally adopted in the Terrorism

⁹ Professor Conor Gearty, Professor of Human Rights Law at King’s College, London who commented on the earlier *Consultation document*.

¹⁰ Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Act: For the purposes of the Act an organisation is proscribed if it is listed in Schedule 2, or it operates under the same name as an organisation listed in that Schedule. However, an organisation is not proscribed if its entry is the subject of a note in that Schedule. The Secretary of State may by order add an organisation to Schedule 2, remove an organisation from that Schedule and amend that Schedule in some other way. The Secretary of State may exercise his or her power in respect of an organisation only if he or she believes that it is concerned in terrorism, and an organisation is concerned in terrorism if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise concerned in terrorism.

6.54 The Act provides further that an application may be made to the Secretary of State for the exercise of his or her power under section 3(3)(b) to remove an organisation from Schedule 2. An application may be made by the organisation, or any person affected by the organisation's proscription. The Secretary of State must make regulations prescribing the procedure for applications, and the regulations must require the Secretary of State to determine an application within a specified period of time, and require an application to state the grounds on which it is made. The Act provides in section 5 that there must be a commission, to be known as the Proscribed Organisations Appeal Commission (POAC), and where an application has been refused, the applicant may appeal to the Commission. The Commission must allow an appeal against a refusal to deproscribe an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review. Where the Commission allows an appeal by or in respect of an organisation, it may make an order. Where an order is made the Secretary of State must as soon as is reasonably practicable lay before Parliament the draft of an order removing the organisation from the list in Schedule 2. The POAC must be appointed by the Lord Chancellor. Schedule 3 sets out the procedure to be followed by the Commission in considering appeals, including arrangements for providing representation, by individuals with appropriate legal qualifications, for organisations and individuals appearing before the Commission. There is no requirement that the members of the Commission should have legal qualifications.

6.55 The Act also deals with the consequences of an appeal to the POAC being successful. Where the POAC makes an order, this has the effect of requiring the Secretary of State either to lay a draft deproscription order before Parliament or to make a deproscription order on the basis of the urgency procedure. The Act allows a

further appeal from a decision of the POAC on a question of law. Where an appeal to the POAC is successful, and an order has been made deproscribing the organisation, anyone convicted of one of the offences listed in subsection (1)(c)¹¹ in respect of the organisation, so long as the offence was committed after the date of the refusal to deproscribe, may, in England and Wales, appeal against his conviction to the Court of Appeal or Crown Court, and the Court will allow the appeal. Provision is also made to seek compensation for the conviction.

6.56 It is intended that the Lord Chancellor will make rules under section 7(2) of the Human Rights Act so that proceedings under section 7(1)(a) of that Act may be brought before the POAC. An individual who seeks deproscription under the Terrorism Act by way of application or appeal, either on behalf of the proscribed organisation or as a person affected, might be discouraged from pursuing either course, or from instituting proceedings under the Human Rights Act, by the risk of prosecution for certain offences, for example the offence of membership of a proscribed organisation. The explanatory notes says that the Act ensures that evidence of anything done, and any document submitted for these proceedings, cannot be relied on in criminal proceedings for such an offence except as part of the defence case.

6.57 Sections 11¹² and 12¹³ create offences in regard to membership and support.

¹¹ The offences are — being a member of a proscribed organisation (section 10); inviting support for a proscribed organisation (section 11); wearing the uniform of a proscribed organisation (section 12); terrorist fund-raising (section 14); the use or possession of money or other property for the purposes of terrorism (section 15); entering into funding arrangements for the purposes of terrorism (section 16); money-laundering terrorist property (section 17); failing to disclose information on which a belief or suspicion that another person has committed an offence under clauses 14 to 17 is based (section 18); or directing the activities of a terrorist organisation (section 54).

¹² 11.(1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.
 (2) It is a defence for a person charged with an offence under subsection (1) to prove (a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.
 (3) A person guilty of an offence under this section shall be liable (a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.
 (4) In subsection (2) "proscribed" means proscribed for the purposes of any of the following (a) this Act; (b) the Northern Ireland (Emergency Provisions) Act 1996; (c) the Northern Ireland (Emergency Provisions) Act 1991; (d) the Prevention of Terrorism (Temporary Provisions) Act 1989; (e) the Prevention of Terrorism (Temporary Provisions) Act 1984; (f) the Northern Ireland (Emergency Provisions) Act 1978; (g) the Prevention of Terrorism (Temporary Provisions) Act 1976; (h) the Prevention of Terrorism (Temporary Provisions) Act

The offence in section 12(1) is not confined to support by providing "money or other property", because that kind of support is dealt with in Part III of the Act. Subsection (4) of section 12 is intended to permit the arranging of genuinely benign meetings.

1974; (i) the Northern Ireland (Emergency Provisions) Act 1973.

¹³

12(1) A person commits an offence if - (a) he invites support for a proscribed organisation, and (b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15).

(2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is - (a) to support a proscribed organisation, (b) to further the activities of a proscribed organisation, or (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation.

(3) A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.

(4) Where a person is charged with an offence under subsection (2)(c) in respect of a private meeting it is a defence for him to prove that he had no reasonable cause to believe that the address mentioned in subsection (2)(c) would support a proscribed organisation or further its activities.

(5) In subsections (2) to (4) - (a) "meeting" means a meeting of three or more persons, whether or not the public are admitted, and (b) a meeting is private if the public are not admitted.

(6) A person guilty of an offence under this section shall be liable - (a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

Section 13¹⁴ replicates the offence at section 3 of the PTA and section 31 of the EPA.

(f) Exclusion

6.58 The Government concluded that the (lapsed) powers in current legislation for the Secretary of State to exclude from Great Britain, Northern Ireland or the whole of the United Kingdom, a person concerned in the commission, preparation or instigation of acts of terrorism connected with Northern Ireland should be repealed and not replaced. The ability to deport, or deny entry to, suspected international terrorists would remain unchanged.

(g) Terrorist property

6.59 The UK Government proposed in its consultation document that the provisions for dealing with terrorist financing should be strengthened. It proposed that the then existing measures should be extended so as to cover the raising and laundering of funds in the United Kingdom which were intended to be used in connection with, or in furtherance of, acts of terrorism anywhere abroad. It also proposed that the courts' powers should be strengthened so that they could order the forfeiture of all money and property found to be a result of criminal activity by a person convicted of giving or receiving or laundering money for terrorist purposes. The Government also considered that the police should be given powers to seize cash which they suspect is being, or is intended to be, used for terrorist purposes pending a determination as to forfeiture by the courts. The explanatory note to the Act explains that this matter was discussed in the Government's consultation document under the heading "Terrorist finance", but that the name has been changed to "Terrorist property" to make it clear that in the Act the Part III offences apply not only to money but also to other property. Part III of the Act also introduces a new power for the police, customs officers and

¹⁴ 13(1) A person in a public place commits an offence if he - (a) wears an item of clothing, or (b) wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation.
 (2) A constable in Scotland may arrest a person without a warrant if he has reasonable grounds to suspect that the person is guilty of an offence under this section.
 (3) A person guilty of an offence under this section shall be liable on summary conviction to - (a) imprisonment for a term not exceeding six months, (b) a fine not exceeding level 5 on the standard scale, or (c) both.

immigration officers to seize cash at borders and to seek forfeiture of the cash in civil proceedings. This is modelled on a power which already exists in the *Drug Trafficking Act 1994*.

6.60 The explanatory note to the Act states that the definition of terrorist property comes into play in the "money laundering" offence (section 18) and the power to seize and forfeit cash at borders (sections 25 and 28), and that subsection (1) makes it clear that terrorist property can include both property to be used for terrorism and proceeds of acts of terrorism. Subsection (2)(a) makes explicit that the proceeds of an act of terrorism covers not only the money stolen in, say, a terrorist robbery, but also any money paid in connection with the commission of terrorist acts. Subsection (2)(b) makes explicit that any resources of a proscribed organisation are covered: not only the resources they use for bomb-making, arms purchase etc but also money they have set aside for non-violent purposes such as paying rent.

6.61 Sections 15 to 17 deal with fundraising, use, possession and funding arrangements. Section 18 deals with money laundering, and although it is entitled "money laundering" and is most likely to be used for money, it also applies to "laundering" type arrangements in respect of other property. Section 19 governs the duty of disclosure of information¹ **and**

¹ 19(1) This section applies where a person — (a) believes or suspects that another person has committed an offence under any of sections 15 to 18, and (b) bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment.

(2) The person commits an offence if he does not disclose to a constable as soon as is reasonably practicable — (a) his belief or suspicion, and (b) the information on which it is based.

(3) It is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure.

(4) Where — (a) a person is in employment, (b) his employer has established a procedure for the making of disclosures of the matters specified in subsection (2), and (c) he is charged with an offence under that subsection, it is a defence for him to prove that he disclosed the matters specified in that subsection in accordance with the procedure.

(5) Subsection (2) does not require disclosure by a professional legal adviser of — (a) information which he obtains in privileged circumstances, or (b) a belief or suspicion based on information which he obtains in privileged circumstances.

(6) For the purpose of subsection (5) information is obtained by an adviser in privileged circumstances if it comes to him, otherwise than with a view to furthering a criminal purpose — (a) from a client or a client's representative, in connection with the provision of legal advice by the adviser to the client, (b) from a person seeking legal advice from the adviser, or from the person's representative, or (c) from any person, for the purpose of actual or contemplated legal proceedings.

(7) For the purposes of subsection (1)(a) a person shall be treated as having committed an offence under one of sections 15 to 18 if — (a) he has taken an action or been in possession of a thing, and (b) he would have committed an offence under one of those sections if he had been in the United Kingdom at the time when he took the action or was in possession of the thing.

requires banks and other businesses to report any suspicion they may have that someone is laundering terrorist money or committing any of the other terrorist property offences in sections 15 to 18. Subsection (1)(b) ensures the offence is focused on suspicions which arise at work. Subsection (5) preserves the exemption in respect of legal advisers' privileged material. It is noted that the Government has decided, in following Lord Lloyd's recommendation suspicions arising in home life, should not replicate the provision of the PTA. Sections 20² and 21³ deal with permission for disclosure of information and co-operation with the police. Section 20 ensures that businesses can disclose information to the police without fear of breaching legal restrictions. Section 21 makes provision for the activities of informants who may have been involved with terrorist property if they are not to be found out and protects others who may innocently become involved. Subsection (2)

(8) A person guilty of an offence under this section shall be liable — (a) on conviction on indictment, to imprisonment for a term not exceeding five years, to a fine or to both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum or to both.

² 20 (1) A person may disclose to a constable — (a) a suspicion or belief that any money or other property is terrorist property or is derived from terrorist property; (b) any matter on which the suspicion or belief is based.

(2) A person may make a disclosure to a constable in the circumstances mentioned in section 19(1) and (2).

(3) Subsections (1) and (2) shall have effect notwithstanding any restriction on the disclosure of information imposed by statute or otherwise.

(4) Where — (a) a person is in employment, and (b) his employer has established a procedure for the making of disclosures of the kinds mentioned in subsection (1) and section 19(2), subsections (1) and (2) shall have effect in relation to that person as if any reference to disclosure to a constable included a reference to disclosure in accordance with the procedure.

³ 21(1) A person does not commit an offence under any of sections 15 to 18 if he is acting with the express consent of a constable.

(2) Subject to subsections (3) and (4), a person does not commit an offence under any of sections 15 to 18 by involvement in a transaction or arrangement relating to money or other property if he discloses to a constable — (a) his suspicion or belief that the money or other property is terrorist property, and (b) the information on which his suspicion or belief is based.

(3) Subsection (2) applies only where a person makes a disclosure — (a) after he becomes concerned in the transaction concerned, (b) on his own initiative, and (c) as soon as is reasonably practicable.

(4) Subsection (2) does not apply to a person if — (a) a constable forbids him to continue his involvement in the transaction or arrangement to which the disclosure relates, and (b) he continues his involvement.

(5) It is a defence for a person charged with an offence under any of sections 15(2) and (3) and 16 to 18 to prove that — (a) he intended to make a disclosure of the kind mentioned in subsections (2) and (3), and (b) there is reasonable excuse for his failure to do so.

(6) Where — (a) a person is in employment, and (b) his employer has established a procedure for the making of disclosures of the same kind as may be made to a constable under subsection (2), this section shall have effect in relation to that person as if any reference to disclosure to a constable included a reference to disclosure in accordance with the procedure.

(7) A reference in this section to a transaction or arrangement relating to money or other property includes a reference to use or possession.

makes it possible for someone involved with such property to avoid prosecution by telling the police as soon as is reasonably practicable and discontinuing involvement if asked to do so by the police. The Act allows for forfeiture of the proceeds of a terrorist property offence. This could arise in a case where an accountant prepared accounts on behalf of a proscribed organisation - thus facilitating the retention or control of the organisation's money - and was paid for doing so. The money he or she received in payment could not be forfeited under section 13(2) of the PTA because it was not intended or suspected for use in terrorism. It could not be confiscated under the Criminal Justice Act 1988 because that confiscation regime excludes terrorist property offences. The Act closes this loophole between the confiscation scheme in the 1988 Act and the counter-terrorist forfeiture scheme.⁴ The Act provides that where a person other than the convicted person claims to be the owner of or otherwise interested in anything which can be forfeited by an order under section 23, the court must shall give him or her an opportunity to be heard before making an order.

6.62 As noted at the beginning of this chapter, the events of September 2001 lead to the UK introducing the *Anti-Terrorism, Crime And Security Bill* 49 of 2001.⁵ It is pointed out in the summary of the *Anti-Terrorism, Crime And Security Act* that Part 1 and schedules 1 and 2 of the Act contain provisions to prevent terrorists from gaining access to their money. They complement provisions in the new *Proceeds of Crime Bill* and ensure that tough investigative and freezing powers are available wherever funds could be used to finance terrorism. The introduction of account monitoring orders enable the police to require financial institutions to provide information on accounts for up to 90 days. The existing requirement to report knowledge or suspicion of terrorist financing has been strengthened, for the regulated sector, so that it is an offence not to report where there are "reasonable grounds" for suspicion. The Act gives law enforcement agencies the power to seize terrorist cash anywhere in the UK, and the power to freeze assets at the start of an investigation, rather than when the person is about to be charged, reducing the risk that funds will be used or moved before they can be frozen. A proposal which was not included in the Act but also implemented is the new multi-agency terrorist finance unit which has been created

⁴ (6) Where a person is convicted of an offence under any of sections 15 to 18, the court may order the forfeiture of any money or other property which wholly or partly, and directly or indirectly, is received by any person as a payment or other reward in connection with the commission of the offence.

⁵ It was noted in Chapter 1 above that the on 28 September 2001 the Security Council of the United Nations adopted resolution 1373 which is aimed at combatting international terrorism and particularly that all States should prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts.

within the National Criminal Intelligence Service (NCIS), and fully supported by additional special branch investigative resources. Part 2 and schedules 3 and 8 of the Act replace provisions in the Emergency Laws (Re-enactments and Repeals) Act 1964 to allow the UK to take swifter, more targeted action to freeze the assets of terrorist individuals and groups. HM Treasury may make freezing orders where there a threat to the UK economy (or part of the UK economy, or to the life or property of UK nationals or residents).

6.63 Sections 24 to 31 of the *Terrorism Act* deal with seizure, detention and forfeiture of terrorist cash at borders. However, when the *Anti-Terrorism, Crime and Security Act* of 2001 was passed, sections 24 to 31 of the *Terrorism Act* 2000 ceased to have effect. Section 24 allowed the power to seize cash to be exercised by any of the agencies operating at borders: police, customs and immigration. This was to allow for the event that a customs or immigration officer was the first to find the cash. It was expected that for the most part the power would be exercised by the police. The definition of cash in subsection (2) was intended to cover the most readily realisable monetary instruments used by terrorists. An order-making power enabled the Secretary of State to add further monetary instruments as the need arose.

6.64 Once cash had been seized, then it could be detained for up to 48 hours. During that time the authorities either had to seek continued detention or forfeiture, and if neither of these occurred during the first 48 hours, the cash had to be returned. A magistrate could allow continued detention for up to 3 months, and a further application could be granted after the 3 months has expired, and so on, up to a maximum of two years. The Act provided for any interest accruing on the cash, and for application to the court for a direction that the cash be released. The Act also made provision for civil forfeiture proceedings in relation to the seized cash. Evidence that the cash is terrorist property was required to the civil standard, proceedings for a criminal offence were not needed and the proceedings themselves were civil as opposed to criminal. Appeals had to be lodged within 30 days. A successful appeal would have resulted in the cash being paid back, together with any accrued interest. The Act provided for the situation where an organisation was deproscribed following a successful appeal to POAC, and a forfeiture order had been made in reliance (in whole or in part) on the fact that the organisation was proscribed. In such cases, the person whose cash has been forfeited could appeal at any time before the end of the period of 30 days beginning with the date on which the deproscription order came into force.

6.65 The *Anti-Terrorism, Crime and Security Act* of 2001 contain measures to allow the UK to take swifter, more targeted action to freeze the assets of overseas governments or

residents.¹ The Acts allows the Government to counter threats to any part of the UK economy or threats to the life or property of a UK resident or national. The Act governs the power of the Treasury to make freezing orders. The Treasury may make a freezing order if two conditions are satisfied: the first condition is that the Treasury reasonably believe that action to the detriment of the United Kingdom's economy (or part of it) has been or is likely to be taken by a person or persons, or action constituting a threat to the life or property of one or more nationals of the United Kingdom or residents of the United Kingdom has been or is likely to be taken by a person or persons. If one person is believed to have taken or to be likely to take the action the second condition is that the person is the government of a country or territory outside the United Kingdom, or a resident of a country or territory outside the United Kingdom. If two or more persons are believed to have taken or to be likely to take the action the second condition is that each of them is the government of a country or territory outside the United Kingdom, or a resident of a country or territory outside the United Kingdom.

6.66 The Act also says that a freezing order is an order which prohibits persons from making funds available to or for the benefit of a person or persons specified in the order. The Act provides on the content of orders and the persons who are prohibited from making funds available that it refers to all persons in the United Kingdom, and all persons elsewhere who are nationals of the United Kingdom or are bodies incorporated under the law of any part of the United Kingdom or are Scottish partnerships. The order may specify that the person or persons to whom or for whose benefit funds are not to be made available is the person or persons reasonably believed by the Treasury to have taken or to be likely to take

¹ **TERRORIST PROPERTY 1 Forfeiture of terrorist cash**

- Schedule 1 (which makes provision for enabling cash which—
 - is intended to be used for the purposes of terrorism,
 - consists of resources of an organisation which is a proscribed organisation, or
 - is, or represents, property obtained through terrorism,
 to be forfeited in civil proceedings before a magistrates' court or (in Scotland) the sheriff) is to have effect.
- (2) The powers conferred by Schedule 1 are exercisable in relation to any cash whether or not any proceedings have been brought for an offence in connection with the cash.
- (3) Expressions used in this section have the same meaning as in Schedule 1.
- (4) Sections 24 to 31 of the Terrorism Act 2000 (c. 11) (seizure of terrorist cash) are to cease to have effect.
- (5) An order under section 123 bringing Schedule 1 into force may make any modifications of any code of practice then in operation under Schedule 14 to the Terrorism Act 2000 (exercise of officers' powers) which the Secretary of State thinks necessary or expedient.

action to the detriment of the United Kingdom's economy (or part of it), or action constituting a threat to the life or property of one or more nationals of the United Kingdom or residents of the United Kingdom, or any person the Treasury reasonably believe has provided or is likely to provide assistance (directly or indirectly) to that person or any of those persons. A person may be specified by being named in the order, or falling within a description of persons set out in the order. The Bill also provides that the description must be such that a reasonable person would know whether he or she fell within it.

6.67 *Schedule 1 of the Anti-terrorism, Crime and Security Act* governs the forfeiture of terrorist cash. The Schedule provides that it applies to cash ("terrorist cash") which is intended to be used for the purposes of terrorism, consists of resources of an organisation which is a proscribed organisation, or is property earmarked as terrorist property. "Cash" means coins and notes in any currency, postal orders, cheques of any kind, including travellers' cheques, bankers' drafts, bearer bonds and bearer shares, found at any place in the United Kingdom. Cash also includes any kind of monetary instrument which is found at any place in the United Kingdom, if the instrument is specified by the Secretary of State by order. The Act provides that this power to make an order is exercisable by statutory instrument, which is subject to annulment in pursuance of a resolution of either House of Parliament.

6.68 The Schedule provides further that an authorised officer may seize any cash if he or she has reasonable grounds for suspecting that it is terrorist cash. An authorised officer may also seize cash part of which he has reasonable grounds for suspecting to be terrorist cash if it is not reasonably practicable to seize only that part. The *Anti-terrorism, Crime and Security Act* provides that a freezing order must be laid before Parliament after being made,² **and ceases to have effect at the end of the relevant period unless before the end of that period the order is approved by a resolution of each House of Parliament (but without that affecting anything done under the order or the power to make a new order).** In terms of the Act the relevant period is a period of 28 days starting with the day on which the order is made. In calculating the relevant period no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days. If the Treasury propose to make a freezing order in the belief that the condition in section 4(2)(b) is satisfied, they must not make the order unless they consult the Secretary of State. The procedure for making certain amending orders is as follows: the provision applies if a freezing order is made specifying by description (rather than by name) the person or persons to whom or for whose benefit funds are not to be made available, or it is proposed to make a further order which amends the freezing order only so as to make it specify by

² Section 10 of the Act.

name the person or persons (or any of the persons) to whom or for whose benefit funds are not to be made available, and the further order states that the Treasury believe that the person or persons named fall within the description contained in the freezing order. The provision also applies if a freezing order is made specifying by name the person or persons to whom or for whose benefit funds are not to be made available, it is proposed to make a further order which amends the freezing order only so as to make it specify by name a further person or further persons to whom or for whose benefit funds are not to be made available, and the further order states that the Treasury believe that the further person or persons fall within the same description as the person or persons specified in the freezing order. This provision also applies if a freezing order is made, and it is proposed to make a further order which amends the freezing order only so as to make it specify (whether by name or description) fewer persons to whom or for whose benefit funds are not to be made available. If this provision applies, a statutory instrument containing the further order is subject to annulment in pursuance of a resolution of either House of Parliament.

6.69 The procedure for revoking orders is as follows: a statutory instrument containing an order revoking a freezing order (without re-enacting it) is subject to annulment in pursuance of a resolution of either House of Parliament. An order may include supplementary, incidental, saving or transitional provisions. A freezing order may include provision that funds include gold, cash, deposits, securities (such as stocks, shares and debentures) and such other matters as the order may specify. A freezing order must include provision as to the meaning (in relation to funds) of making available to or for the benefit of a person. In particular, an order may provide that the expression includes allowing a person to withdraw from an account; honouring a cheque payable to a person; crediting a person's account with interest; releasing documents of title (such as share certificates) held on a person's behalf; making available the proceeds of realisation of a person's property; making a payment to or for a person's benefit (for instance, under a contract or as a gift or under any enactment such as the enactments relating to social security); and such other acts as the order may specify. A freezing order must also include provision for the granting of licences authorising funds to be made available; provision that a prohibition under the order is not to apply if funds are made available in accordance with a licence. In particular, an order may provide —

- that a licence may be granted generally or to a specified person or persons or description of persons;
- that a licence may authorise funds to be made available to or for the benefit of persons generally or a specified person or persons or

description of persons;

- **that a licence may authorise funds to be made available generally or for specified purposes;**
- **that a licence may be granted in relation to funds generally or to funds of a specified description;**
- **for a licence to be granted in pursuance of an application or without an application being made;**
- **for the form and manner in which applications for licences are to be made;**
- **for licences to be granted by the Treasury or a person authorised by the Treasury;**
- **for the form in which licences are to be granted;**
- **for licences to be granted subject to conditions;**
- **for licences to be of a defined or indefinite duration;**
- **for the charging of a fee to cover the administrative costs of granting a licence;**
- **for the variation and revocation of licences.**

4.70 A freezing order may include provision that a person must provide information³

³

Alex Hamilton "Clause 17: what the Bill says" Observer Liberty Watch campaign Sunday November 25, 2001 *The Observer*

"Clause 17 could mean that the police are now able to trawl through personal information held by public authorities, such as medical records and bank details even if they are not sure that a crime has been committed. This information can be given to police anywhere in the world, including in countries with no data protection or privacy laws. These criminal investigations are not limited to acts of terrorism."

"This section amends dozens of Acts in one go, so there is no chance for parliament to weigh up the balance between the prevention of crime and the protection of privacy. The government tried to get these proposals through last year but had to drop the proposed law then in the face of strong parliamentary criticism. These proposals still need careful consideration and this appears to be a cynical attempt to take advantage of the current emergency."

The extent of the additional disclosure powers which would be involved is not yet clear - with the government claiming that the authorities concerned would retain discretion over what it is 'reasonable' to disclose - but critics point especially to section (d) of the clause, which permits additional disclosure not only for investigations which are underway, but also for the purpose of deciding whether or not an investigation should be initiated.

17 Extension of existing disclosure powers

(1) This section applies to the provisions listed in schedule 4, so far as they authorise the disclosure of information.

(2) Each of the provisions to which this section applies shall have effect, in relation to the disclosure of information by or on behalf of a public authority, as if the purposes for which the disclosure of information is authorised by that provision included each of the following:

- the purposes of any criminal investigation whatever which is being or may be carried out, whether in the United Kingdom or elsewhere;
- the purposes of any criminal proceedings whatever which have been or may be initiated, whether in the United Kingdom or elsewhere;

-
- the purposes of the initiation or bringing to an end of any such investigation or proceedings;
 - the purpose of facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end.

(3) The Treasury may by order made by statutory instrument add any provision contained in any subordinate legislation to the provisions to which this legislation applies.

(4) A statutory instrument containing an order under subsection (3) shall be subject to an annulment in pursuance of a resolution of either House of Parliament.

(5) Nothing in this section shall be taken to prejudice any power to disclose information which exists apart from in this section.

(6) The information that may be disclosed by virtue of this section includes information obtained before the commencement of this section.

The Bill goes on to list 58 acts under the heading "Extension of existing disclosure powers" as "Enactments to which section 17 applies", beginning with Section 47 (2) of the Agricultural Marketing Act of 1958 through to six acts passed last year, including the Transport Act 2000, the Utilities Act 2000 and the Postal Services Act 2000. The acts include some - the Cereals Marketing Act 1965, the Sea Fish Industry Act of 1970 and the Diseases of Fish Act 1983 - which may seem to have very little to do with the 'War on Terrorism'.

The inclusion of the Consumer Credit Act 1974, the National Health Service Act 1977, the Telecommunications Act 1984, the Companies Act 1989 and the Health Act 1999 are among the provisions causing most concern about the extent of the extensions of state powers and the curtailment of privacy.

See also Nick Paton Walsh "Terror Bill lets police scan NHS records" *The Observer* Sunday November 25, 2001

"Police forces across the world will get unrestricted access to medical records and bank

if required to do so and it is reasonably needed for the purpose of ascertaining whether an offence under the order has been committed; must produce a document if required to do so and it is reasonably needed for that purpose. In particular, an order may include —

- provision that a requirement to provide information or to produce a document may be made by the Treasury or a person authorised by the Treasury;
- provision that information must be provided, and a document must be produced, within a reasonable period specified in the order and at a place specified by the person requiring it; provision that the provision of information is not to be taken to breach any restriction on the disclosure of information (however imposed);
- provision restricting the use to which information or a document may be put and the circumstances in which it may be disclosed;
- provision that a requirement to provide information or produce a document does not apply to privileged information or a privileged document;
- provision that information is privileged if the person would be entitled to refuse to provide it on grounds of legal professional privilege in proceedings in the High Court or (in Scotland) on grounds of confidentiality of communications in proceedings in the Court of Session;
- provision that a document is privileged if the person would be entitled to refuse to produce it on grounds of legal professional privilege in proceedings in the High Court or (in Scotland) on grounds of

details of Britons under radical powers granted by the new anti-terrorism Bill.

The new powers, which are set to receive their final approval in the House Of Commons tomorrow, have sparked the serious concern of health service regulators and furious opposition from the legal profession.

In an unprecedented move which critics say has 'threatened to destroy doctor-patient confidentiality' and 'swept away some of the last vestiges of privacy in the UK', officials will be able to read NHS records and business details at will. Authorities will not have to establish that a criminal act may have occurred to gain access, as previous laws required. . . ."

confidentiality of communications in proceedings in the Court of Session;

- provision that information or a document held with the intention of furthering a criminal purpose is not privileged.

6.71 A freezing order may require a person to disclose information if three conditions are satisfied. The first condition is that the person required to disclose is specified or falls within a description specified in the order. The second condition is that the person required to disclose knows or suspects, or has grounds for knowing or suspecting, that a person specified in the freezing order as a person to whom or for whose benefit funds are not to be made available is a customer of his or her, or has been a customer of his or her at any time since the freezing order came into force, or is a person with whom he or she has dealings in the course of his or her business or has had such dealings at any time since the freezing order came into force. The third condition is that the information on which the knowledge or suspicion of the person required to disclose is based, or which gives grounds for his knowledge or suspicion, came to him or her in the course of a business in the regulated sector. The freezing order may require the person required to disclose to make a disclosure to the Treasury of that information as soon as is practicable after it comes to him or her. The freezing order may include provision that Schedule 3A to the Terrorism Act 2000 is to have effect for the purpose of determining what is a business in the regulated sector; provision that the disclosure of information is not to be taken to breach any restriction on the disclosure of information (however imposed); provision restricting the use to which information may be put and the circumstances in which it may be disclosed by the Treasury; provision that the requirement to disclose information does not apply to privileged information; provision that information is privileged if the person would be entitled to refuse to disclose it on grounds of legal professional privilege in proceedings in the High Court or (in Scotland) on grounds of confidentiality of communications in proceedings in the Court of Session; provision that information held with the intention of furthering a criminal purpose is not privileged.

6.72 The Act also sets out a number of offences. A person commits an offence if he or she fails to comply with a prohibition imposed by the order. A person commits an offence if he or she engages in an activity knowing or intending that it will enable or facilitate the commission by another person of an offence. A person commits an offence if —

- he or she fails without reasonable excuse to provide information, or to produce a document, in response to a requirement made under the order;
- he or she provides information, or produces a document, which he or she knows is false in a material particular in response to such a requirement or with a view to obtaining a licence under the order;
- he or she recklessly provides information, or produces a document, which is false in a material particular in response to such a requirement or with a view to obtaining a licence under the order;
- he or she fails without reasonable excuse to disclose information as required.

6.73 A person does not commit an offence if he or she proves that he or she did not know and had no reason to suppose that the person to whom or for whose benefit funds were made available, or were to be made available, was the person (or one of the persons) specified in the freezing order as a person to whom or for whose benefit funds are not to be made available. A person guilty of an offence of failing to comply with a prohibition imposed by an or of engaging in an activity knowing or intending that it will enable or facilitate the commission by another person of an offence is liable — on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both; on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine or to both. A person guilty of an offence of failing without reasonable excuse to provide information, or to produce a document, in response to a requirement made under the order; or of providing information, or a document, which he or she knows is false in a material particular in response to such a requirement or with a view to obtaining a licence under the order; or of recklessly providing information, or a document, which is false in a material particular in response to such a requirement or with a view to obtaining a licence under the order; or of failing without reasonable excuse to disclose information as required is liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5 on the standard scale or to both. Proceedings for an offence under the order are not to be instituted in England and Wales except by or with the consent of the Treasury or the Director of Public Prosecutions. Proceedings for an offence under the order are not to be instituted in Northern Ireland except by or with the consent of the Treasury or the Director of Public Prosecutions for Northern Ireland.

6.74 If an offence under the order is committed by a body corporate¹, and is proved to have been committed with the consent or connivance of an officer, or to be attributable to any neglect on his or her part, he or she as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly. A freezing order may include provision for the award of compensation to or on behalf of a person on the grounds that he has suffered loss as a result of — the order; the fact that a licence has not been granted under the order; the fact that a licence under the order has been granted on particular terms rather than others; the fact that a licence under the order has been varied or revoked. In particular, the order may include provision about the person who may make a claim for an award; about the person to whom a claim for an award is to be made (which may be provision that it is to be made to the High Court or, in Scotland, the Court of Session); about the procedure for making and deciding a claim; that no compensation is to be awarded unless the claimant has behaved reasonably (which may include provision requiring him to mitigate his loss, for instance by applying for a licence); that compensation must be awarded in specified circumstances or may be awarded in specified circumstances (which may include provision that the circumstances involve negligence or other fault); about the amount that may be awarded; about who is to pay any compensation awarded (which may include provision that it is to be paid or reimbursed by the Treasury); about how compensation is to be paid (which may include provision for payment to a person other than the claimant). A freezing order must include provision that if a person is specified in the order as a person to whom or for whose benefit funds are not to be made available, and he or she makes a written

¹ (3): These are officers of a body corporate — (a) a director, manager, secretary or other similar officer of the body; (b) any person purporting to act in any such capacity. (4) If the affairs of a body corporate are managed by its members sub-paragraph (2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were an officer of the body.

(5) If an offence under the order — (a) is committed by a Scottish partnership, and (b) is proved to have been committed with the consent or connivance of a partner, or to be attributable to any neglect on his part, he as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

request to the Treasury to give him or her the reason why he or she is so specified, as soon as is practicable the Treasury must give the person the reason in writing.

(h) Disclosing information

6.75 Part 3 and Schedule 4 to the *Anti-terrorism, Crime and Security Act* contain provisions to remove current barriers which prevent customs and revenue officers from providing information to law enforcement agencies in their fight against terrorism and other crime. They also harmonise many existing gateways for the disclosure of information for criminal investigations and proceedings. The Act creates a new gateway giving HM Customs and Excise and the Inland Revenue a general power to disclose information held by them for law enforcement purposes and to the intelligence services in defence of national security. This ensures that known criminals are brought to justice. For example, the provisions of the Act would allow for information on a suspected terrorist financier's bank account to be passed to the police. The Act also clarifies and harmonises a number of existing gateways for disclosure of information from public authorities to agencies involved in criminal investigations and proceedings. The gateways will ensure that public authorities can disclose certain types of otherwise confidential information where this is necessary for the purposes of fighting terrorism and other crimes.

(i) Terrorist investigations

6.76 Section 32 of the *Terrorist Act* defines what is meant by "terrorist investigation". The explanatory notes explain that this definition applies to the power to use cordons, to the powers to obtain search warrants, production orders and explanation orders; and to the power to make financial information orders. There is also an offence of "tipping off" in relation to a terrorist investigation. Sections 33 to 36 deal with cordons. They give the police the power for a limited period to designate¹ **and demarcate a specified area² as a cordoned**

¹ 33(1) An area is a cordoned area for the purposes of this Act if it is designated under this section.

(2) A designation may be made only if the person making it considers it expedient for the purposes of a terrorist investigation.

(3) If a designation is made orally, the person making it shall confirm it in writing as soon as is reasonably practicable.

(4) The person making a designation shall arrange for the demarcation of the cordoned area, so far as is reasonably practicable (a) by means of tape marked with the word "police", or (b) in such other manner as a constable considers appropriate.

² 34(1) Subject to subsection (2), a designation under section 33 may only be made (a) where the area is outside Northern Ireland and is wholly or partly within a police area, by an officer for the police area who is of at least the rank of superintendent, and (b) where the area is in Northern Ireland, by a member of the Royal Ulster Constabulary who is of at least the rank of superintendent.

(2) A constable who is not of the rank required by subsection (1) may make a designation if he

area for the purposes of a terrorist investigation — for instance in the wake of a bomb. They give the police the power to order a person in a cordoned area to leave it immediately, to leave premises which are wholly or partly in or adjacent to a cordoned area, to order the driver or person in charge of a vehicle in a cordoned area to move it from the area immediately, to arrange for the removal of a vehicle from a cordoned area, to arrange for the movement of a vehicle within a cordoned area, to prohibit or restrict access to a cordoned area by pedestrians or vehicles. These provisions also make it an offence to breach a cordon. The period during which a designation has effect may be extended in writing from time to time but a designation shall not have effect after the end of the period of 28 days beginning with the day on which it is made. The Act grants certain powers to the police to obtain information and evidence. Additional investigative powers given to the police in the past under the PTA applied where a terrorist investigation, including a financial investigation, was in progress and the information and other material which was being sought was likely to be of substantial value to that investigation. The principal powers - and the ones of most used in financial investigations - enabled the police in England, Wales and Northern Ireland to:

considers it necessary by reason of urgency.
 (3) Where a constable makes a designation in reliance on subsection (2) he shall as soon as is reasonably practicable (a) make a written record of the time at which the designation was made, and (b) ensure that a police officer of at least the rank of superintendent is informed.
 (4) An officer who is informed of a designation in accordance with subsection (3)(b) — (a) shall confirm the designation or cancel it with effect from such time as he may direct, and (b) shall, if he cancels the designation, make a written record of the cancellation and the reason for it.

- **apply to a justice of the peace for a search warrant¹ in respect of material which did not include excluded or special procedure material or material subject to legal privilege;²**
- **apply to a circuit judge for a production order in respect of excluded or special procedure material. A production order required the holder of the material in question to hand it over to the police or to give them access to it within a specified period;**
- **apply to a circuit judge for a search warrant in relation to excluded or special procedure material. This power could only be used where a production order had been made but not complied with or where the making of such an order would be impracticable or inappropriate; and**
- **apply to a circuit judge for an explanation order. An order of this sort required an individual to provide an explanation of any material which had been found as the result of a production order or of a search under warrant. As a safeguard against the abuse of this power, the Act imposed limits on the extent to which any statement may be used in evidence against the individual concerned and it also provided that material subject to legal professional privilege is exempt from the force of the provisions. Making a false statement, however, constituted an offence under the PTA punishable by up to 2 years' imprisonment.³**

¹ A constable may apply to a justice of the peace for the issue of a warrant for the purposes of a terrorist investigation. The warrant authorises any constable to enter the premises specified in the warrant, to search the premises and any person found there, and to seize and retain any relevant material which is found on a search. Material is relevant if the constable has reasonable grounds for believing that it is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation, and it must be seized in order to prevent it from being concealed, lost, damaged, altered or destroyed. The warrant does not authorise the seizure and retention of items subject to legal privilege, or a constable to require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.

² A justice may grant an application if satisfied that the warrant is sought for the purposes of a terrorist investigation, that there are reasonable grounds for believing that there is material on premises specified in the application which is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation and which does not consist of or include excepted material, and that the issue of a warrant is likely to be necessary in the circumstances of the case.

³ The consultation document noted that there are no circuit judges in Northern Ireland. The powers conferred on circuit judges by section 17 and Schedule 7 to the PTA are therefore exercisable in Northern Ireland by a county court judge. Equivalent provision is made for Scotland save for some minor adjustments to reflect the differences in the legal system there, since in Scotland production and explanation orders are granted by a sheriff on an application from a procurator fiscal. Only in Northern Ireland, the Secretary of State is empowered in certain circumstances to authorise the police to carry out searches for, or require the production of, material in connection with investigations into the offences in sections 9 - 12 of the PTA and/or that of directing a terrorist organisation.

6.77 The explanatory notes to the *Terrorism Act* explain that in the *PTA*, relevant material was defined in relation to "the investigation" - that is, the investigation for which the warrant was issued, whereas the equivalent provision in the *Terrorism Act*, includes in the definition anything likely to be of substantial value to "a terrorist investigation", that is, any terrorist investigation. This is intended to enable a police officer to seize and retain not only material relevant to the investigation for which the warrant was issued but any material relevant to investigation of any of the matters specified in section 32 without having to go back to court for a further warrant. A similar change is made throughout the rest of the Schedule. The schedule gives the judge discretion over the necessity for a warrant in the particular case. The explanatory notes points out that the reasoning behind this is best illustrated by a hypothetical example: Suppose the police need to find, seize and retain certain material on certain premises. They successfully contact a person entitled to grant entry to the premises and access to the material. That person is content to grant them such entry and access, but is not content for the material to be seized and retained. The police therefore needed a warrant to authorise seizing and retaining the material; but the conditions in paragraph 2(2) of Schedule 7 to the *PTA* are not met, so under the *PTA* the justice of the peace could not issue a warrant. It was to cover this eventuality that, in replicating this provision, a more general test that "the issue of a warrant is likely to be necessary in the circumstances of the case" had been substituted.

6.78 The explanatory notes say that a person's response to an explanation order represents information given under compulsion and cannot normally be used in evidence against him, as this would be a breach of the right against self-incrimination (or "right to silence"). The *PTA* provided two exceptions to this general principle. The first is if the criminal trial in question is for the offence of giving a false or misleading answer to the explanation order itself. The second is in a trial for any other offence, if in that trial the person makes a statement inconsistent with his response to the explanation order. The first of these exceptions is replicated in the Act but the second has been dropped. The Act also provides for urgent cases. In urgent cases a police superintendent may issue warrants and explanation orders, so long as he notifies the Secretary of State. The condition that the action must be "in the interests of the State" has been dropped. This is because the Act applies to all forms of terrorism: the power might therefore be used in a case where the terrorism was directed against another country. Under the *PTA*, in Northern Ireland only, the Secretary of State could authorise the police to carry out searches for, or require the production of, material in

connection with investigations into terrorist finance offences or in relation to the offence of directing a terrorist organisation. The Terrorism Act replicates those provisions, again for Northern Ireland only, in an updated form consistent with the other provisions in Schedule 5 to the Act. This will mean that, along with all the Northern Ireland specific measures, these provisions will be temporary and renewable.

6.79 Schedule 6 adds to the powers available to investigate terrorist finance a further investigative tool which has already proved its effectiveness in the investigation of the proceeds of crime in Northern Ireland. The purpose of an order is to enable a constable to identify accounts in relation to terrorist investigations. It is therefore intended for use at an earlier stage in an investigation than production and explanation orders under Schedule 5 to the Act.

(j) **Power of arrest**

6.80 The explanatory notes to the *Terrorism Act* explain that there is a special arrest power for use in terrorist cases because experience continues to show that it is necessary to make provision for circumstances where, at the point when the police believe an arrest should take place, there is not enough to charge an individual with a particular offence even though there is reasonable suspicion of involvement with terrorism. Section 40 provides that "terrorist" means (in that part of the Act) a person who has committed an offence under any of sections 11, 12, 15 to 18, 54 and 56 to 63, or is or has been concerned in the commission, preparation or instigation of acts of terrorism. The section sets out further that the reference in section 41(1)(b) to a person who has been concerned in the commission, preparation or instigation of acts of terrorism includes a reference to a person who has been, whether before or after the passing of the Act, concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by section 1. Sections 42 and 43 give the police powers to search people liable to arrest under section 41. *Subsection (9)* of section 41 and *subsection (5)* of section 43, respectively, give constables the power to make an arrest under section 41(1) of the Act in any Part of the United Kingdom, and to search people under section 43 (these subsections in other words confer "cross border" powers of arrest and search).

(k) **Detention**

6.81 The UK Government proposed that responsibility for granting extensions of detention should, under the new legislation, be transferred from the Secretary of State to a judicial

authority and it explored the arguments for and against reducing from 7 day maximum, the period for which a detainee may be held subject, in future, to judicial authorization. It was noted in the *House of Commons Research Paper* that a person arrested by the police under the PTA could be detained for up to 48 hours without charge, and if the police wished to detain him or her for a further period they had to apply to the Secretary of State to extend the period of detention, and the latter had the power to extend the detention for a period of up to 5 days. It stated that a person arrested under section 14 could therefore have been detained for up to 7 days without charge. Article 5(3) to (5) of the European Convention on Human Rights was also noted.¹

6.82 The *Research Paper* pointed out that in 1988 the European Court of Human Rights held in the case of *Brogan v. UK* that there had been a breach of Article 5(3) of the European Convention of Human Rights (ECHR) where a person had been detained for 4 days and 6 hours without judicial authorisation under what was then section 14 of the PTA. The *Research Paper* noted that in the consultation paper *Legislation Against Terrorism* the UK Government explained the steps taken by the Government in the wake of that decision:

The then Government responded by entering a derogation under the relevant articles of the Convention and the UN International Convention on Civil and Political Rights to preserve the right to detain those suspected of involvement in Irish terrorism for up to 7 days. Consideration was given to amending the PTA to make the judiciary responsible for authorising extensions of detention but the Government concluded that no way could be found of doing so without undermining the independence of the judiciary particularly in Northern Ireland. The derogation remains in force today. It does not apply to international terrorism because the threat to the United Kingdom from such groups, although grave, was - and is - not thought to be comparable to that from Irish terrorism.

¹ 5(3). Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

6.83 The Research Paper also referred to the White Paper *Rights Brought Home: the Human Rights Bill* in which the United Kingdom Government made the following remarks about the derogation in respect of Article 5(3),:

4.3 We are considering what change might be made to the arrangements under the prevention of terrorism legislation. Substituting judicial for executive authority for extensions, which would mean that the derogation could be withdrawn, would require primary legislation. In the meantime, however, the derogation remains necessary. The Bill sets out the text of the derogation, and Article 5(3) will have effect in domestic law for the time being subject to its terms.

4.4 Given our commitment to promoting human rights, however, we would not want the derogation to remain in place indefinitely without good reasons. Accordingly its effect in domestic law will be time-limited. If not withdrawn earlier, it will expire five years after the Bill comes into force unless both Houses of Parliament agree that it should be renewed, and similarly thereafter. The Bill contains similar provision in respect of any new derogation which may be entered in future.

6.84 It was further explained in the *Research Paper* that in its consultation paper *Legislation Against Terrorism* the UK Government set out its views on possible changes to the powers of detention under section 14 of the PTA as follows:

8.5 The Government is aware that some argue that the relevant provisions for detaining, and extending detention, under the PTA should simply be repealed and not replaced. Those who advance this position suggest that special arrangements are not needed because those in the ordinary criminal law are sufficient and should be applied. The Government disagrees. The threat from terrorism is such that the ordinary criminal law is not sufficient, in the Government's view, to protect either the sensitivity of the information which frequently forms a large part of the case for an extension under the PTA, or the independence of the judiciary. There are also marked differences between the criminal justice systems in the three jurisdictions. In Scotland, for example, the courts have no powers under the normal criminal law to extend detentions beyond the 6 hour limit imposed by section 14 of the Criminal Procedure (Scotland) Act 1995, a limit which would be extremely impractical in terrorist cases.

8.6 However, the Government is mindful that the current extension of detention provisions in the Act have been criticised on the grounds that they allow a suspect to be held without charge for longer than is possible under the ordinary criminal law; and that extensions are granted by the executive without reference to any judicial authority. The Government fully appreciates these concerns. It believes that any new legislation must provide new arrangements for extending detentions in terrorist cases.

6.85 The *Research Paper* pointed out that the UK Government identified three possible options for change:

- .. A suggestion by Lord Lloyd that applications for extensions of detention in terrorist cases should be heard ex parte and in camera by the Chief Metropolitan Stipendiary Magistrate in England and Wales; by the Sheriff Principal of Lothian and Borders in Scotland, and by an equivalent officer in Northern Ireland ;
- .. The creation of an independent Commission along the lines of that established by the Special Immigration Appeals Commission Act 1997, to examine and determine applications for extensions of detention under the new counter-terrorist legislation;
- .. The introduction of different arrangements in each of the three jurisdictions for judicial authorities to grant extensions.

6.86 The consultation document explained that the UK Government believed the introduction of arrangements along the lines of the second or third of these options would satisfy the requirements of Article 5(3) of the Convention and enable the United Kingdom to withdraw its derogation, and that on balance the Government favoured Option 2. The *Research Paper* pointed out that it was intended that the police should be able to detain a person arrested for an initial period of up to 48 hours, a person's detention would have to be periodically reviewed by a review officer, who would be an officer who had not been directly involved in the investigation in connection with which the person had been detained and the review officer would only be able to authorise a person's continued detention if satisfied that it was necessary to obtain relevant evidence, whether by questioning him or her or otherwise, to preserve relevant evidence, or pending a decision whether to apply to the Secretary of State for a deportation notice to be served on him or her. It was further envisaged that the detained person, or his solicitor if he or she was available at the time of review, would be able to make oral or written representations about the detention. Furthermore, the review officer would have to make a written record of the outcome of the review, including the grounds on which any continued detention was authorised, and, unless the detained person were to be incapable of understanding what is said to him, was violent or likely to become violent, or in urgent need of medical attention, the record would have to be made in his or her presence and he or she had to be informed about whether the review officer was authorising continued detention and if so, on what grounds. If the police wished to detain a person beyond the 48 hour period the Bill aimed to permit an officer of at least the rank of superintendent to apply, to a judicial authority for the issue of a warrant of further detention.

6.87 The treatment of persons detained under the *Terrorism Act* or examined under it is set out in Schedule 8. The Secretary of State has the power to direct the places at which persons shall be detained.¹ Provision is made for those detained under the Act's arrest and detention procedures including that steps may be taken to identify them; that fingerprints, intimate samples (e.g. DNA) and non-intimate samples (e.g. hair) may be taken; and the limited circumstances in which a detainee may be kept incommunicado or without access to legal advice.² Interviews at a police station must

¹ Amnesty International was concerned about the provisions giving the Secretary of State the power to direct "the place where a person is to be detained" at special interrogation centres, as opposed to designated police stations.

² An officer of at least the rank of superintendent may authorise a delay in informing the person named by a detained person or in permitting a detained person to consult a solicitor only if he or she has reasonable grounds for believing that informing the named person of the detained person's detention or of permitting a solicitor to be present will have any of the following consequences, namely interference with or harm to evidence of a serious arrestable offence,

be audio recorded in compliance with a Code of Practice. The Schedule also contains an order-making power whereby similar provision may be made in respect of video recording. Amnesty International expressed, however, concern on the wide-ranging powers of arrest without warrant; on the denial of a detainee's access to a lawyer upon arrest and that the right to legal assistance can be delayed, up to 48 hours, if the police believe the granting of this right may impede the investigation. They also noted that the Act allows for a consultation between lawyer and detainee to be held "in the sight and hearing" of a police officer, if a senior police officer has reasonable grounds to believe that such consultation would lead to interference with the investigation. They also point out that separate provisions, in relation to Scotland, similarly allow for an officer "to be present during a consultation". Amnesty International considered that these powers breach international standards. They also noted that the maximum period of detention without charge is seven days, with an extension of up to five days being granted by a judicial authority after the initial 48 hours. They pointed out that the provisions regarding judicial supervision of detention are still significantly weaker than under ordinary legislation, since, under ordinary legislation, the maximum period of detention without charge is four days, with further 36-hour and 24-hour extensions being granted by a judicial authority after the initial 36 hours.³

interference with or physical injury to any person, the alerting of persons who are suspected of having committed a serious arrestable offence but who have not been arrested for it, the hindering of the recovery of property obtained as a result of a serious arrestable offence or in respect of which a forfeiture order could be made under section 23, interference with the gathering of information about the commission, preparation or instigation of acts of terrorism, the alerting of a person and thereby making it more difficult to prevent an act of terrorism, and the alerting of a person and thereby making it more difficult to secure a person's apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism. An officer may also give such an authorisation if he or she has reasonable grounds for believing that —

(a) the detained person has committed an offence to which Part VI of the Criminal Justice Act 1988, Part I of the Proceeds of Crime (Scotland) Act 1995, or the Proceeds of Crime (Northern Ireland) Order 1996 (confiscation of the proceeds of an offence) applies,

(b) the detained person has benefited from the offence within the meaning of that Part or Order, and

(c) by informing the named person of the detained person's detention (in the case of an authorisation under sub-paragraph (1)(a)), or by the exercise of the right under paragraph 7 (in the case of an authorisation under sub-paragraph (1)(b)), the recovery of the value of that benefit will be hindered.

³

Amnesty International also raised concern on the Bill saying that the Bill failed to provide explicitly for detainees to be informed, upon arrest, of all of their rights. They pointed out that the Bill provided, for the right of a detainee to inform one person of his/her detention and the place of detention, and that the detainee was also entitled to consult a solicitor "as soon as is reasonably practicable" but that both of these rights could be delayed, up to 48 hours, if the police believed the granting of these rights may impede the investigation. Amnesty International was concerned that the provisions regarding judicial supervision of detention were still significantly weaker than under ordinary legislation. They noted that under the Bill, a person could be detained for 48 hours before a judicial authority determined whether an extension of that detention can be granted; this was longer than the 36 hours in ordinary criminal legislation. They also pointed out that under the Bill, the maximum period of

6.88 The arrangements for reviews of the continued detention by the police of a person arrested under section 41 are also set out in the *Terrorist Act*. A person's detention must be periodically reviewed by a review officer.⁴ The first review must be carried out as soon as is reasonably practicable after the time of the person's arrest. Subsequent reviews must be carried out at intervals of not more than 12 hours, although a review can be postponed. No review of a person's detention will be carried out after a warrant extending his or her detention has been issued. A review may be postponed if at the latest time at which it may be carried out—

- the detained person is being questioned by a police officer and an officer is satisfied that an interruption of the questioning to carry out the review would prejudice the investigation in connection with which**

detention without charge was seven days, whereas it was four days under ordinary legislation. They further remarked that under ordinary legislation, the request for further detention, beyond 36 hours, can only be granted by a court for a further 36 hours and then the court would have to approve the final 24-hour detention, to a maximum of four days. They said that under the Bill, however, further detention beyond the initial 48 hours could only be granted by a judicial authority within 48 hours of the arrest; it would appear that the judicial authority could, at that first 48-hour stage, then grant an extension of up to five days. They considered that if this were so, it may be in violation of the European Court for Human Rights which ruled that detention beyond 4 days and 6 hours without judicial supervision breached Article 5(3).

4

The review officer must be an officer who has not been directly involved in the investigation in connection with which the person is detained. In the case of a review carried out within the period of 24 hours beginning with the time of arrest, the review officer shall be an officer of at least the rank of inspector. In the case of any other review, the review officer shall be an officer of at least the rank of superintendent. Where the review officer is of a rank lower than superintendent, or an officer of higher rank than the review officer gives directions relating to the detained person, and those directions are at variance with the performance by the review officer of a duty imposed on him under this Schedule, then the review officer must refer the matter at once to an officer of at least the rank of superintendent.

the person is being detained,

- no review officer is readily available, or**
- it is not practicable for any other reason to carry out the review.**

6.89 Where a review is postponed it must be carried out as soon as is reasonably practicable. For the purposes of ascertaining the time within which the next review is to be carried out, a postponed review shall be deemed to have been carried out at the latest time at which it could have been carried out. A review officer may authorise a person's continued detention only if satisfied that it is necessary — to obtain relevant evidence¹ whether by questioning him or otherwise, to preserve relevant evidence, pending a decision whether to apply to the Secretary of State for a deportation notice to be served on the detained person, pending the making of an application to the Secretary of State for a deportation notice to be served on the detained person, pending consideration by the Secretary of State whether to serve a deportation notice on the detained person, or pending a decision whether the detained person should be charged with an offence.² The review officer will not authorise continued detention unless he or she is satisfied that the investigation in connection with which the person is detained is being conducted diligently and expeditiously. Before determining whether to authorise a person's continued detention, a review officer must give either of the following persons an opportunity to make representations about the detention, namely the detained person, or a solicitor representing him who is available at the time of the review. Representations may be oral or written. A

¹ "Relevant evidence" means evidence which relates to the commission by the detained person of an offence under any of the provisions mentioned in section 40(1)(a), or indicates that the detained person falls within section 40(1)(b).

² Amnesty International in commenting on the Bill said that the grounds upon which the judicial authority would decide to issue a warrant for further detention are less stringent than under ordinary legislation; they include belief that further detention is necessary to obtain relevant evidence including through questioning and that the investigation is being conducted diligently. They said that in addition, in contrast to ordinary legislation, the Bill allowed for the detainee and the lawyer of their own choice to be excluded from any part of the judicial hearing concerning the reasons for the extension and that this violates fair trial standards. Amnesty International pointed out that anyone deprived of their liberty has the right to be brought promptly before a judge, so that their rights to liberty and freedom from arbitrary arrest or detention can be protected and that this procedure often provides the detained person with their first opportunity to challenge the lawfulness of their detention and to secure release if the arrest or detention violated their rights. Amnesty International considered that this safeguard would be severely undermined if the detained person were to be excluded from this judicial hearing and thus excluded from challenging the lawfulness of his/her detention. They also commented that the safeguard of a judicial hearing would also be undermined if the detainee and his/her lawyer were excluded from the hearing while the court is deciding on whether to order the non-disclosure of information relied upon by the police officer applying for a warrant of extension. They noted that this amounts to an *in camera* hearing where police officers present evidence or allegations which could not be challenged by the detainee or his/her lawyer. Amnesty International remarked that it is very concerned that these clauses undermine the very essence of this safeguard.

review officer may refuse to hear oral representations from the detained person if he or she considers that he or she is unfit to make representations because of his condition or behaviour.

6.90 Where a review officer authorises continued detention he or she must inform the detained person of any of his rights granted by the Schedule which he or she has not yet exercised, and if the exercise of any of his or her rights under either of those paragraphs is being delayed in accordance with the Act, of the fact that it is being so delayed. Where a review of a person's detention is being carried out at a time when his or her exercise of a right under either of those paragraphs is being delayed the review officer must consider whether the reason or reasons for which the delay was authorised continue to subsist, and if in his or her opinion the reason or reasons have ceased to subsist, he or she must inform the officer who authorised the delay of his or her opinion (unless he was that officer). The following provisions (requirement to bring an accused person before the court after his arrest) shall not apply to a person detained under section 41— section 135(3) of the Criminal Procedure (Scotland) Act 1995,³ and Article 8(1) of the Criminal Justice (Children) (Northern Ireland) Order 1998.⁴ Section 22(1) of the Criminal Procedure (Scotland) Act 1995 (interim liberation by officer in charge of police station) does not apply to a person detained under section 41.⁵ A review officer carrying out a review must make a written record of the outcome

³ A person apprehended under a warrant or by virtue of power under any enactment or rule of law shall wherever practicable be brought before a court competent to deal with the case not later than in the course of the first day after he is taken into custody.

⁴ 8.(1) Where a child apparently under the age of 14 — (a) is arrested without warrant for an offence other than homicide; and (b) is not released under Article 7, the child shall be brought before a magistrates' court as soon as is practicable and in any case within a period of 36 hours from the time of his arrest. 8(2) Paragraph (1) shall not apply if a member of the Royal Ulster Constabulary of a rank not below that of superintendent certifies to a magistrates' court within the period of 36 hours from the time of the child's arrest that by reason of illness or accident the child cannot be brought before the court.

⁵ 22(1) Where a person has been arrested and charged with an offence which may be tried summarily, the officer in charge of a police station may — (a) liberate him upon a written undertaking, signed by him and certified by the officer, in terms of which the person undertakes to appear at a specified court at a specified time; or (b) liberate him without any such undertaking; or (c) refuse to liberate him.

(2) A person in breach of an undertaking given by him under subsection (1) above without reasonable excuse shall be guilty of an offence and liable on summary conviction to the following penalties —

- a fine not exceeding level 3 on the standard scale; and
- imprisonment for a period —
 - where conviction is in the district court, not exceeding 60 days; or
 - where conviction is in the sheriff court, not exceeding 3 months.

(3) The refusal of the officer in charge to liberate a person under subsection (1)(c) above and the detention of that person until his case is tried in the usual form shall not subject the officer to any claim whatsoever.

of the review and of any of the following which apply — the grounds upon which continued detention is authorised, the reason for postponement of the review, the fact that the detained person has been informed as required, the officer's conclusion on the matter, the fact that he has taken action, and the fact that the detained person is being detained by virtue of section 41(5) or (6). The review officer must make the record in the presence of the detained person, and inform him or her at that time whether the review officer is authorising continued detention, and if he or she is, of his or her grounds. This does not apply where, at the time when the record is made, the detained person is incapable of understanding what is said to him, violent or likely to become violent, or in urgent need of medical attention.

6.91 The Act provides that a police officer of at least the rank of superintendent may apply for a warrant of further detention in respect of an arrest under section 41. The application will be made to a judicial authority.⁶ A warrant issued by the judicial authority will authorise the detention of a specific person for a specified period of time, with the maximum detention period being seven days from the time of arrest under section 41, or from the time when his examination under Schedule 7 began, whichever is earlier. An application for extension of detention must be made either within the 48-hour period specified in section 41(3) or within six hours of the end of that period. Where an application is made within this six-hour period the judicial authority will dismiss the application, if he or she thinks it could reasonably have been made before the 48-hour period expired.

6.92 An individual to whom an application for further detention applies must be notified that an application has been made, the time at which it is to be heard, and the grounds on which further detention is sought. The person to whom an application relates must be given an opportunity to make oral or written representations to the judicial authority about the application, and is entitled to be legally represented at the hearing. A judicial authority must adjourn the hearing of an application to enable the person to whom the application relates to obtain legal representation where he or she is not legally represented, he or she is entitled to be legally represented, and he or she wishes to be so represented. A judicial authority may exclude the person to whom the application relates and anyone representing him or her from any part of the hearing. Information about the application may be withheld from the individual or anyone

⁶ (4) In this Part "judicial authority" means — (a) in England and Wales, the Senior District Judge (Chief Magistrate) or his deputy, or a District Judge (Magistrates' Courts) who is designated for the purpose of this Part by the Lord Chancellor, (b) in Scotland, the sheriff, and (c) in Northern Ireland, a county court judge, or a resident magistrate who is designated for the purpose of this Part by the Lord Chancellor.

representing him in certain circumstances, namely only if the judicial authority is satisfied that there are reasonable grounds for believing that if the information were disclosed — evidence of an offence under any of the provisions mentioned in section 40(1)(a) would be interfered with or harmed, the recovery of property obtained as a result of an offence under any of those provisions would be hindered, the recovery of property in respect of which a forfeiture order could be made would be hindered, the apprehension, prosecution or conviction of a person who is suspected of falling within section 40(1)(a) or (b)⁷ would be made more difficult as a result of his being alerted, the prevention of an act of terrorism would be made more difficult as a result of a person being alerted, the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with, or a person would be interfered with or physically injured.

6.93 Schedule 9 sets out those offences which are subject to the special provisions for non-jury trials on account of being terrorist-related. In relation to a number of these offences, the Schedule enables the Attorney General for Northern Ireland to certify that particular cases are not to be treated as "scheduled".

(I) Access to appropriate adults and legal advisors

6.94 In its response on the *Draft Codes of Practice Issued Under The Terrorism Act 2000* the Northern Ireland Human Rights Commission (NIHRC)⁸ noted that concern can be expressed regarding the prescribed delay of such a suspect's right to have an appropriate adult present "in exceptional cases of extreme operational necessity". The NIHRC said that given the recent decisions of the European Court of Human Rights in the case of *Averill v UK* (2000) BHRC 430 and *Magee v UK* (2000) BHRC 646, combined with the vulnerability of the person concerned, delay in accessing an appropriate adult to guide the suspect could conceivably in many cases (if not all) be incompatible with the right to a fair trial. They pointed out in particular, that the suspect may not be able to access a solicitor due to the failure to obtain considered guidance and that this failure could make any statements or silences obtained in such circumstances unlawful under Article 6 of the ECHR, particularly in light of the *Magee* decision. They recommended that the Code should provide as follows: "A time period of approximately 20 minutes should be allowed for a suspect to read and acquaint him- or herself with the Code before questioning commences, which can be reduced or waived only in exceptional circumstances, i.e. extreme operational

⁷ This provision defines who suspected "terrorists".

⁸ http://www.nihrc.org/files/draft_code_response_terrorism_act_2000_2.htm

necessity”.

6.95 The NIHRC further noted that a person has a qualified right to see a solicitor as soon as reasonably practicable, privately and at any time and that this right is then circumscribed. They remarked that the police is permitted to delay a suspect under the Act from accessing a solicitor where a police officer of the required rank has reasonable grounds to believe that such access could have a consequence specified in paragraphs 8(4) and 8(5), despite the suspect’s right to same. The NIHRC pointed out that his or her right to “private” access may moreover, be abrogated under paragraph 9, by an Assistant Chief Constable, on similar grounds. The Code excludes paragraph 6.4 of the PACE NI Code, which states that: “If, on being informed or reminded of the right to legal advice, the person declines to speak to a solicitor in person, the officer shall point out that the right to legal advice includes the right to speak with a solicitor on the telephone and ask him if he wishes to do so.” The NIHRC considered that the exclusion of this practice undermines the suspect’s protection under the Code. The NIHRC also commented that under para 6.6 of the Code a suspect who asks for legal advice may not be interviewed before he or she has received such advice, unless (inter alia) an officer of the rank of superintendent or above has reasonable grounds for believing that (para 6.6 (b) (i)) delay will involve an immediate risk of harm to persons or serious loss of, or damage to, property, or (para 6.6 (b) (ii) and (c)) where a solicitor has been contacted and has agreed to attend, and awaiting his or her arrival would cause unreasonable delay to the process of investigation, or the solicitor nominated by the suspect, or selected by him or her from a list, cannot be contacted, has previously indicated that he or she does not wish to be contacted or declines to attend, despite having been contacted.

6.96 The NIHRC noted that leading English authority on the question of legal access is the English Court of Appeal decision in the case of *R v Samuel* [1988] 2 All E R 135 where the Court of Appeal stated there that “the right to legal advice, set out in section 58 of the Act [the Police and Criminal Evidence Act 1984] was fundamental and could only be denied if the officer believed on reasonable grounds that access to a solicitor would hinder police enquiries. This meant either deliberate criminal conduct or “inadvertent” conduct on the solicitor’s part; rarely could either of these be reasonably believed in by the police”. The NIHRC explained that in relation to interviews under emergency legislation, the courts in accordance with statute have traditionally afforded the police greater flexibility in restricting suspects’ access to solicitors. They pointed out that the key question is whether it is permissible for the police to commence an interview without a solicitor where the suspect has requested

access to a solicitor and, if it is, to what extent can the police interview the suspect. The NIHRC said that the legal position can be properly understood only in the light of the jurisprudence of the European Court of Human Rights, noting in particular, three recent decisions of the European Court which developed the law in relation to legal access. They remarked that in its decision in the case of *Murray v UK* (1996) 22 EHRR 29, the European Court stated that:

“the scheme contained in the 1988 Order is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation.....[that] under the [1988] Order, at the beginning of police interrogation an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of the interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced is — whatever the justification for such denial — incompatible with the rights of the accused under art 6.” (para.66)

6.97 The Commission also noted that in 2000 the European Court issued two decisions where it appears to have provided greater protection for a suspect’s legal access. In its decision in the case of *Averill v UK* (2000) BHRC 430, the European Court stated that:

“a refusal to allow an accused under caution to consult a lawyer during the first 24 hours of police questioning must still be considered incompatible with the rights guaranteed to him by Article 6. The situation in which the accused finds himself during that 24-hour period is one where the rights of the defence may well be irretrievably prejudiced on account of the above-mentioned dilemma which the order presents for the accused. . . . As a matter of fairness, access to a lawyer should have been guaranteed to the applicant before his interrogation began”.

6.98 The Commission said further that in its decision in the case of *Magee v UK*, (2000) BHRC 646, the European Court stated similarly that the underlying precept is that, while a suspect’s right to legal access before interrogation could be restricted for good cause, any restriction must not deprive the suspect of a fair hearing. They explained that in *Magee*, the European Court found that the atmosphere in the Castlereagh interrogation centre was so oppressive that legal assistance was necessary at the initial stages to counterbalance the police’s treatment of the applicant. However, the Court refused to rule specifically on the compatibility of the right to draw adverse inferences under the Criminal Evidence (Northern Ireland) Order 1988 with ECHR jurisprudence. The Commission said that it appears nonetheless that the Court has profound misgivings about convictions based in part or in whole on

inferences drawn from statements being made or silences occurring before a suspect has access to legal advice.

6.99 The Northern Ireland Human Rights Commission said it believes that a suspect's right to legal access should be delayed only in the most exceptional of circumstances, and that it appears that paragraphs 6.6 (b) (ii) and (c) have no statutory foundation and that any practice or procedure designed to delay a suspect's legal access should be grounded in a statutory provision. They also remarked that paragraph 6.6(c) does not seem legally justifiable. They considered that it is difficult to imagine the circumstances in which a person would be detained but unable to obtain the services of a solicitor within a short period of hours. They said that it does not appear to be a justifiable basis for allowing non-advised suspects to be interviewed, particularly while the *Criminal Evidence Order (Northern Ireland) 1988* is in force. The Commission noted it inserted the phrase "is unable to question the suspect in a proper manner". The solicitor's duty is outlined at 6D of the Code and includes the solicitor's obligation to object to improper questions. They considered that there must be close monitoring of solicitors who fall foul of this obligation and are to be reported to the Law Society, particularly given the existing concern over police mistreatment of defence solicitors.

6.100 The NIHRC noted that there are concerns about the failure to allow a suspect to communicate confidentially with his or her solicitor, saying that such interference potentially impedes the efficacy of a suspect's right to legal access. They pointed out that the Home Office Circular *24/98 Reducing delays: addressing the reasons for non-compliance with the pre-trial issues time guidelines* implies that "privately" means out of earshot of others, but not necessarily out of other's sight. They were of the view that *out of earshot* is the crucial factor in relation to confidential legal access and should be unassailable. The NIHRC also stated that paragraph 6A of the Code provides guidance for police when a solicitor is delayed, and that it specifically requires that a suspect be informed about possible delays and be given an opportunity to contact a different solicitor if he or she desires. They pointed out that this guidance adds to the suspect's rights and should be part of the Code, but said that it notwithstanding, still falls short of providing sufficient protection given the unlikelihood of a suspect being unable to obtain the relatively prompt services of a solicitor. They also pointed out that paragraph 6B relates to a suspect having difficulty in obtaining the services of a solicitor, and that it indicates that a suspect can continue to try to contact a solicitor until he or she is successful. They remarked that given the importance of a suspect's right of access to a solicitor, this provision

should be part of the Code.

6.101 The Northern Ireland Human Rights Commission said that a key issue in the proposed Code is the extent to which a suspect's right of access to a solicitor can be abrogated, and that the Code may appear to abrogate this right to a greater extent than PACE NI and Schedule 8 of the Terrorism Act, particularly when the state authorities proceed to interview a suspect in the absence of his or her solicitor who is delayed or unavailable in order to avoid unreasonable delay to the investigation. They considered that there does not seem to be statutory authority for the provisions contained in this section of the Code, and their lawfulness appears questionable under the ECHR, specifically Article 6.

(m) Powers of stop, search, entry and seizure

6.102 Sections 44 to 47 of the Terrorism Act give the police powers to stop and search vehicles and their occupants, and pedestrians, for the prevention of terrorism. Authorisations apply to a specific area and are for a maximum of 28 days (though that period may be renewed).⁹ **Vehicle stop and search authorisations, as well as pedestrian authorisations, must be confirmed or amended by a Secretary of State within 48 hours of their being made, or they will cease to have effect. The power conferred by an authorisation may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind. A constable may seize and retain an article which he or she discovers in the course of a search and which he or she reasonably suspects is intended to be used in connection with terrorism. Sections 48 to 52 of the Act gives the police the powers to restrict or prohibit parking for a limited period in a specified area for the prevention of terrorism and makes it an offence to park in or refuse to move from such an area.**

(n) Port and border controls

6.103 An examining officer¹⁰ **may question a person for the purpose of determining**

⁹ An authorisation may be given — (a) where the specified area or place is the whole or part of a police area outside Northern Ireland other than one mentioned in paragraph (b) or (c), by a police officer for the area who is of at least the rank of assistant chief constable; (b) where the specified area or place is the whole or part of the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police; (c) where the specified area or place is the whole or part of the City of London, by a police officer for the City who is of at least the rank of commander in the City of London police force; (d) where the specified area or place is the whole or part of Northern Ireland, by a member of the Royal Ulster Constabulary who is of at least the rank of assistant chief constable.

¹⁰ The Terrorism Act defines "examining officer" in Schedule 7 as meaning a constable, an

whether he or she appears to be a person falling within the definition of a suspected terrorist whether or not the officer has grounds for such a suspicion. This provision applies to a person if he or she is at a port or in the border area, and the examining officer believes that the person's presence at the port or in the area is connected with his entering or leaving Great Britain or Northern Ireland, and also to a person on a ship or aircraft which has arrived in Great Britain or Northern Ireland. A person who is questioned must give the examining officer any information in his or her possession which the officer requests, give the examining officer on request either a valid passport which includes a photograph or another document which establishes his identity, declare whether he or she has with him or her documents of a kind specified by the examining officer, and give the examining officer on request any document which he or she has with him or her and which is of a kind specified by the officer. For the purposes of exercising a power under the Act an examining officer may stop a person or vehicle, and detain a person. For the purpose of detaining a person, an examining officer may authorise the person's removal from a ship, aircraft or vehicle. Where a person is detained the provisions in regard to treatment of detainees apply. A person detained must be released not later than the end of the period of nine hours beginning with the time when his or her examination begins.

6.104 Captains of aircraft carrying passengers other than for reward may allow their passengers to embark from, or disembark at , non-designated airports provided they give 12 hours notice to an examining officer. Captains of ships employed to carry passengers for reward, or of aircraft must ensure that passengers and members of the crew do not disembark at a port in Great Britain or Northern Ireland unless either they have been examined by an examining officer or they disembark in accordance with arrangements approved by an examining officer, that passengers and members of the crew do not embark at a port in Great Britain or Northern Ireland except in accordance with arrangements approved by an examining officer, where a person is to be examined on board the ship or aircraft, that he or she is presented for examination in an orderly manner. The Act also empowers the Secretary of State by order to make provision requiring a person if required to do so by an examining officer, to complete and produce to the officer a card containing such information in such form as the order may specify. An examining officer may also give the owners or agents of a ship or aircraft a written request to provide specified information, and the owners or

immigration officer, and a customs officer who is designated for the purpose of this Schedule by the Secretary of State and the Commissioners of Customs and Excise.

agents must comply with the request as soon as is reasonably practicable.

(o) Terrorist offences

6.105 Section 54 of the Terrorism Act provides that a person commits an offence if he or she provides instruction or training in the making or use of firearms, explosives, or chemical, biological or nuclear weapons. This section covers chemical, biological and nuclear weapons and materials as well as conventional firearms and explosives. It also covers recruitment for training as well as the training itself. The Act provides a defence for persons who are acting for non-terrorist purposes, such as the armed forces which is listed in section 118(5) and therefore imposes an evidential burden only on the defendant. Under section 54(1) no recipient is needed for the offence to be committed. This means that the offence could cover someone who makes weapons instruction for terrorist purposes generally available, for example via the Internet. The definitions of chemical, biological and nuclear weapons and materials are based on other statutes.¹ **Section 56 deals with directing terrorist organisations and provides that a person commits an offence if he directs, at any level, the activities of an organisation which is concerned in the commission of acts of terrorism. Section 56 will apply to all forms of terrorism. The organisation need not be proscribed for this offence to be committed. Sections 57 to 58 deal with possession offences. Sections 59 to 61 make the inciting of terrorism in England and Wales, Scotland, and Northern Ireland an offence.² The *Criminal Justice (Terrorism and Conspiracy) Act 1998* made it an offence to conspire in the United Kingdom to**

¹ Under section 1 of the Chemical Weapons Act 1996 "chemical weapons" are toxic chemicals and their precursors; munitions and other devices designed to cause death or harm through the toxic properties of toxic chemicals released by them; and equipment designed for use in connection with such munitions and devices. Section 1(1)(b) of the Biological Weapons Act 1974 applies to any weapon, equipment or means of delivery designed to use biological agents or toxins for hostile purposes or in armed conflict. The meaning of "nuclear material" set out in the Schedule to the Nuclear Material (Offences) Act 1983, is "plutonium except that with isotopic concentration exceeding 80% in plutonium-238; uranium-233; uranium enriched in the isotopes 235 or 233; uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore-residue; any material containing one or more of the foregoing". The Schedule also further defines "uranium enriched in the isotopes 235 or 233".

² 59(1) A person commits an offence if — (a) he incites another person to commit an act of terrorism wholly or partly outside the United Kingdom, and (b) the act would, if committed in England and Wales, constitute one of the offences listed in subsection (2).
(2) Those offences are — (a) murder, (b) an offence under section 18 of the Offences against the Person Act 1861 (wounding with intent), (c) an offence under section 23 or 24 of that Act (poison), (d) an offence under section 28 or 29 of that Act (explosions), and (e) an offence under section 1(2) of the Criminal Damage Act 1971 (endangering life by damaging property).
(3) A person guilty of an offence under this section shall be liable to any penalty to which he would be liable on conviction of the offence listed in subsection (2) which corresponds to the act which he incites.
(4) For the purposes of subsection (1) it is immaterial whether or not the person incited is in the United Kingdom at the time of the incitement.
(5) Nothing in this section imposes criminal liability on any person acting on behalf of, or holding office under, the Crown.

commit criminal acts abroad. These sections similarly make it an offence for a person in the United Kingdom to incite terrorist acts abroad. The explanatory notes point out that the offence of incitement to specific acts commonly associated with terrorism (such as hostage taking or hijacking aircraft) is already available, by virtue of the extra-territorial jurisdiction established over such offences in the past - and elsewhere in the Act - in legislation implementing various international counter-terrorism Conventions, and that these provisions will, therefore, fill in remaining gaps in the law.

6.106 Sections 62 to 64 deal with terrorist bombing and finance offences. The explanatory notes state that these sections are included to enable the UK to ratify the UN Convention for the Suppression of Terrorist Bombings and the UN Convention for the Suppression of the Financing of Terrorism. The explanatory memorandum also note that they will enable the UK to meet its obligations under the "extradite or prosecute" provisions of these Conventions, which are common to earlier international counter-terrorism Conventions.

6.107 Section 65 and Schedule 9 define which offences qualify for special treatment because they are terrorist offences, or are offences related to the situation in Northern Ireland. They also provide for the concept "scheduled offence" and lists them; and gives the Attorney General discretion in certain cases to certify offences out of the list. The section also enables the Secretary of State to add, or remove, by affirmative resolution procedure any offences from Part I or II or amend Part I or II. Section 66 deal with preliminary inquiry and is concerned with committal proceedings in the Magistrates' Court. It allows the prosecutor to request a preliminary inquiry in relation to scheduled offences. The explanatory notes point out that this provision was introduced in 1975 following the Gardiner Report, as a means of dealing with the problem of non-recognition of the court system by many defendants. In ordinary law a preliminary inquiry may be held only if the prosecutor requests it and the accused does not object. The effect of this section is that the alternative less expeditious preliminary investigation can be avoided. However, if the court considers that a preliminary investigation is in the interest of justice, it will not accede to the prosecution request for a preliminary inquiry. While committal proceedings remain part of the system, this section is useful as a means of keeping delays to a minimum.

6.108 Section 67 deals with the limitation of the power to grant bail and provides that in the case of a scheduled offence bail applications must be dealt with by a High Court judge or a judge of the Court of Appeal. The explanatory notes point out that this provision owes its origin to the fact that prior to its introduction, when magistrates

were dealing with bail applications in terrorist cases, the courts became crowded with persons who tried to intimidate the court and who created a threatening atmosphere. Under the ordinary English law there is a presumption, as opposed to a discretion, that bail will be granted, subject to similar considerations. Section 68 dealing with legal aid in respect of bail is peculiar to scheduled offences as a consequence of the special arrangements provided for them. The arrangements are such that the defendant may make application for legal aid directly to the High Court which is hearing the bail application rather than through the High Court to the Law Society, which is the procedure for legal aid in ordinary criminal cases. Section 69 provides that in the case of a scheduled offence, the maximum period of remand in custody will be 28 days. The justification for this dates back to Sir George Baker's report in 1984 who reported that to bring a person charged with a scheduled offence before a magistrate every seven days was meaningless, especially since the magistrates' court was precluded from granting bail in the majority of scheduled cases.

6.109 Section 70 to 71 deal with custody on remand and directions in the case of young persons. This section applies to a young person (aged 14 to 16) on remand for a scheduled offence. It provides that for security purposes a young person may be held in prison, or elsewhere, which is usually the (secure) Young Offenders Centre, at Hydebank Wood. Under ordinary English law, a young person would be remanded to a training school or remand home, although if a young person is certified by the court to be unruly or depraved, he or she may be committed to a remand centre or the Young Offenders Centre. Given the gravity of scheduled offences, insecure accommodation would not be appropriate. The Secretary of State may give a direction for special arrangements to be made if necessary to prevent the escape or to ensure the safety of the young persons or others.

6.109 Sections 72 to 73 govern time limits for preliminary proceedings. They provide that time limits may be set for the stages of proceedings leading up to trial in scheduled cases. The notes set out that the power has never been used, although an administrative time limit scheme has been operating since 1992. The explanatory notes point out that the background to section 74, providing for the court for trial is to be found in Sir George Baker's 1984 Report, which was written at the time of the accomplice evidence (supergrass) trials, when court accommodation in Northern Ireland was under severe pressure. He recommended that provision should be made to enable the Lord Chancellor, after consultation with the Lord Chief Justice, to direct that trial on indictment of a scheduled offence should be held at the Crown Court sitting elsewhere than in Belfast.

6.110 **Section 75** provides for the mode of trial on indictment of scheduled offences to be by a court sitting without a jury - a "Diplock trial" - but with all the powers, authorities and jurisdiction of a jury court. It also provides that where both scheduled and non-scheduled offences are charged, the case is to be conducted as if all the offences charged were scheduled. The explanatory notes state that the Diplock Court system dates back to 1972 when the Diplock Commission found that the jury system as a means of trying terrorist crime was under strain and in danger of breaking down. It highlighted the danger of perverse acquittals and intimidation of jurors. There is an unfettered right of appeal from the decision of the trial judge. Section 76 provides for the admissibility in evidence, in trials on indictment, of confessions made by persons charged with scheduled offences. The explanatory notes say that it imposes an obligation on the court to exclude or disregard any evidence which has been obtained by subjecting the accused to torture or other improper treatment, or, in such a case, to order a fresh trial to be heard before a differently constituted court. It also provides for confession evidence to be excluded on the grounds of fairness to the accused or otherwise in the interests of justice. Section 77 makes provision for the onus of proof in trials on indictment for offences of possession of firearms and explosives. This provision is based on a recommendation made by the Diplock Commission and its effect is to permit the court to make assumptions as to the accused's knowledge and control of items found on premises where he or she was present or occupied or used. The section is listed in section 118(5) so the defendant need only satisfy an evidential burden as to his or her lack of knowledge or control in order to displace the assumptions. Section 79 provides that the remission granted in respect of a sentence of imprisonment of 5 years or more for a scheduled offence, shall not exceed one third of the term. The explanatory notes point out that this provision was introduced in 1989 as a response to the increased violence of the time, and that its effect is mitigated by the Northern Ireland (Remission of Sentences) Act 1995. It is also noted that that Act provides for the release on licence of those prisoners at the half-way point of sentence, and whilst on licence, such prisoners may be recalled up until the two-thirds point if they are thought likely to commit further offences or if their continued liberty would pose a threat to the safety of the public. From the two-thirds point on they may be granted remission. Section 80 deals with conviction during remission and applies to a person convicted of a scheduled offence committed during a period of remission for a previous conviction for which that person was sentenced to a custodial sentence of more than 1 year. The notes explain that in calculating the unexpired portion of a previous sentence it is important to note that time continues to run while a person is at large and so the actual effect of the section will depend on the time when the later offence is committed. This means that a person released on remission after serving say 2 years of a four year sentence who re-offended after the full term (4 years) of the sentence was expired will not be

affected by the section, but a person who re-offended and was re-convicted after three years would be required to serve one year before starting his new sentence (the unexpired portion does not attract remission).

6.111 Section 82 provides for constables' power of arrest and seizure and confers on the police a general power of arrest on reasonable suspicion, but without a warrant, for scheduled offences and other offences under these provisions. It also provides an associated power of entry and search and a general power to seize anything which a constable has reasonable grounds to suspect may be used in the commission of a scheduled offence or a non-scheduled offence under this Act. Section 83 confers on a member of the Armed Forces general powers of arrest, entry, search and seizure without a warrant when there is reasonable grounds for suspecting the person of committing an offence or of being a terrorist. There is no equivalent power under the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341) ("PACE(NI)"), since PACE(NI) does not apply to the Army. *Subsection (6)* provides that *subsection (2)* does not seek to legalise any act which would be unlawful under the Human Rights Act 1998.³ **Section 84 provides that Schedule 10 (which confers power to search for munitions and transmitters) shall have effect. Section 85 provides that the powers of explosives inspectors to enter and search any premises for the purpose of ascertaining whether any explosive is unlawfully there. The explanatory notes state that this power is primarily intended for use by those who provide security at Court premises, since the powers of an explosives inspector under the Explosives Act 1875 do not extend to public places, and that some members of the Health and Safety Executive also have powers under that Act to enable them to conduct annual inspections of licensed explosives factories and magazines.**

³

83(1) If a member of Her Majesty's forces on duty reasonably suspects that a person is committing, has committed or is about to commit any offence he may -(a) arrest the person without warrant, and (b) detain him for a period not exceeding four hours.

(2) A person making an arrest under this section complies with any rule of law requiring him to state the ground of arrest if he states that he is making the arrest as a member of Her Majesty's forces.

(3) For the purpose of arresting a person under this section a member of Her Majesty's forces may enter and search any premises where the person is.

(4) If a member of Her Majesty's forces reasonably suspects that a person - (a) is a terrorist (within the meaning of Part V), or (b) has committed an offence involving the use or possession of an explosive or firearm, he may enter and search any premises where he reasonably suspects the person to be for the purpose of arresting him under this section.

(5) A member of Her Majesty's forces may seize, and detain for a period not exceeding four hours, anything which he reasonably suspects is being, has been or is intended to be used in the commission of an offence under section 93 or 94.

(6) The reference to a rule of law in subsection (2) does not include a rule of law which has effect only by virtue of the Human Rights Act 1998.

6.112 Section 86 deals with unlawfully detained persons. This section allows a police officer or soldier to enter any premises to search for persons who are believed to be unlawfully detained in circumstances where their life is in danger, and no warrant is necessary. Sections 87-88 allow the police and Army to examine any document or record found in the course of a search to ascertain whether it contains any information of a kind likely to be useful to terrorists. No warrant nor reasonable suspicion is required. Section 89 empowers the police and Army to stop and question persons as to their identity, movements or knowledge of any recent incident endangering life. Sections 90 and 91 allow the police or army to enter premises to preserve the peace or maintain order, and allow a person on the authorisation of the Secretary of State to take possession of land etc for the preservation of peace or the maintenance of order. The common law power of the police is to enter in order to save life or limb, to prevent serious damage to property and to deal with or prevent a breach of the peace. Section 92 allows for road closures. Powers to interfere with public highways are to be found under road traffic law (Road Traffic Act 1988), and there are no other provisions to permit the police to interfere with highways etc, although they may take specific action such as denying access to highways to prevent public disorder or a potential breach of the peace under the Public Order Act 1986. The explanatory notes point out that while Lord Lloyd recommended that these provisions should be removed once lasting peace is established, the powers are still necessary in terms of land requisitioned for both RUC stations and security force bases and to provide protection for residents at sectarian interfaces where the fear of attack by opposing community factions remains real.

6.113 Section 94 is used to make permanent road closures and to provide for town barriers. The condition is the preservation of the peace or the maintenance of order: reasonable suspicion is not required. Lord Lloyd recommends this provision be removed once lasting peace is established. Section 95 makes supplementary provision including allowing for vehicles to be stopped and searched. Section 96 enables the Secretary of State to make regulations for the preservation of the peace and the maintenance of order. The power is wide-ranging but regulations made under it are subject to the affirmative resolution procedure by Parliament.

6.114 Section 98 provides that the Secretary of State may appoint a person to be known as the Independent Assessor of Military Complaints Procedures in Northern Ireland. The Independent Assessor's role is to review procedures for the investigation of complaints about the army and to investigate any representations made to him about those procedures. While the Secretary of State has a power (rather than a duty) to appoint an Assessor, the Government has said that the position will remain while

the Army is needed to act in support of the police in Northern Ireland. Further provision about the Assessor is made in Schedule 11, which this section activates. Sections 99 to 101 continue the power of the Secretary of State to prepare, publish, issue and revise codes of practice on the seizure and retention of property by the police and the powers of the police and army and also provides for a silent video recording scheme in the holding centres.⁴

4

The Role of the Police in A Democratic Society Paper presented by Michael Farrell to a conference held in Dublin Castle on the 3rd and 4th November, 2000, and hosted by the Garda Síochána Human Rights Initiative. <http://www.iccl.ie/criminalj/policing/garda00.html>

"Mention of Northern Ireland leads on naturally to the Report of the Patten Commission. . . . While the Patten Commission was set up to deal with the very specific problem of a police force which was unacceptable to a large section of the community in Northern Ireland, its report amounts to an impressive blueprint for a police service in a democratic society and one in which human rights would be mainstreamed. In Chapter Four it sets out in very clear terms the central importance of human rights to effective policing.

We cannot emphasise too strongly that human rights are not an impediment to effective policing but, on the contrary, vital to its achievement. Bad application or promiscuous use of powers to limit a person's human rights - by such means as arrest, stop and search, house searches - can lead to bad police relations with entire neighbourhoods, thereby rendering effective policing of those neighbourhoods impossible. In extreme cases, human rights abuses by police can lead to wrongful convictions, which do immense damage to the standing of the police and therefore also to their effectiveness. Upholding human rights and upholding the law should be one and the same thing".

. . . A police service in a democracy must be accountable not only in the relatively narrow sense of dealing with complaints of misconduct or public concern over incidents . . . It must also be accountable in the wider sense of being answerable organisationally to the public or their representatives. . . .

The operational one [structural point] is the recommendation by Patten that video recording should be introduced for all police interviews in the North. I have already referred to the rejection by the Special Criminal Court of supposed admissions in the *Paul Ward* case. Time and again in major trials here there have been disputes over admissions allegedly made by the accused but of which the only record is a hand-written note by the interviewing Garda which has not been signed by the accused. Such a system is obviously open to abuse and a significant number of persons have been acquitted at trial or on appeal because of doubts over such statements.

It is nonsensical in the 21st century that video-recording facilities are not installed in every Garda station used for questioning suspects. It is an elementary protection for the rights of persons being questioned and a safeguard for the interviewing Gardai as well. It would eliminate 90% of the arguments about statements and the damage done to confidence in the Garda by such disputes, especially when they result in the statements being rejected.

Electronic recording of interviews was strongly recommended 10 years ago by the Report of the Committee to Enquire into Certain Aspects of Criminal Procedure (the Martin Committee). There is no longer the slightest excuse for failing to introduce it forthwith.

. . . The use and abuse of emergency legislation, including special courts, special detention periods and special rules of evidence, which may well be in breach of international human rights standards, can taint the rest of the police service in the eyes of at least sections of the public. It is in the interests of the police service as a whole that emergency measures are not prolonged after the emergency they were introduced to deal with is basically over. And it is also in the interests of the police service as a whole that such measures are not used for purposes for which they were not originally intended. Obviously what I have particularly in mind is the Special Criminal Court.

. . . The new human rights commitments go hand in hand with huge changes taking place in Irish society, which is no longer the homogeneous, mono-cultural, pale-skinned and overwhelmingly Roman Catholic community it was 20 or even 10 years ago. These changes are irreversible and will become more profound in future years. I would suggest that the new emphasis on human rights standards in the Garda may actually provide something of a guide

(p) **Terrorist information**

6.115 Section 103 of the *Terrorist Act* makes it an offence to collect or possess information about specified persons which is likely to be useful to terrorists, and possessing such information is also an offence.⁵ **This section applies to a person who is or has been a constable, a member of Her Majesty's Forces, the holder of a judicial office, an officer of any court, or a full-time employee of the prison service in Northern Ireland. It is a defence to prove that a person had a reasonable excuse for the collection of such information: this defence is included in section 118(5). It therefore imposes an evidential burden only on the defendant. The Act places a duty on the Chief Constable of the RUC to make arrangements for records to be kept when powers are exercised under this Part of the Act. It is envisaged that records will be kept unless there are reasons which make this impractical: for example following a major incident when the police by necessity would need to stop and question large numbers of people. Provision is also made for private security services. "Security services" is defined as meaning the services of one or more individuals as security guards (whether or not provided together with other services relating to the protection of property or persons). Offences are created for providing or offering to provide security services for reward unless the person holds a licence under this Schedule, or acts on behalf of someone who holds a licence under the Schedule. It deals with application for licences, the issue of licences, the duration and revocation of licences, as well as appeals against refusals to issue a licence and conditions which are imposed on the grant of the licence etc.**

6.116 Section 107 defines specified organisations for the purposes of the four following sections, namely section 108 which deals with evidence, section 109 which deals with inferences, section 110 deals with supplementary issues on evidence and section 11 deals with forfeiture orders.⁶ Section 108 provides that oral evidence from

to how to deal with some of these changes. The human rights standards the Garda is now being asked to implement have after all been drawn from the collective experience of many countries with many different cultures and traditions and represent an attempt to accommodate much greater diversity than we have been used to heretofore.

The human rights revolution is here to stay. Adapting to it may be difficult and even painful for the Garda Síochána, as it will be for many institutions. But failing to adapt to it would be even more painful, leading to bitter disputes, adverse court decisions and criticism by international monitoring bodies. On the other hand, embracing the new human rights culture could help to lead on to a new era of co-operative, responsive and community-based policing. . . .

⁵ 103(1) A person commits an offence if — (a) he collects, makes a record of, publishes, communicates or attempts to elicit information about a person to whom this section applies which is of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind.

⁶ These provisions are based on sections 1, 2 and 4 of the Criminal Justice (Terrorism and

a police officer of at least the rank of superintendent to the effect that the accused is or was a member of a specified organisation shall be admissible as evidence of such membership. A suspect cannot, however, be committed for trial, be found to have a case to answer, or be convicted, solely on the basis of the officer's statement. The court may draw inferences from an accused's failure to mention a fact material to an offence which he could reasonably be expected to mention when questioned.⁷ The court may only draw such inferences where the accused was permitted to consult a solicitor before being questioned. The accused shall not be committed for trial, found to have a case to answer or be convicted solely on the basis of inferences under this section. Section 110 makes it clear that the preceding sections do not prejudice the admissibility of other evidence, preclude the drawing of other inferences, or prejudice other legislation which states that certain evidence is inadmissible in proceedings.

6.117 Section 111 makes provision for the court to order forfeiture of money or property. This applies where a person is convicted of an offence under section 11 or 12 and belonged to a specified organisation at the time the offence was committed. The court is able to order forfeiture of money or property if the individual had it in his or her possession when the offence was committed and if it had been used, or was likely to be used, in connection with the activities of the specified organisation. As

Conspiracy) Act 1998 which was introduced after the Omagh bomb.

⁷ 109(1) This section applies where a person is charged with an offence under section 11.
 (2) Subsection (4) applies where evidence is given that — (a) at any time before being charged with the offence the accused, on being questioned under caution by a constable, failed to mention a fact which is material to the offence and which he could reasonably be expected to mention, and (b) before being questioned the accused was permitted to consult a solicitor.
 (3) Subsection (4) also applies where evidence is given that — (a) on being charged with the offence or informed by a constable that he might be prosecuted for it the accused failed to mention a fact which is material to the offence and which he could reasonably be expected to mention, and (b) before being charged or informed the accused was permitted to consult a solicitor.
 (4) Where this subsection applies — (a) the court, in considering any question whether the accused belongs or belonged at a particular time to a specified organisation, may draw from the failure inferences relating to that question, but (b) the accused shall not be committed for trial, be found to have a case to answer or be convicted solely on the basis of the inferences.
 (5) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.
 110(1) Nothing in section 108 or 109 shall — (a) prejudice the admissibility of evidence admissible apart from that section, (b) preclude the drawing of inferences which could be drawn apart from that section, or (c) prejudice an enactment providing (in whatever words) that an answer or evidence given by a person in specified circumstances is not admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).
 (2) In subsection (1)(c) the reference to giving evidence is a reference to giving it in any manner (whether by giving information, making discovery, producing documents or otherwise).

with forfeiture provisions elsewhere in the Act the court must give an opportunity to be heard to any other individual who has an interest in money or property which could be subject to a forfeiture order under this section.

(q) Informing a named person of the detainee's detention and access to a lawyer

6.118 It was proposed in the *Terrorism Bill*⁸ **that a person detained under Schedule 7⁹ or section 41¹⁰ at a police station in England, Wales or Northern Ireland shall be entitled, if he or she so requests, to have one named person informed as soon as is reasonably practicable that he or she is being detained there. The Bill also provided that the person named must be a friend of the detained person, a relative, or a person who is known to the detained person or who is likely to take an interest in his welfare. Provision was further made that where a detained person is transferred from one police station to another, he shall be entitled to exercise the right of informing people of his or her detention in respect of the police station to which he is transferred. The Bill also proposed that a person detained under Schedule 7 or section 41 at a police station in England, Wales or Northern Ireland shall be entitled, if he so requests, to consult a solicitor as soon as is reasonably practicable, privately and at any time. An officer of at least the rank of superintendent was empowered to authorise a delay in informing the person named by a detained person and in permitting a detained person to consult a solicitor. Where a person were to be detained under section 41 without warrant on the suspicion of being a terrorist he or she had to be permitted to exercise his or her rights of informing persons or of consulting with a solicitor before the end of the 48 hour period. An officer was empowered to give an authorisation for such a delay only if he or she had reasonable grounds for believing that informing the named person of the detained person's detention or that the exercise of the right to consult a solicitor at the time when the detained person desires to exercise it will have any of the following consequences**

⁸ As introduced in the House of Lords.

⁹ Which deals with port and border patrols.

¹⁰ Which makes provision that a constable may arrest without a warrant a person whom he or she reasonably suspects to be a terrorist and that where a person is arrested under section 41 the provisions of Schedule 8 (detention: treatment, review and extension) shall apply. It further provides that a person detained under this section shall (unless detained under any other power) be released not later than the end of the period of 48 hours beginning - (a) with the time of his or her arrest under this section, or (b) if he or she was being detained under Schedule 7 when he was arrested under this section, with the time when his examination under that Schedule began. If on a review of a person's detention the review officer does not authorise continued detention, the person must (unless detained in accordance with subsection (5) or (6) or under any other power) be released. Where a police officer intends to make an application for a warrant extending a person's detention, the person may be detained pending the making of the application.

namely -

- (a) interference with or harm to evidence of a serious arrestable offence,
- (b) interference with or physical injury to any person,
- (c) the alerting of persons who are suspected of having committed a serious arrestable offence but who have not been arrested for it,
- (d) the hindering of the recovery of property obtained as a result of a serious arrestable offence,
- (e) interference with the gathering of information about the commission, preparation or instigation of acts of terrorism,
- (f) the alerting of a person and thereby making it more difficult to prevent an act of terrorism, and
- (g) the alerting of a person and thereby making it more difficult to secure a person's apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism.

6.119 The Bill sought to provide that where an authorisation to delay is given as discussed above, the detained person must be told the reason for the delay as soon as is reasonably practicable, and the reason must be recorded as soon as is reasonably practicable. Furthermore, where the reason for authorising delay ceased to subsist there was to be no further delay in permitting the exercise of the right in the absence of a further authorisation. The Bill also made provision that a direction may provide that a detained person who wishes to exercise the right to consult with a solicitor may consult a solicitor only in the sight and hearing of a qualified officer. Such a direction could be given where the person is detained at a police station in England or Wales, by an officer of at least the rank of Commander or Assistant Chief Constable, or where the person is detained at a police station in Northern Ireland, by an officer of at least the rank of Assistant Chief Constable. Such a direction could be given only if the officer giving it has reasonable grounds for believing that, unless the direction was given, the exercise of the right by the detained person would have any of the consequences as specified in the previous paragraph.

6.120 Amnesty International noted that whereas the *Terrorism Bill* permitted a delay of up to 48 hours before the detained person can gain access to a lawyer under ordinary legislation this period was limited to a maximum of 36 hours.¹ They also

¹ See Amnesty International - Report - EUR 45/43/00 April 2000 United Kingdom: Briefing on

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

6.121 Amnesty International considered that the Bill should state clearly that all suspects will have the right to immediate access to legal advice and to have their lawyers present during interrogation, because these provisions, as they stand, are contrary to recommendations made by international treaty bodies, including the UN Human Rights Committee and the Committee against Torture, which have urged the government to remove all restrictions on immediate access to lawyers and on lawyers being present during interrogation. They pointed out that such measures are inconsistent with international standards including the UN Basic Principles on the Role of Lawyers and the (UN) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which establish the right of all detained people to have access to a lawyer during pre-trial phases and the investigation. Amnesty International noted that the Human Rights Committee has

the Terrorism Bill at <http://www.amnesty.org/ailib/aipub/2000/EUR/44504300.htm>

² It is noteworthy that the Bill as introduced in the House of Lords provides in paragraph 21 in regard to Scotland of schedule 8 that the Secretary of State must, by order, make provision to require that - (a) except in such circumstances, and (b) subject to such conditions, as may be specified in the order, where a person detained has been permitted to consult a solicitor, the solicitor shall be allowed to be present at any interview carried out in connection with a terrorist investigation or for the purposes of Schedule 7 (port or border patrol investigations). It is further noteworthy that these provisions on detention, and the rights of detainees to inform persons of their detention or to consult with a solicitor as presently proposed in Schedule 8 were not contained in the Bill as introduced in the House of Commons.

also stated that "all persons must have immediate access to counsel", and that, in July 1996, the European Court concluded similarly in the case of *Murray v. UK* that delay of 48 hours in granting a detained person access to counsel violated the European Convention in circumstances in which the detainee was being questioned by police and his decision to exercise his right to remain silent could result in adverse inferences being drawn against him. Amnesty International remarked that the right to have counsel present during interrogation is indeed so fundamental that it has been guaranteed for persons suspected or accused of genocide, crimes against humanity and war crimes in the Rome Statute of the International Criminal Court and the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

6.122 Amnesty International noted that the Bill allowed for a consultation between lawyer and detainee to be held "in the sight and hearing" of a police officer, if a senior police officer has reasonable grounds to believe that such consultation would lead to interference with the investigation, and that separate provisions, in relation to Scotland, similarly allow for an officer "to be present during a consultation". Amnesty International explained that these powers breach international standards, noting that Principle 18(4) of the Body of Principles states that interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

(r) **Hoaxes and threats involving noxious substances**

6.123 The *Anti-terrorism, Crime and Security Act* created a new offence for hoaxes and threats involving noxious substances. At present, it is only an offence to make hoaxes or threats in relation to explosive devices. Under the new provision, however, a person would be guilty of an offence if they placed, sent or communicated false information about any substance or article intending to make others believe that it was likely to be a noxious substance which could endanger human life or health. Section 114 of the Act introduces a new offence of hoaxing involving allegedly toxic substances e.g. anthrax, smallpox, acids or other similar substances. There is also to be a new offence of threatening to use noxious substances in order to make people believe that there is a threat to human life or health. The maximum penalties are 7 years or a fine or both. The penalty is in line with the penalty for bomb hoaxes. It was initially reported that the Government proposed to apply the offence retrospectively, to any hoax or threat made on or after midnight 20 to 21 October 2001. However, this proposal has since been dropped - the offence created under the Bill will not apply retrospectively. There have been many anthrax hoaxes since the events of 11

September. Those who send or perpetuate hoaxes cause distress and severe disruption. The Government stated that they are determined to ensure that these offenders can be dealt with firmly.

(s) Race and Religion

6.124 Part 5 of the *Anti-terrorism, Crime and Security Act* contains provisions to tackle those who wish to exploit tensions that have increased since September 11th. This Part extends the racially aggravated offences of assault, public order, criminal damage and harassment to cover attacks aggravated by religious hostility. They amend the incitement to racial hatred offences to cover hatred directed against groups abroad, and increase the maximum penalty for such offences from 2 to 7 years imprisonment.

(t) Weapons of Mass Destruction

6.125 Part 6 of the *Anti-terrorism, Crime and Security Act* strengthens current legislation controlling chemical, nuclear and biological weapons (WMD). It makes it an offence to aid or abet the overseas use or development of chemical, nuclear, biological. It introduces offences equivalent to those in the Chemical Weapons Act 1996 in relation to biological and nuclear weapons. This brings legislation on biological and nuclear weapons into line with existing legislation on chemical weapons. These provisions will cover nuclear and radiological weapons, chemical weapons and biological agents and toxins. There is also a new provision for customs and excise to prosecute.

(u) Control of Pathogens and Toxins

6.126 The summary of the *Anti-terrorism, Crime and Security Act* explains that there is a need to ensure that terrorists do not have access to premises, which hold substances that may be used in a potentially devastating manner such as pathogens dangerous to human, plant or animal health. The need for this has been made clear by recent reports of lack of security at laboratories where some very dangerous pathogens are stored for study purposes. The provisions set out in Part 7 and schedule 5 of the Act will place an obligation on managers of laboratories holding stocks of specified diseases to notify their holdings, and to comply with any reasonable security requirements which the police may impose after an inspection of the premises. It makes it a requirement of managers of laboratories, on receipt of a police request, to furnish the police with the names and other details of people with regular access to the dangerous diseases held in laboratory; provision for background checks to be carried out on such people; and provision for the Secretary of State to direct

that any named individual shall not be allowed access to such disease strains or the premises in which they are held.

(v) Security of Nuclear Industry

6.127 The provisions in Part 8 of the *Anti-terrorism, Crime and Security Act* are an essential but proportionate reinforcement of the civil nuclear security regulatory regime. They are needed to ensure further protection for nuclear sites, material and technology against the risks from terrorists and others. The provisions include extending the jurisdiction for the United Kingdom Atomic Energy Authority Constabulary (UKAEAEC) so that it can protect nuclear sites and nuclear material more effectively. The provisions enable these constables to be deployed to all civil licensed nuclear sites, rather than as at present only on premises of specified nuclear operators, and within five kilometres of such sites. The provisions also provide for regulations to be made to reinforce and update the regulatory regime for security in the civil nuclear industry. In addition they strengthen sanctions against the unauthorised disclosure by individuals of sensitive information on the security of nuclear sites, nuclear material and proliferation-sensitive nuclear technology.

(w) Aviation Security

6.128 Part 9 of the *Anti-terrorism, Crime and Security Act* deals with aviation security and introduces new provisions which improve the Government's ability to enforce aviation security requirements and will help the police, and aviation industry, to deal with potentially dangerous situations at airports. It amends existing legislation, in particular the Aviation Security Act 1982, the Civil Aviation Act 1982 and the Police and Criminal Evidence Act 1984.

(x) Police Powers

6.129 There is a small group of cases where detainees exploit the law and do not co-operate with police identification procedures (e.g. fingerprinting). The *Anti-terrorism, Crime and Security Act* contains powers to give the police and customs services the authority to demand the removal of any item which they believe is being worn wholly or mainly for the purpose of concealing identity, such as facial covering or gloves. There are also powers to photograph and to fingerprint. Part 10 and Schedule 7 permits in certain circumstances constables from the British Transport Police (BTP) and Ministry of Defence Police (MDP) to act outside their normal jurisdictions and provides them with additional police powers. These measures improve the effectiveness of these factors by enabling them

to play a full role in protecting the public from terrorism and other crimes. The BTP's jurisdiction has been extended to allow a BTP officer to act outside their railways jurisdiction in an emergency and if a member of the local police force, the MDP or UKAEA (Atomic Energy) constabulary requests assistance. The BTP have also been given a number of additional police powers that were only previously available to local police forces. These include the power to provide assistance to other police forces, and powers to erect cordons and carry out stop and search exercises under the Terrorism Act 2000. Similarly, changes to their jurisdiction allow MDP officers to act outside Ministry of Defence land in an emergency and when a constable from the local police force, the BTP or the UKAEA constabulary asks for assistance. The provisions also allow MDP officers to provide assistance to other police forces, cordons and carry out stop and search exercises. The changes allow MDP to provide assistance, on request, to other forces and extends to MDP certain powers in the Terrorism Act 2000. A series of Sections make provision for the linked enhancement of police powers in Northern Ireland.

(y) Retention of Communications Data

6.130 Communications data has been central to the investigation into the terrorist attacks on 11 September. Part 11 of the *Anti-terrorism, Crime and Security Act* contains provisions to allow communications service providers to retain data about their customers' communications for national security purposes. Retained data can then be accessed by the security, intelligence and law enforcement agencies under the terms of a code of practice, which is being drawn up in consultation with industry and the Information Commissioner. Communications data is information about the use made of communications by a service provider's customers, e.g. subscriber details, itemised billing. It does not include the content of such communications, i.e. what was said over the phone or written in an email. Investigators use this data to trace criminals' activities and establish links between conspirators. Currently communications service providers are obliged to erase this data when they no longer need it for commercial purposes. This has a severe impact on criminal investigations. The Regulation of Investigatory Powers Act 2000 (RIPA) sets out clear limits on the purposes for which the security, intelligence and law enforcement agencies may request access to data relating to specific communications (e.g. relating to a particular customer or telephone line). Mass trawls or "fishing expeditions" are NOT permitted. This Act allows for a voluntary code of practice, defined in statute, to ensure that service providers have a clear remit for retaining data, which complement the powers given to public authorities in RIPA. It also contains a reserve power to review these arrangements and issue directions under secondary legislation if necessary. The need to maintain a reserve power must be reviewed every two years and may be renewed by affirmative order. Once the

power has been exercised, there is no need for further review.

(z) Bribery And Corruption

6.131 Part 12 of the *Anti-terrorism, Crime and Security Act* brings in provisions to strengthen the law on international corruption, which is linked to conditions which cause terrorism. They put beyond doubt that the law of bribery applies to acts involving foreign holders of public office such as officials, Ministers, MPs and judges (Section 107); and take jurisdiction over crimes of bribery committed by UK nationals and UK incorporated bodies overseas (Section 108). Section 109 is a technical provision, to ensure that the existing presumption of corruption in the 1916 Act, which it is intended to abolish, does not apply any more widely as a result of these new provisions

(Aa) Miscellaneous

6.132 The UK considered that re-enforcing police and criminal judicial co-operation with our EU partners is a key part of the response to international terrorism. EU leaders, at their summit after the US attacks, agreed a number of ambitious measures on police and judicial co-operation to help fight global terrorism. These include urgent progress: on plans for joint investigative teams; on measures to simplify seizing the assets of terrorists across Europe and on measures to speed up extradition arrangements between member states. Part 13 of the *Anti-terrorism, Crime and Security Act* allows the rapid implementation of these important measures in the fight against international terrorism.

(Ab) Use of noxious substances

6.133 Using noxious substances, including biological agents or toxins, toxic chemicals or radioactive material for terrorist purposes has become an offence in the *Anti-terrorism, Crime and Security Act*. This creates an offence of using a biological weapon for the first time, as well as giving suitable sentencing powers (up to 14 years) for the use of other substances.

(Ac) Intelligence Services Act 1994

6.134 The two proposals introduce greater flexibility for intelligence gathering outside the British Islands and adapt the scope and definition of serious crime. They achieve this through extending the powers of GCHQ in the *Anti-terrorism, Crime and Security Act* and ensure the necessary powers to obtain vital intelligence to combat terrorism and serious crime.

(Ad) Terrorism Act 2000

6.135 Section 117 of the *Anti-terrorism, Crime and Security Act* introduces section 38B into the Terrorism Act making the failure to disclose information about acts of terrorism to an appropriate authority a criminal offence.¹ **A similar offence was contained in the PTA 1989 but was restricted solely to terrorism relating to the affairs of Northern Ireland. The new provision extends the provision to domestic and international terrorism. Subsection (1) establishes the obligation of any person to disclose information which he knows or believes might help prevent another person carrying out an act of terrorism or might help the police in bringing a terrorist to justice in the UK. The act of terrorism can take place anywhere in the world and can involve any group or individual carrying out a terrorist act. 'Any person' includes family members and partners – having a legal or familial relationship with someone does not constitute immunity from the obligation to disclose information as defined in subsection (1). Non-disclosure of such information constitutes an offence. The authority to whom such a disclosure should be made is specified as a constable for England, Wales and Scotland, but for Northern Ireland the disclosure should be made to the constable or a member of Her Majesty's forces. A defence for a person is provided if he or she can demonstrate that there was a reasonable excuse for the non-disclosure. The Act also introduces a definition of a radioactive weapon. Amendment of Schedule 7 to the Terrorism Act 2000 extends the provision to include air travel within the UK. It equalises provisions to stop, detain and search people who journey**

¹ In *Legislation Against Terrorism: A consultation paper* it was noted that section 18 of the PTA made it an offence to fail to report information to the police etc which might be of material assistance in preventing an act of terrorism or in arresting someone carrying out such an act. It was pointed out that the offence was one of the most controversial in the PTA for it was aimed particularly at those who may have helped someone whom they subsequently learn may be actively engaged in terrorist-related activities or who may be living with, or related to, someone who is active in this way. It was said that the latter in particular may be placed in a difficult position of conflicting loyalties if they learn of something the disclosure of which to the police could render them liable to reprisal. Lord Lloyd questioned its practical value, and that he recommended that an offence of this sort should not be included in any permanent legislation. It was explained that the UK Government had some sympathy with this viewpoint, that limited use is made of the existing offence but that the it was not wholly persuaded that the existence of the offence increases the likelihood that someone in possession of information of the kind covered by the offence would pass it on to the police. The Government was mindful that the Irish Government decided to include such an offence in the emergency legislation it introduced in the wake of the Omagh bombing, and recognised the clear signal such a provision can give. It welcomed views on whether the offence should be retained in new UK-wide counter-terrorist legislation. In the *Analysis Of The Responses To The Government's Consultation Paper (Cm 4178)* it was noted on withholding information about terrorist acts that 20 responses were received, 12 responses supported the retention of such provision, whereas 7 responses rejected retention and one other comment on this issue was received.

internally with those travelling to and from the UK and Common Travel Area. The provision has been extended to include goods being transported. It is intended that the use of these powers whether in respect of persons or goods should be intelligence led.

(Ae) Passenger and Freight Information

6.136 The Act gives additional powers to require carriers to collect and provide information about passengers and goods to the enforcement agencies and which can then be shared between the agencies. It is an essential power to allow law enforcement agencies to target and track terrorists. Details of the information that carriers will be required to provide is to be decided in secondary legislation. Once in place, it would be useful in targeting other serious criminals that can be linked to terrorism, such as drug smugglers and people traffickers as freight information fills a gap in the intelligence gateway.

CHAPTER 7

THE UNITED STATES OF AMERICA

A. INTRODUCTION

7.1 The events of 11 September 2001 led to a host of legislative initiatives¹ to deal with terrorism also in the US. On 24 September 2001 the US Attorney General John Ashcroft explained the need in the US for legislative measures to combat terrorism as follows in his testimony before the House Committee on the Judiciary :

. . . the American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist acts. The danger that darkened the United States of America and the civilized world on September 11th did not pass with the atrocities committed that day. They require that we provide law enforcement with the tools necessary to identify, dismantle, disrupt and punish terrorist organizations before they strike again. Terrorism is a clear and present danger to Americans today. . . .

At the Department of Justice, we are charged with defending Americans' lives and liberties. We are asked to wage war against terrorism within our own borders. Today we seek to enlist your assistance, for we seek new laws against America's enemies, foreign and domestic.

. . . the deficiencies in our current laws on terrorism reflect two facts. First, our laws fail to make defeating terrorism a national priority. Indeed, we have tougher laws against organized crime and drug trafficking than terrorism. Second, technology has dramatically outpaced our statutes.

Law enforcement tools created decades ago were crafted for rotary telephone — not email, the Internet, mobile communications and voice mail. Every day that passes without dated statutes and the old rules of engagement — each day that so passes is a day that terrorists have a competitive advantage. Until Congress makes these changes, we are fighting an unnecessarily uphill battle. . . . we are today sending our troops into the modern field of battle with antique weapons. It is not a prescription for victory.

The anti-terrorism proposals . . . represent careful balanced, long overdue improvements to our capacity to combat terrorism. It is not a wish list; it is a modest set of proposals — essential proposals focusing on five broad objectives which I will briefly summarize.

First, law enforcement needs a strengthened and streamlined ability for our intelligence-gathering agencies to gather the information necessary to disrupt, weaken

¹ Inter alia, H.R. 3210 Terrorism Risk Protection Act which creates a temporary industry risk spreading program to ensure the continued availability of commercial property and casualty insurance and reinsurance for terrorism-related risks to limit immediate market disruptions, encourage economic stabilization, and facilitate a transition to a viable market for private terrorism risk insurance; H.R. 3004, the Financial Anti-Terrorism Act of 2001, provides the United States with new tools to combat the financing of terrorism and other financial crimes, and contains provisions to strengthen law enforcement authorities, as well as to enhance public-private cooperation between government and industry in disrupting terrorist funding; S. 1447, the Aviation and Transportation Security Act, establishes a new Transportation Security Administration within the Department of Transportation responsible for security for all modes of transportation and headed by a new Under Secretary. USA PATRIOT Act of 2001 - H.R. 3162 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism; the Export Administration Act of 2001; the Port and Maritime Security Act of 2001; HR3160 which amends the Antiterrorism and Effective Death Penalty Act of 1996 with respect to the responsibilities of the Secretary of Health and Human Services regarding biological agents and toxins, and it amends title 18, United States Code; HR3448 Bioterrorism Response Act of 2001; and HR2500 Combating Terrorism Act of 2001.

and eliminate the infrastructure of terrorist organizations. Critically we also need the authority for our law enforcement to share vital information with our national security agencies in order to prevent terrorist and future terrorist attacks.

Terrorist organizations have increasingly used technology to facilitate their criminal acts and hide their communications from law enforcement. Intelligence-gathering laws that were written for an era of land-line telephone communications are ill-adapted for use in communications over multiple cell phones and computer networks — communications that are also carried by multiple telecommunications providers located in different jurisdictions.

Terrorists are trained to change cell phones frequently, to route email through different Internet computers in order to defeat surveillance. Our proposal creates a more efficient technology neutral standard for intelligence-gathering, ensuring that law enforcement's ability to trace the communications of terrorists over cell phones, computer networks and the new technologies that may be developed in the years ahead. These changes would streamline intelligence-gathering procedures only. We do not seek changes in the underlying protections in the law for the privacy of law-abiding citizens. The information captured by the proposed technology-neutral standard would be limited to the kind of information you might find in a phone bill, such as the phone numbers dialed by a particular telephone. The content of these communications in this setting would remain off-limits to monitoring by intelligence authorities, except under the current legal standards where content is available under the law which we now use. Our proposal would allow a federal court to issue a single order that would apply to all providers in the communications chain, including those outside the region where the court is located. We need speed in identifying and tracking down terrorists. Time is of the essence. The ability of law enforcement to trace communications into jurisdictions without obtaining an additional court order can be the difference between life and death for American citizens.

We are not asking the law to expand; just to grow as technology grows. This information has historically been available when criminals used pre-digital technologies. This same information should be available to law enforcement officials today.

Second, we must make fighting terrorism a national priority in our criminal justice system. In his speech to the Congress, President Bush said that Osama bin Laden's terrorist group al Qaeda is to terror what the mafia is to organized crime. However, our current laws make it easier to prosecute members of organized crime than to crack down on terrorists who can kill thousands of Americans in a single day. The same is true of drug traffickers and individuals involved in espionage. Our laws treat these criminals and those who aid and abet them more severely than our laws treat terrorists.

We would make harboring a terrorist a crime. Currently, for instance, harboring persons engaged in espionage is a specific criminal offense, but harboring terrorists is not. Given the wide terrorist network suspected of participating in the September 11th attacks, both in the United States and in other countries, we must punish anyone who harbors a terrorist. Terrorists can run, but they should have no place to hide. Our proposal also increases the penalties for conspiracy to commit terrorist acts to a serious level, as we have done for many drug crimes.

Third, we seek to enhance the authority of the Immigration and Naturalization Service to detain or remove suspected alien terrorists from within our borders. The ability of alien terrorists to move freely across our borders and operate within the United States is critical to their capacity to inflict damage on our citizens and facilities. Under current law, the existing grounds for removal of aliens for terrorism are limited to direct material support of an individual terrorist. We propose to expand these grounds for removal to include material support to terrorist organizations. We propose that any alien that provides material support to an organization that he or she knows or should know is a terrorist organization should be subject to removal from the United States.

Fourth, law enforcement must be able to follow the money in order to identify and neutralize terrorist networks. Sophisticated terrorist operations require substantial financial resources. On Sunday evening President Bush signed a new executive order under the International Emergency Economic Powers Act, IEEPA, blocking the assets of and the transactions of individuals and organizations with terrorist organizations

and other business organizations that support terrorism. President Bush's new executive order will allow intelligence, law enforcement and financial regulatory agencies to follow the money trail to the terrorists and to freeze the money to disrupt their actions. This executive order means that the United States banks that have assets of these groups or individuals must freeze their accounts. And United States citizens or businesses are prohibited from doing businesses with those accounts.

At present the president's powers are limited to freezing assets and blocking transactions with terrorist organizations. We need the capacity for more than a freeze. We must be able to seize. Doing business with terrorist organizations must be a losing proposition. Terrorist financiers must pay a price for their support of terrorism which kills innocent Americans.

Consistent with the president's action yesterday and his statements this morning, our proposal gives law enforcement the ability to seize the terrorists assets. Further, criminal liability is imposed on those who knowingly engage in financial transactions, money laundering involving the proceeds of terrorist acts.

Finally, we seek the ability for the president of the United States and the Department of Justice to provide swift emergency relief to the victims of terrorism and their families.

. . . the investigation into the acts of September 11 is ongoing, moving aggressively forward. To date the FBI and INS have arrested or detained 352 individuals who remain — there are other individuals — 392 — who remain at large, because we think they have and we think they have information that could be helpful to the investigation.

The investigative has yielded 324 searches, 103 court orders, 3410 subpoenas, and the potential tips are still coming in to the Web site and the 1-800 hotline. The Web site has received almost 80,000 potential tips; the hotline, almost 15,000.

Now it falls to us, in the name of freedom and those who cherish it, to ensure our nation's capacity to defend ourselves from terrorists. Today I urge the Congress, I call upon the Congress to act, to strengthen our ability to fight this evil wherever it exists, and to ensure that the line between the civil and the savage, so brightly drawn on September 11th, is never crossed again.

7.2 Commentators were highly critical² about these measures³ and cautioned

²

See the Statement Of US Senator Russ Feingold, the chairman of the Constitution Subcommittee of the Judiciary Committee, on the Patriot Act made from the Senate Floor on 25 Oct 2001 (see <http://www.senate.gov/~feingold/releases/01/10/102501at.html>)

" . . . The Administration's proposed bill contained vast new powers for law enforcement, some seemingly drafted in haste and others that came from the FBI's wish list that Congress has rejected in the past. You may remember that the Attorney General announced his intention to introduce a bill shortly after the September 11 attacks. He provided the text of the bill the following Wednesday, and urged Congress to enact it by the end of the week. That was plainly impossible, but the pressure to move on this bill quickly, without deliberation and debate, has been relentless ever since. It is one thing to shortcut the legislative process in order to get federal financial aid to the cities hit by terrorism. We did that, and no one complained that we moved too quickly. It is quite another to press for the enactment of sweeping new powers for law enforcement that directly affect the civil liberties of the American people without due deliberation by the peoples' elected representatives. Fortunately, cooler heads prevailed at least to some extent, and while this bill has been on a fast track, there has been time to make some changes and reach agreement on a bill that is less objectionable than the bill that the Administration originally proposed. . . .

We must maintain our vigilance to preserve our laws and our basic rights. We in this body have a duty to analyze, to test, to weigh new laws that the zealous and often sincere advocates of security would suggest to us. This is what I have tried to do with this anti-terrorism bill. And that is why I will vote against this bill when the roll is called.

Protecting the safety of the American people is a solemn duty of the Congress; we must work tirelessly to prevent more tragedies like the devastating attacks of September 11th. We must prevent more children from losing their mothers, more wives from losing their husbands, and more firefighters from losing their heroic colleagues. But the Congress will fulfill its duty only when it protects *both* the American people and the freedoms at the foundation of American society. So let us preserve our heritage of basic rights. Let us practice as well as preach that

against overhasty action being taken.⁴

liberty. And let us fight to maintain that freedom that we call America. . . .

There have been periods in our nation's history when civil liberties have taken a back seat to what appeared at the time to be the legitimate exigencies of war. Our national consciousness still bears the stain and the scars of those events: The Alien and Sedition Acts, the suspension of habeas corpus during the Civil War, the internment of Japanese-Americans, German-Americans, and Italian-Americans during World War II, the blacklisting of supposed communist sympathizers during the McCarthy era, and the surveillance and harassment of antiwar protesters, including Dr. Martin Luther King Jr., during the Vietnam War. We must not allow these pieces of our past to become prologue.

Mr. President, even in our great land, wartime has sometimes brought us the greatest tests of our Bill of Rights. For example, during the Civil War, the government arrested some 13,000 civilians, implementing a system akin to martial law. President Lincoln issued a proclamation ordering the arrest and military trial of any persons "discouraging volunteer enlistments, or resisting militia drafts." Wisconsin provided one of the first challenges of this order. Draft protests rose up in Milwaukee and Sheboygan. And an anti-draft riot broke out among Germans and Luxembourgers in Port Washington, Wisconsin. When the government arrested one of the leaders of the riot, his attorney sought a writ of habeas corpus. His military captors said that the President had abolished the writ. The Wisconsin Supreme Court was among the first to rule that the President had exceeded his authority. . . .

As it seeks to combat terrorism, the Justice Department is making extraordinary use of its power to arrest and detain individuals, jailing hundreds of people on immigration violations and arresting more than a dozen "material witnesses" not charged with any crime. Although the government has used these authorities before, it has not done so on such a broad scale. Judging from government announcements, the government has not brought any criminal charges related to the attacks with regard to the overwhelming majority of these detainees.

For example, the FBI arrested as a material witness the San Antonio radiologist Albader Al-Hazmi, who has a name like two of the hijackers, and who tried to book a flight to San Diego for a medical conference. According to his lawyer, the government held Al-Hazmi incommunicado after his arrest, and it took six days for lawyers to get access to him. After the FBI released him, his lawyer said, "This is a good lesson about how frail our processes are. It's how we treat people in difficult times like these that is the true test of the democracy and civil liberties that we brag so much about throughout the world." I agree with those statements. . . ."

³ Nancy Chang says in "How Does USA PATRIOT Act Affect Bill of Rights?" published in the *New York Law Journal* of December 6, 2001 that the US commitment to their Bill of Rights has been put to test by the horrific events of Sept. 11, and to an extraordinary degree, the USA PATRIOT Act delegates the task of safeguarding the Bill of Rights to the executive branch. She notes that it remains to be seen whether the executive will limit the exercise of its powers under the Act to situations where national security is truly at stake, ensure that its actions are not motivated by discriminatory intent, and tread as lightly as possible upon civil liberties. Jonathan Ringel and Tony Mauro remark in "Do New Anti-Terrorism Proposals Pass Constitutional Muster?" *American Lawyer Media* 8 October 2001 at <http://www.law.com/> as follows:

"After intensive negotiations, Congress this week is set to vote on some extraordinary measures to change criminal and immigration law. The aim, of course, is to give the government the tools it says it needs to combat terrorism. But questions have been raised about the constitutionality of several of the provisions. What does U.S. Supreme Court precedent say about those proposals?"

⁴ See Robin Toner "Bush Law-Enforcement Plan Troubles Both Right and Left" *New York Times* 28 September 2001 who says that after the terrorist attacks, there was a bipartisan rush to provide the administration with emergency aid money, new military authority and financial relief for the airlines, but that Congress is taking a second look — and a third and a fourth — at the administration's proposals for new law enforcement powers to fight terrorism. He notes that asked about the strikingly different response, Representative Dick Armey, the House majority leader and a conservative Republican, said: "This is a tougher area for us to look at than areas that involve money. This is about how we equip our anti-espionage,

counterterrorism agencies with the tools they want while we still preserve the most fundamental thing, which is the civil liberties of the American people." See also the following articles by the same author published in the *New York Times*: "Not So Fast, Senator Says, as Others Smooth Way for Terror Bill" 10 October 2001, "After the Attacks: Civil Liberties; Some Foresee A Sea Change In Attitudes On Freedoms" 15 September 2001, "Civil Liberty vs. Security: Finding a Wartime Balance" 18 November 2001 and "Ashcroft and Leahy Battle Over Expanding Police Powers" *New York Times* 2 December 2001.

B. THE PATRIOT ACT

(a) Introduction

7.3 The Senate Bill passed on 11 October 2001 and the Bill passed by the House of Representatives on 12 October 2001, contained the short title saying "Uniting and Strengthening America (USA) Act of 2001". The Bill subsequently passed by the House on October 24, 2001 (the "House Bill"), changed the title to the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001."¹ **Section 2 contains the rule of construction to provide that any portion of the Act found to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed to give it the maximum effect permitted by law and that any portion found invalid or unenforceable in its entirety shall be severable from the rest of the Act.**

(b) Title I—enhancing Domestic Security Against Terrorism

7.4 Sec. 101 establishes a counterterrorism fund in the Treasury of the United States, without affecting prior appropriations, to reimburse Department of Justice components for costs incurred in connection with terrorism and terrorism prevention, rebuild any Justice Department component damaged or destroyed as a result of a terrorism incident, pay terrorism-related rewards, conduct terrorism threat assessments, and reimburse Federal agencies for costs incurred in connection with detaining suspected terrorists in foreign countries. Section 102 expresses the sense of Congress in condemning acts of violence and discrimination against Arab Americans, American Muslims, and Americans from South Asia, and to declare that every effort must be taken to protect their safety. Section 103 authorizes \$200,000,000 per year for fiscal years 2002, 2003 and 2004 for the Technical Support Center established in section 811 of the Antiterrorism and Effective Death Penalty Act of 1996 to help meet the demands of activities to combat terrorism and enhance the technical support and tactical operations of the FBI.

7.5 Section 104 authorizes the Attorney General to request military assistance in support of Department of Justice activities relating to the enforcement of 18 U.S.C. §2332a during an emergency situation involving a weapon of mass destruction. Section 105 allows the Secret Service to develop a national network of electronic crime task forces, based on the highly successful New York Electronic Crimes Task Force model, for the purpose of preventing, detecting, and investigating various forms of electronic crimes, including potential terrorist

¹ <http://www.senate.gov/~leahy/press/200110/102401a.html>

attacks against critical infrastructure and financial payment systems. Section 106 gives to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States the property of enemies of the United States during times of national emergency, which was permitted by the Trading with the Enemy Act, 50 app. U.S.C. § 5(b), until 1977, when the International Economic Emergency Act was passed. The new provision permits the President, when the United States is engaged in military hostilities or has been subject to attack, to confiscate property of any foreign country, person or organization involved in hostilities or attacks on the United States. This section also permits courts, when reviewing determinations made by the executive branch, to consider classified evidence ex parte and in camera.

(c) Title II—enhanced Surveillance Procedures

7.6 Section 201 gives authority to intercept wire, oral, and electronic communications relating to terrorism² **and adds criminal violations relating to terrorism to the list of predicate statutes in the criminal procedures for interception of communications under chapter 119 of title 18, United States Code.**³ Section 202 gives authority to

² Professor Lewis R Katz said in “Anti-terrorism Laws: Too Much of A Good Thing” [Http://jurist.law.pitt.edu/forum/forumnew39.htm](http://jurist.law.pitt.edu/forum/forumnew39.htm) that the USA Patriot Act of 2001 is a red-flag type of name guaranteed to raise suspicion, and he asks what type of extreme government behaviour is Congress trying to hide under that apple-pie name? He remarked that the essentials of the Act do not trouble him and that the increased authority to conduct electronic surveillance of telephone and internet communications strikes him as reasonable, for the concept of reasonableness must be flexible enough to incorporate modern technology. He considers that because the terrorists have access to modern technology, the Fourth Amendment command of reasonableness cannot and will not deprive the government of adequate tools for legitimate law enforcement needs and that the threat is so dire that the command of reasonableness may require the granting of authority that would not be forthcoming in the fight against ordinary crime. He noted that the detention of more than one thousand Arab aliens in the United States is more troubling but not alarming, and that the decision to detain these men is not in any way reminiscent of the relocation of all Japanese-Americans from the West Coast following the bombing of Pearl Harbour. He lamented that the US government will make mistakes, and that innocent people will be detained but pointed out that the release of some of these men is reassuring. He however remarked that reports of the conditions of the detention and the limitations placed upon the detainees’ lawyers are troubling and offensive. He explained that his approval of the Justice Department’s policies and behaviour is not unlimited, pointing out that the Justice Department’s announcement that it will eavesdrop on communications between some suspects and their lawyers when the Attorney General has reasonable suspicion that the suspect may disclose information about on-going or future terrorist activities brought his new-found romance with government to a crashing halt. He stated that he does not doubt that unusual circumstances might arise where there is legitimate cause to intercept such communications, even though the very concept of such interceptions will have a chilling effect upon the lawyer-client relationship. He said that he is deeply troubled, however, that the administration would claim such authority for the Attorney General rather than acknowledging the preferred constitutional rule which requires prior judicial authorization for such interceptions. He considered that bypassing the neutral and detached magistrate is not necessary, results in the collection of too much power in the executive branch, and is an unreasonable search under the Fourth Amendment and a violation of the Sixth Amendment right to counsel.

³ Statement Of U.S. Senator Russ Feingold, chairman of the Constitution Subcommittee of the

intercept wire, oral, and electronic communications relating to computer fraud and abuse offenses and adds criminal violations relating to computer fraud and abuse to the list of predicate statutes in the criminal procedures for interception of communications under chapter 119 of title 18, United States Code.⁴ Section 203 provides for authority to share criminal investigative information. It amends the criminal procedures for interception of communications under chapter 119 of title 18, United States Code, and the grand jury procedures under Rule 6(e) of the Federal Rules of Criminal Procedures to authorize disclosure of foreign intelligence information obtained by such interception or by a grand jury to any Federal law enforcement, intelligence, national security, national defence, protective or immigration personnel to assist the official receiving that information in the performance of his official duties. Section 203(a) requires that within a reasonable time after disclosure of any grand jury information, an attorney for the government has to notify the court of such disclosure and the departments, agencies or entities to which disclosure was made. Section 203(b) pertains to foreign intelligence information obtained by intercepting communications pursuant to a court-ordered wiretap.

7.7 Section 203(c) also authorizes such disclosure of information obtained as part of a criminal investigation notwithstanding any other law. The information must meet statutory definitions of foreign intelligence or counterintelligence or foreign intelligence information. Recipients may use that information only as necessary for their official duties, and use of the information outside those limits remains subject to applicable penalties, such as penalties for unauthorized disclosure under chapter 119, contempt penalties under Rule 6(e) and the Privacy Act. The Attorney General must establish procedures for disclosure of information that identifies a United States person, such as the current procedures established under Executive Order 12333 for

Judiciary Committee, on the Patriot Act on 25 October 2001 where he noted, inter alia, that the original Administration proposal contained a provision that would have allowed the use in US criminal proceedings against US citizens of information obtained by foreign law enforcement agencies in wiretaps that would be illegal in this country. In other words, evidence obtained in an unconstitutional search overseas was to be allowed in a US court.

⁴ Senator Feingold said he has concluded that the bill still does not strike the right balance between empowering law enforcement and protecting civil liberties, but that does not mean that he opposes everything in the bill. He considered that many of its provisions are entirely reasonable, and he hopes they will help law enforcement more effectively counter the threat of terrorism. He pointed out that it is entirely appropriate that with a warrant the FBI be able to seize voice mail messages as well as tap a phone, and that it is also reasonable, even necessary, to update the federal criminal offense relating to possession and use of biological weapons. He said it made sense to make sure that phone conversations carried over cables would not have more protection from surveillance than conversations carried over phone lines, and it made sense to stiffen penalties and lengthen or eliminate statutes of limitation for certain terrorist crimes.

the intelligence community. It modified the Administration proposal to limit the scope of personnel eligible to receive information. Section 204 clarifies the intelligence exceptions from limitations on interception and disclosure of wire, oral, and electronic communications. It amends the criminal procedures for interception of wire, oral, and electronic communications in title 18, United States Code, to make clear that these procedures do not apply to the collection of foreign intelligence information under the statutory foreign intelligence authorities. Section 205 authorizes the FBI Director to expedite the employment of personnel as translators to support counterterrorism investigations and operations without regard to applicable Federal personnel requirements and limitations.

7.8 Section 206 modifies the Foreign Intelligence Surveillance Act ("FISA") to allow surveillance to follow a person who uses multiple communications devices or locations, a modification which conforms FISA to the parallel criminal procedure for electronic surveillance in 18 U.S.C. §2518(11)(b). The court order need not specify the person whose assistance to the surveillance is required (such as a particular communications common carrier), where the court finds that the actions of the target may have the effect of thwarting the identification of a specified person. Section changes the initial period of a FISA order for a surveillance or physical search targeted against an agent of a foreign power from 90 to 120 days, and changes the period for extensions from 90 days to one year. One-year extensions for physical searches are subject to the requirement in current law that the judge find "probable cause to believe that no property of any United States person will be acquired during the period." Section 207 also changes the ordinary period for physical searches under FISA from 45 to 90 days.

7.9 Section 208 increases the number of Federal district judges designated to serve on the FISA court from seven to 11, and requires that no less than 3 of the judges reside within 20 miles of the District of Columbia. Section authorizes the government access to voice mails with a court order supported by probable cause in the same way e-mails currently may be accessed, and authorizes nationwide service with a single search warrant for voice mails. Current law, 18 U.S.C. §2510(1), defines "wire communication" to include "any electronic storage of such communication," with the result that the government must apply for a Title III wiretap order before it may obtain unopened voice mail messages held by a service provider. This section amends the definition of "wire communication" so that it no longer includes stored communications. It also amends 18 U.S.C. §2703 to specify that the government may use a search warrant (instead of a wiretap order) to compel the production of

unopened voicemail, thus harmonizing the rules applicable to stored voice and non-voice (e.g., e-mail) communications.⁵

7.10 The Act broadens the types of records that law enforcement may obtain, pursuant to a subpoena, from electronic communications service providers by requiring providers to disclose the means and source of payment, including any bank account or credit card numbers. Current law⁶ allows the government to use a subpoena to compel communications providers to disclose a small class of records that pertain to electronic communications, limited to such records as the customer's name, address, and length of service. Investigators may not use a subpoena to obtain such records as credit card number or other form of payment and must use a court order. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity.

7.11 Section 212 amends 18 USC §2702 to authorize providers of electronic communications services to disclose the communications (or records of such communications) of their subscribers if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires the disclosure of the information without delay. This section also corrects an anomaly in the current law by clearly permitting a provider to disclose non-content records (such as a subscriber's log-in records) as well as the contents of the customer's communications to protect their computer systems. Section 213 amends 18 USC §3103a to authorize a court to issue a search warrant in which the government is permitted to delay providing notice of the warrant's execution.⁷

⁵ Senator Russ Feingold says that another very troubling provision has to do with the effort to combat computer crime. The bill allows law enforcement to monitor a computer with the permission of its owner or operator, without the need to get a warrant or show probable cause. That's fine in the case of a so called "denial of service attack" or plain old computer hacking. A computer owner should be able to give the police permission to monitor communications coming from what amounts to a trespasser on the computer. As drafted in the Senate bill, however, the provision might permit an employer to give permission to the police to monitor the e-mails of an employee who has used her computer at work to shop for Christmas gifts. Or someone who uses a computer at a library or at school and happens to go to a gambling or pornography site in violation of the Internet use policies of the library or the university might also be subjected to government surveillance – without probable cause and without any time limit. With this one provision, fourth amendment protections are potentially eliminated for a broad spectrum of electronic communications.

⁶ 18 U.S.C. §2703(c)(1)(C). See "A Closer Look: Provisions of the Antiterrorism Bill" *New York Times* 26 October 2001 at <http://www.nytimes.com/2001/10/26/national/26CBOX.html>

⁷ See however Marcia Coyle "New Search Law Likely to Provoke Fourth Amendment Challenge: Terrorism bill OKs 'sneak-and-peek'" *The National Law Journal* 29 October at <http://www.law.com/> who says that among the likely court fights over Congress' terrorism package is one over so-called sneak-and-peek warrants, according to Fourth Amendment scholars and groups across the political spectrum. She notes that the anti-terrorism package

Consistent with the requirements of case law from the Second and Ninth Circuits, this section also provides several limitations on this authority. First, delayed notice is authorized only in cases where the government has demonstrated reasonable cause to believe that providing immediate notice would have an adverse result as defined in 18 USC §2705. Second, the provision prohibits the government from seizing any tangible property or any wire or electronic communication or stored wire or electronic communication unless it makes a showing of reasonable necessity for the seizure. Third, the warrant must require the giving of notice within a reasonable time of the execution of the search. It is narrower than the original Administration proposal, which would have permitted delay as law enforcement saw fit.⁸

enacted in the wake of the Sept. 11 attacks contains a provision expanding the authority of federal law enforcement officers to conduct covert searches, but unlike other provisions broadening law enforcement power, this one does not have a "sunset" or time limit attached that would allow the lawmakers to revisit its necessity at a later date. She adds that like many other provisions, the sneak-and-peek language is not restricted to terrorism investigations. Marcia Coyle states that the Justice Department argued that the existing law is a mix of inconsistent rules, practices and court decisions that vary from jurisdiction to jurisdiction, and that it said the anti-terrorism provision resolves the inconsistency by establishing a uniform, statutory standard for all cases. She notes that in the end, Boston University's Maclin says, it's all a question of how we view the Fourth Amendment and that the amendment's essential purpose is to control the discretion of government officials to intrude in our lives. She points out that he asks how many judges, particularly where criminal contraband is discovered, are going to say the government's request is unreasonable, and considers that they're not going to do it. She says Fourth Amendment scholar Yale Kamisar of the University of Michigan Law School notes that the Supreme Court has not focussed on notice under the Fourth Amendment as much as it has on probable cause and reasonable suspicion. She reports that he considers that as long as the police have probable cause or individualized suspicion to do this, the Court could say there's no reason to tell you, although he'd hope not. He is of the view that people ought to know what's taken from them so they can at least prepare a defense." She remarks that it is said that the problem may be getting a challenge before the Supreme Court, that having Congress codify this power strengthens the department's hand when the warrants are litigated, and if the department sees a potential legal challenge in front of them, they may offer plea bargains to eliminate the threat. It is also said that it may take 10 years or more before this power is invalidated.

8

See also Senator Russ Feingold's statement on the Anti-Terrorism Bill made from the Senate Floor on 25 Oct 2001 <http://www.senate.gov/~feingold/releases/01/10/102501at.html> that the bill contains some very significant changes in criminal procedure that will apply to every federal criminal investigation in the US, not just those involving terrorism. He pointed out that one provision would greatly expand the circumstances in which law enforcement agencies can search homes and offices without notifying the owner prior to the search. He considered that the longstanding practice under the Fourth Amendment of serving a warrant prior to executing a search could be easily avoided in virtually every case, because the government would simply have to show that it has "reasonable cause to believe" that providing notice "may" "seriously jeopardize an investigation," and that this is a significant infringement on personal liberty. He said that notice is a key element of Fourth Amendment protections, that it allows a person to point out mistakes in a warrant and to make sure that a search is limited to the terms of a warrant. He remarked on the possibility of the police showing up at one's door with a warrant to search your house, one looks at the warrant and say, "yes, that's my address, but the name on the warrant isn't me, and the police realize a mistake has been made and go away. He noted that if you're not home, and the police have received permission to do a "sneak and peak" search, they can come in your house, look around, and leave, and may never have to tell you.

7.12 Section 214 modifies the FISA provisions for pen register and trap and trace to eliminate the requirement to show to the court that the target is in contact with an "agent of a foreign power." It replaces this requirement with a determination that the pen register or trap and trace is relevant to an investigation to protect against international terrorism or clandestine intelligence activities or to obtain foreign intelligence information not concerning U.S. persons. Any investigation of a United States person may not be based solely on activities protected by the First Amendment. It is narrower than the original Administration proposal, which would simply have removed the "agent of a foreign power" requirement. Section 215 deals with access to records and other items under the FISA. It removes the "agent of a foreign power" standard for court-ordered access to certain business records under FISA and expands the scope of court orders to include access to other records and tangible items. The authority may be used for an investigation to protect against international terrorism or clandestine intelligence activities or to obtain foreign intelligence information not concerning US persons. An investigation of a United States person may not be based solely on activities protected by the First Amendment. It is narrower than the original Administration proposal, which would have removed requirements of court order and the "agent of a foreign power" showing. Section 216 authorizes courts to grant pen register and trap and trace orders that are valid anywhere in the nation. It also ensures that the pen register and trap and trace provisions apply to facilities other than telephone lines (e.g., the Internet). It specifically provides, however, that the grant of authority to capture "routing" and "addressing" information for Internet users does not authorize the interception of the content of any such communications. It further requires the government to use the latest available technology to ensure that a pen register or trap and trace device does not intercept the content of any communications. Finally, it provides for a report to the court on each use of "Carnivore"-like devices on packet-switched data networks. Makes a number of improvements over Administration proposal, including exclusion of content, exclusion of ISP liability, and Carnivore report.

7.13 Section 217 allows computer service providers who are victims of attacks by computer trespassers to authorize persons acting under colour of law to monitor trespassers on their computer systems in a narrow class of cases. A computer trespasser is defined as a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communications transmitted to, through, or from the protected computer. However, it does not include a person known by the owner or operator of the protected computer

to have an existing contractual relationship with the owner or operator for access to all or part of the protected computer. It is narrower than the original Administration proposal, which did not exclude service provider subscribers from definition of trespasser and did not limit interception authority to only those communications through the computer in question.

7.14 Section 218 amends FISA to require a certification that "a significant purpose " rather than "the purpose" of a surveillance or search under FISA is to obtain foreign intelligence information.⁹ It is narrower than the Administration proposal,¹⁰ which

⁹ Professor Susan Herman notes (see <http://jurist.law.pitt.edu/forum/forumnew40.htm>) as Nancy Chang does below, that the thrust of the *USA Patriot Act* surveillance provisions is to provide federal agencies with more surveillance options, and less judicial supervision. She explains that the principal statute governing electronic surveillance in criminal investigations, Title III of the Crime Control and Safe Streets Act of 1968, tried to meet concerns the Supreme Court had expressed about the constitutionality of electronic surveillance under Fourth Amendment, by providing standards to limit the scope of surveillance and by providing a judicial check. She points out that except in certain cases deemed emergencies, applicants must persuade a judicial officer that they have probable cause that the interception they seek may provide evidence of one of a number of listed offenses, and the court order permitting surveillance, like the statute, will require investigators to submit to various forms of limitations and judicial supervision. She states that evidence intercepted in violation of Title III's central provisions, is made inadmissible in judicial and other proceedings, and cases decided in response to defendants' motions to suppress evidence seized then flesh out the nature of judicial participation. She notes that the Foreign Intelligence Surveillance Act [FISA], was aimed not at gathering evidence for a criminal prosecution, but at gathering information about the activities of foreign persons and agents (as opposed to "USA persons"), and judicial involvement in deciding whether to issue orders permitting this type of surveillance is both covert and minimal. Prof Herman explains that instead of requiring probable cause, surveillance orders are issued on a certification by the Attorney General that has nothing to do with probable cause, and that between 1996 and 2000, out of 4275 applications for FISA warrants, 4275 were granted. She points out that because the point is to gather intelligence rather than evidence, challenges to the legality of surveillance aren't likely to arise, and subjects may never even know that they have been under surveillance. She considers that the *USA Patriot Act* allows surveillance of USA citizens under standards more like FISA than Title III, and allows powers permitted under Title III to be employed even where there is no probable cause and minimal judicial involvement, as in FISA. She says that FISA warrants may now be used even if intelligence is not the primary purpose of an investigation. Prof Herman points out that "roving wiretaps" are a good example of how the powers under Title III have been extended. She notes that the Department of Justice argued to the public that revision of existing wiretap law was necessary to keep up with modern technology – to allow a roving wiretap that would allow a person's conversations to be intercepted even if the person carried a cell phone, or moved from phone to phone. She points out that the argument ran that why should an investigation be limited to wiretapping one particular telephone, when modern telephone users frequently have access to several phones, although the authority to issue an order for a roving wiretap already existed under Title III, for investigations where probable cause has been demonstrated. She further explains that the *USA Patriot Act* extends the roving wiretap authority to intelligence wiretaps, which are authorized secretly and are not based on probable cause, the authorization may be nation-wide, and once additional telephones that a target uses (perhaps in someone else's home) are being monitored, other users of that telephone will also be subject to continuing surveillance. She says that most of the new surveillance powers granted will expire after four years pursuant to the statute's sunset provisions, and that most of the powers are not confined to investigations concerning terrorism, but apply to any criminal investigations. She notes that if there is to be any check on the Attorney General's use of these powers, it will have to come from congressional oversight and asks whether Congress will be

would have allowed FISA surveillance if intelligence gathering was merely "a" purpose.¹¹ Section 219 amends Federal Rule of Criminal Procedure 41(a) to provide

able to muster the political will to hold effective hearings, and to overcome the Bush Administration's reluctance to share what it claims as executive prerogative?

¹⁰ Senator Ross Feingold noted that he is also very troubled by the broad expansion of government power under the Foreign Intelligence Surveillance Act, known as FISA, since when Congress passed FISA in 1978 it granted to the executive branch the power to conduct surveillance in foreign intelligence investigations without meeting the rigorous probable cause standard under the Fourth Amendment that is required for criminal investigations. He pointed out that there is a lower threshold for obtaining a wiretap order from the FISA court because the FBI is not investigating a crime, it is investigating foreign intelligence activities, but the law currently requires that intelligence gathering be the primary purpose of the investigation in order for this lower standard to apply. He remarked that the bill changes that requirement. The government now will only have to show that intelligence is a "significant purpose" of the investigation. So even if the *primary* purpose is a criminal investigation, the heightened protections of the Fourth Amendment won't apply. He noted that it seems obvious that with this lower standard, the FBI will try to use FISA as much as it can. And of course, with terrorism investigations that won't be difficult, because the terrorists are apparently sponsored or at least supported by foreign governments, and this means that the fourth amendment rights will be significantly curtailed in many investigations of terrorist acts. He said the significance of the breakdown of the distinction between intelligence and criminal investigations becomes apparent when you see the other expansions of government power under FISA in this bill. He stated that one provision that troubles him a great deal is a provision that permits the government under FISA to compel the production of records from any business regarding any person, if that information is sought in connection with an investigation of terrorism or espionage. He noted that one is not talking here about travel records pertaining to a terrorist suspect, which all can see can be highly relevant to an investigation of a terrorist plot, but that FISA already gives the FBI the power to get airline, train, hotel, car rental and other records of a suspect. He pointed out that under this bill, the government can compel the disclosure of the personal records of anyone – perhaps someone who worked with, or lived next door to, or went to school with, or sat on an airplane with, or has been seen in the company of, or whose phone number was called by -- the target of the investigation, and under this new provisions *all* business records can be compelled, including those containing sensitive personal information like medical records from hospitals or doctors, or educational records, or records of what books someone has taken out of the library. He noted that this is an enormous expansion of authority, under a law that provides only minimal judicial supervision. He pointed out that under this provision, the government can apparently go on a fishing expedition and collect information on virtually anyone, and all it has to allege in order to get an order for these records from the court is that the information is sought for an investigation of international terrorism or clandestine intelligence gathering. That's it. On that minimal showing in an ex parte application to a secret court, with no showing even that the information is *relevant* to the investigation, the government can lawfully compel a doctor or hospital to release medical records, or a library to release circulation records. He considered that this is a truly breathtaking expansion of police power.

¹¹ Nancy Chang says in "How Does USA PATRIOT Act Affect Bill of Rights?" published in the *New York Law Journal* of December 6, 2001 that section 218 of the *USA PATRIOT Act* amends FISA to permit law enforcement agencies to circumvent the Fourth Amendment's probable cause requirement when conducting surreptitious wiretaps and searches that have as "a significant purpose" the gathering of foreign intelligence, even when their primary purpose is criminal investigation. She notes that prior to the enactment of the Act, orders issued under FISA's lax standards were restricted to situations where the gathering of foreign intelligence information was "the purpose" of the surveillance. In *United States v. United States District Court for the Eastern District of Michigan (Keith)*, the Supreme Court wisely observed that "[o]fficial surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech" because of "the inherent vagueness of the domestic security concept ... and the temptation to utilize such surveillances to oversee political dissent." She explains that the *Keith* Court,

that warrants relating to the investigation of terrorist activities may be obtained in any district in which the activities related to the terrorism may have occurred, regardless of where the warrants will be executed. Section 220 amends 18 USC §2703(a) to authorize courts with jurisdiction over the offense to issue search warrants for electronic communications in electronic storage anywhere in the United States, without requiring the intervention of their counterparts in the districts where Internet service providers are located¹². It is narrower than the Administration proposal in that it limits the forum shopping problem by limiting to courts with jurisdiction over the offense.

7.15 Section 221 authorizes the President unilaterally to restrict exports of agricultural products, medicine or medical devices to the Taliban or the territory of Afghanistan controlled by the Taliban. It is narrower than the original Administration proposal which would have undermined the congressional approval requirement, conferring upon the President control of agricultural and medical exports "to all designated terrorists and narcotics entities wherever they are located." Section 222 deals with assistance to law enforcement agencies. It provides that the Act does not impose any additional technical requirements on a provider of a wire or electronic communication service and that a provider of a wire or electronic communication service, landlord, custodian or other person who furnishes facilities or technical assistance pursuant to section 216 shall be reasonably compensated for expenditures incurred in providing such facilities or assistance.

however, declined to examine "the scope of the President's surveillance power with respect to the activities of foreign powers." Nancy Chang explains that the constitutionality of Section 218 is in considerable doubt, as in *United States v. Truong Dinh Hung*, the Fourth Circuit held that "the executive should be excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence reasons," because "once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution."

¹² Tony Mauro noted in Jonathan Ringel and Tony Mauro "Do New Anti-Terrorism Proposals Pass Constitutional Muster?" *American Lawyer Media* October 8, 2001 <http://www.law.com/> that the proposals to expand government wiretap and electronic surveillance authority seem unlikely to raise major constitutional red flags for the Supreme Court — especially in a wartime setting, when the justices have rarely challenged the will of the executive. He said, however, that some of the provisions, if contested, will force the Court to fit traditional Fourth Amendment doctrine into the new setting of Internet communications, with uncertain results, and noted that University Columbus School of Law professor Clifford Fishman, author of several works on the law of wiretapping stated that the most important skill for a lawyer in this area is the ability to argue by analogy, and that he asked whether tracing e-mail addresses is more like getting information from the cover of a piece of mail, or is it more like a pen register, considering that the US is making up the law as they go along. He pointed out that in spite of that uncertainty, Fishman thinks that most of the surveillance proposals making their way through Congress are "not beyond the pale" and would likely be upheld.

7.16 Section 223 deals with civil liability for certain unauthorized disclosures and it creates civil liability for violations, including unauthorized disclosures, by law enforcement authorities of the electronic surveillance procedures set forth in title 18, United States Code (e.g., unauthorized disclosure of pen trap, wiretap, stored communications), or FISA information. It also requires administrative discipline of officials who engage in such unauthorized disclosures. Section 224 provides a 4-year sunset for sections 206, 201, 202, 203(b), 204, 206, 207, 209, 210, 212, 214, 215, 217, 218, 220, 223 -- at the end December 31, 2005, with the authorities "grandfathered" as to particular investigations based on offenses occurring prior to sunset.

(d) Title III — international Money Laundering Abatement and Anti-terrorist Financing Act of 2001

7.17 Section 301 contains the short title of Title III, "International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001". Section 303 provides that the provisions added and amendments made by Title III will terminate after September 30, 2004, if the Congress enacts a joint resolution to that effect, and that any such joint resolution will be given expedited consideration by the Congress. HR 3004, the Financial Anti-Terrorism Act of 2001, provides the United States with new tools to combat the financing of terrorism and other financial crimes. The measure contains provisions to strengthen law enforcement authorities, as well as to enhance public-private cooperation between government and industry in disrupting terrorist funding. Specifically, the measure —

- A. makes it a crime to smuggle over \$10,000 into or out of the US, and to transport more than \$10,000 in criminal proceeds across state lines;
- B. gives the Justice Department new prosecutorial tools to combat terrorist-related and other money laundering through US financial institutions;
- C. provides statutory authorization for the Financial Crimes Enforcement Network (FinCEN), which analyzes reports filed by financial institutions on currency transactions and suspicious financial activity;
- D. sets up a unit in FinCEN directed at oversight and analysis of hawalas¹³ **and**

¹³ Kevin Anderson "Hawala system under scrutiny" 8 November 2001BBC News Online at http://news.bbc.co.uk/hi/english/business/newsid_1643000/1643995.stm
The US has intensified its war on terrorism on the financial front, targeting an ancient, informal system of money transfers that officials believe funnelled millions of dollars to Osama Bin Laden's al-Qaeda network. The system is known as hawala, and it has been used for hundreds of years to move money across distances and around legal and financial barriers in South Asia and the Middle East. Arab traders used it on the Silk Road to avoid being robbed, and now millions of Pakistanis, Indians and others working abroad use the hawala system to send money home to their families. Billions of dollars flow through this informal and

anonymous system, and officials believe that al-Qaeda is using the system to move money to its operatives around the world.

Difficult to trace

Typically, a transaction begins with a visit to a hawala broker. The person wanting to send money gives the broker the sum of money to be transferred plus a fee and the name and location of the person he wants the money delivered to. The broker then gives his customer a receipt. The receipts are usually nothing elaborate, often just a bit of paper. The broker then contacts a broker in the recipient's country. The recipient contacts the local hawala broker. While the system may be ancient, hawala brokers routinely use fax machines or the internet to communicate with other brokers. The broker is given a code. It could be anything. It could be a string of numbers, or it could be a \$5 bill with a specific serial number sent to him by his relative. Records are kept only until the transaction is completed. Then they are destroyed. The money does not move, either physically or electronically. Brokers dole out money from the same pool that they take it in. They make money from the fees they charge for the transactions. The system is built on the trust between brokers, a trust built up between generations of hawala brokers.

Modern roots

While the hawala system may have ancient roots, much of the present hawala network grew out of gold smuggling operations in South Asia in the 1960s and 1970s, says Sunil Dasgupta, a foreign policy researcher with the Brookings Institution in Washington. To get around gold import restrictions, smugglers used boats to ship gold from Dubai and Abu Dhabi to South Asia. After selling the gold, they then needed to get the cash back home. The smugglers discovered a solution in the growing population of Indians and Pakistanis working in the Gulf states. These workers often sent money back home to their families, but if they went through official banking channels it cost more than the hawala system set up by the smugglers. They could offer better rates because of the profits they were making on smuggled gold. They developed an efficient system for moving money from expatriates in the Middle East, South-East Asia, the UK and even in North America to families in Pakistan and India, Mr Dasgupta said. "The use of hawala networks by terrorist organisations is easy and could pass unnoticed in the large bulk of 'legitimate' transactions undertaken by expatriate South Asians," he said.

See also Sam Vaknin "To Stop Bin Laden, Follow the Money" <http://www.the-idler.com/IDLER-01/10-22.html>

... The OECD's Financial Action Task Force (FATF) says that:

"Hawala remains a significant method for large numbers of businesses of all sizes and individuals to repatriate funds and purchase gold.... It is favoured because it usually costs less than moving funds through the banking system, it operates 24 hours per day and every day of the year, it is virtually completely reliable, and there is minimal paperwork required." (Organisation for Economic Co-Operation and Development (OECD), "Report on Money Laundering Typologies 1999-2000," Financial Action Task Force, FATF-XI, February 3, 2000, at http://www.oecd.org/fatf/pdf/TY2000_en.pdf)

Hawala networks closely feed into Islamic banks throughout the world and to commodity trading in South Asia. There are more than 200 Islamic banks in the USA alone and many thousands in Europe, North and South Africa, Saudi Arabia, the Gulf states (especially in the free zone of Dubai and in Bahrain), Pakistan, Malaysia, Indonesia, and other South East Asian countries. By the end of 1998, the overt (read: tip of the iceberg) liabilities of these financial institutions amounted to 148 billion US dollars. They dabbled in equipment leasing, real estate leasing and development, corporate equity, and trade/structured trade and commodities financing (usually in consortia called "Mudaraba").

... II. HAWALA AND TERRORISM

Recent anti-terrorist legislation in the US and the UK allows government agencies to regularly supervise and inspect businesses that are suspected of being a front for the "Hawala" banking system, makes it a crime to smuggle more than \$10,000 in cash across USA borders, and empowers the Treasury secretary (and its Financial Crimes Enforcement Network - FinCEN) to tighten record-keeping and reporting rules for banks and financial institutions based in the USA. A new inter-agency Foreign Terrorist Asset Tracking Center (FTAT) was set up. A 1993 moribund proposed law requiring US-based Hawaladar to register and to report suspicious transactions may be revived. These relatively radical measures

other underground black market banking systems;

- E. makes it a crime to knowingly falsify one's identity in opening an account at a financial institution and directs the Treasury to develop regulations to guide financial institutions in identifying account holders;**
- F. directs the Treasury Department to establish a secure web site to**

reflect the belief that the al-Qaida network of Osama bin Laden uses the Hawala system to raise and move funds across national borders. A Hawaladar in Pakistan (Dihab Shill) was identified as the financier in the attacks on the American embassies in Kenya and Tanzania in 1998.

But the USA is not the only country to face terrorism financed by Hawala networks.

A few months ago, the Delhi police, the Indian government's Enforcement Directorate (ED), and the Military Intelligence (MI) arrested six Jammu Kashmir Islamic Front (JKIF) terrorists. The arrests led to the exposure of an enormous web of Hawala institutions in Delhi, aided and abetted, some say, by the ISI (Inter Services Intelligence, Pakistan's security services). The Hawala network was used to funnel money to terrorist groups in the disputed Kashmir Valley. Luckily, the common perception that Hawala financing is paperless is wrong. The transfer of information regarding the funds often leaves digital (though heavily encrypted) trails. Couriers and "contract memorizers", gold dealers, commodity merchants, transporters, and moneylenders can be apprehended and interrogated. Written, physical, letters are still the favourite mode of communication among small and medium Hawaladars, who also invariably resort to extremely detailed single entry bookkeeping. And the sudden appearance and disappearance of funds in bank accounts still have to be explained. Moreover, the sheer scale of the amounts involved entails the collaboration of off shore banks and more established financial institutions in the West. Such flows of funds affect the local money markets in Asia and are instantaneously reflected in interest rates charged to frequent borrowers, such as wholesalers. Spending and consumption patterns change discernibly after such influxes. Most of the money ends up in prime world banks behind flimsy business facades. Hackers in Germany claimed (without providing proof) to have infiltrated Hawala-related bank accounts.

The problem is that banks and financial institutions - and not only in dodgy offshore havens ("black holes" in the lingo) - clam up and refuse to divulge information about their clients. Banking is largely a matter of fragile trust between bank and customer and tight secrecy. Bankers are reluctant to undermine either. Banks use mainframe computers which can rarely be hacked through cyberspace and can be compromised only physically in close co-operation with insiders. The shadier the bank - the more formidable its digital defenses. The use of numbered accounts (outlawed in Austria, for instance, only recently) and pseudonyms (still possible in Lichtenstein) complicates matters. Bin Laden's accounts are unlikely to bear his name. He has collaborators.

Hawala networks are often used to launder money, or to evade taxes. Even when employed for legitimate purposes, to diversify the risk involved in the transfer of large sums, Hawaladars apply techniques borrowed from money laundering. Deposits are fragmented and wired to hundreds of banks the world over ("starburst"). Sometimes, the money ends up in the account of origin ("boomerang").

Hence the focus on payment clearing and settlement systems. Most countries have only one such system, the repository of data regarding all banking (and most non-banking) transactions in the country. Yet, even this is a partial solution. Most national systems maintain records for 6-12 months, private settlement and clearing systems for even less.

Yet, the crux of the problem is not the Hawala or the Hawaladars. The corrupt and inept governments of Asia are to blame for not regulating their banking systems, for over-regulating everything else, for not fostering competition, for throwing public money at bad debts and at worse borrowers, for over-taxing, for robbing people of their life savings through capital controls, for tearing at the delicate fabric of trust between customer and bank (Pakistan, for instance, froze all foreign exchange accounts two years ago). Perhaps if Asia had reasonably expedient, reasonably priced, reasonably regulated, user-friendly banks - Osama bin Laden would have found it impossible to finance his mischief so invisibly.

receive electronic filings of Suspicious Activity Reports (SARs) and provide financial institutions with alerts and other information regarding patterns of terrorist or other suspicious activity that warrant enhanced scrutiny;

- G. requires Treasury to report quarterly to industry on how SARs are used to assist law enforcement in combating terrorism and other crimes;
- H. authorizes intelligence agency access to reports filed by financial institutions and expands government access to consumer financial records and credit histories;
- I. creates a public-private task force on terrorist financing;
- J. sets a December 31, 2001, deadline for proposed regulations on SAR reporting requirements for broker-dealers and authorizes Treasury to require SARs of commodity futures traders;
- K. authorizes the Secretary of the Treasury to impose “special measures” if a foreign country, financial institution, transaction, or account is deemed to be a “primary money laundering concern”;
- L. prohibits US financial institutions from providing banking services to “shell” banks that have no physical presence in any country nor any affiliation with a financial institution;
- M. requires greater due diligence for certain correspondent and private banking accounts;
- N. authorizes Treasury to regulate concentration accounts;
- O. requires financial institutions to have anti-money laundering programs;
- P. authorizes the President to impose certain sanctions (including limiting access to the US financial system) against foreign governments that refuse to cooperate in law enforcement efforts against terrorism and money laundering; and
- Q. updates US anti-counterfeiting laws.

7.18 The following sections were deleted from the measure as reported by the Committee on Financial Services on October 11, 2001: 103 (Interstate Currency Couriers), 109 (Violations of Reporting Requirements for Nonfinancial Trades and Business), 121 (Customs Service Border Searches), 307 (Prohibition on Acceptance of Any Bank Instrument for Unlawful Internet Gambling), and 308 (Internet Gambling In or Through Foreign Jurisdictions). It was explained in the background to the legislation that in the wake of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, extensive coverage has been given to the financial transactions and infrastructure associated with the terrorists. Early reports revealed

that terrorist operatives used thousands of dollars in cash for expensive flight school training, paid their rent with checks drawn on local American banks, bought airline tickets over the Internet with credit cards, and engaged in numerous other financial transactions. Although it is indicated that the hijackers likely underwrote much of their low-budget operation from funds generated by US-based jobs and perhaps petty financial crime, experts suspect that at least some of the seed money may have originated overseas from Osama Bin Laden's organization, Al Qaeda.

7.19 Despite the provisions of the 1970 Bank Secrecy Act (BSA) and various money laundering laws enacted since, the current money laundering regime appears to have been of little use in detecting or preventing the terrorist hijackers from operating freely in the United States. For example, laws requiring US banks to file Currency Transaction Reports (CTRs) for financial transactions in excess of \$10,000, and Suspicious Activity Reports (SARs) for potentially criminal financial transactions of \$5,000 or more, set thresholds that exceed many of the reported financial transactions of the terrorists. Even the Currency or Monetary Instrument Reports (CMIRs) which must be filed by any person transporting more than \$10,000 into or out of the United States may have proved futile in detecting any large cash flows through U.S. ports of entry.¹⁴

¹⁴ See James Risen "Money Transfers by Hijackers Did Not Set Off Alarms for Banking Regulators" *New York Times* 16 July 2002 <http://www.nytimes.com/2002/07/17/national/17TERR.html?todayshheadlines>
Even as the Sept. 11 hijackers pumped hundreds of thousands of dollars into commercial banks to finance the terrorist operation, they never tripped any of the American banking system's alarms intended to warn federal regulators of the suspicious movement of cash, investigators have said. The hijackers, largely financed by a series of cash infusions sent by a suspected middleman for Al Qaeda in the Persian Gulf region, moved at least \$325,000 into about 35 American accounts without any of the banks' issuing reports of suspicious activity to federal regulators. Without any such red flags from the banks, federal financial investigators never scrutinized any of the accounts before Sept. 11, officials said. Some federal investigators said they now believed that the hijackers were careful not to raise suspicions — and not to run afoul of American bank reporting requirements — by keeping many of their initial transactions less than \$10,000. The terrorists also apparently avoided transactions that involved large amounts of cash. Banks have to report cash deposits of \$10,000 or more to the Financial Crimes Enforcement Network of the Treasury Department.
New details on the financing of the attacks became public as the House subcommittee on terrorism and homeland security prepared to release a report on intelligence lapses and abilities before Sept. 11. The panel conducted a separate inquiry from the broader investigation into lapses by intelligence and law enforcement that is being conducted by a joint Congressional committee. The House subcommittee is widely expected to find that the United States needed to focus more intensely on counterterrorism before Sept. 11 and to propose legislation to improve coordination among federal agencies. Financial safeguards also failed to detect the money trail behind the Sept. 11 plot. Even when the hijackers began to receive much larger amounts of money, their transactions did not prompt any of the banks that they were using to file federal reports of suspicious activity. In fact, because they received most of their money through wire transfers of funds directly into commercial bank accounts, the hijackers were able to avoid having to make large cash deposits, and so skirted several important bank reporting requirements, officials said.
F.B.I. officials have said that in some cases the hijackers used fake Social Security numbers to open their accounts, but that bank officials never checked or questioned those numbers. If

7.20 In his testimony before the House Financial Services Committee on October 3, 2001, Under Secretary of the Treasury Gurule described how "Al Qaeda operatives use checks, credit cards, ATM cards, and wire-transfer systems and brokerage accounts throughout the world, including the US." He explained how some Islamic charities have been penetrated and their fund-raising activities exploited by terrorists. He also testified that Al Qaeda uses banks, legal businesses, front companies and underground financial systems to finance the organization's activities, and that some elements of the organization rely on profits from the drug trade. Mr. Gurule outlined the steps U.S. officials are taking to address the financial networks and transactions that support terrorism including: (1) investigating terrorist organizations and their supporters; (2) identifying assets to be blocked; (3) figuring out the methods terrorists use to move funds for operational support; (4) identifying the gaps in US law enforcement and regulatory regimes that terrorists exploit in order to move funds; (5) sharing information with law enforcement agencies and other organizations around the world; and (6) utilizing the powers of existing laws and regulations, such as the International Emergency Economic Powers Act, the Bank Secrecy Act, and the Anti-Terrorism Act, to deprive terrorists access to any of funds or other financial assets in the United States.

the banks had realized that accounts had been opened with bogus Social Security numbers, they would have been required to file reports of suspicious activity to federal regulators, officials said.

The banks' failure to scrutinize the application forms for the accounts let the hijackers gain access to the commercial banking system. None of the banks used by the hijackers filed so-called currency transaction reports, routine filings that banks have to make to the federal government on any cash transaction of \$10,000 or more. Banks have to file currency transaction reports even when they have no reason to believe that the transaction is suspicious.

But even those reports do not necessarily raise red flags with government investigators. Instead, the government asks commercial banks to monitor patterns of transactions that appear suspicious and gives the banks broad guidelines, rather than fixed standards, on what to look for. None of the banks detected unusual patterns in the hijackers' accounts, and none filed suspicious activity reports with the Treasury Department, the officials said. Beginning in the summer of 2000, Mohamed Atta and Marwan al-Shehhi, who investigators theorize were two leaders of the 19 hijackers, began to receive a series of wire transfers from the United Arab Emirates. F.B.I. officials said the bureau believed that the transfers were sent by Mustafa Ahmed al-Hisawi, who has been identified as a financial manager for Osama bin Laden. Mr. Hisawi is widely believed to have fled to Pakistan before Sept. 11, but only after receiving unused cash back from the hijackers. In June 2000, Mr. Shehhi received a \$4,790 wire transfer in Manhattan from the United Arab Emirates. The next month, a second transfer, for \$9,985, was wired from the emirates to a SunTrust bank account in Florida opened jointly by Mr. Atta and Mr. Shehhi. On Aug. 7, 2000, an additional \$9,485 was wired from the emirates to that account, a transfer quickly followed by a wire transfer of \$19,985 from the emirates to the account on Aug. 30 and a \$69,985 wire transfer from the emirates on Sept. 18. Officials at the Financial Crimes Enforcement Network said banks were not required to report such transfers to the government. Instead, banks have to keep records of wire transfers of more than \$3,000 for five years.

7.21 Testifying before the Committee at the same hearing, Deputy Assistant Attorney General Mary Lee Warren warned that "we are fighting with outdated weapons in the money laundering arena today." She described money laundering as an increasingly global problem involving the cross-border smuggling of bulk cash and the international electronic transfer of funds which enables criminals in one country to conceal their funds in another. Dennis Lormel of the FBI expressed support for the money laundering legislation proposed by the Administration and described the Bureau's concerns regarding vulnerabilities in the current financial system which facilitate movement of terrorist funds. Like Warren, he warned that terrorist and other criminal organizations "rely heavily upon wire transfers" and called for greater transparency in the originators of such funds. Lormel also cited correspondent banking as another "potential vulnerability in the financial services sector that can offer terrorist organizations a gateway into U.S. banks." He also warned of the problems associated with nonbank financial institutions, so-called "Money Services Businesses" (MSBs), which terrorists are able to exploit because of heretofore inadequate regulation. Industry witnesses from the ABA and SIA discussed their current efforts to cooperate with law enforcement to stop terrorist funding and outlined some of the obstacles they are encountering in that endeavour. Both called for enhanced efforts to strengthen the ongoing public-private partnership. Under Secretary of State Stuart Eizenstat underscored the need for new tools to deal in a "measured, precise, and cost-effective way with particular money laundering threats" and endorsed legislation passed by the House Banking Committee in the last Congress and reintroduced by Ranking Member LaFalce as H.R. 1114. Finally, money laundering expert John Moynihan noted that the "Achilles heel of any criminal organization is its financial infrastructure" and described in detail how underground "black market banking" operations - like Hawala systems - are used by criminals to finance their trade.

7.22 HR 3004 is designed to address vulnerabilities in the U.S. financial system and to supplement and reinforce existing US money laundering laws by expanding the strategies the United States can employ to combat international money laundering. HR 3004 is drawn from two bills the Administration has forwarded to Congress: (1) the Anti-Terrorism Act of 2001, which strengthens criminal provisions relating to financial support for terrorism, permits a broader confiscation of terrorist assets, authorizes the IRS to disclose certain tax records to law enforcement and intelligence agencies investigating terrorism, and applies financial crimes prohibitions to conduct committed abroad so long as the tools or proceeds of the crime pass through or are in the US; and (2) the Money Laundering Act of 2001, which strengthens criminal

penalties for bulk cash smuggling, transfers from the Internal Revenue Code to the Bank Secrecy Act of 1970 the Form 8300s that businesses must file on cash transactions over \$10,000, and expands the list of foreign "predicate" offenses for money laundering to include public corruption and fraud against a foreign government.

(i) **Subtitle A. International Counter-Money Laundering and Related Measures**

7.23 Section 311 deals with special measures for jurisdictions, financial institutions, or international transactions or accounts of primary money laundering concern. Section 311 adds a new section 5318A to the Bank Secrecy Act, to give the Secretary of the Treasury, in consultation with other senior government officials, authority (in the Secretary's discretion), to impose one or more of five new "special measures" against foreign jurisdictions, foreign financial institutions, transactions involving such jurisdictions or institutions, or one more types of accounts, that the Secretary, after consultation with Secretary of State and the Attorney General, determines to pose a "primary money laundering concern" to the United States. The special measures include:¹⁵

¹⁵ Kurt Eichenwald and Joseph Kahn "US Seeking a Stronger Role for Banks on Terrorists' Cash" October 20, 2001 <http://www.nytimes.com/2001/10/20/national/20MONE.html>
 "Government and banking industry officials are working on a plan to allow banks to serve as a front line for law enforcement in detecting financial transactions by terrorist groups, people involved in the effort have said. . . . the talks are at a preliminary stage, . . . to discuss ways to have the banking industry take part in detecting and stopping the transactions. If successful, the effort would represent a fundamental shift in the relationship between law enforcement and the banking industry, which until now has been responsible for submitting data to the government that is mostly used for investigations after a crime has occurred. . . . blocking terrorist financing before an attack would require them to overhaul their efforts to battle money laundering, a participant in the meeting said.
 Terrorists tend to use the banking system to distribute relatively small amounts of money from large deposits overseas. Banks are geared to monitor accounts for the opposite type of activity, as when drug cartels collect relatively small proceeds from drug sales, disguise the origin of the money and move it into large accounts offshore. . . . Until now, the primary mechanism for dealing with financial transactions of terrorists and criminals has been reports filed by financial institutions on suspicious activities. The system generates hundreds of thousands of suspicious-activity reports each year, as well as 12 million currency- transaction reports for any transfer of more than \$10,000. The volume is so large . . . that law enforcement officials mostly use the accumulated paperwork for retrospective investigations, not for blocking accounts or tracking suspects while terrorists are planning an attack.
 The discussions between the government and the banking industry are intended to devise new red flags that can move through the system more quickly, as well as to allow banks to cooperate more fully to detect patterns of illicit activity . . . Financial institutions have been a major source of information in the investigation of the terrorist attacks on Sept. 11. . . . government agencies have sent to banks lists of individuals and organizations with financial ties to Al Qaeda, the terrorist organization of Osama bin Laden. The government has demanded that the financial institutions freeze the accounts of any name on those lists. . . . People who have reviewed the collected information said that many of the names on

government subpoenas have been matched with bank and credit card accounts, and investigators have obtained reams of related data.”

- * requiring additional recordkeeping or reporting for particular transactions;
- * requiring the identification of the foreign beneficial owners of certain accounts at a US financial institution;
- * requiring the identification of customers of a foreign bank who use an interbank payable-through account opened by that foreign bank at a US bank;
- * requiring the identification of customers of a foreign bank who use an interbank correspondent account opened by that foreign bank at a US bank; and
- * after consultation with the Secretary of State, the Attorney General, and the Chairman of the Federal Reserve Board, restricting or prohibiting the opening or maintaining of certain interbank correspondent or payable-through accounts.

7.24 Measures (1) through (4) may not be imposed for more than 120 days except by regulation, and measure (5) may only be imposed by regulation. Section 312 deals with special due diligence for correspondent accounts and private banking accounts. Section 312 adds a new subsection (i) to 31 U.S.C. §5318, to require a US financial institution that maintains a correspondent account or private banking account for a non-United States person to establish appropriate and, if necessary, enhanced due diligence procedures to detect and report instances of money laundering. The new provision also creates minimum anti-money laundering due diligence standards for US financial institutions that enter into correspondent banking relationships with banks that operate under offshore banking licenses or under banking licenses issued by countries that (1) have been designated as noncooperative with international counter money laundering principles by an international body with the concurrence of the U.S. representative to that body, or (2) have been the subject of special measures authorized by section 311.¹ Finally, the new provision creates minimum anti-money laundering due diligence standards for maintenance of private banking accounts by US financial institutions.

7.25 New section 31 USC §5318(i) will take effect 270 days after the date of enactment; the Secretary of the Treasury is required to issue regulations (in

¹ The Treasury Department will be able to require banks to make much greater efforts to determine the sources of large overseas private banking accounts. The Treasury will also be able to impose sanctions on nations that refuse to provide information on depositors to American investigators. Monitoring of American dealings by the nearly paperless banks, or hawalas, of the Middle East will be allowed.

consultation with the appropriate Federal functional regulators) within 180 days of enactment further delineating the requirements of the new subsection, but the statute is to take effect whether or not such regulations are issued, and failure to issue final regulations shall in no way affect the enforceability of §5318(i) as added by section 312. Section 313 adds a new subsection (j) to 31 USC §5318, to bar depository institutions and brokers and dealers in securities operating in the United States from establishing, maintaining, administering, or managing correspondent accounts for foreign shell banks, other than shell bank vehicles affiliated with recognized and regulated depository institutions. The new 31 USC §5318(j) takes effect 60 days after enactment. Section 314 requires the Secretary of the Treasury to issue regulations, within 120 days of the date of enactment, to encourage cooperation among financial institutions, financial regulators and law enforcement officials, and to permit the sharing of information by law enforcement and regulatory authorities with such institutions regarding persons reasonably suspected, based on credible evidence, of engaging in terrorist acts or money laundering activities. This section also allows (with notice to the Secretary of the Treasury) the sharing of information among banks involving possible terrorist or money laundering activity, and requires the Secretary of the Treasury to publish, at least semiannually, a report containing a detailed analysis of patterns of suspicious activity and other appropriate investigative insights derived from suspicious activity reports and law enforcement investigations. The final text of this section includes section 203 (Reports to the Financial Services Industry on Suspicious Financial Activities) and portions of section 205 (Public-Private Task Force on Terrorist Financing Issues) of H.R. 3004.

7.26 Section 315 amends 18 USC §1956 to include foreign corruption offenses, certain US export control violations, certain customs and firearm offenses, certain computer fraud offenses, and felony violations of the Foreign Agents Registration Act of 1938, to the list of crimes that constitute "specified unlawful activities" for purposes of the criminal money laundering provisions. Section 316 establishes procedures to protect the rights of persons whose property may be subject to confiscation in the exercise of the government's anti-terrorism authority. Section 317 amends 18 USC §1956 to give United States courts "long-arm" jurisdiction over foreign persons committing money laundering offenses in the United States, over foreign banks opening US bank accounts, and over foreign persons who convert assets ordered forfeited by a US court. It also permits a Federal court dealing with such foreign persons to issue a pre-trial restraining order or take other action necessary to preserve property in the United States to satisfy an ultimate judgment.²

² The Senate, but not the House, bill included language permitting the appointment by a

7.27 Section 318 expands the definition of financial institution for purposes of 18 USC §§1956 and 1957 to include banks operating outside of the United States. Section 319 combines sections 111, 112, and 113 of H.R. 3004 with section 319 of the Senate bill. This section amends 18 USC §981 to treat amounts deposited by foreign banks in interbank accounts with US banks as having been deposited in the United States for purposes of the forfeiture rules, but grants the Attorney General authority, in the interest of justice and consistent with the United States' national interest, to suspend a forfeiture proceeding, based on that presumption. This section also adds a new subsection (k) to 31 USC §5318 to require US financial institutions to reply to a request for information from a US regulator relating to anti-money laundering compliance within 120 hours of receipt of such a request, and to require foreign banks that maintain correspondent accounts in the United States to appoint agents for service of process within the United States. The new 31 USC 5318(k) authorizes the Attorney General and the Secretary of the Treasury to issue a summons or subpoena to any such foreign bank seeking records, wherever located, relating to such a correspondent account, and it requires US banks to sever correspondent arrangements with foreign banks that do not either comply with or contest any such summons or subpoena. Finally, section 319 amends section 413 of the Controlled Substances Act to authorize United States courts to order a convicted criminal to return property located abroad and to order a civil forfeiture defendant to return property located abroad pending trial on the merits. With respect to the provisions requiring a response to certain requests for information by US regulators within 120 hours of receipt and the requirement that correspondent relationships with foreign banks that do not either respond or challenge subpoenas issued under new 31 USC §5318(k) must be terminated, the House receded to the Senate. With respect to the power to order convicted criminals to return property located abroad, the Senate receded to the House.

7.28 Section 320 amends 18 USC §981 to permit the United States to institute forfeiture proceedings against the proceeds of foreign criminal offenses found in the United States. Section 321 amends 31 USC §5312(2) to add credit unions, futures commission merchants, commodity trading advisors, or commodity pool operators to the definition of financial institution for purposes of the Bank Secrecy Act, and to provide that the term "Federal functional regulator" includes the Commodity Futures

Federal court of a receiver to collect and take custody of assets of a defendant to satisfy criminal or civil money laundering or forfeiture judgments; with respect to the latter provision, the House receded to the Senate.

Trading Commission for purposes of the Bank Secrecy Act. Section 322 extends the prohibition against the maintenance of a forfeiture proceeding on behalf of a fugitive to include a proceeding by a corporation whose majority shareholder is a fugitive and a proceeding in which the corporation's claim is instituted by a fugitive. Section 323 permits the government to seek a restraining order to preserve the availability of property subject to a foreign forfeiture or confiscation judgment.

7.29 Section 324 directs the Secretary of the Treasury, in consultation with the Attorney General, the Federal banking agencies, the SEC, and other appropriate agencies to evaluate operation of the provisions of subtitle A of Title III of the Act and recommend to Congress any relevant legislative action, within 30 months of the date of enactment. Section 325 authorizes the Secretary of the Treasury to issue regulations concerning the maintenance of concentration accounts by US depository institutions, to prevent an institution's customers from anonymously directing funds into or through such accounts. Section 326 adds a new subsection (I) to 31 USC §5318 to require the Secretary of the Treasury to prescribe by regulation, jointly with each Federal functional regulator, minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account at a financial institution; the minimum standards shall require financial institutions to implement, and customers (after being given adequate notice) to comply with, reasonable procedures concerning verification of customer identity, maintenance of records of identity verification, and consultation at account opening of lists of known or suspected terrorists provided to the financial institution by a government agency. The required regulations are to be issued within one year of the date of enactment.

7.30 Section 326(b) requires the Secretary of the Treasury, again in consultation with the Federal functional regulators (as well as other appropriate agencies), to submit a report to Congress within six months of the date of enactment containing recommendations about the most effective way to require foreign nationals to provide financial institutions in the United States with accurate identity information, comparable to that required to be provided by US nationals, and to obtain an identification number that would function similarly to a US national's tax identification number. Section 327 amends section 3(c) of the Bank Holding Company Act of 1956, and section 18(c) of the Federal Deposit Insurance Act to require the Federal Reserve Board and the Federal Deposit Insurance Corporation, respectively, to consider the effectiveness of a bank holding company or bank (within the jurisdiction of the appropriate agency) in combating money laundering activities, including in overseas

branches, in ruling on any merger or similar application by the bank or bank holding company.³

7.31 Section 328 requires the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the United States, and to report annually to the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs concerning progress toward that goal. Section 329 provides criminal penalties for officials who violate their trust in connection with the administration of Title III. Section 330 states the sense of the Congress that the President should direct the Secretary of State, the Attorney General, or the Secretary of the Treasury, as appropriate and in consultation with the Federal Reserve Board, to seek negotiations with foreign financial supervisory agencies and other foreign officials, to ensure that foreign financial institutions maintain adequate records relating to any foreign terrorist organization or its membership, or any person engaged in money laundering or other financial crimes, and make such records available to US law enforcement and financial supervisory personnel when appropriate.

(ii) Subtitle B. Bank Secrecy Act Amendments and Related Improvements

7.32 Section 351 restates 31 USC §5318(g)(3) to clarify the terms of the safe harbour from civil liability for financial institutions filing suspicious activity reports pursuant to 31 USC §5318(g). The amendments to subsection (g)(3) also create a safe harbour from civil liability for banks that provide information in employment references sought by other banks pursuant to the amendment to the Federal Deposit Insurance Act made by section 355. Section 352 amends 31 USC §5318(h) to require financial institutions to establish anti-money laundering programs and grants the Secretary of the Treasury authority to set minimum standards for such programs.⁴

7.33 Section 353 amends 31 USC §§5321, 5322, and 5324 to clarify that penalties for

³ The Senate receded to the House, with the agreement that the amendments will apply only to applications submitted after December 31, 2001.

⁴ The Senate receded to the House with respect to a provision in H.R. 3004 that the anti-money laundering program requirement take effect at the end of the 180-day period beginning on the date of enactment of the Act and a related provision that the Secretary of the Treasury shall prescribe regulations before the end of that 180-day period that consider the extent to which the requirements imposed under amended §5318(h) are commensurate with the size, location, and activities of the financial institutions to which the regulations apply.

violation of the Bank Secrecy Act and its implementing regulations also apply to violations of Geographic Targeting Orders issued under 31 USC §3526, and to certain recordkeeping requirements relating to funds transfers.⁵ Section 354 amends 31 USC §5341(b) to add "money laundering related to terrorist funding" to the list of subjects to be dealt with in the annual National Money Laundering Strategy prepared by the Secretary of the Treasury pursuant to the Money Laundering and Financial Crimes Strategy Act of 1998. Section 355 amends §18 of the Federal Deposit Insurance Act to permit (but not require) a bank to include information, in a response to a request for an employment reference by a second bank, about the possible involvement of a former institution-affiliated party in potentially unlawful activity.⁶ Section 356 directs the Secretary of the Treasury, after consultation with the Securities and Exchange Commission and the Federal Reserve Board, to publish proposed regulations, on or before December 31, 2001, and final regulations on or before July 1, 2002, requiring broker-dealers to file suspicious activity reports.⁷ Section 356(b) authorizes the Secretary of the Treasury, in consultation with the Commodity Futures Trading Commission, to prescribe regulations requiring futures commission merchants, commodity trading advisors, and certain commodity pool operators to submit suspicious activity reports under 31 USC §5318(g). Section 356(c) requires the Secretary of the Treasury, the SEC and Federal Reserve Board to submit jointly to Congress, within one year of the date of enactment, recommendations for effective regulations to apply the provisions of 31 USC §§5311-30 to both registered and unregistered investment companies, as well as recommendations as to whether the Secretary should promulgate regulations treating personal holding companies as financial institutions that must disclose their beneficial owners when opening accounts or initiating funds transfers at any domestic financial institution.

7.34 Section 357 directs the Secretary of the Treasury to submit a report to Congress, six months after the date of enactment, on the role of the IRS in the administration of the Bank Secrecy Act, with emphasis on whether IRS Bank Secrecy Act information processing responsibility (for reports filed by all financial institutions) or Bank Secrecy Act audit and examination responsibility (for certain non-bank

⁵ The House receded to a provision in the Senate bill that also amends 31 U.S.C. §5326 to make the period of a geographic target order 180 days.

⁶ The House receded to the Senate with respect to a provision that the safe harbor from civil liability for a bank that provides information to a second bank applies unless the first bank acts with malicious intent.

⁷ The Senate receded to the House with respect to the specific time requirements in section 356(a).

financial institutions) should be retained or transferred. Section 358 contains amendments to various provisions of the Bank Secrecy Act, the Right to Financial Privacy Act, and the Fair Credit Reporting Act, to permit information to be used in the conduct of United States intelligence or counterintelligence activities to protect against international terrorism. Section 359 clarifies that the Bank Secrecy Act treats certain underground banking systems as financial institutions, and that the funds transfer recordkeeping rules applicable to licensed money transmitters also apply to such underground systems. This section also directs the Secretary of the Treasury to report to Congress, within one year of the date of enactment, on the need for additional legislation or regulatory controls relating to underground banking systems.

7.35 Section 360 authorizes the Secretary of the Treasury to instruct the United States Executive Director of each of the international financial institutions (for example, the IMF and the World Bank) to use such Director's "voice and vote" to support loans and other use of resources to benefit nations that the President determines to be contributing to United States efforts to combat international terrorism, and to require the auditing of each international financial institution to ensure that funds are not paid to persons engaged in or supporting terrorism. Section 361 adds a new §310 to subchapter I of chapter 3 of title 31, United States Code, to make the Financial Crimes Enforcement Network ("FinCEN") a bureau within the Department of the Treasury, to specify the duties of FinCEN's Director, and to require the Secretary of the Treasury to establish operating procedures for the government-wide data access service and communications center that FinCEN maintains. Section 361 also authorizes appropriations for FinCEN for fiscal years 2002 through 2005. Finally, this section requires the Secretary to study methods for improving compliance with the reporting requirements for ownership of foreign bank and brokerage accounts by US nationals imposed by regulations issued under 31 USC §5314. The required report is to be submitted within six months of the date of enactment and annually thereafter.

7.36 Section 362 directs the Secretary of the Treasury to establish, within nine months of enactment, a secure network with FinCEN that will allow financial institutions to file suspicious activity reports and provide such institutions with information regarding suspicious activities warranting special scrutiny. Section 363 increases from \$100,000 to \$1,000,000 the maximum civil and criminal penalties for a violation of provisions added to the Bank Secrecy Act by sections 311 and 312 of this Act. Section 364 authorizes certain Federal Reserve personnel to act as law enforcement officers and carry fire arms to protect and safeguard Federal Reserve employees and premises. Section 365 adds 31 USC §5331 (and makes related and

conforming changes) to the Bank Secrecy Act to require any person who receives more than \$10,000 in coins or currency, in one transaction or two or more related transactions in the course of that person's trade or business, to file a report with respect to such transaction with FinCEN. Regulations implementing the new reporting requirement are to be promulgated within six months of enactment.

7.37 Section 366 requires the Secretary of the Treasury to report to the Congress before the end of the one year period beginning on the date of enactment containing the results of a study of the possible expansion of the statutory system for exempting transactions from the currency transaction reporting requirements and ways to improve the use by financial institutions of the statutory exemption system as a way of reducing the volume of unneeded currency transaction reports.

(iii) Subtitle C. Currency Crimes

7.38 Section 371 creates a new Bank Secrecy Act offense, 31 USC §5332, involving the bulk smuggling of more than \$10,000 in currency in any conveyance, article of luggage or merchandise or container, either into or out of the United States, and related forfeiture provisions. Sec. 372. Forfeiture in currency reporting cases. Section 372, included in the Senate bill and H.R. 3004 with different language concerning mitigation, amends 31 U.S.C. §5317 to permit confiscation of funds in connection with currency reporting violations consistent with existing civil and criminal forfeiture procedures. Section 373 amends 18 USC §1960 to clarify the terms of the offense stated in that provision, relating to knowing operation of an unlicensed (under state law) or unregistered (under Federal law) money transmission business. This section also amends 18 USC. §981(a) to authorize the seizure of funds involved in a violation of 18 USC §1960. Section 374 makes a number of changes to the provisions of 18 USC §§470-473 relating to the maximum sentences for various counterfeiting offenses, and adds to the definition of counterfeiting in 18 USC §474 the making, acquiring, etc. of an analog, digital, or electronic image of any obligation or other security of the United States.

7.39 Section 375 makes a number of changes to the provisions of 18 USC §§478-480 relating to the maximum sentences for various counterfeiting offenses involving foreign obligations or securities and adds to the definition of counterfeiting in 18 USC §481 the making, acquiring, etc. of an analog, digital, or electronic image of any obligation or other security of a foreign government. Section 376 expands the scope of predicate offenses for laundering the proceeds of terrorism to include "providing

material support or resources to terrorist organizations," as that crime is defined in 18 USC § 2339B of the criminal code. Section 377 applies the financial crimes prohibitions to conduct committed abroad in situations where the tools or proceeds of the offense pass through or are in the United States.

(e) Title IV—protecting the Border

(i) Subtitle A. Protecting the Northern Border

7.40 Section 401 authorizes the Attorney General to waive any cap on the number of full time employees assigned to the INS on the northern border. Section 402 authorizes additional appropriations to allow for a tripling in personnel for the Border Patrol, INS Inspectors, and the US Customs Service in each State along the northern border, and an additional \$50 million each to the INS and the US Customs Service to improve technology and acquire additional equipment for use at the northern border. Not in original Administration proposal. Section 403 gives the State Department and INS access to the criminal history record information contained in the National Crime Information Center's Interstate Identification Index, Wanted Persons File, and any other information mutually agreed upon between the Attorney General and the agency receiving access. Same as original Administration proposal. Section 404 allows the Attorney General to authorize overtime pay for INS employees in an amount in excess of \$30,000 during calendar year 2001, to ensure that experienced personnel are available to handle the increased workload generated by the events of September 11, 2001.

7.41 Section 405 requires the Attorney General to report to Congress on the feasibility of enhancing the FBI's Integrated Automated Fingerprint Identification System or other identification systems to identify foreign passport and visa holders who may be wanted in connection with a criminal investigation in the United States or abroad before issuing a visa to that person or their entry or exist from the United States.

(ii) Subtitle B. Enhanced Immigration Provisions

7.42 Section 411 amends the definition of "engage in terrorist activity" to clarify that an alien who solicits funds or membership or provides material support to a certified terrorist organization is inadmissible and removable.⁸ **Aliens who solicit funds or membership or**

⁸ Senator Feingold says that another provision in the bill that deeply troubles him allows the detention and deportation of people engaging in innocent associational activity. It would allow for the detention and deportation of individuals who provide lawful assistance to groups that are not even designated by the Secretary of State as terrorist organizations, but instead have

engaged in vaguely defined "terrorist activity" sometime in the past. To avoid deportation, the immigrant is required to prove a negative: that he or she did not know, and should not have known, that the assistance would further terrorist activity.

This language creates a very real risk that truly innocent individuals could be deported for innocent associations with humanitarian or political groups that the government later chooses to regard as terrorist organizations. Groups that might fit this definition could include Operation Rescue, Greenpeace, and even the Northern Alliance fighting the Taliban in northern Afghanistan. This provision amounts to "guilt by association," which I believe violates the First Amendment.

And speaking of the First Amendment, under this bill, a lawful permanent resident who makes

provide material support to organizations not designated as terrorist organizations

a controversial speech that the government deems to be supportive of terrorism might be barred from returning to his or her family after taking a trip abroad.

Despite assurances from the Administration at various points in this process that these provisions that implicate associational activity would be improved, there have been no changes in the bill on these points since it passed the Senate.

Now here's where my cautions in the aftermath of the terrorist attacks and my concern over the reach of the anti-terrorism bill come together. To the extent that the expansive new immigration powers that the bill grants to the Attorney General are subject to abuse, who do we think is most likely to bear the brunt of that abuse? It won't be immigrants from Ireland, it won't be immigrants from El Salvador or Nicaragua, it won't even be immigrants from Haiti or Africa. It will be immigrants from Arab, Muslim, and South Asian countries. In the wake of these terrible events, our government has been given vast new powers and they may fall most heavily on a minority of our population who already feel particularly acutely the pain of this disaster.

When concerns of this kind have been raised with the Administration and supporters of this bill they have told us, "don't worry, the FBI would never do that." I call on the Attorney General and the Justice Department to ensure that my fears are not borne out.

have the opportunity to show that they did not know and should not have known that their actions would further terrorist activity.⁹ This section also creates a definition of "terrorist organization," which is not defined under current law, for purposes of making an alien inadmissible or removable. It defines a terrorist organization as one that is —

- (1) **designated by the Secretary of State as a terrorist organization under the process supplied by current law;**
- (2) **designated by the Secretary of State as a terrorist organization for immigration purposes; or**
- (3) **a group of two or more individuals that commits terrorist**

⁹ Nancy Chang notes in "How Does USA PATRIOT Act Affect Bill of Rights?" published in the *New York Law Journal* of December 6, 2001 that the USA PATRIOT Act deprives immigrants of their due process rights through two mechanisms that operate in tandem. She says that first, section 411 vastly expands the class of immigrants that can be removed from the United States on terrorism grounds, and notwithstanding the fact that the term "terrorist activity" is commonly understood as being limited in scope to premeditated and politically-motivated violence targeted against a civilian population, section 411 expands the term to encompass any crime that involves the use of a "weapon or dangerous device (other than for mere personal monetary gain)." She considers that under this broad definition, an immigrant who grabs a knife or makeshift weapon in the midst of a heat-of-the-moment altercation or in committing a crime of passion may be subject to removal as a "terrorist." She notes, furthermore, that the term "terrorist organization" is no longer confined to organizations that have had their terrorist designations published in the Federal Register, as section 411 includes as "terrorist organizations" undesignated groups that fall under the loose criterion of "two or more individuals, whether organized or not," which engage in specified terrorist activities. She points out that in situations where a non-citizen has solicited funds for, solicited membership for, or provided material support to an undesignated "terrorist organization," section 411 saddles him with the difficult, if not impossible, burden of "demonstrat[ing] that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity."

activities or plans or prepares to commit (including locating targets for) terrorist activities.

7.43 The changes made by this section will apply to actions taken by an alien before enactment with respect to any group that was at that time certified by the Secretary of State. This provision is narrower than the original Administration proposal by allowing an alien to show support for non-designated organization was offered without knowledge of organization's terrorist activity. Section 412 grants the Attorney General the authority to certify that an alien meets the criteria of the terrorism grounds of the Immigration and Nationality Act, or is engaged in any other activity that endangers the national security of the United States, upon a "reasonable grounds to believe" standard, and take such aliens into custody.¹ This authority is delegable only to the Deputy Attorney General. The Attorney General must either begin removal proceedings against such aliens or bring criminal charges within seven days,² or

¹ Nancy Chang (see previous footnote) explains that section 412 provides that upon no more than the Attorney General's unreviewed certification that he has "reasonable grounds to believe" that a non-citizen is engaged in terrorist activities or other activities that threaten the national security, a non-citizen may be detained for as long as seven days without being charged with either a criminal or immigration violation. She remarks that if the non-citizen is charged with an immigration violation, he is subject to mandatory detention and is ineligible for release until he is removed or until the Attorney General determines that he should no longer be certified as a terrorist, and while immigration proceedings are pending, the Attorney General is required to review his certification once every six months. Ms Chang explains that Section 412 does not, however, direct the Attorney General either to inform the non-citizen of the evidence on which the certification is based or to provide the non-citizen with an opportunity to contest that evidence at the administrative level. Instead, Section 412 restricts the non-citizen's ability to seek review of the certification to a habeas corpus proceeding, and in the event that the non-citizen is found removable but removal is "unlikely in the reasonably foreseeable future," he may be detained for additional periods of six months "if the release of the United States or the safety of the community or any person."

² Jonathan Ringel and Tony Mauro "Do New Anti-Terrorism Proposals Pass Constitutional Muster?" *American Lawyer Media* 8 October 2001 <http://www.law.com/> Jonathan Ringel noted that after intensive negotiations, Congress was set to vote on some extraordinary measures to change criminal and immigration law, the aim, of course, was to give the government the tools it says it needs to combat terrorism. He remarked that questions have been raised about the constitutionality of several of the provisions and noted what does the US Supreme Court precedent say about those proposals. He considered that hard-fought compromises appear to have silenced many critics of the government's proposed new powers to detain noncitizens which are contained in both versions of the anti-terrorism legislation. He pointed out that should the debate, however, get litigious, an unwittingly prescient Supreme Court decision from June 2001 offers clues as to how the justices view the issue. "A statute permitting indefinite detention of an alien would raise a serious constitutional problem," wrote Justice Stephen Breyer in the companion cases *Zadvydas v. Immigration and Naturalization Service* and *Ashcroft v. Ma*. Breyer cited the Fifth Amendment's bar against the government depriving any person liberty without due process of law. Jonathan Ringel noted that the cases did not deal directly with suspected terrorists but with criminal aliens ordered to be deported by the federal government but, however, stuck in jail because their home countries won't take them back. He stated that by a 5-4 vote, the Court held that if the government could not deport an alien within six months, courts could order the alien released as long as the alien proves there is no significant likelihood of removal from incarceration and the government fails to rebut that claim. He pointed out that Justice Breyer also noted that

release them from custody.³ An alien who is charged but ultimately found not to be removable is to be released from custody. An alien who is found to be removable but has not been removed, and whose removal is unlikely in the reasonably foreseeable future, may be detained if the Attorney General demonstrates that release of the alien will adversely affect national security or the safety of the community or any person.⁴

the Court had "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections," and that in language far more significant after Sept. 11, Breyer added that the decision did not make law regarding "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."

Jonathan Ringel stated that Justice Anthony Kennedy, joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas, wrote in dissent that the majority ruling risked letting rapists and other criminals go free, and that Kennedy wrote, the majority unwisely interfered with the government's foreign policy: "Underworld and terrorist links are subtle and may be overseas, beyond our jurisdiction to impose felony charges" necessary to imprison threatening foreigners. Mr. Ringel said that Breyer responded, however, that the statute in *Zadvydas* "applies not only to terrorists and criminals, but also to ordinary visa violators" who could get unconstitutionally detained indefinitely. He pointed out that the Court's discussion addresses the very positions taken by administration officials, lawmakers, and civil liberties advocates in the debate over the Bush administration's efforts to expand the power to detain noncitizens after the Sept. 11 attacks. As originally drafted, the proposal would have allowed Attorney General John Ashcroft to detain any "alien he has reason to believe may commit, further or facilitate" terrorist acts, but that this clause has been toned down, setting a seven-day limit on how long the government may hold an alien suspected to threaten national security, after that period, the government must either file criminal or immigration charges or let the alien go free, and in addition, aliens may challenge their detention in habeas corpus proceedings.

³ Professor Susan Herman (Professor at Brooklyn Law School) notes in her article "The *USA Patriot Act* and the US Department of Justice: Losing Our Balances?" (see <http://jurist.law.pitt.edu/forum/forumnew40.htm>) notes that the *USA Patriot Act* further increases the authority of the Attorney General to detain and deport non-citizens with little or no judicial review, and that the Attorney General may certify that he has "reasonable grounds to believe" that a non-citizen endangers national security. She points out that the Attorney General and Secretary of State are also given the authority to designate domestic groups as terrorist organizations, and deport any non-citizen who belongs to them. She says that like the *Anti-Terrorism and Effective Death Penalty Act* of 1996, the *Illegal Immigration Reform and Immigrants' Responsibility Act* of 1996 had sharply curtailed judicial review of the Attorney General's actions in a variety of circumstances. She explains that the previous term the Supreme Court had interpreted some of those provisions as allowing more judicial supervision than Congress probably intended, on the theory that the alternative interpretation might leave the provisions in question open to constitutional challenge, but that in 2001 Congress has resumed its campaign to enhance executive prerogative and minimize judicial review. She considers that the Supreme Court could, as it did in 2000, resist some of these instances of court-stripping and asks whether the Justices are likely to throw themselves in front of 2001's train if Congress, the President, and the US people are not expressing any dissatisfaction, or was judicial supremacy just the previous year's fashion?

⁴ Peter Spiro comments in "The End of the "War" (And of War As We Know It): Deploying A Law Enforcement Model In The Fight Against Terrorism" 31 January 2002 http://writ.news.findlaw.com/commentary/20020131_spiro.html that one should consider the treatment of aliens, whose rights are first to go at the altar of national security and that early proposals from the Justice Department would have dramatically increased already expansive enforcement discretion in the immigration context. He notes that as part of a proposed Mobilization Against Terrorism Act, an extraordinary "certification" procedure would have empowered the Justice Department to remove aliens (resident or not) deemed to be terrorists

Judicial review of any action taken under this section, including review of the merits of the certification, is available through habeas corpus proceedings, with appeal to the US Court of Appeals for the DC Circuit.⁵ The Attorney General shall review his certification of an alien every six months. The provision is narrower than the original Administration proposal in numerous ways, including placing a 7-day limit on detention without charge,⁶ ordering release of aliens found not to be removable, and

on the basis of secret information, subject to no form of judicial review, but that that proposal was taken off the table early on, in the face of stiff congressional opposition. He also explains that Congress also balked at granting legislative authority for the indefinite detention of aliens not otherwise charged with crimes or violations of the immigration law, and as a result, the primary legislation enacted in response to the attacks — the USA PATRIOT Act — allows the Attorney General to detain an alien suspected of terrorist activity for only up to seven days without immigration or criminal charge. Moreover, even aliens against whom removal proceedings have been instituted on terrorism grounds can be detained beyond six months only if the continued detention is supported by a finding that release of the alien would threaten national security or the safety of individuals. (He states that this requirement was composed with a clear eye to the Supreme Court's recent decision regarding the rights of aliens in *Zadvydas v. Davis*.)

⁵ Jonathan Ringer pointed out that aliens may challenge their detention in habeas corpus proceedings, but that the bill routes all such cases exclusively to the DC District Court. He noted that the jurisdictional wrinkle is also subject to some debate in Congress. He stated that immigration lawyers who bitterly opposed the administration's first draft have grudgingly accepted the seven-day proposal. He pointed out that one commentator credits the administration for agreeing to judicial review of the detention, but still calls the proposed law certainly open to question in the courts, saying that it is a novel arrangement, and that one has to have some concerns about detention based on the say-so of one executive officer." He noted that the administration disputes the term "indefinite detention, alleging that the bill simply allows the government to revoke the bond of dangerous aliens while they are awaiting deportation proceedings and that it is well within the bounds of constitutionality, pointing to the exception for terrorists or national security matters mentioned in Breyer's *Zadvydas* opinion. Mr Ringer said that the ACLU, however, calls Breyer's terrorism comment "dictum" that merely poses a constitutional question that has yet to be addressed.

⁶ Senator Feingold remarked that the Administration's original proposal would have granted the Attorney General extraordinary powers to detain immigrants indefinitely, including legal permanent residents. The Attorney General could do so based on mere suspicion that the person is engaged in terrorism. I believe the Administration was really over-reaching here, and I am pleased that Senator Leahy was able to negotiate some protections. The Senate bill now requires the Attorney General to charge the immigrant within seven days with a criminal offense or immigration violation. In the event that the Attorney General does not charge the immigrant, the immigrant must be released. While this protection is an improvement, the provision remains fundamentally flawed. Even with this seven-day charging requirement, the bill would nevertheless continue to permit the indefinite detention in two situations. First, immigrants who win their deportation cases could continue to be held if the Attorney General continues to have suspicions. Second, this provision creates a deep unfairness to immigrants who are found not to be deportable for terrorism but have an immigration status violation, such as overstaying a visa. If the immigration judge finds that they are eligible for relief from deportation, and therefore can stay in the country because, for example, they have longstanding family ties here, the Attorney General could continue to hold them. Now, I am pleased that the final version of the legislation includes a few improvements over the bill that passed the Senate. In particular, the bill would require the Attorney General to review the detention decision every six months and would allow only the Attorney General or Deputy Attorney General, not lower level officials, to make that determination. While I am pleased these provisions are included in the bill, I believe it still falls short of meeting even basic constitutional standards of due process and fairness. The bill continues to allow the Attorney General to detain persons based on mere suspicion. Our system normally requires

more meaningful judicial review of Attorney General's determination of national security risk posed by an alien.⁷

7.44 Section 413 provides new exceptions to the laws regarding disclosure of information from State Department records pertaining to the issuance of or refusal to issue visas to enter the US, and allows the sharing of this information with a foreign government on a case-by-case basis for the purpose of preventing, investigating, or punishing acts of terrorism. Section 414 expresses the sense of the Congress that the Attorney General, in consultation with the Secretary of State, should fully implement the entry/exit system as expeditiously as practicable. Particular focus should be given to the utilization of biometric technology and the development of tamper-resistant documents. Section 415 includes the new Office of Homeland Security as a participant in the Entry and Exit Task Force established by the

higher standards of proof for a deprivation of liberty. For example, deportation proceedings are subject to a clear and convincing evidence standard. Criminal convictions, of course, require proof beyond a reasonable doubt. The bill also continues to deny detained persons a trial or hearing where the government would be required to prove that the person is, in fact, engaged in terrorist activity. This is unjust and inconsistent with the values our system of justice holds dearly.

⁷ William Glaberson notes in "Groups Gird for Long Legal Fight on New Bush Anti-Terror Powers" <http://www.nytimes.com/2001/11/30/politics/30RIGH.html> that the Administration reported about a program to give special immigration status — and perhaps a path to citizenship — to foreigners who provide useful information about suspected terrorist activities in the US or abroad. He says that according to Mr. Bush and Mr. Ashcroft the Responsible Cooperators Program is designed to provide an incentive for new arrivals in the United States, including some illegal immigrants, to give federal authorities leads in their widening terrorist investigations. Mr. Glaberson points out that the program already exists, and has drawn bipartisan support on Capitol Hill, but the decision to promote it and focus it on antiterrorism was clearly part of an effort to counter criticism from civil liberties advocates and others that Mr. Ashcroft is leading a roundup of foreigners, and prosecuting hundreds on visa or other violations even if they are found to have no connection with terrorism. He notes that the Responsible Cooperators Program, was originally put in place in 1994 as part of a law aimed at reducing violent crime, and that it expired in September, but a bipartisan bill renewing the program was quickly enacted with little notice and President Bush signed it into law on Oct. 1. In giving the program a public lift today, he explains that Mr. Ashcroft signaled that in light of the terrorist investigation, the Justice Department was eager to find people to consider for the law's special benefits. The law allows the government to award a special classification to people who provide useful information to law enforcement authorities, and aliens who obtain that status may remain in the United States for three years even if they had previously come to the United States illegally.

See also Neil A. Lewis "Immigrants Offered Incentives to Help U.S. Fight Terrorism" November 30, 2001 *New York Times* <http://www.nytimes.com/> who states that Attorney General John Ashcroft today offered a deal to foreigners — if they provide useful evidence against terrorists, the administration will help them remain in the United States and may even offer a fast track to American citizenship. He notes that Mr. Ashcroft said that the people who have the courage to make the right choice deserve to be welcomed as guests into the US and perhaps to one day become fellow citizens, as he described how he hoped to use a little-known seven-year-old program to offer incentives for providing information on terrorism. Mr. Lewis remarks that officials said it was meant to represent a carrot to go along with the several other recent law enforcement initiatives that were less popular among many immigrant groups.

Immigration and Naturalization Service Data Management Improvement Act of 2000.

7.45 Section 416 seeks to implement the foreign student monitoring program created in 1996 by temporarily supplanting the collection of user fees mandated by the statute with an appropriation of \$36,800,000 for the express purpose of fully and effectively implementing the program through January 2003. Thereafter, the program would be funded by user fees. Currently, all institutions of higher education that enroll foreign students or exchange visitors are required to participate in the monitoring program. This section expands the list of institutions to include air flight schools, language training schools, and vocational schools. Section 417 requires the Secretary of State to conduct an annual audit to assess precautionary measures taken to prevent the counterfeiting and theft of passports among countries that participate in the visa waiver program, and ascertain that designated countries have established a program to develop tamper-resistant passports. Results of the audit will be reported to Congress. This provision would advance the deadline for participating nations to develop machine readable passports to October 1, 2003, but permit the Secretary of State to waive the requirements imposed by the deadline if he finds that the program country is making sufficient progress to provide their nationals with machine-readable passports. Section 418 directs the State Department to examine what concerns, if any, are created by the practice of certain aliens to "shop" for a visa between issuing posts.

(iii) Subtitle C – Preservation of Immigration Benefits for Victims of Terrorism

7.46 The Act also provides for the preservation of immigration benefits for victims of terrorism. It is certain that some aliens fell victim to the terrorist attacks on the U.S. on September 11 and for many families, these tragedies will be compounded by the trauma of husbands, wives, and children losing their immigration status due to the death or serious injury of a family member. These family members are facing deportation because they are out of status: they no longer qualify for their current immigration status or are no longer eligible to complete the application process because their loved one was killed or injured in the September 11 terrorist attack. Others are threatened with the loss of their immigration status, through no fault of their own, due to the disruption of communication and transportation that has resulted directly from the terrorist attacks. Because of these disruptions, people have been and will be unable to meet important deadlines, which will mean the loss of eligibility for certain benefits and the inability to maintain lawful status, unless the law

is changed. At the request of Congressman Conyers and Senator Leahy, sections 421-428 was included in the final bill to modify the immigration laws to provide the humanitarian relief to these victims and their family members in preserving their immigration status.

7.47 Section 421 provides permanent resident status to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as a family-sponsored immigrant or employer-sponsored immigrant, or of an application for labour certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a US citizen where the petitioning citizen died as a direct result of the terrorist attack. This section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a US citizen or a permanent resident. Not in original Administration proposal.

7.48 Section 422 provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the United States (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the United States as a direct result of the attacks will be considered to have departed legally and will not be considered to have been unlawfully present for the purposes of section 212(a)(9) of the INA if departure occurs before November 11.

7.49 Current law provides that an alien who was the spouse of a US citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. Section 423 provides that if the citizen died as a direct result of the terrorist attacks, the 2-year requirement is waived. This section provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the United States on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence. The section also provides that an alien spouse or child of an alien who (1) died as a direct result of the terrorist attacks and (2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death).

7.50 Under current law, certain visas are only available to an alien until the alien's 21st birthday. Section 424 provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien's 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien's 21st birthday. Section 425 provides that temporary administrative relief may be provided to an alien who was lawfully present on September 10, was on that date the spouse, parent or child of someone who died or was disabled as a direct result of the terrorist attacks, and is not otherwise entitled to relief under any other provision of this legislation.

(f) TITLE V — Removing obstacles to investigating terrorism

7.51 Section 501 authorizes the Attorney General to offer rewards – payments to individuals who offer information pursuant to a public advertisement – to gather information to combat terrorism and defend the nation against terrorist acts without any dollar limitation. (Current law limits rewards to \$2 million). Rewards of \$250,000 or more require the personal approval of the Attorney General or President and notice to Congress. The Act authorizes

the Secretary of State to offer rewards – payments to individuals who offer information pursuant to a public advertisement – to gather information to combat terrorism and defend the nation against terrorist acts without any dollar limitation (Current law limits rewards to \$5 million). Rewards of \$100,000 or more require the personal approval of the Secretary of State and notice to Congress. Section 503 authorizes the collection of DNA samples from any person convicted of certain terrorism-related offenses and other crimes of violence, for inclusion in the national DNA database. Section 504 amends FISA to authorize consultation between FISA officers and law enforcement officers to coordinate efforts to investigate or protect against international terrorism, clandestine intelligence activities, or other grave hostile acts of a foreign power or an agent of a foreign power.

7.52 Section 505 modifies current statutory provisions on access to telephone, bank, and credit records in counterintelligence investigations to remove the "agent of a foreign power" standard. The authority may be used only for investigations to protect against international terrorism or clandestine intelligence activities, and an investigation of a United States person may not be based solely on activities protected by the First Amendment. Section 506 gives the Secret Service concurrent jurisdiction to investigate offenses relating to fraud and related activity in connection with computers, and permanently extends its current authority to investigate financial institution fraud. Sec. 507 requires application to a court to obtain educational records in the possession of an educational agency or institution if it is determined by the Attorney General or Secretary of Education (or their designee) that doing so could reasonably be expected to assist in investigating or preventing a federal terrorism offense or domestic or international terrorism.⁸ **Limited immunity is given to persons producing such information acting in good faith, and the Attorney General is directed to issue guidelines to protect confidentiality.** Section 508 requires application to a court to obtain reports, records and information in the possession of the National Center for Educational Statistics that are relevant to an authorized investigation or prosecution of terrorism. **Limited immunity is given to persons producing such information acting in good faith, and the Attorney General is directed to issue guidelines to protect confidentiality.**

(g) **Title VI — Victims of terrorism, public safety officers, and their families**

⁸

The chairman of the Constitution Subcommittee of the Judiciary Committee, Senator Russ Feingold pointed out in his statement in the Senate on the Patriot Act on 25 October 2001 that the original bill contained sweeping permission for the Attorney General to get copies of educational records without a court order, but that the final bill requires a court order and a certification by the Attorney General that he has reason to believe that the records contain information that is relevant to an investigation of terrorism.

7.53 The Act provides in sections 611 to 614 for the expedited payment for public safety officers involved in the prevention, investigation, rescue, or recovery efforts related to a terrorist attack. The Act also makes amendments to the Victims of Crime Act of 1984 and, inter alia, authorizes the Office for Victims of Crime (OVC) to replenish the antiterrorism emergency reserve with up to \$50 million and establishes a mechanism to allow for replenishment in future years. Funds added to the Crime Victims Fund to respond to the September 11 attacks shall not be subject to the cap or the new formula provisions.

(h) Title VII — Increased information sharing for critical infrastructure protection

7.54 Section 701 expands the Department of Justice Regional Information Sharing Systems (RISS) Program to facilitate information sharing among Federal, State and local law enforcement agencies to investigate and prosecute terrorist conspiracies and activities and doubles its authorized funding for FY2002 and FY2003.⁹

(i) Title VIII —Strengthening the criminal laws against terrorism

7.55 Section 801 creates a new statute (to be codified at 18 USC §1993) to make punishable acts of terrorism and other violence against mass transportation vehicles, systems, facilities, employees and passengers; the reporting of false information about such activities; and attempts and conspiracies to commit such offenses. Violations are punishable by a fine and a term of imprisonment of 20 years; however, if the mass transportation vehicle was carrying a passenger at the time of the attack, or if death resulted from the offense, the maximum term of imprisonment is increased to life. Section 802 defines the term "domestic terrorism" as a counterpart to the current definition of "international terrorism" in 18 USC §2331. The new definition for "domestic terrorism" is for the limited purpose of providing investigative authorities (i.e., court orders, warrants, etc.) for acts of terrorism within the territorial jurisdiction of the United States.¹⁰ **Such offenses are those that are —**

(1) dangerous to human life and violate the criminal laws of the United

⁹ Currently, 5,700 Federal, State and local law enforcement agencies participate in the RISS Program.

¹⁰ Nancy Chang considers in "How Does USA PATRIOT Act Affect Bill of Rights?" published in the *New York Law Journal* of December 6, 2001 that because this new crime is couched in such vague and expansive terms, it runs the risk of being read as licensing the investigation, surveillance and prosecution of political activists and organizations who oppose government policies. She also notes that, in addition, Section 411 of the Act imposes a purely ideological and highly subjective test for entry into the United States that takes into account core political speech, since representatives of a political or social group "whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities" can no longer gain entry into the United States.

- States or any state; and
- (2) appear to be intended (or have the effect) –
- * to intimidate a civilian population;
 - * influence government policy intimidation or coercion; or
 - * affect government conduct by mass destruction, assassination, or kidnapping (or a threat of).

7.56 Section 803 establishes a new criminal prohibition against harboring terrorists, similar to the current prohibition in 18 USC § 792 against harboring spies, and makes it an offense when someone harbors or conceals another they know or should have known had engaged in or was about to engage in federal terrorism offenses.¹¹ Section 804 extends the special maritime and territorial jurisdiction of the United States to cover, with respect to offenses committed by or against a US national, US diplomatic, consular and military missions, and residences used by US personnel assigned to such missions. Section 805 amends 18 USC §2339A, which prohibits providing material support to terrorists, in four respects:

- * First, it adds three terrorism-related offenses to the list of §2339A predicates.
- * Second, it provides that §2339A violations may be prosecuted in any Federal judicial district in which the predicate offense was committed.
- * Third, it clarifies that monetary instruments, like currency and other financial securities, may constitute "material support or resources" for purpose of §2339A.
- * Fourth, it explicitly prohibits providing terrorists with "expert advice or assistance," such as flight training, knowing or intending that it will be used to prepare for or carry out an act of terrorism.

7.57 Section 806 provides that the assets of individuals and organizations engaged in planning or perpetrating acts of terrorism against the United States, as well as the proceeds and instrumentalities of such acts, are subject to civil forfeiture. Section 807 clarifies that the provisions of the Trade Sanctions Reform and Export Enhancement Act of 2000 (title IX of Public Law 106-387) do not limit or otherwise affect the criminal prohibitions against providing material support to terrorists or designated terrorist organizations, 18 USC §§2339A & 2339B. Section 808 updates

¹¹ The provision is narrower than the Administration's proposal except that the final bill removes the Administration's original proposal to make it an offense to harbour someone merely suspected of engaging in terrorism.

the list of predicate offenses under the current definition of "Federal crime of terrorism," 18 USC. §2332b(g)(5). Section 809 eliminates the statute of limitations for certain terrorism-related offenses, if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.

7.58 Section 810 raises the maximum prison terms to 15 or 20 years or, if death results, life, in the following criminal statutes: 18 USC §81 (arson within the special maritime and territorial jurisdiction of the United States); 18 USC §1366 (destruction of an energy facility); 18 USC §2155(a) (destruction of national-defense materials); 18 USC §§2339A & 2339B (provision of material support to terrorists and terrorist organizations); 42 USC 2284 (sabotage of nuclear facilities or fuel); 19 USC §46505(c) (killings on aircraft); 49 USC §60123(b) (destruction of interstate gas or hazardous liquid pipeline facility). Section 811 ensures adequate penalties for certain terrorism-related conspiracies by adding conspiracy provisions to the following criminal statutes: 18 USC §81 (arson within the special maritime and territorial jurisdiction of the United States); 18 USC §930(c) (killings in Federal facilities); 18 USC §1362 (destruction of communications lines, stations, or systems); 18 USC §1363 (destruction of property within the special maritime and territorial jurisdiction of the United States); 18 USC §1992 (wrecking trains); 18 USC §2339A (material support to terrorists); 18 USC §2340A (torture); 42 USC §2284 (sabotage of nuclear facilities or fuel); 49 USC §46504 (interference with flight crews); 49 USC §46505 (carrying weapons or explosives on aircraft); 49 USC §60123 (destruction of interstate gas or hazardous liquid pipeline facility).

7.59 Section 812 authorizes extending the period of supervised release for certain terrorism-related offenses that resulted in, or created a foreseeable risk of, death or serious bodily injury to another person. Section 813 amends the RICO statute to include certain terrorism-related offenses within the definition of "racketeering activity," thus allowing multiple acts of terrorism to be charged as a pattern of racketeering for RICO purposes. This section expands the ability of prosecutors to prosecute members of established, ongoing terrorist organizations that present the threat of continuity that the RICO statute was designed to permit prosecutors to combat.

7.60 Section 814 clarifies the criminal statute prohibiting computer hacking, 18 USC §1030, to cover computers located outside the United States when used in a manner that affects the interstate commerce or communications of this country, update the definition of "loss" to ensure full costs to victims of hacking offenses are counted,

clarify the scope of civil liability and eliminate the current mandatory minimum sentence applicable in some cases. Section 815 provides an additional defence under 18 USC §2707(e)(1) to civil actions relating to preserving records in response to Government requests. Section 816 requires the Attorney General to establish regional computer forensic laboratories and to support existing computer forensic laboratories to help combat computer crime. Section 817 amends the definition of "for use as a weapon" in the current biological weapons statute, 18 USC §175, to include all situations in which it can be proven that the defendant had any purpose other than a prophylactic, protective, or peaceful purpose. This section also creates a new criminal statute, 18 USC §175b, which generally makes it an offense for certain restricted persons, including non-resident foreign nationals of countries that support international terrorism, to possess a listed biological agent or toxin.¹²

(k) Title IX — Improved intelligence

7.61 Section 901 clarifies the role of the Director of Central Intelligence ("DCI") with respect to the overall management of collection goals, analysis and dissemination of foreign intelligence gathered pursuant to the Foreign Intelligence Surveillance Act, in order to ensure that FISA is properly and efficiently used for foreign intelligence purposes. It requires the DCI to assist the Attorney General in ensuring that FISA efforts are consistent with constitutional and statutory civil liberties. The DCI will have no operational authority with respect to implementation of FISA, which will continue to reside with the FBI. Section 902 revises the National Security Act definitions section to include "international terrorism" as a subset of "foreign intelligence." This change will clarify the DCI's responsibility for collecting foreign intelligence related to international terrorism. Section 903 expresses the Sense of Congress that the CIA should make efforts to recruit informants to fight terrorism. Section 904 allows the Secretary of Defense, the Attorney General and the DCI to defer the submittal of certain reports to Congress until February 1, 2002. Section 905 creates a responsibility for law enforcement agencies to notify the Intelligence Community when a criminal investigation reveals information of intelligence value. The provision regularizes existing ad hoc notification, and makes clear that constitutional and statutory prohibitions of

¹² The provision modified the original Administration proposal, which did not require the government to establish the mens rea of the defendant to prove the crime of possession of the biological weapon. Regulatory provision in original Administration proposal was dropped at the Administration's request.

certain types of information sharing apply.

7.62 Section 906 regularizes the existing Foreign Terrorist Asset Tracking Center by creating an element within the Department of Treasury designed to review all-source intelligence in support of both intelligence and law enforcement efforts to counter terrorist financial support networks. Section 907 directs the submission of a report on the feasibility of establishing a virtual translation capability, making use of cutting-edge communications technology to link securely translation capabilities on a nationwide basis. Section 908 directs the Attorney General, in consultation with the DCI, to establish a training program for Federal, State and local officials on the recognition and appropriate handling of intelligence information discovered in the normal course of their duties.

(I) Title X — Miscellaneous issues

7.63 deals with miscellaneous issues. Section 1001 authorizes the Inspector General of the Department of Justice to designate one official to review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice. Section 1002 condemns discrimination and acts of violence against Sikh-Americans. Section 1003 contains a definition of "electronic surveillance" and it authorizes the use of the new computer trespass authority under FISA. Section 1004 clarifies the judicial districts in which money laundering prosecutions under 18 USC §§1956 and 1957 may be brought. Section 1005 authorizes grants to State and local authorities to respond to and prevent acts of terrorism. Section 1006 makes inadmissible to the United States any alien who a consular officer or the Attorney General knows, or has reason to believe, is involved in a Federal money laundering offense. Section 1007 authorizes money for anti-drug training in the Republic of Turkey, and for increased precursor chemical control efforts in the South and Central Asia region.

7.64 Section 1008 directs the Attorney General to report to Congress on the feasibility of using a biometric identifier (fingerprint) scanning system, with access to the FBI fingerprint database, at consular offices abroad and at points of entry into the United States. Section 1009 directs the FBI to report to Congress on the feasibility of providing airlines with computer access to the names of suspected terrorists. Not in original Administration proposal. Section 1010 provides temporary authority for the Department of Defense to enter contracts for the performance of security functions at any military installation of facility in the United States with a proximately located local or State government. Section 1011 amends the Telemarketing and Consumer Fraud and Abuse Prevention Act to require any person engaged in telemarketing for the solicitation of charitable contributions to disclose to the

person receiving the call that the purpose of the call is to solicit charitable contributions, and to make such other disclosures as the FTC considers appropriate. Section 1012 allows the Department of Transportation to obtain background records checks for any individual applying for a license to transport hazardous materials in interstate commerce.

7.65 Section. 1013 expresses the sense of the Senate that the United States should make a substantial new investment in 2001 toward improving State and local preparedness to respond to potential bioterrorism attacks. Section 1014 authorizes an appropriated Department of Justice program to provide grants to States to prepare for and respond to terrorist acts including but not limited to events of terrorism involving weapons of mass destruction and biological, nuclear, radiological, incendiary, chemical, and explosive devices. The authorization revises this grant program to provide:

- (1) additional flexibility to purchase needed equipment;
- (2) training and technical assistance to State and local first responders; and
- (3) a more equitable allocation of funds to all States. Section adds an additional antiterrorism purpose for grants under the Crime Identification Technology Act, and authorizes grants under that Act through fiscal year 2007.

7.66 Section 1016 establishes a National Infrastructure Simulation and Analysis Center (NISAC) to address critical infrastructure protection and continuity through support for activities related to counterterrorism, threat assessment, and risk mitigation.

C. MILITARY TRIBUNALS

7.67 On November 13, President Bush signed a military order¹ **establishing a process of military tribunals² for trials of any person other than an American citizen suspected of a terrorist-related offense, whether apprehended in the US or abroad:**³

¹ <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>

² See David E. Sanger "President Defends Secret Tribunals in Terrorist Cases" <http://www.nytimes.com/2001/11/30/politics/30CIVIL.html> who notes that President Bush strongly defended his decision to establish military tribunals to prosecute terrorists as well as the arrests and detentions of hundreds of Middle Eastern men in the response to the Sept. 11 attacks. He points out that speaking to the men and women he has appointed as the country's top prosecutors, Mr. Bush portrayed the tribunals and the detentions as necessary byproducts of America's wartime footing, and that he said that the enemy has declared war on the US and "we must not let foreign enemies use the forums of liberty to destroy liberty itself."

³ "NLADA issues Statement of Principles to guide Congress in creating appropriate alternative to Bush military tribunals" 7 December 2001 <http://www.nlada.org/>
". . . The trial of individuals alleged to have played a major role in the attacks of September 11, at a time when the United States is engaged in open military conflict, presents legitimate

Sec. 2. Definition and Policy. (a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from

security challenges, which must be accommodated in the narrowest possible manner consistent with well-established safeguards guaranteed under the US Constitution and international law, including:

- (1) Access to counsel of one's choosing, and a guarantee of the effective assistance of qualified counsel for defendants who cannot afford retained counsel, encompassing confidential communication with counsel, funding for necessary and reasonable expert and investigative services, and adequate time to prepare and present a defense;
- (2) An independent judicial officer presiding;
- (3) The right to be informed promptly of the charges, and to be released promptly if not charged or otherwise lawfully detained under established federal or international law;
- (4) The right to cross-examine witnesses, and to review and meaningfully test the reliability as well as the probative value of the government's evidence, subject to existing safeguards for specific sensitive information under CIPA or similar procedures, as well as a guarantee of access to exculpatory evidence;
- (5) Rights against self-incrimination and coerced confessions;
- (6) A presumption of innocence;
- (7) Proof beyond a reasonable doubt;
- (8) Unanimous judgment as to both conviction and sentencing; and
- (9) Judicial review.

Individuals apprehended in this country must, of course, continue to be tried in civilian courts. If Congress elects to authorize military commissions or to use an existing international tribunal for the trial of terrorism suspects apprehended abroad, the undersigned organizations respectfully recommend that the above principles of due process, at a minimum, be accorded.

time to time in writing that:

- (a) there is reason to believe that such individual, at the relevant times,
 - (i) is or was a member of the organization known as al Qaida;
 - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
- (b) it is in the interest of the United States that such individual be subject to this order.

Sec. 3. Detention Authority of the Secretary of Defence. Any individual subject to this order shall be —

- (a) detained at an appropriate location designated by the Secretary of Defence outside or within the United States;
- (b) treated humanely, without any adverse distinction based on race, colour, religion, gender, birth, wealth, or any similar criteria;
- (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
- (d) allowed the free exercise of religion consistent with the requirements of such detention; and
- (e) detained in accordance with such other conditions as the Secretary of Defence may prescribe.

Sec. 4. Authority of the Secretary of Defence Regarding Trials of Individuals Subject to this Order.

- (a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.
- (b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.
- (c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for —
 - (1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defence may provide;
 - (2) a full and fair trial, with the military commission sitting as the triers of both fact and law;
 - (3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;
 - (4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

- (5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defence and conduct of the defence by attorneys for the individual subject to this order;
- (6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;
- (7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and
- (8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defence if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defence. Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defence such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defence.

- (a) As a military function and in light of the findings in section 1, the Secretary of Defence shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.
- (b) The Secretary of Defence may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

- (a) Nothing in this order shall be construed to —
 - (1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;
 - (2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or
 - (3) limit the lawful authority of the Secretary of Defence, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.
- (b) With respect to any individual subject to this order —
 - (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
 - (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.
- (c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.
- (d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.
- (e) I reserve the authority to direct the Secretary of Defence, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

7.68 Prof Lewis R Katz remarks that as if the decision to intercept and encroach on the lawyer-client relationship were not enough to take the bloom off this rose, the White House cut short the then existing honeymoon when it announced that the

administration reserves the right to try suspected terrorists before military commissions, whether those persons are apprehended in the United States or in Afghanistan.¹ He remarks that the Attorney General claims that people who commit such acts should not receive the rights guaranteed under the Bill of Rights to persons accused of crime and asks whatever became of the presumption of innocence? He notes that until these people are lawfully convicted, one has no right to assume their guilt and the government has even reserved until later what rules of evidence will prevail at such trials and what standard of proof will be required for a guilty verdict. He explains that he cannot imagine any circumstance that would justify trying any person apprehended in the United States in front of a military commission, without the Sixth Amendment rights that attach to any defendant in a civilian or military court, when the civilian courts are functioning. He considers that there is no legitimate

¹ Professor Lewis R. Katz "Anti-terrorism Laws: Too Much of A Good Thing" [Http://jurist.law.pitt.edu/forum/forumnew39.htm](http://jurist.law.pitt.edu/forum/forumnew39.htm) See also Judith Resnik "Invading the Courts: We don't need military 'tribunals' to sort out the guilty" *Legal Times* January 18, 2002 <http://www.law.com/> who notes that apologists for the order invoke case law from several decades ago, notably the 1942 decision *Ex parte Quirin*, and the 1940s decisions in *Korematsu* and *Hirabayashi*, upholding curfews, evacuations and internment of Japanese-Americans, and the Civil War case of *Ex parte McCordle*. She says that all these cases are painful reminders that, in times of war, courts often do not protect against incursions on civil liberties, and until recently, students would likely have been taught not to rely on such cases because they represent aberrant and largely abhorrent moments in the US's constitutional history. She points out that all of these cases predate the equality law of *Brown v. Board of Education*, the right of counsel protected in *Gideon v. Wainwright*, and decades of developments in due process and rights of access to courts, and moreover, after those precedents, the United States joined the Geneva Protocols of 1949 and the International Covenant on Civil and Political Rights, both committing the US to fair process through independent judges. Judith Resnik notes that there is other, more recent precedent that has not been a part of the debate, namely *United States v. Tiede*. She states that in 1978, Hans Tiede escaped from what was then East Berlin by hijacking a plane to freedom in West Berlin, but because the United States and other countries had just signed a treaty with the Soviet Union against hijacking, the United States undertook to try the offender in Berlin. She explains that at trial, the government argued that the United States, as an occupying force, could conduct the trial free from the USA Constitution and free from judicial review, and whatever rights belonged to the defendant, came from the secretary of state, because the court was an implementing arm of USA foreign policy. She points out that Judge Stern, explained, that "it is the first principle of American life — not only life at home but life abroad — that everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution." She remarks that Judge Stern required that the defendant be accorded due process of law, and the defendant was tried by a jury, which convicted him. She notes that as *Tiede* demonstrates, judges can adapt familiar procedures to complex circumstances, that other examples come from current international courts, and around the world, democratic countries have crafted courts to address horrific terrorism while keeping the values of due process intact. She considers that contemporary legal precedents and practices could thus support a court's rejection of the Nov. 13 order; none have upheld as extreme a proposition as this order, but, as the older precedents warn, when judges are scared, they can be too forgiving of constitutional lapses and too eager to support a president. Judith Resnik considers that US law should only sanction a system that protects the rights and procedures reflecting the nation's fundamental commitments to fairness and equality, and to accomplish this, the best response would be to withdraw the order. She suggests that the President use that action to demonstrate that deliberative democracies produce public exchanges that actually make changes in policy.

necessity for such drastic action which would bypass the fundamental rights which are the hallmark of American justice.²

² See Robert A. Levy "Misreading 'Quirin'" *The National Law Journal* January 16, 2002 <http://www.law.com/> who remarks that the Bush administration has floated preliminary rules for military tribunals, and that those rules, which respond to criticisms from civil libertarians, are a step in the right direction, don't go far enough. He considers that military tribunals have no business on USA soil. He notes that the Fifth and Sixth Amendments to the USA Constitution ensure due process and a speedy and public jury trial, and says that those protections apply to "persons," not just USA citizens. He explains that when the Framers wanted to say citizens, they said citizens, and when they said persons, that's what they meant. He notes that there are 18 million noncitizens in the United States; the vast majority of them are here legally, and that's not to say tribunals are improper for prosecuting noncitizens apprehended overseas as those persons are not entitled to constitutional protection. Robert Levy considers that tribunals are a legitimate venue to try, convict and punish them, but for persons residing in the United States, constitutional rights cannot be so casually discarded. He points out that yes, the Supreme Court said in 1942 in *Ex parte Quirin* that it was OK to use military tribunals in the United States, even to try citizens, if they are suspected of being unlawful combatants but that the *Quirin* Court imposed several conditions. First, he says, a presidential proclamation authorizing military tribunals "does not bar accused persons from access to the civil courts for the purpose of determining the applicability of the Proclamation to the particular case", but the words of the Bush military order says: A detainee "shall not be privileged to seek any remedy — directly or indirectly — in any court of the United States." He remarks that the Bush military order, in denying a civil judicial remedy, has violated the *Quirin* mandate. Second, he explains, says *Quirin*, Congress formally declared war against Germany, and Articles of War "explicitly provided ... that military tribunals shall have jurisdiction to try offenses against the law of war" but by contrast, the entire Bush scheme was concocted without congressional input. He points out that the administration responds that Congress has spoken: On Sept. 14, the Senate and House overwhelmingly passed a resolution authorizing action against persons that "planned, authorized, committed or aided" the terrorist attacks of Sept. 11. He states that is true, but the resolution had nothing to say about tribunals, it sanctioned the use of force, not procedures for convicting enemy belligerents, and, furthermore, the Sept. 14 resolution, unlike the Bush order, relates only to persons involved in the acts of Sept. 11. He considers that the reach of the order — i.e., anyone involved with international terrorism — cannot be squared with the congressional resolution. He further comments let's say we do not need a formal declaration, or even express legislative authority for tribunals, and all that matters is objective reality: We are in a state of war; Congress' resolution is good enough. Ergo, he notes, according to *Quirin*, military tribunals may try offenses against the law of war by unlawful combatants, even in the United States. He asks but who are those unlawful combatants. He notes that that term of art describes enemy belligerents who do not have uniforms or other insignia of a command structure, do not openly possess weapons and will not themselves commit to abide by the law of war, and considers that terrorists like al-Qaida surely qualify although the Taliban may not. Robert Levy states that the scope of the Bush order is substantially more elastic, and that the Bush tribunals apply not only to al-Qaida but also to any noncitizen that Bush has "reason to believe" has "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor" — or anyone who has knowingly harbored such a person. He says that we do not know how direct the involvement with terrorists must be, where it occurred, when, or against whom and that we do not even have a definition of international terrorism. He argues that conceivably, a drug dealer who unwittingly supplied a terrorist could be prosecuted by a military tribunal. He points out that the argument in a nutshell is as follows: If the Bill of Rights applies to unlawful combatants in the United States, the Bush military order is unconstitutional. If the law of war is in force, military tribunals in the United States must be, first, subject to civil judicial review; second, authorized by Congress; and, third, limited to prosecuting unlawful combatants. He remarks that in any event, the order as it now stands is illegitimate, and those of us who say so are not, in the attorney general's unfortunate and offensive words, "giving ammunition to America's enemies," "aiding terrorists" or "eroding our national unity." He points out that they are upholding the Constitution, securing the values that sustain a free society and, at the same time, preserving for the president the option of using military tribunals outside of the United States, where they belong.

7.69 Peter Spiro says that now that the engagement in Afghanistan is over, its aftermath is better addressed through a law enforcement model than under the model President Bush has suggested, of a continuing war that operates for an indefinite period of time, and is not ended even by the cessation of hostilities.³ He states that the events of September 11 have demonstrated the obsolescence of old models of conflict premised on hostilities among states, from both a domestic and international perspective. Under domestic law, that means rejecting extraordinary procedures, such as the proposed military tribunals, and pursuing terrorists as we pursue criminals, within normal constitutional constraints. He explains that under international law, that means shifting attention away from regimes governing traditional warfare, in particular the Geneva conventions, and as the relevant benchmark, rather, we should now turn to human rights instruments governing punishment and the criminal justice process. He notes that these rules, in conventions to which the United States is a party, significantly constrain the detention and prosecution of criminal defendants.⁴

³ Peter Spiro "The End of the "War" (And of War As We Know It): Deploying A Law Enforcement Model In The Fight Against Terrorism" 31 January 2002 http://writ.news.findlaw.com/commentary/20020131_spiro.html

⁴ See also "Concerns arise over treatment of Guantanamo detainees" Associated Press Monday, January 21 2002 <http://www.globeandmail.com/> where it was reported that the British government wants the United States to explain its treatment of al-Qaeda and Taliban prisoners after British newspapers ran photos of handcuffed, kneeling detainees wearing blacked-out goggles and face masks. It was noted that a group of British legislators and human rights groups also pressed for the detainees to be given prisoner-of-war status under the Geneva Convention. Such status would mean they would be tried under the same procedures as USA soldiers - through court-martial or civilian courts, not military tribunals. Paul Knox says in "X-ray reveals little regard for global law" Wednesday, January 16, 2002 <http://www.globeandmail.com/>

"So they aren't prisoners of war, this hapless collection of individuals in chainlink cages at Camp X-ray, on the USA naval station in Guantanamo, Cuba. In fact, they're not even prisoners, not if you're a USA official reading from the script. The two acceptable terms for these alleged Taliban and al-Qaeda miscreants are "detainee" and "unlawful combatant." Whatever. Guantanamo's newest involuntary residents — that's my entry in the creative euphemism contest -- pose a conundrum for experts in international and military law. . . .

In all likelihood, the Bush administration will do as it pleases, constrained only by basic notions of humanitarian conduct. It clearly believes its captives are beyond the reach of any judicial authority, or anything that calls itself international law. Maybe they'll be tried, maybe not. Maybe the trials will be open, maybe not. Maybe they'll be grilled about terrorist activities, then left alone for a few months with the Koran and their memories. Maybe what this is really all about is good old-fashioned deterrence. . . .

There's been a lot of talk in the past few months about Washington's newfound vocation for multilateralism. Most of it is just wind. The "coalition" against terrorism is basically a superpower and a few add-ons. Both before and after Sept. 11, Mr. Bush has been consistently uncomfortable with any global consensus that requires actual compromise. It was one thing to abrogate the Cold War-era Anti-Ballistic Missile Treaty. But what of the accords scuttled by the United States that would eventually have made terrorism, its new enemy, more difficult to carry out? In July, USA negotiators forced a radical weakening of an action plan to combat the global trade in small arms -- something you'd think anyone opposed to Islamist terrorism would have been in favour of. Then they walked away from a verification scheme to enforce the 1972 treaty on biological warfare. They said international inspection of

7.70 Peter Spiro considers that a resistant Bush Administration is finding it hard to defy such international norms and that perhaps the greatest significance of September 11 is indeed the way in which international law is coming home to roost, and the boundaries between domestic and international law have broken down. He considers that it is not clear that the military tribunals will ever be deployed. He notes that with the Administration's decision to pursue criminal prosecution in federal district court against Zacarias Moussaoui, and given that Moussaoui — claimed to be a September 11 co-conspirator and the planned "fifth hijacker" on Flight 93, which crashed in Pennsylvania -- is not being tried before a tribunal, it is unlikely that the government will place any suspects apprehended in the United States for lesser roles before tribunals either. He considers that other countries will not extradite suspects without assurances that prosecution will be undertaken in the ordinary court system. He says the die has yet to be so clearly rolled with respect to the Taliban and Al Qaeda detainees being held in Guantanamo, but that here, too, domestic and international opposition to the tribunals may well result in their abandonment.⁵

USA laboratories might jeopardize commercial drug research and expose secret bio-defence plans.

The story of USA reticence goes on: the International Criminal Court, the Kyoto climate-change accord, the treaty banning antipersonnel land mines. Why should it be any different with the law of war?

Yes, it's harder for a superpower to be altruistic and ignore its national interest, simply because its national interest is bigger and broader and more complicated than anyone else's. Does that mean international law and global security agreements are obsolete, and we should make whatever deals we can with Washington, close our eyes and pray?

The best answer I can come up with is that America will eventually tire of its militarized global hunt for terrorists. It will get distracted by other things, and, in one form or another, it will stand down. But threats to security will remain, and the establishment of the global rule of law, with mechanisms to enforce it, will start to look good again. When that happens, it will be better to have made whatever progress is possible than to have given up.

⁵

Peter Spiro also notes that meanwhile, on the international side, attention is now focused on the application of the Geneva Convention Relative to the Treatment of Prisoners in Wartime and the question is whether Taliban and Al Qaeda detainees qualify for prisoner of war status thereunder. He explains that one reason the status matters is that non-POW's — "unlawful combatants," to use the Administration's term — can be punished for activities that otherwise would be exonerated by a wartime context. (Another reason is that POW status brings with it greater protections and rights.): "The Administration is correct to the extent that it has asserted that Al Qaeda operatives complicit in the September 11 attacks and other terrorist operations shouldn't enjoy the immunities afforded traditional military personnel (although those immunities would not extend to conduct off the battlefield against civilian targets). The Geneva model doesn't work in this context. But finding that the Geneva convention not to apply won't let U.S. authorities off the international law hook in their treatment and disposition of the detainees. It simply shifts the terms of the debate. The next round of debate will grapple with the International Covenant on Civil and Political Rights, to which the USA became a party in 1992. Among other provisions, the Covenant prohibits arbitrary detention and cruel, inhumane or degrading treatment of detainees. It also requires a presumption of innocence, and trial within a reasonable time. And it affords defendants a right against self-incrimination, a right to examine witnesses against them, and a right to seek a writ of habeas corpus. Indefinite detention without charge would clearly violate Covenant constraints, especially in the absence of genuine emergency conditions. So would some elements of the procedures the Administration has contemplated for the military tribunals. In short, rejecting the

7.71 Anne Gearan remarks that a military trial of someone accused of terrorism would include lawyers, jurors and a judge, but similarities to a typical American courtroom would end there, and that even supporters of the idea say it would mean fewer rights for the accused, a freer hand for the government and little or no oversight from other judges or the public.⁶ She notes that civil liberties defenders say the military terror tribunal sketched by the White House is just shy of a Star Chamber -- ultrasecret and omnipotent. She explains that Attorney General John Ashcroft said that the assaults were acts of war, and that a military commission is the appropriate place to try terrorists captured in Afghanistan or elsewhere, foreigners living in America also could go before the court, which could sit in the United States or abroad, since, in his view, foreign terrorists who commit war crimes against the United States in his judgment are not entitled to and do not deserve the protections of the American Constitution. She points out that Philip Allen Lacovara⁷ said that it leaves open more questions than it answers, and that what it essentially does is stake out the president's willingness to use military tribunals. She remarks that Lacovara notes that the president himself would decide who came before a military court, many of the particulars of a trial would be up to him and the defence secretary, and it is not clear whether the government would have to prove guilt beyond a reasonable doubt, the burden prosecutors must meet in an ordinary criminal court, since rules about what evidence can be used at trial would be looser than in a regular court. She states that at the least, prosecutors would be able to use hearsay statements, statements, several lawyers said, the government also would likely be able to use material

wartime legal paradigm for dealing with detainees will not leave the USA with a legal carte blanche. Rather, it will force the Administration to face a law enforcement model that is subject to another, equally demanding set of international norms. Of course, the Bush Administration has hardly had international law in mind in formulating its post-conflict strategy. Bush Administration officials have long shown a contempt for international legal regimes. But they've been blindsided by the ferocity of protests from European and other international actors, including leading human rights organizations, who have been putting considerable pressure on USA authorities to live up to its international obligations. Donald Rumsfeld may complain that "it's amazing the insight that parliamentarians can gain from 5,000 miles away." But he, and the Administration, need to listen, for those parliamentarians and other international actors control something the USA needs -- namely, cooperation in continuing anti-terrorist efforts. Whether or not the proposed military tribunals comport with domestic constitutional norms, their use would spark broad international protests. That, ultimately, is why the tribunal option is probably a dead one. The most significant long-term legal development to come out of September 11 is not a contraction of domestic civil liberties, as many might have expected. Instead, it is an acceleration in the pace with which international law is brought to bear on the United States. Advocacy groups have been pressing the USA on other fronts, most notably with respect to the death penalty, but that has produced only glancing blows on inner-circle foreign policy decisionmaking. With this episode international law has elbowed its way into the Situation Room, where it is likely to stay, welcome or not."

⁶ Anne Gearan "Military Court Would Mean Faster Trials, More Secrecy, Fewer Rights in Terrorism Cases" *The Associated Press* November 15, 2001 <http://www.law.com>

⁷ A former counsel to the Watergate special prosecutor who has written and lectured on military courts worldwide.

collected through searches or wiretaps that would be unconstitutional if used against an American citizen in a criminal court.⁸ She remarks that it is also considered that the right to appeal a conviction or sentence would be curtailed or eliminated, unless the Supreme Court got involved. A military tribunal could have one judge and a panel of officers sitting as a jury, on the model of a traditional court-martial, or it could have a panel of judges acting as both judge and jury.⁹ She notes Locavara said that

⁸ See Anthony Lewis' comment "Right and Wrong" November 24, 2001 <http://www.nytimes.com/2001/11/24/opinion/24LEWI.html?todayshdlines> who says that the effect of President Bush's order allowing anyone who is not a USA citizen and who is suspected of terrorist activity to be tried by a special military tribunal, is that it covers millions of resident aliens in this country: people with green cards, and that any one of them could be brought before a military tribunal, instead of a regular court, if the president said he or she has "aided" terrorism or "harbored" a terrorist. He lists the following factors noting that the trials by military commission would lack what most Americans would regard as essentials of fairness:

- (c) Military officers, who are dependent on their superiors for promotion, would act as judge and jury.
- (d) A two-thirds vote of commission members present at the time would be sufficient to convict — and to impose any sentence.
- (e) The defendant could be barred, on security grounds, from seeing the evidence against him.
- (f) The defendant could not appeal to "any court of the United States or any state."
- (g) The trials could be held in secret.
- (h) What confidence could the world have in the justice of such a proceeding? Such confidence is crucial. The Nuremberg trials of Nazi leaders, in open court before an international tribunal, had a profound long-term effect in bringing Germans back to democracy and humanity.

Mr Lewis considers that if Mr. Bush's order had been limited to suspected foreign terrorists captured in Afghanistan or other foreign countries, it would have been more persuasive legally, but that sweeping millions of resident aliens under the order seems to violate the principle that civilians should not be subject to military law in this country, noting that the Supreme Court held that imposing martial law in Hawaii in World War II was unconstitutional. He points out that in recent years conservatives have given striking support to civil liberty, and says that it was sad to find some conservative voices enlisting behind the Bush order. He notes they argued that terrorists deserve no better, and states that of course the question to be decided at a trial — a fair trial — is, however, whether they are terrorists. He considers not just the nature of Mr. Bush's order but the way it was done smacked of illegitimacy, as it was sudden, peremptory, without even a nod to consulting Congress.

See also William Safire "Kangaroo Courts" 26 November 2001 <http://www.nytimes.com/2001/11/26/opinion/26SAFI.html> who says, inter alia:

"The U.C.M.J. demands a public trial, proof beyond reasonable doubt, an accused's voice in the selection of juries and right to choose counsel, unanimity in death sentencing and above all appellate review by civilians confirmed by the Senate. Not one of those fundamental rights can be found in Bush's military order setting up kangaroo courts for people he designates before "trial" to be terrorists. Bush's fiat turns back the clock on all advances in military justice, through three wars, in the past half-century."

⁹ William Glaberson "Tribunal Comparison Taints Courts-Martial, Military Lawyers Say" *New York Times* 2 Dec 2001 writes that former military lawyers say they are angered by a public perception that the military tribunals are merely wartime versions of American courts-martial, a routine part of military life with a longstanding reputation for openness and procedural fairness. He notes that these lawyers say that the proposed tribunals are in fact significantly different from courts-martial, adding that confusion between the two has distorted the debate over the tribunals and unfairly denigrated military justice. He says that John S. Cooke, a

Judges probably would come from the existing military justice system, but could include civilian judges invited by Bush, and a terrorist trial would not be on television, but likely take place on a military base, under heavy security, and the public might not even know about the trial until it was over.¹⁰

7.72 Anne Gearan points out that the United States last used a military tribunal to try German saboteurs who sneaked ashore in New York and Florida in 1942. The trial was secret, and conviction and execution for six saboteurs was swift.¹¹ The Supreme

retired Army judge who is the chairman of the American Bar Association's committee on armed forces law, said military courts had been tainted by association with the tribunals, which many commentators, politicians and civil libertarians criticized as an effort to find a foolproof shortcut to a guilty verdict, that there's been a lot of talk about military kangaroo courts, and having grown up in the courts-martial system, he is rather offended by it, because it is a good system that provides more than adequate due process for the men and women in the US's military service. He points out that Mr Cooke explained that standard military courts closely resemble civilian courts in many ways, and that they offered many of the fundamental protections that critics had said the president ignored in his order authorizing the military tribunals. Courts-martial, for example, are governed by rules of evidence similar to those in civilian courts. They give defendants full rights to appeal a conviction, require proof of guilt beyond a reasonable doubt and require a unanimous decision to impose the death penalty, but those and many other protections were missing from the sketchy outline of the tribunals proposed in the president's order. The order specified some details that distinguished the tribunals from courts-martial, and provides, for instance, that sentences — apparently including the death penalty — can be imposed by a two-thirds vote of the tribunal members, whereas in courts-martial, the rules limiting the kind of evidence that can be heard are as strict as they are in civilian courts. Hearsay, for example, is limited in both civilian courts and courts-martial because it is often unreliable. But the president's order suggested that any evidence — apparently including hearsay — would be admitted if it had "probative value to a reasonable person.

¹⁰ John Ibbitson says in "Prison camp faces rights challenge" *Globe and Mail* January 22, 2002 <http://www.globeandmail.com/> that civil libertarians launched the first legal challenge to the USA government's handling of al-Qaeda and Taliban prisoners at Guantanamo Bay, even as British Prime Minister Tony Blair dismissed concerns about alleged mistreatment of the detainees. He states that former USA attorney-general Ramsey Clark and other civil-rights advocates have petitioned for a writ of habeas corpus, challenging the murky legal status of the prisoners at the Cuban military base-turned-penitentiary, and if granted, the writ would force Washington to bring the prisoners before a court and list the charges against them. Thirty-four more detainees arrived at the base from internment camps in Afghanistan on Sunday, bringing the total to 144. He explains that while observing most of the strictures of the Geneva Convention, USA officials want the freedom to question the prisoners without benefit of counsel and to choose whether to deport them to their country of origin, to refer them to the civil courts or try them under special military tribunals. See also "US justice would be an injustice: The UN must try terrorists" *Guardian* January 6, 2002 <http://www.observer.co.uk/>

¹¹ See also Tony Mauro "Historic High Court Ruling Is Troublesome Model for Modern Terror Trials" *American Lawyer Media* 19 November 2001 at <http://www.law.com/> who notes that when the FBI had arrested eight German saboteurs intent on blowing up American factories, bridges and department stores, it lead on 23 July 1942 to the lawyers for the Germans and USA Attorney General, trying to convince the Supreme Court to return from its summer recess immediately to weigh the constitutionality of the military commission created to try the Germans. He points out that the justices soon announced a special session of the Court — before the trial was over and before a habeas corpus petition was filed in the case, and after a breakneck briefing schedule and nine hours of oral argument on July 29 and 30, the Court almost immediately upheld the procedure in a brief per curiam decision. The full ruling came

Court upheld the proceeding, but under terms that lawyers said might not protect the White House from a constitutional challenge.¹² She notes that Thomas Henriksen, a

nearly three months later, but meanwhile, the defendants had been found guilty. On Aug. 8, six of the Germans were electrocuted and the other two were sentenced to long prison terms, by order of President Franklin Roosevelt. Mauro explains that the executions marked an end to an extraordinary fast-track legal process that is the model for President George W. Bush's Nov. 13 order authorizing military commissions as a way to bring the Sept. 11 terrorists to justice, and the Supreme Court decision that upheld the military trials of the German saboteurs, *Ex parte Quirin*, also provides the strongest authority for Bush's controversial order, which would permit swift and secret trials on military bases or even at sea. He explains that to some, the saboteur trials and the *Quirin* decision itself are flawed models for the current situation, and instead demonstrate that wartime justice can be too hasty to withstand the test of time. He also refers to the case of *Korematsu v. United States*, never overruled, that upheld the wartime internment of Japanese-Americans, upon which Justices themselves later looked back as one of the high court's less shining moments. The ruling in the earlier *Quirin* case said that military tribunals could be used to prosecute belligerents, including "the enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property." Mauro says that that language may be enough for the Bush administration to cite as justification for its controversial order, but with no formal declaration of war in the current terrorist crisis, lawyers for defendants may also find language in *Quirin* that they can exploit. He explains that the decision implied that spies and saboteurs retain some constitutional rights, but that it avoided announcing clear rules for when military commissions are appropriate and when they are not.

See also the comment by Geoffrey Robertson "Kangaroo courts can't give justice: We need an international tribunal for terrorist suspects" December 5, 2001 *The Guardian* <http://politics.guardian.co.uk/comment/story/0,9115,612282,00.html> who says that the immediate response of the US president to the atrocity of September 11 was to demand "justice" but that the military commissions he has set up to try suspects are such travesties of justice that it would be wrong for the UK, or any other in Europe, to extradite a defendant to undergo their process.

¹²

Clare Dyer "PoWs or common criminals, they're entitled to protection" *Guardian* January 30, 2002 <http://www.guardian.co.uk/> reports that Judge Richard Goldstone (international human rights expert, the first chief prosecutor at the war crimes tribunals for the former Yugoslavia and Rwanda, Justice of the South African Constitutional Court, and tipped to be the first president of the international criminal court when it gets off the ground next year) explains why al-Qaida suspects must not be tried in secret. She notes that Judge Richard Goldstone is concerned about the American response to the atrocities of September 11. She points out that the way the US deals with the captives of its war on terrorism, he believes, will be crucial to preserving the fragile coalition put together for a battle the superpower, for all its might, will not be able to fight alone, and behind his concerns is a fear that America's reaction to the loss of belief in its invulnerability could even damage the edifice of international humanitarian law built up in the aftermath of the second world war and the Holocaust. She reports that for a start, he says, the US administration has no authority to declare by "fiat" that the detainees at Guantanamo Bay are not prisoners of war, the "very surprising and very disappointing" proposal to try them by military commissions or tribunals would strip them of many of the safeguards of a fair trial, and "All of the due process for which the Americans have always fought and criticised others for not adhering to are not included." She notes that Goldstone is a voice who commands attention wherever issues of international human rights law and war crimes are debated. His latest role is as head of a task force on international terrorism which began its deliberations in January 2002, set up by the International Bar Association, representing lawyers in 182 countries, it will look at how to tackle the new scourge of global terrorism, ensuring national security and the safety of citizens without throwing civil liberties overboard. Clare Dyer points out that the US seems to be inventing the rules as it goes along, and understandably, the administration does not want to label the detainees as prisoners of war. Under the Geneva Conventions, this would protect them from interrogation by their captors, frustrating the main object of their detention. She points out that Goldstone dismisses defence secretary Donald Rumsfeld's categorisation of the captives as "unlawful combatants,

Hoover Institution historian who has researched war trials, said history is better served by keeping terrorist trials under the jurisdiction of the military, that you have to avoid the kangaroo court that would happen if you tried the case in a federal court. She says he commented that you don't want a situation where high-powered attorneys are clowning for the cameras, you also want a jury that is solid, and that in a

it's not a term recognised by international law" that they get it from the US supreme court, in the case in 1942 which dealt with six German spies who were landed in civilian clothes by a submarine on Long Island who were captured before they committed any criminal offences in the United States and Roosevelt didn't want to treat them as prisoners of war or as common criminals. He notes the US supreme court invented this category of unlawful combatants and they were tried by a military commission and executed, but that case is really no precedent because the US was officially at war with Germany, and the al-Qaida people don't come from a country with which the United States is at war." He also points out that the US had no authority under international law to transfer the detainees from Afghanistan to Cuba, saying that he just doesn't understand the legitimacy of simply forcibly taking them out of Afghanistan without an extradition order and flying them off to a third country and interrogating them. The Geneva Conventions say that those captured in war are presumed to be prisoners of war until an independent tribunal declares what their true status is. Clare Dyer remarks that according to a leaked memo, secretary of state Colin Powell wanted each detainee to have his status declared by a military judge, but was overruled. She notes that Goldstone thinks it "unlikely" that the Guantanamo Bay detainees are prisoners of war. The convention allows irregular soldiers to be treated as POWs, but only if they fulfil certain criteria, including wearing an insignia and obeying the laws of war, but that, he says, is not for the US administration to decide. She points out that he believes that the captives should be treated as ordinary criminal suspects, saying that if they're not prisoners of war, they're simply common law criminals, and in either case, they're entitled to some sort of due process. She states Goldstone remarks that as prisoners of war, they're entitled to some protection, but as ordinary common criminals, under the US constitution, they've got even better protection, and as criminal suspects, they would have rights not to incriminate themselves, to be tried in open court by an independent tribunal under strict rules of evidence, with an appeal to a higher court. She explains that Goldstone says that none of these safeguards would apply under the procedure outlined by President Bush, which amounts to "anything other than a fair trial". She also states that Goldstone says that he has got no objection to a military court, but it must have fair process, and the ordinary American courts martial do. She notes he does think it's objectionable that sitting members of the army subject to army discipline would preside in the military tribunals as one can imagine the pressure on them to render decisions that will be popular with their commanders but ordinary courts martial are not presided over by people who are looking after their careers. He considers that nobody could reasonably object if the US decided to try the detainees in its own domestic courts, but the administration seems to have ruled that out for security reasons. She says his own preference would be for an ad hoc international tribunal, like those in the Hague and Rwanda, and since suspects have been picked up in Britain, Spain, Australia and Germany and it would be messy and inappropriate to have trials in different countries, all arising out of the same events. She notes his comment that the international criminal court, had it been in existence, would have been an ideal forum, but its remit is not retrospective, but that the US has refused to sign up to it, apparently afraid that its own troops could be hauled up before it. She points out that Goldstone is confident that the court will get the support of the 60 nations it needs this year, and he thinks the experiences of September 11 have increased the chances that the US will eventually come on board. She notes that he argues that for the al-Qaida and Taliban detainees in Cuba trial by an international tribunal would be important to demonstrate their guilt credibly for the international community, particularly in the Islamic world, and clearly, secret trials held in Guantanamo Bay are hardly going to achieve that. She states he maintains that the US is creating a very bad precedent which could boomerang on it in the future, that a result could be other countries in the future treating United States citizens in this way. She notes him saying that imagine how the United States would feel if their troops were picked up in Afghanistan and flown for trial to Iran before some secret commission, facing a death sentence.

military court out of the country, you get to set the rules and keep it sensible.

7.73 It was recently reported that the Defence Secretary Donald H. Rumsfeld said that the Pentagon's rules for military tribunals aim to protect the rights of suspects while safeguarding Americans' security and ability to aggressively wage war against terrorism.¹³ It was stated that he said that the process is balanced, fair, designed to produce just outcomes, and that it will speak volumes about the American character as a nation. It was noted that he remarked that military tribunals would offer al-Qaida and Taliban defendants many of the same rights as in regular US trials — a move apparently designed to answer critics who complained the courts would be stacked against the accused, and defendants would be presumed innocent, be given attorneys and could be convicted only if the evidence were beyond a reasonable doubt, although the rules also limit many rights of the accused, in response to what Rumsfeld called the "unique circumstances" of the war against terrorism.

7.74 The Defence Secretary explained that to keep the cases out of federal courts, for example, defendants would have a very restricted right of appeal to a special review panel made up of one military official and two outside experts deputized by President Bush, and the defendant could appeal neither to a lower federal court nor directly to the Supreme Court. Human rights groups called that unacceptable. It is noted that the Washington director of the Lawyers' Committee for Human Rights commented that the idea that the review is going to be a military officer and two people who the president hand-picks — that's just not even close to what you would need to ensure a fair trial. As the standards for evidence also would be looser than in civilian courts or military courts-martial, with hearsay allowed, it is pointed out that Rumsfeld explained that in wartime it may be difficult to locate witnesses. The accused also might not be allowed to hear the evidence against him if it were classified, although his military-appointed defence attorney could, and the tribunals could be closed to the public if the presiding officer decided evidence was classified or sensitive, or to prevent threats to the safety of trial participants. Rumsfeld reportedly has said they would be used in rare cases, if at all, and only if the suspects' home countries do not take over prosecution. It was reported that President Bush said that the tribunals would be used, if, in the course of bringing somebody to justice, it would jeopardize or compromise national security interests. It was also noted that Pentagon officials made clear that, even if a suspect were found innocent, he would not necessarily be freed, but that enemy combatants may be held

¹³ "Rumsfeld: Tribunal Rules Protect US" *New York Times* March 21, 2002
<http://www.nytimes.com/aponline/national/AP-Military-Tribunals.html?todaysh headlines>

for the duration of the conflict. It was also pointed out that though few details were offered, Bush would have the final say on what happened to a convicted defendant, but could not overrule an acquittal. Officials would not say where defendants might be tried, but seemed to indicate it would not be inside the United States. It was also acknowledged that if defendants were tried inside the United States, a US court might have jurisdiction to consider an appeal. It was explained that part of the tribunals' goal is to help the war effort, as the way interrogations and intelligence information could be dealt with, tribunals could lead to new details about possible future threats against America.¹⁴

D. THE US REPORT TO THE UN SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1373 OF 2001

(a) Introduction

¹⁴ David E. Rovella "Tribunal Rules Don't End Debate on Fairness: Appeals, secret evidence at issue" *The National Law Journal* 25 March 2002 says that legal advisers to the Pentagon say they hoped the adoption of key civilian trial protections would mollify critics of the 13 Nov 2001 order creating military tribunals. He notes that legal concepts such as proof beyond a reasonable doubt, double jeopardy and the presumption of innocence were incorporated into rules unveiled March 21. He explains that while some in Congress expressed satisfaction with the rules, civil rights lawyers have found much to criticize, specifically, they are attacking the structure of the tribunal proceedings, including the use of secret evidence and an all-military appeals process, since there is no appeal outside the military system, and no review by an independent body. Citing the Geneva Convention, the ACLU has attacked the tribunals, saying prisoners of war must be sentenced under a system of justice similar to that available to the soldiers of the detaining power. It is argued that there is a stacking of the deck in the tribunal rules, and it is noted that the main difference between the federal and tribunal rules are those areas that will help secure convictions rather than secrets. It is also said that the evidence standard opens the door to hearsay and physical evidence obtained by military forces preventing any chain-of-custody challenges. David Rovella points out that defence efforts will be complicated by the court's ability to keep some evidence secret from the accused or his civilian lawyer, and that civilian lawyers must be cleared before handling secret evidence, and this does not guarantee that person's presence at closed Commission proceedings. It is also argued that the fact that an accused is also excluded from closed proceedings, but the military defence lawyer is not, makes it impossible for the defence lawyer to do his job, and if there is information that the defence lawyer can't tell his client, how is the lawyer supposed to be able to talk to his client to find out if the evidence is viable. It is considered that it's better to have the lawyer know the evidence than to have no one know it, but it's still not the right to hear the evidence against you. It is noted that the biggest change from President Bush's Nov. 13 order is the creation of an appellate process requiring the secretary of defence to appoint three military officers to review tribunal rulings, and that the panel may approve and forward a ruling to the secretary or send them back to the tribunal's appointing authority for further action. It is pointed out that at least one member of the commission must be a judge, and civilian legal experts may be appointed through a temporary military appointment. The rules restrict the panel to reviewing issues of fact and law in accordance with the tribunal rules only, not federal law or the Constitution. Rovella says foreign politicians have criticized the availability of the death penalty in tribunals, and commentators note that the appellate structure may create another obstacle to international cooperation, saying that the concern is whether command review deprives the trial forum of the status of tribunal, and there is also the ability of the defence secretary or president to alter any finding short of a not guilty verdict. He points out that to the extent that European countries might be called upon to extradite people, this kind of appellate structure could be a further impediment.

7.75 In its Report to the UN Security Council Committee established pursuant to Resolution 1373 of 2001 the United States of America (US) noted that the Resolution requires, among other things, that all member states prevent the financing of terrorism and deny safe haven to terrorists, member states need to review and strengthen their border security operations, banking practices, customs and immigration procedures, law enforcement and intelligence cooperation, and arms transfer controls.

7.75 The US pointed out that it is waging a broad-ranging campaign both at home and abroad against terrorism, including by taking military action in Afghanistan, and noted that President Bush has promised: “We will direct every resource at our command — every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war — to the disruption and to the defeat of the global terror network.” The US said that the following are some of the many steps that they have been taking to combat terrorism:

- On 23 September 2001, Executive Order (EO) 13224, froze all the assets of 27 foreign individuals, groups, and entities linked to terrorist acts or supporting terrorism and authorized the freezing of assets of those who commit, or pose a significant threat of committing, acts of terrorism.
- On 28 September 2001 the US sponsored the UN Security Council Resolution 1373, calling on all UN members to criminalize the provision of funds to all terrorists, effectively denying terrorists safe financial haven anywhere.
- On 5 October 2001 the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, redesignated 25 terrorist organizations (including al-Qaeda) as foreign terrorist organizations pursuant to the *Antiterrorism and Effective Death Penalty Act* of 1996. Giving material support or resources to any of these foreign organizations is a felony under US law.
- On 12 October 2001 the US added 39 names to the list of individuals and organizations linked to terrorism or terrorist financing under E.O. 13224.
- On October 26, the US enacted the US PATRIOT Act, which significantly expanded the ability of US law enforcement to investigate and prosecute persons who engage in terrorist acts.
- On October 29, the US created a Foreign Terrorist Tracking Task Force aimed at denying entry into the US of persons suspected of being terrorists and locating, detaining, prosecuting and deporting terrorists already in the US.

- On November 2, the US designated 22 terrorist organizations located throughout the world under E.O. 13224, thus, highlighting the need to focus on terrorist organizations worldwide.
- On November 7, the US added 62 new organizations and individuals, all of whom were either linked to the Al Barakaat conglomerate or the Al Taqwa Bank, which have been identified as supplying funds to terrorists.
- On December 4, the US froze under EO 13224 the assets and accounts of the Holy Land Foundation in Richardson, Texas, whose funds are used to support the Hamas terrorist organization, and two other entities, bringing the total to 153.
- On December 5, the Secretary of State designated 39 groups as "terrorist organizations" under the Immigration and Nationality Act, as amended by the new *US PATRIOT Act*, in order to strengthen the United States' ability to exclude supporters of terrorism or to deport them if they are found within our borders. We call the list of such designated organizations the "Terrorist Exclusion List."
- The US has signed and expects to ratify in the near future the *UN Convention for the Suppression of the Financing of Terrorism* and the *UN Convention for the Suppression of Terrorist Bombings*.
- The US has met with numerous multilateral groups and regional organizations to accelerate the exchange of operational information laid out in UNSCR 1373.
- The US has stepped up bilateral information exchanges through law enforcement and intelligence channels to prevent terrorist acts and to investigate and prosecute the perpetrators of terrorist acts.
- The US Federal Bureau of Investigation has created an interagency Financial Investigation Group to examine the financial arrangements used to support terrorist attacks. The FBI headquarters houses this group, which includes analysts and investigators from numerous federal agencies and federal prosecutors with backgrounds in investigating and prosecuting financial crimes.
- The US brought to conclusion the prosecution of four al-Qaeda members for the bombing of US embassies in Dar es Salaam and Nairobi.
- The US has designed a new tamper-resistant US visa, and we have upgraded passports to prevent photo substitution.
- The US has intensified border discussions with Canada and Mexico to improve border security.

(b) **What measures have been taken to prevent and suppress the financing of terrorists acts?**

7.77 The US said in its report that the assault on the financial underpinnings of terrorism is central to US efforts to fight terrorists and their supporters with every available weapon, and that through the September 23 Executive Order freezing US assets of designated individuals and organizations that commit terrorist acts or fund terrorism, and other measures, the US is taking concrete actions internally to combat the financing of terrorist entities. The Report also explained that the US works closely with governments around the world in identifying and freezing terrorists' assets, and that the US has contacted almost every other UN Member State to encourage them to identify and freeze terrorist assets through implementation of the UN Security Council Resolutions and other means.

7.78 The Report noted on the freezing of terrorist assets that President George W. Bush signed Executive Order (E.O.) 132241 on September 23 2001 pursuant to his authority under the International Emergency Economic Powers Act (IEEPA). The Report explained that this order blocks all property and interests in property of foreign persons and entities designated by the President in the Order, or designated by the Secretary of State as committing, or posing a significant risk of committing, acts of terrorism threatening the security of US nationals or US national security, foreign policy, or economy, if that property is either within the US or within the possession or control of US. persons.¹ **The Order also**

¹ Josh Meyer notes in "Charity Sues Over Anti-Terror Law: Muslim group says freezing of its assets by federal government was unconstitutional" <http://www.latimes.com/> that an Illinois charity targeted by the Treasury Department as an alleged accomplice to terrorist groups sued the federal government, saying use of a sweeping new anti-terrorism law to freeze the group's assets was unconstitutional and unfair. He states that legal experts predicted that the lawsuit, filed by the Global Relief Foundation, will be a test case in determining how far the government can go in attempting to thwart the work of groups it believes are associated with terrorist activity. It is explained that the suit will sort out what is the government's case, and it will probably test the extent of the law, seeking an immediate overturning of the Dec. 14 order the Treasury Department issued freezing the group's funds, using the provisions of the Patriot Act. That legislation, was meant to provide authorities with enhanced powers to combat terrorism, including staunching the flow of funds to alleged terrorist organizations. Meyers notes that representatives of Global Relief said the legislation enabled the government to unfairly freeze about \$900,000 of the charity's funds and seize all its financial records without providing any evidence of wrongdoing. Josh Meyers reports that the financial freeze, lawyer Roger Simmons said, has virtually shut down the US-based Muslim charity organization, cutting off paychecks to its employees and thwarting its relief efforts worldwide, and that the basic essence of what happened is their assets were frozen without ever giving them their day in court. Meyers points out that Global Relief describes itself as a humanitarian organization dedicated to helping victims of poverty and war, mostly in Muslim nations, and that it has offices throughout the world, including Afghanistan, but raises most of its money from donors in the United States. He also reports that that NATO-led peacekeepers and United Nations police raided Global Relief's offices in Yugoslavia and detained several people on suspicion of being linked to international terrorism. He says according to a North Atlantic Treaty Organization statement authorities received "credible intelligence information that individuals working for this organization may have been directly involved in supporting worldwide international terrorist activities".

blocks the property and interests in property of persons determined by the Secretary of the Treasury to provide support or services to, or to be associated with, any individuals or entities designated under the Order. The Secretary of the Treasury may also block property and interests in property of persons determined to be owned or controlled by, or to act for or on behalf of, persons designated in or under the E.O. Any transaction or dealing by US persons or within the US in property and interests in property blocked pursuant to the Order is prohibited.

7.79 The Report noted that the Order directs the US Government to cooperate and coordinate with foreign governments to suppress and prevent terrorism, to deny financial services and financing to terrorists, and to share intelligence about terrorist financing. The Report stated also that under Section 219 of the *Immigration and Nationality Act* (as amended by the *Antiterrorism and Effective Death Penalty Act* of 1996), the Secretary of State may, in consultation with the Attorney General and the Secretary of the Treasury, designate an organization as a Foreign Terrorist Organization ("FTO") if the organization is a "foreign organization" that "engages in terrorist activity" that "threatens the security of US nationals or the security of the United States". The Report pointed out that the Department of the Treasury may require US financial institutions possessing or controlling assets of designated FTOs to block all financial transactions involving these assets, and that it is a federal crime to provide material support to designated FTOs, and certain members of these FTOs are not allowed to enter or remain in the US.

7.80 The Report set out that under Executive Order 12947 of January 23, 1995, as amended by EO 13099 of August 20, 1998, the President designated sixteen organizations, and authorized the Secretary of State to designate additional foreign individuals or entities who have committed, or pose a significant risk of committing, acts of violence with the purpose or effect of disrupting the Middle East peace process, or who have provided support for or services in support of such acts of violence. The Report explained that designations of terrorism-related organizations and individuals pursuant to the Order, as amended, have continuing validity as actions taken in the US consistent with the objectives of UNSCR 1373. It was also pointed out that the Order further authorized the Secretary of the Treasury to block the property of persons determined to be owned or controlled by, or acting for or on behalf of, persons designated in or under the Order, all property and interests in property of persons designated under the Order in the US or in the control of US persons are blocked, and any transaction or dealing in such blocked property is prohibited.

7.81 The US Report noted on designated terrorists and their supporters that EO 13224 includes an annex listing 27 organizations and individuals whose assets are blocked by the EO because of their ties to terrorism, and an additional 39 individuals and organizations were added on October 12, 2001. The Report pointed out that on 2 November 2001 22 terrorist organizations already designated as FTOs, but not previously designated under the Order were added to the list;² 62 more individuals and entities were added on November 7, and three additional entities were listed on December 4, bringing the total to 153. The Report stated that the list will be updated periodically, and in addition, a total of 28 terrorist organizations have been designated as FTOs, and 16 individuals and entities have been designated under EO 12947.

7.82 On improved coordination at home, the US Report noted that the US is improving coordination and information sharing internally, and that the Foreign Terrorist Asset Tracking Center (FTAT), in the Office of Foreign Assets Control at the

²

Joseph Kahn and Patrick E. Tyler "The Money Trail: US Widens Net to Snare Terror Assets; Expands List" <http://www.nytimes.com/2001/11/03/international/03TERR.html>

"The Bush administration imposed stringent financial sanctions today on the anti-Israeli organizations Hamas, Hezbollah and 20 other suspected terrorist groups, significantly broadening the campaign to seize terrorist assets beyond groups with links to Osama bin Laden's Al Qaeda network. The move is a sign that the administration feels confident enough about the stability of the coalition battling Al Qaeda to begin expanding its financial campaign to include groups that have considerable support in the Arab world.

After the Sept. 11 attacks, pro-Israeli lobbyists and some members of Congress had pressed President Bush to use all the powers at his disposal to combat terrorists generally, not just those who are thought responsible for the assaults on the World Trade Center and the Pentagon. Many who made that case applauded today's action.

While the United States has long frozen any assets held by the Palestinian group Hamas and the Iran-backed Hezbollah in this country, the Bush administration for weeks resisted adding them to a list of people and organizations subject to more far-reaching controls.

Egypt, Jordan, Saudi Arabia and other Arab nations have urged the administration to focus narrowly on Mr. bin Laden, and State Department officials initially argued that toughening financial penalties on Hamas, Hezbollah and other international terrorist groups could undermine efforts to build a coalition to support the war in Afghanistan, administration officials said.

. . . Under a presidential executive order issued in September, the Treasury Department can impound the American assets of anyone at home or abroad who is suspected of providing aid or financial services to Al Qaeda and its direct supporters. If a foreign bank declines to cooperate with Treasury's order, the administration could seize that bank's assets in the United States. An initial list of terrorists subject to the controls included Mr. bin Laden and Al Qaeda, as well as groups in the Philippines, Algeria, Pakistan, Egypt and Uzbekistan thought to have direct financial ties to Mr. bin Laden. With today's addition, eight other Arab organizations, three Colombian groups, the Real Irish Republican Army and the Basque group E.T.A. are among those hit with the same controls. Officials acknowledged that they intentionally included the Irish, Basque and Colombian groups on the list to show that the next stage in the war was not focused mainly on Israel and the Palestinians. . . .

President Bush had been saying for weeks that his goal was to "eradicate terrorism," not just the terrorists who attacked the United States on Sept. 11. But to date he has been eager to avoid any links between military action in Afghanistan and the Israeli-Palestinian conflict. . . .

Department of Treasury, identifies the financial infrastructure of terrorist organizations worldwide to curtail their ability to move money through the international banking system. It was said that the Federal Bureau of Investigation (FBI) has broadened its investigative efforts on the financial front, in terrorists' use of money laundering, electronic transactions, cyberbanking, and trafficking in valuable gems.

7.83 The Report also noted measures to improve domestic tools to stop financing terrorism. It stated that on 26 October 2001, President Bush signed into law the *US PATRIOT Act*,³ providing for broad new investigative and information sharing between law enforcement and intelligence agencies with respect to terrorist financing. It expands the scope of USA regulations against money laundering by requiring securities brokers and dealers to file suspicious activity reports and gives new power to act against money laundering havens. *The PATRIOT Act* also expands the President's powers to confiscate property under the International Emergency Economic Powers Act (IEEPA) when the USA is engaged in armed hostilities or has been attacked.

7.84 The US Report remarked on international cooperation, outreach and coordination that the US is working to improve international sanctions and anti-money laundering coordination, notably through a multilateral sanctions administrators coordinating group which meets regularly

with the Treasury Department's Office of Financial Assets Control on USA and European Union

sanctions. The Report pointed out that the USA has strong outreach programs to encourage other nations to join this effort, that senior officials have urged strong action in support of the global effort against terrorist financing, including removal of legal or other barriers that might hinder cooperative efforts, and that the US will seek to respond to requests for technical assistance to block terrorist assets, cut off terrorist fund flows, and prevent fund-raising activities which benefit terrorists. It was noted that the US has signed and expects to ratify in the near future the *UN Convention for the Suppression of the Financing of Terrorism*, and that it is also a signatory to the *UN Convention against Transnational Organized Crime*.

7.85 On important international initiatives in which the US plays a role, the US

³ "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Acts of 2001," 107th Congress (2001).

Report reflected that —

- .. the US and the European Union have developed unprecedented cooperation on counterterrorism since September 11, including close cooperation on the freezing of the assets of terrorists and their supporters, as well as increased assistance in investigations and the sharing of information among law enforcement authorities, increased coordination of measures to strengthen aviation security, further exchanges of ideas on tightening border controls, and increased contact between key judicial and police organizations. A US-EUROPOL Agreement was signed in early December 2001, facilitating the exchange of analytical data.**
- .. The Secretary of State joined with the Foreign Ministers of the other members of the Organization of the American States to approve a resolution on September 21 condemning the terrorist acts of September 11 and expressing the need for hemispheric solidarity and effective measures against terrorism, that on October 15, the Inter-American Committee Against Terrorism (CICTE) formed a sub-committee to increase cooperation in tracking the financial assets of terrorists and their supporters.¹**
- .. The Foreign Ministers of States Parties to the Inter-American Treaty of Reciprocal Assistance ("Rio Treaty") adopted a Resolution on September 21 restating their commitment of reciprocal assistance and affirming that measures being taken by the USA and other states in reaction to the terrorist attacks of September 11 were in the exercise of their inherent right of individual and collective self-defense.**
- .. In Shanghai last October, leaders of the Asia Pacific Economic Cooperation (APEC) forum responded to President Bush's call for a coalition to defeat terrorism with a strong statement condemning the terrorist attacks in the USA. They also committed APEC members to implement relevant UN conventions and resolutions and to take specific steps to stop the flow of funds to terrorists and their supporters, and to steps to ensure aviation and maritime security, strengthen energy security, and enhance border security and customs enforcement.**

7.86 The Report explained further that among the other important initiatives that the

¹ These recommendations were to be approved at the CICTE Regular Session in January.

US participate in are —

- **The G-7 finance ministers issued a comprehensive action plan on terrorist financing on October 6, calling for a special Financial Action Task Force (FATF) plenary on October 29-30, and an Egmont Group meeting on October 31. G-7 countries have called for increased international coordination and efforts to combat terrorist financing.**
- **At its plenary on October 29-30, FATF adopted eight special recommendations focussed on combating terrorist financing, and then adopted an action plan to implement them.¹**
- **At its October 31 meeting, the 58 member nations of the Egmont Group of financial intelligence units agreed to expand information sharing on terrorist financing.**
- **The Finance Ministers and Central Bank Governors of the G-20 adopted on 17 November 2001 a comprehensive action plan of multilateral cooperation to deny terrorists and their associates access to, or use of, their financial systems, and to stop any abuse of informal banking networks. The plan also calls on G-20 countries to make public the lists of terrorists whose assets are subject to freezing, and the amount of assets frozen.²**
- **The International Monetary Fund (IMF) has expanded its activities to include efforts aimed at countering terrorist financing. In its November 17 Communiqué, the International Monetary and Financial Committee of the Board of Governors (the IMFC) called on each IMF member to freeze all terrorist assets within its jurisdiction and to implement fully UNSCR 1373.³**
- **Within the G-8, the Counter-terrorism Experts Group and the Lyon Group held a second special joint session on November 18-20, adding concrete actions, timelines, and responsibilities to the 25-point G-8 Counter-terrorism Action Plan developed earlier by the two groups. The Plan would advance the fight against terrorism in the areas of aviation security, judicial cooperation, and law enforcement.**

¹ The overall FATF effort were to be reviewed when FATF met in Hong Kong in January 2002.

² It was noted that the Manila Framework Group formally endorsed the G-20 Action Plan during its December 2001 meetings.

³ It was noted that members must publish monthly reports by February 1, 2002, listing terrorist assets subject to freezing and the amount of assets frozen, and that the IMF will expand efforts to help countries review and optimize their financial, legal, and institutional frameworks to help ensure that all avenues are closed to terrorism.

- In the area of international aviation security, the US participates in the Aviation Security (AVSEC) panel of the International Civil Aviation Organization (ICAO) to enhance worldwide aviation security standards.⁴

(c) **What are the offences and penalties in the US with respect to provision and collection of funds to provide support to terrorists?**

7.87 The US Report noted that there are several sources of legal authority for the US government to rely upon in imposing civil and criminal penalties for the provision and collection of funds to provide support to terrorists. The Report stated that these include both laws prohibiting material or other support to terrorists and their supporters, and money laundering laws addressing a variety of criminal activity, including the unlawful movement of money without proper reports.

7.88 The Report pointed out on the issue of providing support to terrorism that providing “material support” to terrorists or terrorist organizations has been prohibited as a crime since the enactment of the *Antiterrorism and Effective Death Penalty Act* of 1996, and as a result of the October 26, 2001 enactment of the *USA PATRIOT Act*, there is now specific authority to forfeit terrorist assets as well, thus providing a direct means to deprive terrorists of their funds. The Report said US law makes it a crime to provide material support or resources within the US to a person intending that the support or resources will be used, or is in preparation for, the commission of a wide variety of specified terrorism-related crimes.⁵ **The Report noted that “material support or resources” is very broadly defined and means “currency or other financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”⁶ The Report noted that property provided as “material support” to a terrorist in violation of 18 U.S.C. § 2339A is subject to forfeiture if it is involved in a transaction or attempted transaction in violation of 18 U.S.C. § 1956-57, or if it is the proceeds of a section 2339A offense.⁷ The Report explained that in addition, US law⁸**

⁴ The US would participate in the ICAO Ministerial Conference in February to establish an ICAO audit plan for compliance with Annex 17 to the Chicago Convention (on safeguarding civil aviation against acts of unlawful interference), to upgrade certain recommended security practices, and to seek a greater level of participation in voluntary contributions to the AVSEC fund.

⁵ 18 U.S.C. § 2339A.

⁶ 18 U.S.C. § 2339A.

⁷ 18 U.S.C. § 981(a)(1)(A) would authorize forfeiture for the transaction offense, and 18 U.S.C. § 981(a)(1)(C) would authorize forfeiture for the proceeds offense.

⁸ 18 U.S.C. § 2339B.

prohibits the provision of "material support" to a Foreign Terrorist Organization.⁹ The Report noted that a Foreign Terrorist Organization (FTO) may be designated pursuant to section 219 of the Immigration and Nationality Act,¹⁰ and that Al-Qaida has been designated as an FTO. The Report stated that when a financial institution becomes aware that it has possession of, or control over, any funds in which a Foreign Terrorist Organization, or its agent, has an interest, it must retain possession or control over the funds, and report the existence of such funds to the Secretary of the Treasury, and failure to do so may result in civil penalties. Providing prohibited "material support" is punishable criminally by 15 years imprisonment and/or a fine of up to \$250,000 for individuals and \$500,000 for organizations.

7.89 On money laundering and currency reporting the report noted that property brought into or taken out of the United States with the intent to promote one of the terrorist acts or other crimes constituting a Specified Unlawful Activity is subject to civil forfeiture.¹¹ The Report explained that, if, for example, US Customs agents learned during an investigation that funds raised in the US were sent, or were attempted to be sent, abroad to fund a terrorist action, or funds came into the United States for such a purpose, the funds would be forfeitable. Currency and other monetary instruments, including a deposit in a financial institution traceable to those instruments, may be forfeited¹² when a required Currency Monetary Instrument Report has not been filed properly. Pursuant to the USA PATRIOT Act, there is now specific authority to forfeit currency and other monetary instruments if someone "knowingly conceals" those instruments to evade a reporting requirement.¹³

7.90 The Report pointed out that any person who violates any license, order, or regulation issued pursuant to the *International Emergency Economic Powers Act* (IEEPA), *ie*, the authority under which the President issued Executive Orders 13224

⁹ 12 U.S.C. § 2339B.

¹⁰ U.S.C. § 1189

¹¹ 18 U.S.C. § 981(a)(1)(A) (as property involved in a violation of 18 U.S.C. § 1956(a)(2)(A).

¹² 31 U.S.C. § 5317(e). Senator Ross Feingold pointed out that one proposal made by the Administration would have broadened the criminal forfeiture laws to permit - prior to conviction - the freezing of assets entirely unrelated to an alleged crime, that the Justice Department has wanted this authority for years, and Congress has never been willing to give it. He says that for one thing, it touches on the right to counsel, since assets that are frozen cannot be used to pay a lawyer, and that the courts have almost uniformly rejected efforts to restrain assets before conviction unless they are assets gained in the alleged criminal enterprise. This proposal, in his view, was simply an effort on the part of the Department to take advantage of the emergency situation and get something that they've wanted to get for a long time.

¹³ 31 U.S.C. § 5332 (the new Bulk Cash Smuggling offense).

and 12947, may be subject to civil fines, and those who willfully violate, or willfully attempt to violate, any license, order or regulation issued pursuant to IEEPA may be subject to criminal penalties including fines or imprisonment.

(a) **What legislation and procedures exist for freezing accounts and assets at banks and financial institutions?**

7.91 The US noted that their President signed Executive Order 13224 on 23 September 2001 that this Order allows for the blocking of property and interests in property of all persons designated pursuant to the Order,¹⁴ **and that EO 13224 also charged the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, with responsibility for its implementation, including the promulgation of regulations related to the sanctions. The Report pointed out that designated terrorist property and interests in property, including funds and financial assets or economic resources, within the US or in the possession or control of a US person, are blocked, any transaction or dealing in the US or by US persons in such blocked property and interests in property are prohibited, and transactions intended to evade the prohibitions imposed in the Executive Order also are prohibited.**¹⁵ The Report explained that Executive Order 13224 complements and builds upon other legal measures that impose sanctions on terrorists and their supporters, and in particular, several terrorists designated under E.O. 13224, and subject to its sanctions, were previously designated in or pursuant to E.O. 12947, as amended.

7.92 The Report said that blocked property, including blocked funds, that a US person imports, exports, or attempts to import or export may be seized and forfeited by the US Customs Service, as may any merchandise imported contrary to the sanctions.¹⁶ Any conveyance or thing (e.g., a container) facilitating such importation may be seized and forfeited, and any person concerned in the unlawful activity is subject to a penalty equal to the value of the imported goods,¹⁷ and US Customs also may seize and forfeit arms, munitions, or “other articles” exported, or attempted to be

¹⁴ The report noted such designations include terrorists, as well as those who provide support or services to, or associate with, persons with terrorism-related links.

¹⁵ According to the US Report between September 11 and December 6, 2001, the US blocked a total of 79 financial accounts within the US, pursuant to E.O. 13224, and the accounts totalled \$33.7 million. Included in those actions was the November 7 blocking by the Department of the Treasury of the property and interests in property of several financial institutions and accounts — primarily those of the “Al Barakaat” organization.

¹⁶ 19 U.S.C. § 1595a.

¹⁷ The report noted that 18 U.S.C. § 545 (civil forfeiture for articles imported contrary to law) should also be considered.

exported, in violation of law. The Report pointed out on the question of what measures exist to prohibit the activities envisaged under par 1(d) of resolution 1373¹⁸ the Executive Order 13224 noted above which allows for the blocking of property and interests in property of all persons designated pursuant to the Order, and that the US Customs Service has formed a financial anti-terrorism task force, known as Operation Green Quest, to identify, disrupt, and dismantle the financial infrastructure of terrorist organizations.¹⁹

(e) What legislation or other measures are in place to prevent persons from providing any form of support to persons involved in terrorist acts, including recruitment, eliminating the supply of weapons and what offences prohibit recruitment to terrorist groups and supply of weapons?

7.93 The US Report noted on recruitment that conspiracy and other laws make it illegal to solicit a person to commit a terrorist act or other crime, that recruiting for membership in a terrorist organization is grounds for denying a visa, and a foreign national who enters the United States and is later found in violation of these prohibitions is subject to deportation. On the issue of weapons, the report noted the following measures —

- US law contains criminal prohibitions on the acquisition, transfer and exportation of certain firearms, 18 and numerous state and local laws also apply.
- The US Government requires licenses for the export of defence articles (which includes technical data) and defence services pursuant to the *Arms Export Control Act* (AECA),¹⁹ which counters the illicit transfer of USA-origin defense items to any unauthorized person. Violations of the AECA or its implementing regulations can result in civil and criminal penalties.
- It is a crime under USA law to provide material support such as

¹⁸ Measures to prohibit nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.

¹⁹ The report pointed out that in November 2001, Operation GREEN QUEST— composed of investigators and analysts from U.S. Customs, the Internal Revenue Service (IRS), the Federal Bureau of Investigation (FBI), and the Treasury Department's Office of Financial Assets Control (OFAC) — coordinated five search warrants. Concurrently, several businesses had their activities and their bank accounts (\$1.3 million USD) frozen. Intelligence and investigation had indicated the businesses and accounts were paying fees to terrorist organizations. The funds were frozen based on Executive Order 13324 and routine judicial procedures were used to further the criminal prosecution of the individuals and businesses involved.

funding and weapons for a terrorist act or to an organization designated by the Secretary of State as a foreign terrorist organization. 20 It is also grounds for denying a visa or removing an individual from the USA²¹

- The US government also applies controls to exports and re-exports of sensitive US-origin dual-use items and nuclear-related items pursuant to the statutory authorities of the Department of Commerce and the Nuclear Regulatory Commission. The Department of the Treasury administers and enforces economic sanctions against designated terrorists and those determined to be linked to such terrorists. These sanctions prohibit any transactions or dealings in property or interests in property of terrorism-related entities or individuals, including the exportation or re-exportation of any goods or technology either from the US or by US persons. Violations of these laws or their implementing regulations can result in civil or criminal penalties.

7.94 The Report also reflected the following other measures:

- The USA uses a full range of counterterrorism and counterintelligence techniques in preventing terrorist acts, including the use of human and technical sources; aggressive undercover operations; analysis of telephone and financial records; mail; and physical surveillance.
- The intelligence community also tracks terrorist organizations overseas, including attempts to recruit members, and the movement of weapons intended for terrorists and proposed sales to terrorist countries.
- The Customs Service (USCS) exchanges information with companies involved in the manufacture, sale, or export of: munitions or arms, explosive or sensitive materials, restricted communication technologies or equipment, or components of weapons of mass destruction. The USCS meets with industry experts to obtain their assistance in controlling the export of US-origin high technology and munitions items. This partnership between government and industry enhances national security and fosters effective export controls.

(f) **What other steps are being taken to prevent the commission of terrorist acts, and in particular, what early warning mechanisms exist to allow exchange of information?**

7.95 The US reported that its law enforcement and intelligence agencies have many

active and aggressive information sharing programs to prevent terrorist acts,¹ **and that Congress has mandated expansion of international information sharing on immigration and law enforcement matters in support of worldwide anti-terrorism efforts. Many nations cooperate actively with the USA in fighting terrorism.**

(g) What legislation or procedures exist for denying safe haven to terrorists?

7.96 The US explained that their legislation contains provisions prohibiting admission of foreign nationals who have engaged in terrorist activity, it provides for removal of such persons if they are in the US, and foreign nationals who are closely associated with or who support terrorist activity can also be denied admission or removed in certain circumstances (e.g. foreign nationals who act as representatives of foreign terrorist organizations or of certain groups that publicly endorse acts of terrorism). The Report pointed out that for immigration purposes, the "terrorist activity" definition includes any unlawful act involving:

¹ The Report noted the following measures:

- Prior to September 11, the US regularly exchanged information on terrorists and specific indications of threats in other states with their intelligence agencies, and since September 11, the US has provided expanding streams of information regarding the responsibility for those terrorist attacks, and information about specific terrorist identities and activities through liaison channels.
- With some allied governments the US shares data through bilateral arrangements on known and suspected terrorists to prevent the issuance of visas and to strengthen border security. Expansion of this program is anticipated. This program is used to preclude visa issuance to terrorists, to warn embassies overseas about certain applicants, to alert intelligence and law enforcement agencies, and to enable immigration and customs officials at ports of entry to detect terrorists who may have obtained visas.
- The Immigration and Naturalization Service (INS) has law enforcement officers stationed abroad who conduct liaison with host government immigration, police and security services. INS also maintains a fulltime presence at INTERPOL, working actively with other federal agents in providing information to police agencies worldwide. INS also has bilateral information-sharing arrangements with certain of its counterpart immigration services.
- The Legal Attaché program of the Federal Bureau of Investigation (FBI) enables it to share information on a broad and timely basis. Direct lines of communication have been established between the US and many countries to coordinate investigative resources worldwide.
- The private sector is included in the dissemination of information of possible terrorist threats, particularly in international financial and technology transfer matters related to terrorist activity.
- The FBI has established a Counterterrorism Division to further enhance the FBI's analysis, information-sharing, and investigative capabilities. The FBI is publicizing wanted terrorists through various programs including the Top Twenty Terrorist Program.
- The FBI has created an interagency Financial Investigation Group to examine the financial arrangements used to support the terrorist attacks. The FBI headquarters houses this group, which includes analysts and investigators from numerous federal agencies and federal prosecutors with backgrounds in investigating and prosecuting financial crimes.

hijacking; sabotage; detention under threat for the purpose of coercion (of a government or an individual); violent attack on an internationally protected person; assassination; the use of biological, chemical, or nuclear weapons; or the use of explosives, firearms, or any other weapon or dangerous device with the intent to cause harm to individuals or damage to property. The attempt or conspiracy to commit these acts is also included as "terrorist activity." The report also said that US law defines "engage in terrorist activity" broadly to include committing, inciting, preparing or planning a terrorist activity; gathering target information; soliciting funds or resources for terrorist activity or a terrorist organization; soliciting an individual to engage in terrorist activity or to join a terrorist organization; and affording material support (e.g. a safe house, transportation, communications, funds, funds transfer), false documentation or identification, weapons, or training for the commission of terrorist activity to a person who has committed terrorist activity, or to a terrorist organization.

7.97 It was also pointed out that the Department of State and the Immigration and Naturalization Service work together with other agencies to maintain a robust database of terrorists and terrorism supporters, to prevent them from receiving visas or gaining access to the US. There are additional terrorism-related grounds for denying admission to the US, such as that terrorists are ineligible, for example, for temporary protected status, and asylum and refugee status. There are also provisions in the US Criminal Code, and the Immigration and Nationality Act, to prosecute those who harbor or smuggle alien terrorists, or who provide them with material support (including immigration or other identity documents). In addition, foreign nationals who provide material assistance to, or solicit it for, certain designated terrorist organizations are inadmissible to the United States or may be deported if previously admitted. Thirty-nine Terrorist Exclusion List organizations were designated on December 5, 2001 for this purpose. The Report noted that as an example of relevant actions, USA immigration authorities have excluded from the US foreign nationals based upon classified information relating to terrorist activity. Some of the cases involved attempted entry with fraudulent passports; others involved immigrants without a valid immigrant visa.

(h) **What legislation or procedures exist to prevent terrorists acting from US territory against other states or citizens?**

7.98 The US reported that numerous laws address the threat of terrorists acting from USA territory against citizens or interests of other states. The US explained that terrorist financing and money laundering laws are very useful in countering such situations as providing material support or resources. The provision, in the US, of material support to a foreign terrorist organization is a serious crime under US law and allows the US to take actions which also benefit the anti-terrorist efforts of its overseas partners in the fight against

terrorism. They noted that the USA has recently, damaged the overseas operations of Mujahadin E-Khalq, the Provisional Irish Republican Army, Hizballah and other foreign terrorist organizations by criminally charging people in the US with providing or attempting to provide material support or resources to those organizations. Furthermore, on December 4, 2001 they shut down a Texas-based fundraising operation whose activities benefited the terrorist activities of Hamas in the Middle East.

7.99 The US noted that it is a crime to provide, attempt, or conspire to provide within the USA material support or resources, or to conceal or disguise the nature, location, source or ownership of resources, knowing or intending that they are to be used in the commission or preparation of a wide variety of specified terrorist related crimes. Material support or resources is very broadly defined and includes, for example, monetary instruments, financial services, lodging, training, documentation, communications, weapons, personnel, transportation, and other physical assets (except medicine or religious materials). It is also a crime to knowingly provide or attempt or conspire to provide material support or resources to a designated foreign terrorist organization, and material support or resources is again defined very broadly. USA jurisdiction is extraterritorial and the statute specifically contemplates the movement of material support or resources from the USA to a foreign terrorist organization outside the USA. Providing or collecting funds for the use of terrorists or terrorist organizations is also a violation of the law. Transactions need not be entirely domestic, but rather can be, and in some cases must be, international to meet the elements of the violation.

7.100 In addition to the substantial terms of incarceration and the criminal and civil fines imposed for the above violations, the code also authorizes the US to seize and forfeit funds and other assets involved in violations of §§ 1956, 1957, 2339A, and 2339B and funds or assets in which terrorists or terrorist organizations have an interest. The code also includes numerous crimes that may be charged against individuals who act from the US against the citizens of another country or against the interests or facilities of another country, regardless of whether those citizens, facilities or interests are located within the USA or within that other country.²

² The Report noted that for example, 18 U.S.C. § 956 makes it a crime to conspire to kill, maim, or injure persons or damage property in a foreign country; 18 U.S.C. § 2332b makes it a crime to engage in acts of terrorism transcending national boundaries; 18 U.S.C. § 2332a(b) makes it a crime for a national of the United States to use certain weapons of mass destruction outside the United States; 18 U.S.C. § 1116 the murder or manslaughter of foreign officials, official guests, or internationally protected persons a crime; 18 U.S.C. § 1119 makes a foreign murder of a U.S. national a crime; 18 U.S.C. § 32 makes it a crime to destroy aircraft of aircraft facilities within or outside the U.S.; and finally, 49 U.S.C. §§ 46502 - 46507 make it a crime to engage in aircraft piracy or carry a weapon or explosive on an aircraft.

Also, the 50 states each have criminal codes that may enable them to punish people who conspire within their borders to commit serious, terrorist-related crimes beyond the borders of the US.

(i) **What steps have been taken to establish terrorist acts as serious criminal offences and to ensure that the punishment reflects the seriousness of such terrorist acts?**

7.101 The US pointed out that terrorist acts are among the most serious offenses under US law, and that violent, terrorist-related crimes generally carry substantially higher criminal penalties and can lead to imposition of the death penalty, or life imprisonment. They remarked that in 2001, after convicting four members of al-Qaida for the bombing of the US embassies in Nairobi and Dar es Salaam, a federal jury in New York City recommended life imprisonment for all four. It was noted that depending on the defendant's acts, his criminal history, and his willingness to cooperate with authorities, there is a range of sentences from which the sentencing judge may select, and that in recent years, the death penalty in a federal international terrorism prosecution has not been imposed.

7.102 The Report pointed out that terrorist financing statutes carry substantial criminal fines and considerable periods of incarceration, and that there is only one such case in which a sentence has been imposed. The Report explained that in that case, a US-based individual was assisting immigrants (including at least one affiliated with a foreign terrorist organization) to fraudulently obtain enhanced immigration status, he plead guilty, agreed to cooperate with federal authorities, and received a sentence of two years of incarceration without any possibility of parole and three years of supervision. It was also stated that the money laundering statutes also carry considerable penalties, and that the US Sentencing Guidelines provide for substantial enhancement of the prescribed period of incarceration in instances where terrorist activity is involved.

(j) **What procedures and mechanisms are in place to assist other states?**

7.103 The US pointed out that it provides assistance for criminal investigations or proceedings relating to terrorist acts through bilateral programs and as an active participant in multilateral programs:

- The US provides training and technical assistance on money laundering and financial investigations to law enforcement, regulatory, and prosecutorial counterparts. The programs benefit anti-terrorist efforts by

assisting other nations' anti-money laundering programs; assisting in creating financial intelligence units; and training financial investigators, bank regulators, and prosecutors to recognize and investigate suspicious transactions.

- The US maintains mutual legal assistance treaties and agreements with over 45 countries, with more in negotiation or signed and awaiting Senate approval. They provide assistance in the investigation, prosecution, and suppression of criminal offenses, including those related to terrorism.¹
- **The US assists in training other countries' counterterrorism task forces. Training includes major case management, terrorist crime scene management, advanced kidnapping investigations, and financial underpinnings of terrorism. Also, the US makes personnel available for assistance on a case-by-case basis. Pertinent information is shared on a regular basis with law enforcement entities around the world.**
- **The US also maintains overseas International Law Enforcement Academies, and their courses include segments on financial crime and money laundering.**

(k) How do border controls prevent the movement of terrorists, how do the procedures for issuance of identity papers and travel documents support this and what measures exist to prevent their forgery etc?

7.104 The US explained that with few exceptions, all non-USA citizens entering the US must have a valid visa or be exempted by holding a passport from one of 29 countries approved for visa waiver. Every visa applicant is subject to a name check through a database containing nearly six million records, at entry, everyone is subject to inspection, and inspectors are well trained to determine counterfeit and altered documents, and to detect evasive or untruthful responses. It was noted that every entering visitor is subject to checks in databases.² **The US remarked that because of long common borders, movements to the USA from Canada and Mexico are difficult to control, and although cooperation with those governments is good, they are engaged in renewed**

¹ It was noted that such treaties, for example, typically obligate the USA to provide foreign investigators and prosecutors with financial records, witness statements and testimony, and assistance in freezing and forfeiting criminally derived assets, and that even in the absence of a treaty relationship, the US may, under appropriate circumstances, provide a host of evidential assistance to foreign countries pursuant to our domestic law. The US acts on hundreds of foreign requests for assistance in criminal matters every year.

² The Report explained that a new, tamper-resistant visa will shortly replace the current visa, and the US is also working to improve the exchange of data among agencies to ensure that anyone with a history of involvement with terrorism is quickly identified.

discussions with both governments to improve border controls. It was explained that American citizens must have a US passport to enter the US unless they have been travelling in North, Central or South America, in which case they may use other documents to verify their citizenship and identity. As the US has no national identity card system, the INS may rely on several other documents to establish identity and citizenship.

7.105 The US pointed out that in aviation security, the Federal Aviation Administration has issued a series of security advisories to USA and foreign air carriers to enhance passenger and baggage screening requirements, to establish stricter controls on general aviation and tighten the rules on belly cargo in passenger planes. These measures, along with hardening cockpit doors, have upgraded the security of flights to, from and within the US.

(I) **What legislation, procedures and mechanisms are in place for ensuring asylum seekers have not been involved in terrorist activity before granting refugee status?**

7.106 The US noted that it has several measures to ensure that asylum seekers have not been involved in terrorist activity before it grants them refugee status. A directive issued by President Bush on October 29, 2001 creates a Foreign Terrorist Tracking Task Force strengthening existing procedures. The Task Force will coordinate USA programs to: (1) deny entry of foreign nationals associated with, suspected of being engaged in or supporting terrorist activity; and (2) locate, detain, prosecute, or deport such foreign nationals in the US. The US grants refugee status in two different forms: a) individuals applying from abroad may be admitted as refugees; b) refugees in the USA may be granted asylum, and to be eligible for either status, an applicant must establish that he or she is unable or unwilling to return home because of past persecution or well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The US said that it is a party to the 1967 Protocol Relating to the Status of Refugees, through which it undertook obligations found in the 1951 Convention Relating to the Status of Refugees. US law contains several provisions that, together, implement the grounds for exclusion of refugee status found in the 1951 Convention including denial of refugee status to those involved in terrorist activity.

7.107 The US reported that under US law, those who apply for refugee status from outside the country are generally subject to the same grounds of inadmissibility as other applicants and cannot be granted refugee status if those grounds apply. Under US law, foreign

nationals who engage in terrorist activity are inadmissible, and this provision is enforced in the overseas refugee program through a screening process that relies on applicant interviews by USA immigration officials, checks of appropriate information databases, and security referral procedures to review and investigate cases. Experts provide consultative guidance on questionnaires, biometrics and other security mechanisms to immigration officials who adjudicate refugee protection claims. It was pointed out that slightly different safeguards apply in the domestic program. The law excludes from asylum any person who has engaged or may engage in terrorist activity, who incites terrorist activity, or who is a knowing member of a terrorist organization. Representatives of a terrorist organization, or of certain groups whose endorsement of terrorism undermines US counterterrorism efforts, are also barred from asylum. An individual may also be excluded from asylum if there are good reasons for regarding the individual as a danger to the security of the US, or for believing that the individual has committed a serious non-political crime. US law interpreting the serious non-political crime provisions make clear that, even if the crime involves political motivations, it is considered non-political if it is grossly out of proportion to the political objective, or if it involves acts of an atrocious nature. These provisions are enforced by screening procedures relying on fingerprint and identity checks and on databases that have information on criminal and terrorist activity.

(m) What procedures are in place to prevent the abuse of refugee status by terrorists?

7.108 Once refugee or asylum status has been granted, US law prohibits the abuse of such status by terrorists. The Foreign Terrorist Tracking Task Force created by Presidential Directive in October 2001 coordinates programs to locate, detain, prosecute, or deport foreign nationals in the US who are suspected of being engaged in or supporting terrorist activity. Persons admitted from abroad as refugees are subject to removal from the US if they have engaged, or are engaged, in any terrorist activity, notwithstanding their refugee status, and a refugee is required in every case to submit to inspection by INS at the end of one year. An immigration official examines the refugee to determine whether any grounds of inadmissibility apply and may deny the refugee permanent resident status on terrorism grounds. Similar safeguards ensure terrorists do not abuse asylum. Asylum can be terminated if it is determined that the asylee is subject to any of the bars to asylum, which include specific provisions excluding terrorists, as well as provisions excluding those who have committed serious nonpolitical crimes and those who can reasonably be regarded as a danger to the security of the US. The US pointed out that many modern extradition treaties provide that the political offense exception to extradition is not available for certain criminal offenses associated with terrorism, e.g. murder or other willful crimes against a head of state

or family member and terrorist offenses specified in multilateral international agreements.¹

E. INTERROGATING A SUSPECTED TERRORIST

7.109 Professors John Parry and Welsh White note that reports of abuses in the interrogation of suspected terrorists raise the question of how — or whether — the interrogation of a suspected terrorist should be limited when national security may be at stake.² **They say suppose that federal agents are interrogating an individual whom they suspect of knowing something about terrorist attempts to distribute anthrax through the mail and ask when the agents prepare to question such a person, what restraints does the US Constitution impose on their conduct? They note that just two years ago, the Supreme Court reaffirmed the *Miranda* decision, holding that in order to protect an arrested suspect's Privilege Against Self-incrimination, the police are required to warn the suspect of his or her constitutional rights before questioning him or her. They ask whether the federal agents would be required to give the suspected terrorist *Miranda* warnings, would they be prohibited from seeking information from the suspect if he or she invokes his or her right to remain silent or his or her right to have an attorney present? And, they ask, if the agents do interrogate the suspect, what techniques will they be allowed to employ, and if there is technology that allows them to probe for indications of the suspect's guilty knowledge, will they be allowed to use it? They further note should the suspect refuse to answer questions, what if any, tactics will they be permitted to use to persuade him or her to change his mind?**

7.110 Professors Parry and White explain that the constitutional limitations imposed on police interrogators vary depending on the purpose for which they are seeking information: If the federal agents' questions to the suspect are prompted by an immediate concern for protecting the public — thwarting a new attempt to distribute anthrax, for example — the Supreme Court has held that the agents may question the suspect without first warning him of his *Miranda* rights, moreover, the suspect's answers to such questions may be used not only to avert any immediate threat but as evidence in any subsequent prosecution of the suspect, and even if the suspect makes it clear he does not wish to reveal any information, the police will not be required to cease their interrogation. They remark that the Privilege Against Self-

¹ The US Noted that these treaty provisions are US law and have been applied in a number of cases, and that the US has also signed and expects to ratify in the near future two multilateral terrorism conventions, those relating to Terrorist Bombings and Terrorist Financing, which have the effect of limiting the political offense exception to extradition.

² Professors John Parry and Welsh White "Interrogating a Suspected Terrorist" White University of Pittsburgh School of Law <http://jurist.law.pitt.edu/terrorism/terrorismparry.htm>

incrimination prevents the government from convicting an individual on the basis of information he has been forced to reveal, although the Privilege does not prohibit the police from using tactics that would otherwise be impermissible when they are seeking to obtain potentially life-saving information. Accordingly, they say, when the police are questioning a suspect for the purpose of preventing imminent harm, they would be allowed to use technology to probe the suspect's consciousness, even if the suspect objects, and they would also be allowed to use sophisticated psychologically-oriented interrogation techniques in order to persuade the suspect that it is in his or her interest to disclose information. They point out that tactics designed to induce the suspect's cooperation, such as promises that might otherwise be prohibited, should thus be permitted if the agents are seeking to obtain vital information.

7.111 Professors Parry and White ask if it is accepted that police should be allowed to use otherwise impermissible interrogation tactics when lives are at stake, how far should they be permitted to go, and note that in some countries, use of torture to obtain information from terrorists is an accepted practice, such as in Israel, interrogators used third-degree practices on alleged Palestinian terrorists, some of whom died in custody. They point out that the Supreme Court of Israel recently outlawed these practices, but left open the possibility that torture could be justified in "ticking bomb" situations. They comment that in America, skilled interrogators have generally concluded that the harsh practices associated with the third degree are less effective in obtaining truthful statements than psychologically oriented techniques that are designed to reduce the suspect's resistance by first gaining his rapport and then probing his psyche to find the best means of inducing his cooperation. Professor Parry and White explain that in some situations, however, interrogators might conclude that torture or other extreme tactics might be the best means of securing vital information. They state that recent reports suggest that federal officials are at the point of reaching that conclusion for suspects in the September 11 attacks, having found traditional interrogation tactics to be unsuccessful.

7.112 Professor Parry and White note that torture and other practices associated with the third degree led the Supreme Court to regulate police interrogation practices through the Due Process Clause, and for more than half a century, it has been established that the police are absolutely prohibited from using force, threats of force, excessively protracted questioning, and other forms of physical or mental torture to produce a confession. They point out that prohibition of these practices is a fundamental aspect of the US system of government, and all citizens, whether innocent, suspected or actually guilty, receive the benefit of this protection. They

consider that greater leeway should certainly be given to interrogating officers when they seek to protect public safety, but law enforcement officials should not be allowed to decide for themselves that desperate times call for desperate measures. They point out that the cost of adhering to fundamental safeguards may be high in some situations, but it is the price of upholding the constitutional values that distinguish us from our opponents, and, in order to uphold those values, we must make it clear to the police that they are not permitted to employ abusive interrogation practices, including any form of torture.

F. ANTI-HOAX LEGISLATION

7.113 On December 12, 2001 it was reported that the US House Unanimously Passes Anti-hoax Legislation cracking down on a variety of hoaxes not covered under the then current US law. This legislation would impose civil and criminal penalties to deter and punish a person or persons for perpetrating a hoax that others could reasonably believe is or may be a biological, chemical, or nuclear attack or an attack using some other type of weapon of mass destruction. House Judiciary Committee Chairman F James Sensenbrenner, Jr said, "While our emergency responders and law enforcement are stretched to their limits in responding to real threats, they have had to respond to an increased number of hoaxes. These hoaxes are not meant to be funny; rather they are meant to terrorize and frighten. These hoaxes distract federal, state and local law enforcement, criminal investigators and emergency responders from real crises and real threats. As a result, they place both the public and our national security at risk and must be punished." Those convicted of perpetrating a hoax under H.R. 3209 could be penalized by:

- A. up to five years in prison;
- B. fines of up to \$250,000; and
- C. being responsible for the reimbursement of any emergency or investigative expense due to the hoax.

7.114 It was recently reported that the first trial of a person charged with committing an anthrax hoax has ended in an acquittal, a setback for the Justice Department's efforts to severely punish people who panicked the public and tied up resources with false bioterror attacks.¹ **According to the Washington Post Kinley Gregg, 38, of Maine, was found not guilty of mailing a threatening communication, a crime that could have resulted in five years in prison and a \$250,000 fine. She did not testify but has admitted that she sent**

¹ Cheryl W Thompson "Maine Woman Acquitted In 1st Anthrax Hoax Trial" *Washington Post* 22 February 2002 <http://www.washingtonpost.com>

a letter containing table salt to a friend shortly after the real anthrax attacks last fall. Gregg's attorneys contended that because the letter -- which leaked onto a postal worker at a New Hampshire post office -- contained no threat, Gregg could not be convicted under the federal statute. A jury of seven women and five men deliberated about three hours before agreeing. "What the prosecution really wanted to hammer home was that the people in the United States Postal Service would consider it a threat," said juror Brian Rafferty. "But the person who handled the letter didn't freak out, and they never evacuated the post office. And even as of yesterday, the substance hadn't been tested." Fifty-seven people have been charged with state and federal crimes for allegedly committing bioterrorism hoaxes, according to Justice Department records. At least six have pleaded guilty but have yet to be sentenced. Another hoax suspect, Los Angeles Fire Capt. Christopher Cooper, struck a deal with the government that reduced his crime from a felony to a misdemeanor, according to Thom Mrozek, a spokesman with the US attorney's office in Los Angeles. Cooper is accused of mailing an envelope containing a check covered in powder and inscribed with the words "choke on it," to his ex-wife's lawyer. He allegedly mailed similar envelopes twice before Sept. 11, but those acts went unnoticed and unpunished.

7.115 Gregg acknowledged in a telephone interview that she put a newspaper article and the salt in an envelope, addressed it in block letters, wrapped it in tape and dropped it in the mail to a friend as a joke. It was a "misguided moment," she said. "I specifically chose salt because it was granular, and I thought it would be impossible to mistake it for anything else, certainly nothing that would hang in the air and get into someone's lungs," Gregg said. "It was very spur of the moment." The anthrax hoaxes caused panic in some places, prompted the closure of post offices, stores and banks, and sent hazardous material teams scrambling from site to site in the weeks after letters containing deadly anthrax bacteria were discovered at media and government offices in Florida, New York and Washington. Five people were killed and 13 others sickened in the actual bioterror attacks. With Gregg's acquittal, legal experts questioned whether the Justice Department can successfully carry out its pledge to throw the book at those who committed anthrax hoaxes.

7.116 It was reported that it does show why the government should be careful in not necessarily prosecuting every case that comes in the door, and it shows that juries are not inclined to just convict someone willy-nilly said Michael P. Seng, a professor at the John Marshall Law School in Chicago. Robert Kinsella, an assistant US attorney in New Hampshire who prosecuted the Gregg case, said he was satisfied with the verdict and predicted that it would not hurt the agency's chances of successfully

prosecuting other anthrax hoax cases. "She mailed what she considered to be a joke. We believe it can be a joke as well as a threat under federal law," he said. "Therefore, if it happens again, we will prosecute the case." But jurors said they acquitted Gregg because the government "didn't take the case seriously." "They didn't shut down the post office or have the material tested," said juror Dominic Lea. "You can't take chances like that. The government dropped the ball." The jurors also doubted the testimony of a government witness, a postal employee who handled the envelope containing the substance and said he had an immediate reaction. A co-worker who was with him at the time of the incident said he initially didn't react. Gregg's legal troubles began when the envelope she mailed her friend, Janice Harney, arrived at the post office in Somersworth, N.H., last Oct. 31 and a then-unknown substance leaked from it. Postal inspectors contacted Harney, who called Gregg. A week later, Gregg said she came home to a phone message from a postal inspector telling her that she would be charged in federal court with sending a threatening communication. "This was not a case where she was a terrorist or even a criminal," said Jeffrey Weinstein, one of Gregg's lawyers. "She sent a joke to a friend and got caught in a circumstance."

G. LEGISLATIVE MEASURES EXITING PRIOR TO SEPTEMBER 2001

7.117 The US Code contains numerous provisions which aim to protect the security interests of the United States. The following chapters from Title 18 of the Code contain some of the most important provisions in this regard, i.e.:

ρ	Chapter 115	-	Treason, sedition and subversive activities;
ρ	Chapter 113B	-	Terrorism;
ρ	Chapter 105	-	Sabotage;
ρ	Chapter 84	-	Presidential and presidential staff assassination, kidnapping and assault;
ρ	Chapter 18	-	Congressional, cabinet and supreme court assassination, kidnapping and assault;
ρ	Chapter 51	-	Homicide;
ρ	Chapter 55	-	Kidnapping;
ρ	Chapter 41	-	Extortion and threats;
ρ	Chapter 12	-	Civil disorders;
ρ	Chapter 81	-	Piracy and privateering;
ρ	Chapter 39	-	Explosives and other dangerous articles;
ρ	Chapter 10	-	Biological weapons.

7.118 The US has over the past years enacted various anti-terrorist legislation to address various aspects of terrorism, improve the prosecution of terrorists and provide for increased penalties for terrorist crimes. The latest comprehensive legislation which congress passed is the *Antiterrorist and Effective Death Penalty Act* of 1996. The Act, inter alia, provides for -

- habeas corpus reform;
- defendants convicted of terrorist crimes to make restitution to victims;
- a prohibition on providing material support or resources to foreign terrorist organizations;
- the removal and exclusion of alien terrorists;
- the necessary means and the maximum authority permissible under the Constitution to combat the threat of nuclear contamination and proliferation that may result from the illegal possession of radioactive materials;
- the implementation of the *Plastic Explosives Convention*;
- increased penalties and offences relating to terrorism.

7.119 The provisions of Chapter 113B of the US Code, as amended by the *Antiterrorism and Effective Death Penalty Act* of 1996, specifically deal with terrorism, with the emphasis on international terrorism. Section 2332 makes provision for criminal penalties in cases where a national of the US is killed outside the US, where a person outside the US attempts or conspires to kill a US national and where persons outside the US engage in physical violence with intent to cause serious bodily injury to a national of the US, or with the result that serious bodily injury is caused to a national of the US. Provision is made for the death penalty in cases of murder, life imprisonment in cases of conspiracies to commit murder, and fines and terms of imprisonment in other cases. No prosecution in terms of this section may be undertaken except on written certification of the Attorney General that in his judgement the offence was intended to coerce, intimidate, or retaliate against a government or a civilian population. Sections 2332a and c deal with the use of weapons of mass destruction and chemical weapons. A person who uses these weapons against a US national while such national is outside of the US, or any person within the US, or any property of the US, whether the property is within or outside of the US can be imprisoned for life, or if death results, be punished by death.

7.120 Acts of terrorism transcending national boundaries are punishable in terms of section 2332b of the US Code. Whoever, involving conduct transcending national boundaries kills, kidnaps, maims, assaults resulting in serious bodily injury or with a dangerous weapon any person in the US, or creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure shall be punished - if death results, by death or

imprisonment for any term of years or life. This prohibition requires a jurisdictional base, for example: The structure damaged/destroyed is owned or possessed by the US or any US department/agency; and the victim is a US official. The prosecution is, however, not required to prove knowledge by the defendant of the alleged jurisdictional base. Section 2332b(f) provides that the Attorney General shall have primary investigative responsibility for all Federal crimes of terrorism. A “federal crime of terrorism” is defined as an offense that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, and is a violation of a number of crimes listed, e.g. - arson, bombings, hostage taking, destruction of aircraft facilities, etc.

7.121 In terms of section 2332d it is an offense for US persons (including juridical persons) to engage in a financial transaction with a government of a country, designated as a country supporting international terrorism. Provision is made for a fine or imprisonment for not more than ten years, or both. Section 2339B prohibits the provision of material support to foreign terrorist organizations and also compels financial institutions that become aware that it has possession of, or control over, funds in which a foreign terrorist organization has an interest, to retain possession thereof and to report the existence of such funds. Provision is made for civil penalties in cases where financial institutions fail to comply and a fine or imprisonment not more than ten years in cases of unlawful provision of support.

7.122 Hostage taking is closely associated with the issue of terrorism and the provisions of section 1203 of the US Code illustrates the point. Section 1203 stipulates that whoever, whether inside or outside the US, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implied condition for the release of the persons detained shall be punished by imprisonment for any term of years and, if death of any person results, shall be punished by death or life imprisonment. Provision is made for exceptions:

- (i) It is not an offense under this section if the conduct required occurred outside the US unless the offender or person seized is a US national, the offender is found in the US or the governmental organization sought to be compelled is the Government of the US.
- (ii) It is not an offense under this section if the conduct required for the offence occurred inside the US, each alleged offender and each person seized are US nationals, and each offender is found in the US, unless the governmental organization sought to be compelled is the Government of the US.

7.123 Section 3071 of the US Code provides that with respect to acts of terrorism primarily within the jurisdiction of the US, the Attorney General may reward any individual who furnishes information -

- ρ leading to the arrest or conviction, in any country, of any individual or individuals for the commission of an act of terrorism against a US person or US property; or
- ρ leading to the arrest or conviction in any country of any individual or individuals for conspiring or attempting to commit an act of terrorism against a US person or property.

7.124 An “act of terrorism” is defined as an activity that -

- (a) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the US or of any State, or that would be a criminal violation if committed within the jurisdiction of the US or any State; and
- (b) appears to be intended -
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by assassination or kidnapping.

7.125 Section 3286 extends the period during which a person can be prosecuted for non-capital terrorism offenses. The indictment must be found or the information must be instituted within 8 years after the offense was committed. The period would normally be five years. The US Congress has passed legislation to afford greater protection to foreign officials, official guests and internationally protected persons. Chapters in the US Code dealing with homicide, kidnapping, assault, extortion and threats now specifically provide for crimes committed against the abovementioned categories of persons. Section 112(a) of the US Code, for example, provides that whoever assaults, strikes, imprisons or offers violence to a foreign official, official guest or internationally protected person or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined under this title or imprisoned not more than three years, or both. In cases where a deadly or dangerous weapon was used, or bodily injury was inflicted, provision is made for a fine or imprisonment of not more than ten years or both. A threat of assault in violation of this section is punishable in terms of section 878 of the US Code with a fine or imprisonment not more than

three years, or both.

7.126 Section 970 of the US Code aims to protect property occupied by foreign governments and provides, inter alia, that whoever wilfully injures or destroys, or attempts to injure, damage, or destroy, any property, real or personal located within the United States and belonging to or utilized or occupied by any foreign official or official guest, shall be fined under this title, or imprisoned not more than five years, or both. Section 1030 of the US Code aims to protect protected computers from unauthorized access and damage. "Protected computer" means a computer used by a financial institution or the US Government. Impairment to the integrity or availability of a system or information that threatens public health or safety qualifies as "damage" in terms of this provision. Section 1030 provides for a number of offenses in connection with computers.

7.127 Chapter 207 of the US Code provides for the detention of defendants. In terms of section 3142 of the US Code a judicial officer must order the detention of a person before trial if he finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person or the community. Section 3143 contains similar provisions regarding the detention of defendants pending sentence or appeal.

7.128 Finally, Amnesty International recently pointed out in their report on the USA that allegations of torture, brutality, unjustified shootings and cover-ups involving members of the Chicago Police Department have surfaced repeatedly over the past ten years and that many of the issues reflect national patterns of concern, as documented in Amnesty International's reports¹. **Amnesty International stated that although Police Superintendent Terry Hillard has introduced some reforms, the city and police department have failed to implement the detailed monitoring or oversight systems adopted by some other large police agencies in recent years. Amnesty International recently remarked that it believes that videotaping interrogations can be an important safeguard against ill-treatment, a view endorsed by other international human rights bodies.² They noted that in 1998, the United Nations (UN) Special Rapporteur on Torture strongly recommended that the Spanish Government consider video-recording police interrogations as a means of protecting both detainees and law enforcement officers who may be falsely accused of torture or ill-treatment. Amnesty International also**

¹ Amnesty International points to *Rights For All* (October 1998, AI Index AMR 51/35/98) and *Race, Rights and Police Brutality* (September 1999, AI Index AMR 51/147/99) see <http://www.amnesty.org/ailib/aipub/1999/SUM/25114799.htm>

² <http://www.amnesty.org/ailib/aipub/1999/AMR/25116899.htm>

pointed out that the European Committee for the Prevention of Torture (CPT) has recommended that the electronic recording of police interviews in Switzerland, Belgium and France serve as a guarantee for people deprived of their liberty and as facilitating the investigation of allegations of ill-treatment.

7.129 In 1998 Amnesty International also recommended in regard to international human rights standards and in order to live up to its stated commitment to universal human rights, the USA should:³

- Ratify, without reservations, human rights treaties that it has not yet ratified, in particular the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights, the Convention relating to the status of refugees, the American Convention on Human Rights and other Inter-American human rights treaties.
- Withdraw its reservations to the International Covenant on Civil and Political Rights and the Convention Against Torture, in particular those that restrict the implementation of Articles 6 and 7 of the International Covenant on Civil and Political Rights and Articles 1, 3 and 16 of the Convention against Torture. It should also withdraw reservations that restrict the USA's fulfilment of international obligations in its domestic law.
- Ratify the first Optional Protocol to the International Covenant on Civil and Political Rights (allowing the right of individual petition to the Human Rights Committee) and recognize the competence of the Committee against Torture to receive and act on individual cases; on ratification of the American Convention on Human Rights, recognize the competence of the Inter-American Court of Human Rights.
- Submit to the Committee against Torture the USA's initial report on its implementation of the Convention against Torture, which was due in November 1995.
- Support an Optional Protocol to the Convention on the Rights of the Child which prohibits the recruitment of people under 18 years of age into governmental or non-governmental armed forces and their

³ <http://www.amnesty.org/ailib/aipub/1998/AMR/25104698.htm>

participation in hostilities.

CHAPTER 8

CANADA

A. LEGISLATIVE MEASURES IN CANADA

8.1 Legislative measures were introduced in Canada on 15 October 2001 as a result of the attacks on the USA on 11 September 2001.¹ **The *Anti-Terrorism Act* amends the**

¹ See Bruce Cheadle "New bill called anti-democratic" *The Canadian Press* Monday, October 15, 2001 "Sweeping new anti-terrorism legislation will do little to make Canada safer, say some civil libertarians, but it could undermine basic freedoms that help define the country. "Remember, this is all about preserving our way of life, in which we regard liberty as a prime example," said Alan Gold, president of the Ontario Criminal Lawyers Association. "We don't want to turn into a police state. To turn into a police state in the name of liberty is bizarre." Justice Minister Anne McLellan introduced the legislation in the Commons on Monday, barely a month after terrorist attacks in Washington and New York claimed more than 5,000 lives and rocked public confidence in domestic security. McLellan said she fully expects court challenges of some aspects of the massive, 170-page omnibus bill. But she said the government is "very comfortable going into any court in this country" to justify some of the legislation's unprecedented measures. "Keep in mind that the Charter of Rights and Freedoms does not suggest for a minute that any of the rights therein are absolute . . .," said McLellan. "People who live in daily fear of their personal security and safety cannot live in a free and democratic society. That fear starts to eat away and erode at the very underpinnings of democracy." But some of the bill's new provisions could also erode democracy, say civil libertarians. They cite new rules that:

- (a) Permit the arrest of individuals without warrant if it's believed that would prevent terrorist activity.
- (b) Compel people to provide information related to terrorism to an investigating judge without charges laid or a crime having been committed.
- (c) Reduce safeguards on obtaining and extending warrants for wiretaps.
- (d) Make it illegal to "facilitate" terrorist activity.

Even the government's much-touted definition of terrorist activity itself came under fire. In the past, Nelson Mandela and the African National Congress would have been terrorists under the definition, said Alan Borovoy of the Canadian Civil Liberties Association, while today the Kurds of Iraq would likely qualify in their battle against Saddam Hussein's repression. "I am hard-pressed to appreciate why all this has been considered necessary because I'm very aware of the considerable power that already exists," said Borovoy. He added some of the relaxed rules for police surveillance are simply "a gratuitous undermining of safeguards" that will do nothing to help apprehend terrorists. Most of the political response to the legislation was more muted. NDP House leader Bill Blaikie said his party seeks public input but the New Democrats would like to see that "the legitimate rights of Canadians to domestic political dissent are not in any way threatened or curtailed." Conservative Peter MacKay said he believes the bill achieves a balance between civil liberties and security, although he noted some concern about preventive arrest. "I suggest strongly (such detention) will have to be coupled with training, with followup with municipal and RCMP and military police to ensure there are no abuses . . .," he said in the Commons. Simon Potter, first vice-president of the Canadian Bar Association, said his group wants to work with the government to curb the legislation's more draconian possibilities — such as 14-year prison terms for facilitating terrorist activity. "We're going to have to make sure these things are defined appropriately so that a travel agent doesn't suddenly find himself or herself a criminal — so that people know when it is they're breaking the law," said Potter. The bar association is also concerned about the unprecedented creation of judicial investigatory hearings. "It is very, very new in Canada to imagine that someone can be compelled to come before a judge and testify about events or activities without there being any ongoing case, civil or

Criminal Code, the *Official Secrets Act*, the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering) Act* and a number of other Acts, and enacts the *Charities Registration (Security Information) Act*, in order to combat terrorism. Part 1 of the Act amends the *Criminal Code* to implement international conventions related to terrorism, to create offences related to terrorism, including the financing of terrorism and the participation, facilitation and carrying out of terrorist activities, and to provide a means by which property belonging to terrorist groups, or property linked to terrorist activities, can be seized, restrained and forfeited. It also provides for the deletion of hate propaganda from public web sites and creates an offence relating to damage to property associated with religious worship. Part 2 amends the *Official Secrets Act*, which becomes the *Security of Information Act*. It addresses national security concerns, including threats of espionage by foreign powers and terrorist groups, economic espionage and coercive activities against émigré communities in Canada. It creates new offences to counter intelligence-gathering activities by foreign powers and terrorist groups, as well as other offences, including the unauthorized communication of special operational information.

8.2 Part 3 of the Act amends the *Canada Evidence Act* to address the judicial balancing of interests when the disclosure of information in legal proceedings would encroach on a specified public interest or be injurious to international relations or national defence or security. The amendments impose obligations on parties to notify the Attorney General of Canada if they anticipate the disclosure of sensitive information or information the disclosure of which could be injurious to international relations or national defence or security, and they give the Attorney General the powers to assume carriage of a prosecution and to prohibit the disclosure of information in connection with a proceeding for the purpose of protecting international relations or national defence or security. Part 4 amends the *Proceeds of Crime (Money Laundering) Act*, which becomes the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. The amendments will assist law enforcement and investigative agencies in the detection and deterrence of the financing of terrorist activities, facilitate the investigation and prosecution of terrorist

criminal," said Potter. While the specifics of the Sept. 11 attacks may make such investigations attractive, he said, "you can also easily imagine you don't want that power leaking over the edges into our normal daily lives." One critic privately likened the judicial investigations to "summoning people before Star chambers, it rings bells of inquisition." Most civil libertarians agree the anti-terrorism measures serve a political agenda but may do little to enhance domestic security itself. "There's demonstrated need for more police work to gather evidence and locate people that are responsible, there's no doubt about that," said Gold. "But I'm not sure there's a demonstrated need for more legislation." Added Potter: "Some people have been willing to jump into a very deep end on the basis of contemporaneous events. We want to confront the danger of us going much further than is necessary."

activity financing offences, and improve Canada's ability to cooperate internationally in the fight against terrorism. Part 5 amends the *Access to Information Act*, *Canadian Human Rights Act*, *Canadian Security Intelligence Service Act*, *Corrections and Conditional Release Act*, *Federal Court Act*, *Firearms Act*, *National Defence Act*, *Personal Information Protection and Electronic Documents Act*, *Privacy Act*, *Seized Property Management Act* and *United Nations Act*. The amendments to the *National Defence Act* clarify the powers of the Communications Security Establishment to combat terrorism. Part 6 enacts the *Charities Registration (Security Information) Act*, and amends the *Income Tax Act*, in order to prevent those who support terrorist or related activities from enjoying the tax privileges granted to registered charities.

8.3 It was explained that the proposed *Anti-Terrorism Act* includes measures to identify, prosecute, convict and punish terrorists, such as:

- defining and designating terrorist groups and activities to make it easier to prosecute terrorists and those who support them;
- making it an offence to knowingly participate in, contribute to or facilitate the activities of a terrorist group or to instruct anyone to carry out a terrorist activity or an activity on behalf of a terrorist group;
- making it an offence to knowingly harbour a terrorist;
- creating tougher sentences and parole provisions for terrorist offences;
- cutting off financial support for terrorists by making it a crime to knowingly collect or give funds, either directly or indirectly, in order to carry out terrorism, denying or removing charitable status from terrorist groups, and by making it easier to freeze and seize their assets; and
- ratifying two UN anti-terrorism conventions, the *International Convention for the Suppression of the Financing of Terrorism* and the *International Convention for the Suppression of Terrorist Bombings*, as well as the *Safety of United Nations and Associated Personnel Convention*.

8.4 The Bill would give law enforcement and national security agencies new investigative tools to gather knowledge about and prosecute terrorists and terrorist groups, as well as protect Canadians from terrorist acts, including:

- making it easier to use electronic surveillance against terrorist groups;
- creating new offences targeting unlawful disclosure of certain information of national interest;
- amending the *Canada Evidence Act* to guard certain information of national interest from disclosure during courtroom or other judicial proceedings;
- amending the *National Defence Act* to continue and clarify the

- mandate of the Communications Security Establishment (CSE) to collect foreign communications;
- within carefully defined limits, allowing the arrest, detention and imposition of conditions of release on suspected terrorists to prevent terrorist acts and save lives;
- requiring individuals who have information related to a terrorist group or offence to appear before a judge to provide that information; and
- extending the DNA warrant scheme and data bank to include terrorist crimes.

8.5 It was explained that these necessary measures target people and activities that pose a threat to the security and well being of Canadians. It was said that this is a struggle against terrorism, and not against any one community, group or faith. Diversity is one of Canada's greatest strengths, and the Government of Canada is taking steps to protect it. Measures were included in the Bill to address the root causes of hatred and to ensure Canadian values of equality, tolerance and fairness are affirmed in the wake of the September 11 attacks. These include:

- amending the *Criminal Code* to eliminate online hate propaganda and create a new offence of mischief against places of religious worship or religious property; and
- amending the *Canadian Human Rights Act* to extend the prohibition against hate messages beyond telephone messages to include all telecommunications technologies.

8.6 It was said that the proposed *Anti-Terrorism Act* includes rigorous checks and balances in order to uphold the rights and freedoms of Canadians, such as, for example, the scope of *Criminal Code* provisions which was considered to be clearly defined to ensure that they only apply to terrorists and terrorist groups. The Act was also to be subject to a Parliamentary review in three years. It was considered that the scope of the proposed *Anti-Terrorism Act* is consistent with Canada's legal framework, including the *Canadian Charter of Rights and Freedoms*, the requirement for due process, and the consent of the Attorney General and judicial review where appropriate, and that these measures are also in keeping with actions taken by Canada's international partners against terrorism. "The measures we are introducing strike the right balance between civil liberties and national security, and signal our resolve to ensure that Canadians will not be paralyzed by acts of terrorism," said Minister McLellan. The Act builds on Canada's longstanding and continuing contribution to the global campaign against terrorism. Under the *Criminal Code*, terrorists can already be prosecuted for hijacking, murder and other acts of violence. Canadian courts also have the jurisdiction to try a number of terrorist crimes

committed abroad to ensure that terrorists are brought to justice, regardless of where the offence was committed. Canada has already ratified 10 of 12 United Nations counter-terrorism conventions and, with this bill, will be able to ratify the remaining two. The proposed legislation also builds on regulations introduced by the Government of Canada on October 3, 2001 following a UN Security Council resolution, to cut terrorists off from their financial support.

8.7 On 8 December 2001 it was announced that the Anti-Terrorism Act received Royal Assent. It was explained that the new measures are a part of the Government's Anti-Terrorism Plan which takes aim at terrorist organizations and strengthens investigation, prosecution and prevention of terrorist activities at home and abroad. Anne McLellan, Minister of Justice and Attorney General of Canada said that this legislation strikes at the new face of modern terrorism that was seen in the horrific events of September 11. She remarked that it reassures Canadians and its allies that Canada is serious about dealing with this long term threat to its peace and human security through effective laws that safeguard Canadian rights and freedoms,¹ including the most fundamental right to live in a secure and peaceful society." The provisions under Bill C-36 would come into force soon after measures for implementation have been arranged with the provinces, territories, police and others responsible for enforcement.

8.8 It was explained that since the introduction of Bill C-36, the Government of Canada has listened carefully to the concerns of Canadians to ensure that the anti-

¹ See "Canada defies U.S. on PoWs" *Globe and Mail* 17 January 2002 <http://www.globeandmail.com/> where it was noted that the first Canadian troops have arrived in Kandahar to find their freedom of movement could be limited by a looming dispute with the United States over the treatment of prisoners, and that the Canadian federal government said that Canada will treat all prisoners of war in Afghanistan according to international law. It was reported that growing criticism around the world accuses the United States of ignoring Geneva Convention rules on Prisoner of War treatment as it moves the men it captured to a U.S. naval base in Cuba. See also "Detainees are prisoners of war, UN says" 16 January 2001 *Global and Mail*"; Canada seeking clarification on prisoners" 5 February 2002 <http://www.washingtontimes.com> (where it was reported that Canada is seeking clarification from the United States on how Washington decides whether Taliban or al Qaida fighters captured in Afghanistan are prisoners of war or unlawful combatants); on 22 January 2002 that Liberal MP JOHN GODFREY questions his government's decision to hand over prisoners of war without guarantees under the Geneva Convention in "Prisoners of conscience?" [http://www.globeandmail.com](http://www.globeandmail.com;);

terrorism legislation meets their needs. Canadians want measures that will protect their security and they support strong laws that deal effectively with terrorism. Canadians also want assurances that safeguards are in place to protect their rights and freedoms. It was considered that the provisions in the *Anti-Terrorism Act* meet the need for protection of both human security and human rights. The *Anti-Terrorism Act* includes measures to deter, disable, identify, prosecute, convict and punish terrorists, such as:

- defining and designating terrorist groups and activities to make it easier to prosecute terrorists and those who support them;
- making it an offence to knowingly participate in, contribute to or facilitate the activities of a terrorist group or to instruct anyone to carry out a terrorist activity or an activity on behalf of a terrorist group or to knowingly harbour a terrorist; and
- cutting off financial support for terrorists by making it a crime to knowingly collect or give funds, either directly or indirectly, in order to carry out terrorism, denying or removing charitable status from those who support terrorist groups, and by making it easier to freeze and seize their assets.

8.9 The Act will give law enforcement and national security agencies new investigative tools to gather knowledge about and prosecute terrorists and terrorist groups, as well as protect Canadians from terrorist acts, including:

- enhancing the ability to use electronic surveillance against terrorist groups with measures similar to those already in place for organized crime investigations;
- within carefully defined limits, allowing the arrest and imposition of supervisory conditions of release on suspected terrorists to prevent terrorist acts and save lives; and
- requiring individuals who have information related to a terrorist group or offence to appear before a judge to provide that information.

8.10 Measures have been included in the Act to address the root causes of hatred and to ensure Canadian values of equality, tolerance and fairness are affirmed in the wake of the September 11 attacks. These include:

- amending the *Criminal Code* to eliminate online hate propaganda

and create a new offence of mischief against places of religious worship or religious property; and

- amending the *Canadian Human Rights Act* to clarify that the prohibition against spreading repeated hate messages by telephonic communications includes all telecommunications technologies.

8.11 It was stated that the *Anti-Terrorism Act* contains rigorous safeguards to uphold the rights and freedoms of Canadians, which were further strengthened as a result of recommendations made by the House of Commons and Senate committees that studied the bill.¹ These safeguards include:

¹ Jim Brown "McLellan to curb on anti-terrorist powers: Not all critics satisfied" 21 Nov 2001 <http://www.canoe.ca/Canoe/canoe/news.html> reported that Justice Minister Anne McLellan, bowing to widespread criticism, agreed to rewrite landmark anti-terrorist legislation and impose a five-year sunset clause on the most contentious new police powers and that she acknowledged at the Commons justice committee that certain aspects of Bill C-36 have given rise to some concern. He noted that much of the criticism during a month of hearings centred on provisions that would allow police to arrest suspects before they have committed an actual crime, hold them without charge for up to 72 hours and force them to testify at investigative hearings. He also reported that the Canadian Alliance wants McLellan to outlaw simple membership in terrorist groups. The bill currently zeroes in on terrorist actions and does not criminalize membership itself, due to fears that would infringe the Charter of Rights.

- **the Attorney General and Solicitor General of Canada, provincial Attorneys General and Ministers responsible for policing will be required to report annually to Parliament on the use of the preventive arrest and investigative hearing provisions in Bill C-36. In addition, the whole Act will be subject to a Parliamentary review in three years;¹**
- **provisions in the Act dealing with preventive arrest and investigative hearing powers will sunset after five years unless a resolution is passed by both the House of Commons and Senate to extend either or both of these powers for up to five more years.² A provision will also be added to grandfather proceedings that have already started prior to the sunset date so that they can be completed, if the powers are not extended;³**

¹ It was explained that the Government of Canada is also tabling an amendment requiring the Attorney General and Solicitor General of Canada, provincial Attorneys General and Ministers responsible for policing, to table an annual report to Parliament on the use of preventive arrest and investigative hearings. The *Criminal Code* and other federal laws already require reports to Parliament on the exercise of certain powers, and Bill C-36 itself already requires the Commissioner of the Communications Security Establishment to report annually on the activities of the CSE to the Minister of National Defence, who then tables the report in Parliament. An annual reporting requirement on the operation of the *Anti-Terrorism Act* would help the Government of Canada and the provinces to monitor the use of preventive arrest and investigative hearings. The annual reports would also help to inform the Parliamentary review of the legislation within three years, which is already required by Bill C-36, by providing information on where refinements may be necessary.

² David Gamble says in "Sun to set on anti-terror legislation" 21 November 2001 http://www.canoe.ca/CNEWSAttack011121/21_sunset-sun.html that unease was raised about sections of the bill that would allow publication bans at terrorist trials on the names of key witnesses and police investigators — and even jurors, judges, Crown prosecutors and defence lawyers, that it's a big step toward a secret proceeding. It was argued that public trials are a hallmark of democracy, and the Government is whittling away at it. According to a Justice Department official the anti-terrorist bill does no such thing, proceedings would remain open, journalists could cover them and participants would be identified in the court record as usual, the bill merely allows for a ban on media reporting of names in exceptional cases and if people are judged to be in danger, and the same provisions were included in organized crime legislation designed to combat biker gangs and other criminal networks. He also says there was concern in the legal community about other provisions that would let the government refuse to disclose evidence at trial if it would reveal intelligence sources or other sensitive information, but the Department of Justice said that would merely mean the evidence cannot be used in court at all. As an additional safeguard, the bill provides that if an accused person's right to a fair trial is compromised by government secrecy, the presiding judge can stay proceedings, and this is not going to be a situation where evidence heard in secret can be used to convict somebody.

³ What the provisions in the proposed *Anti-Terrorism Act* do was explained as follows: Under the "preventive arrest" provisions of the proposed *Anti-Terrorism Act*, suspected terrorists could be arrested and judicial supervisory conditions of release imposed where appropriate, in order to prevent terrorist activity and protect the lives of Canadians. Preventive arrest would allow a peace officer to arrest and bring a person before a judge to impose reasonable supervisory conditions if there are reasonable grounds to suspect that the person will commit a terrorist activity. A warrant of arrest and consent of the Attorney General would be required except in emergency circumstances, and the person would have to be brought before a judge within 24 hours of an arrest. Under the "investigative hearing" provisions, individuals with

- the scope of *Criminal Code* provisions is clearly defined to ensure that they only apply to terrorists and terrorist groups; and
- the *Anti-Terrorism Act* is consistent with Canada's legal framework, including the *Canadian Charter of Rights and Freedoms*, the requirement for due process, and the consent of the Attorney General and judicial review where appropriate.

8.12 The third key amendment to the Bill dealt with the definition of terrorist activity. Justice Minister Anne McLellan explained that the original definition of terrorist activity contained in the Bill⁴ related to disruption of essential services would be

information relevant to an ongoing investigation of a terrorist crime would be required to appear before a judge to provide that information. This would require the consent of the Attorney General. This provision would increase the ability of law enforcement to effectively investigate and obtain evidence about terrorist organizations, subject to legal safeguards to protect the witness, for example, from self-incrimination. The rationale for the amendment was explained as follows: The threat of terrorism is not a temporary one. The additional powers of preventive arrest and investigative hearings in Bill C-36 are designed to provide preventive tools that will be needed for the foreseeable future. They have also been carefully designed to ensure they meet the requirements of the *Charter of Rights and Freedoms*. The current provisions in C-36 are in keeping with and, in some ways, significantly more restrained, than those proposed by other countries. For example, U.S. law allows grand jury hearings in criminal matters, not just terrorism-related investigations. Grand jury witnesses can be compelled to testify, and material witnesses can be detained if this is necessary to ensure their appearance before the grand jury. Under the U.K.'s *Terrorism Act 2000*, an officer can question a person about a recent incident that endangered life, and it is an offence not to answer. A suspected terrorist can also be arrested and detained without warrant for an initial period of 48 hours, which can be extended for up to five days with judicial approval. The powers in Bill C-36 are not based on new concepts in Canadian law. The *Competition Act* and the *Mutual Legal Assistance in Criminal Matters Act* contain investigative hearing powers. The preventive arrest procedure is similar to existing provisions concerning peace bonds in the *Criminal Code*, which permit a judge to impose supervisory conditions on persons whom it is feared will commit certain types of violent offences. However, these new powers have been perceived by many Canadians as exceptional extensions of law enforcement powers that hold the potential for abuse. In light of these concerns, the Government of Canada is proposing a five-year sunset clause for these provisions and a parallel resolution procedure for continuation so that these powers could be reconsidered by Parliament after they have been in effect for a few years. In doing so, Parliament would have the opportunity to determine if these new powers are working as they were intended, and, if they are still needed given a continued threat of terrorism, extend their use for up to five more years. The grandfathering of proceedings that have already commenced when the powers sunset is important to ensure that, if no Parliamentary resolution is passed, law enforcement's efforts to identify and prosecute terrorists, and those who support them, are not lost when the powers expire and investigative proceedings have not been completed.

4

“Terrorist activity” means

(a) an act or omission committed or threatened in or outside Canada that, if committed in Canada, is one of the following offences:

- the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,
- the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971,

-
- the offences referred to in subsection 7(3) that implement the *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 December 14, 1973,
 - the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979,
 - the offences referred to in subsection 7(3.4) or (3.6) that implement the *Convention on the Physical Protection of Nuclear Material*, done at Vienna and New York on March 3, 1980,
 - the offences referred to in subsection 7(2) that implement the *Protocol for 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 February 24, 1988,
 - the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988,
 - the offences referred to in subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,
 - the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and
 - the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of Terrorist Financing*, adopted by the General Assembly of the United Nations on December 9, 1999, or
- an act or omission, in or outside Canada,
- that is committed
 - in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside Canada, and
 - (ii) that is intended
 - to cause death or serious bodily harm to a person by the use of violence,
 - to endanger a person's life,
 - to cause a serious risk to the health or safety of the public or any segment of the public,
 - to cause substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C) and (E), or
 - to cause serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in any of clauses (A) to (C),
- and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or 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

changed to delete the word "lawful."⁵ This would *ensure that protest activity, whether lawful or unlawful, would not be considered a terrorist activity* unless it was intended to cause death, serious bodily harm, endangerment of life, or serious risk to the health or safety of the public. It is explained that one of the main concerns that has been expressed relates to the exclusion of "lawful advocacy, protest, dissent or stoppage of work" from the scope of the definition. The Canadian Government said that it has always been the Government's intent that lawful democratic dissent and advocacy be protected and excluded from the definition. Some have questioned whether, because of the use of the word "lawful", the definition might be construed and interpreted such that activities of this type that include unlawful activities, such as assault, trespass and minor property damage, might amount to terrorism. The Government acknowledged that it has further examined this provision, that it agrees that the provision could be misinterpreted, and therefore the Government proposed to remove the word "lawful". This would not have the effect of making otherwise unlawful protests lawful, it would, however, clarify that this specific exclusion from the definition of "terrorist activity" applies whether or not the advocacy, protest, dissent or stoppage of work is lawful. What is important is whether the activities meet the high standards of the definition of "terrorist activity", and not whether the particular activity is lawful or, not, under some other law. For similar reasons, the Government would propose other minor amendments to the definition to clarify that an expression of political, religious or ideological beliefs alone is not a "terrorist activity," unless it is part of a larger conduct that meets all of the requirements of the definition of "terrorist activity, including that it is intended to intimidate the public or compel a government, and intentionally causes death or serious physical harm to people. The Government also undertook to clarify that the illegal acts of a few cannot be construed to taint the legitimacy of other protestors.

8.13 Justice Minister Anne McLellan said that the Canadian Government also noted that another concern that has been raised in Committee and elsewhere, about the definition of terrorist activity is the possibility that the anti-terrorist enforcement measures in the Bill could be used to target particular cultural, religious or ethnic groups. The Minister of Justice remarked that Government must be very sensitive to

“terrorist group” means

- an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or
 - a listed entity,
- and includes an association of such entities.

⁵ “Amendments to the *Anti-Terrorism Act*”
http://canada.justice.gc.ca/en/news/nr/2001/doc_27904.html

this criticism and to the feelings of Canadians who have no connection at all with terrorist activity, but who nevertheless may feel that they have come under suspicion merely because of their cultural, religious or ethnic backgrounds. She noted that it has been suggested that part of the difficulty in this regard is posed by the use of the words "political, religious, or ideological purpose, objective or cause" which refers to the motivations for terrorist activity in the definition. She said she did not agree with this as in no way do these words target any particular cultural, religious or ethnic groups or political or ideological causes. She considered that the words rather recognize the various motivations that underlie the unacceptable activities that are set out in the definition of terrorism in Bill C-36. She remarked that the words are limiting words that help to distinguish terrorist activities from other forms of criminality that are intended to intimidate people by the use of violence, and that these words are important to appropriately define and limit the scope of Bill C-36 to deal with terrorism. She nevertheless believed that Government can and should take additional measures to help ensure that the enforcement provisions in the Bill are not interpreted or applied in a discriminatory manner or in a manner that would suppress democratic rights. She explained that the government would therefore propose the addition of a new provision that will stipulate, for greater certainty, that the definition of terrorist activity would not apply to the expression of political, religious or ideological ideas that are not intended to cause the various forms of harm set out in the definition. An interpretive clause would also be added to the Bill stating for greater clarity that an expression of political, religious or ideological beliefs alone is not a "terrorist activity," unless it is part of a larger conduct that meets all of the requirements of the definition of "terrorist activity." (i.e. conduct that is committed for a political, religious or ideological purpose, is intended to intimidate the public or compel a government, and intentionally causes death or serious physical harm to people.)

8.14 The Minister explained that the provisions in the proposed *Anti-Terrorism Act* would do the following:

- Bill C-36 defines *terrorist activity* in the *Criminal Code* as an action that takes place either within or outside of Canada that:
 - is an offence under one of 10 UN anti-terrorism conventions and protocols; or
 - is taken for political, religious or ideological purposes and intimidates the public concerning its security, or compels a government to do something, by intentionally killing, seriously harming or endangering a person, causing substantial

property damage that is likely to seriously harm people or by seriously interfering with or disrupting an essential service, facility or system.

8.15 Justice Minister Anne McLellan noted that the definition currently makes it clear that disrupting an essential service is not a terrorist activity if it occurs during a lawful protest or a work strike and is not intended to cause death or serious harm to persons. She explained the rationale for the amendment as follows: Many Canadians are concerned that the expression of political, religious or ideological beliefs would be targeted by the definition of "terrorist activity," and others are concerned that the definition, as currently worded, would capture all unlawful protest activity, including relatively minor acts such as vandalism and property damage, under the terrorism umbrella. She explained that it is important to preserve a definition of terrorism so that it recognizes the unique and insidious nature of this activity. Removing the notion of political, religious or ideological motivation would transform the definition from one that is designed to recognize and deal strongly with terrorism to one that is not distinguishable from a general law enforcement provision in the *Criminal Code*. Further, other Western democracies have recognized the need to identify political, religious or ideological motivation in relation to terrorist acts. The U.K. *Terrorism Act 2000*, for example, defines terrorism as the use or threat of action where it is made "for the purpose of advancing a political, religious or ideological cause." Moreover, this clause in the definition must be applied in association with the other elements of the definition. It is not enough for an act to be an expression of political, religious or ideological belief. It must also be committed for a political, religious or ideological purpose, and it must also intentionally cause death or serious injury, and it must also have the intent to intimidate the public or compel a person, organization or government to do something. Adding an interpretive clause clarifies that the paragraphs should not be read in isolation and will ensure that the powers available under the proposed Anti-Terrorism Act would not be used to discriminate against any individual or group on the basis of religious, political or ideological belief alone. The Government of Canada also recognizes that Canadians must feel confident that protest or other activities, which form an important part of our democratic process, will not be targeted by the new legislation unless they clearly meet this strictly limited definition of "terrorist activity." Removing the word "lawful" clarifies the intent of the definition to ensure that the focus is on the harm intended and caused, rather than on the lawfulness of the protest. This amendment will reduce confusion and ensure that protest activity that intentionally causes serious disruption of essential services or infrastructure, even if it is unlawful, would not be inadvertently characterized as a

terrorist activity unless it also intentionally causes death or serious harm to people. Examples of serious disruption of an essential service or infrastructure might include major destruction of a hydroelectric system or critical computer systems. She said that terrorist activity would not include acts of civil disobedience or labour actions, even if they were unlawful, such as acts that resulted in some property damage.

8.16 The fourth amendment related to a review mechanism For Attorney General Certificates, Justice Minister Anne McLellan said. She explained that a number of changes are being made concerning the Attorney General certificates. The certificate could no longer be issued at any time, but only *after* an order or decision for disclosure, for example by a Federal Court judge, in a proceeding. The life of the certificate would be fifteen years, unless re-issued. The certificate would be published in the *Canada Gazette*. The certificate would be subject to review by a judge of the Federal Court of Appeal. The existing provisions and process for the collection, use and protection of information would be preserved under the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act*. Proper review and oversight of the powers provided for in Bill C-36 help ensure that the measures in Bill C-36 are applied appropriately. Various review mechanisms already established under Canadian law would apply to the exercise of powers under the Bill, and this would include, for example, such mechanisms as complaints investigated by the Commission for Public Complaints Against the RCMP, and the various complaint and review mechanisms that apply with respect to police forces under provincial jurisdiction. Significant powers under this Bill are subject to judicial supervision and, in many cases, this is in addition to explicit ministerial review and supervision powers. As well, the provisions in the Bill will be subject to a full review by Parliament within three years. It was noted what the provisions in the proposed Anti-Terrorism Act do, namely that the proposed *Anti-Terrorism Act* would allow the Attorney General to issue a certificate in connection with a proceeding under the *Canada Evidence Act* to prohibit the disclosure of information for the purpose of protecting national defence, national security, and information obtained in confidence from or in relation to a foreign entity.

8.17 The rationale for the amendment was that freedom of information remains the rule rather than the exception, and full public access to the vast majority of government information will not be affected by this legislation. The Attorney General certificate process is intended to apply, in exceptional cases only, as the ultimate guarantee that ensures the protection of very sensitive information by the Government of Canada. The protection of this information is of particular concern

where it has been obtained from our allies on the condition that it not be released to a third party without the consent of the originating country, and where the consent is not given for such release. The Attorney General's certificate provides an assurance and absolute guarantee that this information will be protected. The certificate could only be issued personally by the Attorney General of Canada, and only where very sensitive information is threatened by disclosure in individual proceedings. It does not exempt entire departments or all information from the *Privacy Act* or the *Access to Information Act*. Where a certificate has been issued in another proceeding, it would also prevent the disclosure of the same information contained in a record under the *Access to Information Act* or the same personal information of a specific individual under the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act*. The certificate would also suspend only the right of access under the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act*. The existing provisions and process for the collection, use and protection of personal information would be preserved under these Acts.

8.18 It was also pointed out that the amendments would also restrict the timing of issuance of the certificate. While, initially, the wording of the Bill allowed for the Attorney General certificate to be issued at any time, the amendment would stipulate that the certificate could be issued only after an order or decision for disclosure of that information has been made in a proceeding. Some have also expressed concern that, in the absence of a review mechanism and a specific time limit on certificates, the power to prevent disclosure could be used too broadly. The Government has listened closely to the concerns of Canadians on this issue. The certificate process in the proposed *Anti-Terrorism Act* will be amended so that a judge of the Federal Court of Appeal would be given an independent review role to ensure that the limited scope of information for which certificates may be issued under the legislation is respected. Further, the certificate would be limited in time to 15 years, but could be reissued by the Attorney General. Finally, each certificate would now be published in the *Canada Gazette*. Through these amendments, the Government of Canada could continue to protect highly sensitive information. This ability is essential in order for Canada to play a meaningful role with its international partners in confronting terrorism, both at home and abroad.

8.19 The fifth amendment dealt with the facilitation definition. The interpretive provision in the definition of facilitation offences were to be moved from section 83.01(2)(c) to section 83.19. A "flag" will be left at section 83.01 to indicate that the provision has been moved. What the provision in the proposed *Anti-Terrorism Act*

does: The proposed *Anti-Terrorism Act* makes it an offence to participate in, contribute to or facilitate the activities of a terrorist group or to instruct anyone to carry out a terrorist activity or an activity on behalf of a terrorist group. The rationale for the amendment was that the provisions concerning facilitation of a terrorist activity would be reordered so that they clearly state that, in order to be guilty of an offence, an individual must know or intend that his or her act would help a terrorist activity to occur, even if the details of the activity are not known by the individual.

8.20 The sixth issue dealt with technical amendments. Justice Minister Anne McLellan stated that the amendments also include a number of provisions to clarify the intent of the Bill, as well as technical amendments to improve the Bill. In regard to the proposed Annual Report, some have made a strong case, however, that additional monitoring is necessary. Therefore, following models that exist elsewhere in Canadian criminal law, a requirement for an annual report was to be proposed. This provision would require the Attorney General of Canada, and those of the provinces, to report publicly once a year on the exercise of the C-36 powers of investigative hearings that took place under their jurisdiction. The provision would further require the Attorney General of Canada, and those of the provinces, as well as the Solicitor General of Canada and the ministers responsible for policing in the provinces, to each report publicly once a year on the exercise of the C-36 powers of preventive arrest that took place under their jurisdiction. Detailed information to be reported in each case would be specified in the law. Not only would this information provide an annual check on the use of these new provisions, but it would also inform the Parliamentary review which is to occur within three years. This report mechanism is similar to that which exists currently under the Part VI of the *Criminal Code*, dealing with interception of communications. It is also similar to reporting provisions relating to the use of the limited justification for otherwise illegal law enforcement activities that are part of Bill C-24 passed by the House of Commons earlier in 2001.

8.21 The Minister noted that it has also been suggested that a sunset clause will give additional impetus for close re-examination of the provisions of the Bill. The thinking on this point is that Parliament should be required to turn its mind directly to whether certain provisions of the Bill are still required after a given period of time, and the government does not see the need for a sunset clause for the entire bill. First, a sunset clause on the entire bill would call into question our commitment to meet our ongoing international obligations. Second, the need to maintain vigilance against terrorism is a continuous one and the measures in the Bill are balanced, reasonable and subject to significant safeguards. Furthermore, the provisions of Bill C-36 comply

with the *Canadian Charter of Rights and Freedoms* and therefore, a sunset clause is not necessary to ensure their compliance. At the same time she recognized that certain aspects of Bill C-36 have given rise to some concern, and she agreed that certain powers under the Bill should be subject to close monitoring. As such, in addition to proposing amendments to make investigative hearings and preventive arrest powers subject to an annual report, as an additional safeguard, the Government would also propose that these two measures be subject to a sunset clause under which they would expire after five years. This expiry would be subject, however, to the ability of Parliament to extend the provisions, on resolutions adopted by a majority of each Chamber, for additional periods of time; but no period may ever exceed five years. The Parliamentary power to extend the provisions responds to the concern that the expiry could otherwise occur in urgent circumstances where it is clear that the provisions should continue. At the same time, the requirement for resolutions of each Chamber requires Parliament to turn its mind directly to the issue of continuation of the powers is an important guarantee of parliamentary oversight.

8.22 Justice Minister Anne McLellan also explained that another area of the Bill that has caused some concern is the certificates that would be issued by the Attorney General under the *Canada Evidence Act*, the *Access to Information Act*, the *Privacy Act* and other Acts in order to prohibit disclosure of sensitive information relating to international relations, national defence or security, and it has been suggested that this power has not been appropriately circumscribed and subject to safeguards. She remarked that she continues to believe that the power to issue such certificates is a vital addition to the Canadian ability to prevent the disclosure of information injurious to international relations, national defence or security. While there currently exist procedures to protect this information, the guaranteed protection from disclosure offered by the certificates is necessary, above all, with respect to security and intelligence information shared with Canada by other countries. At the same time, she noted that she was aware of the criticism that the provisions could be more carefully tailored and should be subject to review. For this reason, she proposed that the certificates have a maximum lifespan of 15 years, unless re-issued. After its expiry, the effect of the certificate would no longer apply and the information to which it applied would be subject to the normal provisions of the law concerning disclosure or non-disclosure. Further, she proposed that the issuance of a certificate should be reviewable by a judge of the Federal Court of Appeal. Finally, each certificate would be published in the *Canada Gazette*.

8.23 She also proposed a number of adjustments to other areas of the Bill to

improve its operation. These include changing the name of "List of terrorists" to "Listed entities".¹ She explained that while this change is merely one of name, it eliminates what might otherwise be seen as excessively blunt language in the Bill.² The Government also proposed moving the definition of "facilitate" from section 83.01 so that it appears in conjunction with the facilitation offence at 83.19. This responds to criticism that the separation of the definition from the offence was confusing in this particular instance, and failed to emphasize clearly that facilitation must be 'knowing'.

B. REPORT OF THE GOVERNMENT OF CANADA TO THE COUNTER-TERRORISM COMMITTEE OF THE UNITED NATIONS SECURITY COUNCIL ON MEASURES TAKEN TO IMPLEMENT RESOLUTION 1373 (2001)³

(a) Introduction

8.24 Canada says in its report that fighting terrorism is of the highest priority for the Government of Canada. It notes that since the September 11 attacks, Canada has taken vigorous action to counter the terrorist threat and has been working closely with many members of the United Nations to ensure the safety of all our citizens, to cut off financial support and deny safe haven to terrorists, and to bring terrorists to justice. Although Canada had substantial anti-terrorist measures already in place, it was recognized that further legislation was needed to deal more effectively with the global threat of terrorism. Consequently, the draft legislation described in this report was tabled in Parliament. A number of these legislative initiatives will receive significant funding from the Budget of the Canadian Government tabled in the House of Commons on 10 December 2001.

8.25 While the Government of Canada has initiated actions on a wide array of fronts in the

¹ **83.05** (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Solicitor General of Canada, the Governor in Council is satisfied that there are reasonable grounds to believe that

- the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or
- the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

² Jim Brown reported in "McLellan to curb on anti-terrorist powers: Not all critics satisfied" 21 Nov 2001 <http://www.canoe.ca/Canoe/canoe/news.html> that the justice minister also backed a cosmetic change in the list of terrorist organizations to be compiled by the government under the bill. Instead of terrorist groups, such organizations will now be known as "listed entities." The change was suggested by a Senate committee that worried innocent groups would be stigmatized by the name terrorist, even if they were wrongly included on the list and were later deleted. McLellan said she doesn't care what they're called, as long as the bill is effective in fighting true terrorist activity and financing.

³ <http://www.dfait-maeci.gc.ca/resolution1373-e.asp>

fight against terrorism, the attached table contains a detailed description of those measures taken by Canada which relate to Security Council Resolution 1373 (2001). The passage of draft legislation now pending in Parliament will implement fully the provisions of the Resolution. Since the draft legislation is subject to Parliamentary approval and further measures may be taken in the fight against terrorism, a further report to the Counter-Terrorism Committee is anticipated.

(b) Implementation of Un Security Council Resolution 1373 (2001)

(i) Prevention and suppression of the financing of terrorist acts

8.26 On October 2, 2001, the Government of Canada implemented the *United Nations Suppression of Terrorism Regulations* (the "Regulations") and on October 15, the Government introduced legislation in Parliament entitled the *Antiterrorism Act*, referred to as Bill C-36. The Regulations make it an offence for any person in Canada and any Canadian outside of Canada to knowingly provide or collect funds with the intention or knowledge that they be used by a listed person, or to deal in any property of a listed person, and prohibit the making available of funds and financial or other related services to a listed person. Bill C-36 contains amendments to the *Criminal Code* to create three new offences relating to terrorist financing. The new offences relate to providing or collecting property for terrorist activities (*International Convention on the Suppression of the Financing of Terrorism*); collecting property, providing, or making available property or financial or other related services for terrorist purposes; and using or possessing property for terrorist purposes.

8.27 Among other measures, Bill C-36 amends the *Proceeds of Crime (Money Laundering) Act*, or PCMLA, to expand its scope to encompass terrorist financing. The amendments to the PCMLA require the reporting of transactions suspected of being linked to terrorist financing. They also expand the mandate of Canada's financial intelligence unit (FINTRAC) to include the analysis of these reports, the disclosure of key identifying information to law enforcement and intelligence agencies and the ability to share information related to terrorist financing with its international counterparts.

(ii) Criminalize the provision or collection of funds by nationals

8.28 Canada explains that paragraph 1(b) was implemented through Section 3 of the Regulations, which prohibits (under penalty of imprisonment for up to five years, and a fine of up to CAD \$5,000) the provision or collection of funds with the intention or knowledge that the funds be used by a person designated as being associated with terrorist activity. Bill C-

36 includes amendments that would increase the maximum term of imprisonment to ten years, and an unlimited fine. Further, Bill C-36 amends the Canadian *Criminal Code* to add a new section 83.02,¹ **which would prohibit the provision or collection of funds with the intention or knowledge that the funds will be used for terrorist activities. The maximum penalty for violation of this prohibition would be ten years' imprisonment and an unlimited fine.**

(iii) **Freeze funds and other financial assets or economic resources**

8.29 Canada notes that paragraph 1(c) was implemented through Section 4 of the Regulations, which freeze the assets of designated individuals and entities associated with terrorist activity. Section 7 requires financial institutions to report monthly on whether they have any such assets in their possession. Section 8 requires all persons in Canada and all Canadians outside Canada to report to law enforcement and intelligence authorities if they are in possession or control of any such assets. Names listed by the UN Security Council Committee concerning Afghanistan are automatically incorporated in the Regulations. In addition, Canada is pro-actively listing other individuals and entities under the Regulations, as the Government of Canada determines that they are associated with terrorist activities. As of November 16, 2001, CAD \$344,000 in 28 accounts had been frozen by Canadian financial institutions as assets covered by Regulations implemented under the *United Nations Act*.

8.30 Bill C-36 also provides for the immediate freezing of property that is owned or controlled by terrorist groups by adding a new section 83.08² to the *Criminal Code*, as

¹ **83.02** Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out

(ii) an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of "terrorist activity" in subsection 83.01(1), or

(ii) any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

² **83.08** (1) No person in Canada and no Canadian outside Canada shall knowingly

(ii) deal directly or indirectly in any property that is owned or controlled by or on behalf of a terrorist group;

(ii) enter into or facilitate, directly or indirectly, any transaction in respect of property referred to in paragraph (a); or

well as new sections 83.1 and 83.11³ which establish reporting requirements similar to the Regulations. Penalties will include a maximum term of imprisonment of ten years, and an unlimited fine. Other amendments will also allow for the restraint,⁴ seizure⁵ and

-
- (ii) provide any financial or other related services in respect of property referred to in paragraph (a) to, for the benefit of or at the direction of a terrorist group.
- ³ **83.11(1)** The following entities must determine on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a listed entity:
- (ii) authorized foreign banks within the meaning of section 2 of the *Bank Act* in respect of their business in Canada, or banks to which that Act applies;
 - (ii) cooperative credit societies, savings and credit unions and caisses populaires regulated by a provincial Act and associations regulated by the *Cooperative Credit Associations Act*;
 - (ii) foreign companies within the meaning of subsection 2(1) of the *Insurance Companies Act* in respect of their insurance business in Canada;
 - (c.1) companies, provincial companies and societies within the meaning of subsection 2(1) of the *Insurance Companies Act*;
 - (c.2) fraternal benefit societies regulated by a provincial Act in respect of their insurance activities, and insurance companies and other entities engaged in the business of insuring risks that are regulated by a provincial Act;
 - (ii) companies to which the *Trust and Loan Companies Act* applies;
 - (ii) trust companies regulated by a provincial Act;
 - (ii) loan companies regulated by a provincial Act; and
 - (ii) entities authorized under provincial legislation to engage in the business of dealing in securities, or to provide portfolio management or investment counselling services.
- (2) Subject to the regulations, every entity referred to in paragraphs (1)(a) to (g) must report, within the period specified by regulation or, if no period is specified, monthly, to the principal agency or body that supervises or regulates it under federal or provincial law either
- (ii) that it is not in possession or control of any property referred to in subsection (1), or
 - (ii) that it is in possession or control of such property, in which case it must also report the number of persons, contracts or accounts involved and the total value of the property.
- ⁴ **83.13 (1)** Where a judge of the Federal Court, on an *ex parte* application by the Attorney General, after examining the application in private, is satisfied that there are reasonable grounds to believe that there is in any building, receptacle or place any property in respect of which an order of forfeiture may be made under subsection 83.14(5), the judge may issue
- (ii) if the property is situated in Canada, a warrant authorizing a person named therein or a peace officer to search the building, receptacle or place for that property and to seize that property and any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made under that subsection; or
 - (ii) if the property is situated in or outside Canada, a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in, that property other than as may be specified in the order.
- ⁵ **83.13(2)** On an application under subsection (1), at the request of the Attorney General, if a judge is of the opinion that the circumstances so require, the judge may
- (ii) appoint a person to take control of, and to manage or otherwise deal with, all or part of the property in accordance with the directions of the judge; and
 - (ii) require any person having possession of that property to give possession of the property to the person appointed under paragraph (a).
- (4) The power to manage or otherwise deal with property under subsection (2) includes

forfeiture⁶ of property derived from the commission of a terrorist offence and property used to commit or intended to be used to commit a terrorist activity.

- (iv) Prohibit nationals or any persons and entities within Canada from making any funds, financial assets or economic resources or financial or other related services available, for benefit of persons who commit, attempt to commit, facilitate or participate in the commission of terrorist acts

8.31 The Report says paragraph 1(d) was implemented through the Regulations, which in Section 4(b) prohibit making property or any services available for the benefit of designated individuals or entities associated with terrorist activity. Bill C-36 would likewise add to the *Criminal Code* sections 83.03⁷ and 83.04⁸ which would

- (ii) in the case of perishable or rapidly depreciating property, the power to sell that property; and

- (ii) in the case of property that has little or no value, the power to destroy that property.

(5) Before a person appointed under subsection (2) destroys property referred to in paragraph (4)(b), he or she shall apply to a judge of the Federal Court for a destruction order.

(6) Before making a destruction order in relation to any property, a judge shall require notice in accordance with subsection (7) to be given to, and may hear, any person who, in the opinion of the judge, appears to have a valid interest in the property.

- ⁶ 83.14 (1) The Attorney General may make an application to a judge of the Federal Court for an order of forfeiture in respect of

- (ii) property owned or controlled by or on behalf of a terrorist group; or

- (ii) property that has been or will be used, in whole or in part, to facilitate or carry out a terrorist activity.

(2) An affidavit in support of an application by the Attorney General under subsection (1) may be sworn on information and belief, and, notwithstanding the *Federal Court Rules, 1998*, no adverse inference shall be drawn from a failure to provide evidence of persons having personal knowledge of material facts.

(3) The Attorney General is required to name as a respondent to an application under subsection (1) only those persons who are known to own or control the property that is the subject of the application.

(4) The Attorney General shall give notice of an application under subsection (1) to named respondents in such a manner as the judge directs or as provided in the rules of the Federal Court.

(5) If a judge is satisfied on a balance of probabilities that property is property referred to in paragraph (1)(a) or (b), the judge shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

(5.1) Any proceeds that arise from the disposal of property under subsection (5) may be used to compensate victims of terrorist activities and to fund anti-terrorist initiatives in accordance with any regulations made by the Governor in Council under subsection (5.2).

- ⁷ **83.03** Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services

- (ii) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the

prohibit making available property or services for terrorist activities, as well as using property for terrorist activities or possessing property that will be used for terrorist activities. Bill C-36 also contains measures to prevent the use of registered charities to provide funds to support terrorist activities. Specifically, Part 6 of Bill C-36 provides an administrative mechanism to prevent the registration of an organization as a charity and to revoke the registration of a charity if there are reasonable grounds to believe that the organization makes or will make resources available directly or indirectly to an organization engaged in terrorist activities. The Bill also prohibits entering or facilitating any transaction or providing any financial or other related services in respect of that property.

- (v) Providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

8.32 Existing general provisions in Canada's criminal law dealing with criminal conspiracy and other inchoate offences apply to criminal activities related to terrorist acts. Bill C-36 contains an amendment to the *Criminal Code* that criminalizes the participation in the activity of a terrorist group or the facilitation of a terrorist activity. This provision specifically covers the situation of anyone recruiting a person in order to facilitate or commit a terrorist offence or recruiting a person to receive training so as to be able to contribute to a terrorist activity. These offences are punishable by up to ten years' imprisonment. Canadian legislation has established a system of strict control over the import, export and internal possession of firearms and military weapons and explosives. Other sensitive goods and technologies that could be used in the design, development and production of weapons of mass destruction are also subject to export control. Bill C-42, introduced in Parliament on 22 November,

-
- (ii) purpose of benefiting any person who is facilitating or carrying out such an activity, or knowing that, in whole or part, they will be used by or will benefit a terrorist group,
is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

⁸ **83.04** Every one who

- (ii) uses property, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity, or
(ii) possesses property intending that it be used or knowing that it will be used, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity,
is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

includes measures to give the Government of Canada the power to tighten internal controls on and regulate the export of civilian explosives. It will also give the Government the explicit power to control the export and transfer from Canada of technology and for the Minister of Foreign Affairs to consider international peace and stability as criteria.

(vi) Taking of necessary steps to prevent the commission of terrorist acts, including early warning to other States by exchange of information

8.33 The legislation that establishes the mandates for the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS) contains provisions which facilitate the timely exchange of information with other countries to prevent the commission of terrorist acts. Prevention and deterrence is and has always been a primary objective of the Royal Canadian Mounted Police. Any information that is generated which will enable the agency to prevent or deter such activity is provided to concerned countries in a timely manner. The CSIS has an early warning function. The primary responsibility of CSIS is to collect information, forewarn and advise the Government of Canada regarding activities that may constitute a threat to the security of Canada including terrorist threats. In addition, CSIS shares information and intelligence on terrorist threats with allied services. Whether of domestic or foreign origin, addressing the threat of terrorism is CSIS' highest priority. CSIS is continuing to develop new techniques and approaches within its counter-terrorism program to help ensure that Canada does not become a focus of terrorist activity. Since 1989, CSIS has substantially broadened the scope and enhanced the content of its international relations. CSIS has a large number of cooperative arrangements with other countries. It also maintains liaison officers in a number of countries to facilitate the exchange of information. Through its Foreign Liaison Program, CSIS works cooperatively with the appropriate intelligence services and other agencies to share information on terrorist threats.

8.34 The Report set out that the legislative amendments in Bill C-36 include new investigative tools which will make it easier to use electronic surveillance against terrorist organizations. Bill C-36 would also allow the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) to share certain information with a foreign counterpart if there are reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a terrorist financing offence. Bill C-42 amends both the *Immigration Act* and the *Aeronautics Act* to require advance passenger information to be provided to the Government of Canada for

certain limited purposes. Bill C-44, introduced in Parliament on 28 November 2001, amends the *Aeronautics Act* to permit airlines to share this information with other governments where required to do so by the laws of the foreign state.

(vii) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens

8.35 Both the present Canadian *Immigration Act* and a new *Immigration and Refugee Protection Bill* which has been passed by Parliament and will come into force soon, contain provisions which prohibit the entry into Canada or provide for the removal from Canada of persons concerning whom there are reasonable grounds to believe have engaged, are engaged or will engage in acts of terrorism or are members of an organization involved in terrorism. Both the notions of membership and terrorism have been interpreted by the Canadian courts broadly and include all the activities described above.⁹ The Canadian Security Intelligence Service (CSIS), in

⁹ In the case of *Szabo v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1095 the court explained how the meaning of terrorism is ascertained for purposes of the *Immigration Act*:

I do not accept the submission that the term terrorism is inherently ambiguous such that its meaning cannot be arrived at through legal analysis. . . .

[27] I agree entirely with Denault J. that the word "terrorism" must receive a broad and unrestricted interpretation. In my view, that is the only sensible approach, bearing in mind the purpose of the section 40.1 proceedings, as stated in section 38.1 of the Act, and the overall objectives of Canadian immigration policy as stated in section 3. I, like Robertson J.A. in *Suresh*, *supra*, am of the view that the killing of innocent civilians in the pursuit of political goals can only be categorized as constituting terrorism. I also agree, without hesitation, with Rothstein J.'s remarks at page 106 of his reasons in *Singh*, *supra*, where he states:

[22] [...] In his testimony, Lawrence Brooks, Supervisor with the Counter Terrorist Branch at CSIS expressed the opinion that terrorism includes "politically motivated violence, often with an indiscriminate target, ... a bomb in a marketplace or assassination attempts". For the purposes of this case, it is not necessary to further define terrorism. A politically motivated organization which sets off bombs, killing innocent people and which engages in assassinations is surely an organization engaged in terrorism. [...]

[28] I also wish to adopt as mine the opinion given by John O'Sullivan in the Thursday, September 27, 2001 edition of the *National Post*, where Mr. O'Sullivan writes:

A terrorist is a man who murders indiscriminately, distinguishing neither between innocent and guilty, nor between soldier and civilian. He may employ terrorism - planting bombs in restaurants or hijacking planes and aiming them at office towers - in a bad cause or a good one.

He may be a Nazi terrorist, or an anti-Nazi terrorist, a communist or an anti-communist, pro-Palestinian or pro-Israel. We may want to defeat his political cause or see it triumph. For his methods, however, the terrorist is always to be condemned. Indeed, to describe him objectively is to condemn him, even if his cause is genuinely a fight for freedom with which we sympathize.

[29] With respect to a person's membership in an organization that "there are reasonable grounds to believe" will engages in terrorism or was engaged in terrorism, Mr. Justice Rothstein, in *Singh*, *supra*, states at page 111:

[52] The provisions deal with subversion and terrorism. The context in immigration legislation is public safety and national security, the most serious concerns of government. It is trite to say that terrorist organizations do not issue membership

cooperation with Canadian Immigration authorities, has ongoing mechanisms under the present *Immigration Act*, "to remove from Canada persons found inadmissible on national security grounds". Since 1992, this process has resulted in the deportation of 14 persons. Bill C-36 contains an amendment to the *Criminal Code* making it an offence to harbour or conceal anyone who has carried out a terrorist act or for the purpose of enabling a person to facilitate or carry out a terrorist activity. These offences are punishable by up to ten years' imprisonment. Amendments to the Criminal Code in Bill C-36 extend Canada's jurisdiction over terrorist financing offences such that anyone who has committed such an offence outside Canada and is present in Canada after the commission of a terrorist financing offence, could be prosecuted in Canada. Moreover, the Bill extends Canada's jurisdiction over terrorism offences committed outside Canada if the offences are committed by a Canadian citizen, a stateless person residing in Canada or a permanent resident present in Canada after the commission of the offence. The *Extradition Act* would also be available to extradite a person who has committed a terrorist offence in another country. Bill C-42 amends the *Immigration Act* to permit the Minister to approve the destination of a person leaving Canada under a departure order or an exclusion order, to ensure that fugitives from justice do not escape from jurisdictions seeking their return.

- (viii) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens

8.36 Bill C-36 defines terrorist activity so as include any act or omission that is committed with the intention of intimidating the public or compelling a person, government or international organization to do or refrain from doing anything, whether the person, government or organization is inside or outside Canada. Thus anyone financing, planning, facilitating or committing terrorist activities on Canadian territory with a view to acting against another state or its citizens would be committing an offence in Canada. In addition, the investigative mandate of CSIS permits the collection of information or intelligence about activities suspected of being directed towards or in support of terrorism.

cards. There is no formal test for membership and members are not therefore easily identifiable. The Minister of Citizenship and Immigration may, if not detrimental to the national interest, exclude an individual from the operation of s. 19(1)(f)(iii)(B). It think it is obvious that Parliament intended the term "member" to be given an unrestricted and broad interpretation. I find no support for the view that a person is not a member as contemplated by the provision if he or she became a member after the organization stopped engaging in terrorism. If such membership is benign, the Minister has discretion to exclude the individual from the operation of the provision.

- (ix) Measures to ensure person who participate in financing, planning, preparation or perpetration of terrorist acts or supporting terrorist acts is brought to justice and terrorist acts are established as serious criminal offences

8.37 The Canadian report notes that the penalties for terrorist offences are severe, and range from up to ten years' imprisonment to life imprisonment. Bill C-36 provides that in some circumstances penalties are to be served consecutively, and that an individual convicted of a terrorism offence may be ordered to serve a minimum of half the sentence before being eligible for parole.

- (x) Assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings

8.38 The *Mutual Legal Assistance in Criminal Matters Act* serves as the primary vehicle for affording countries assistance in investigating or prosecuting offences, including terrorist financing offences. While assistance is usually provided pursuant to a bilateral treaty, it is possible to provide assistance without the existence of a treaty. Canada has a network of 27 bilateral Mutual Legal Assistance Treaties (MLAT). Canada has some 20 ongoing terrorism-related cases of formal MLAT requests for evidence-gathering assistance and has five such extradition-related arrests, one case prior to and four post September 11.

- (xi) Prevention of movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents

8.39 Canada participates in a number of international fora established for the purpose of exchanging information on illegal migration trends and travel document abuse, for example, the Immigration Fraud Conference, the Pacific Rim Conference and the G8 Summit Experts Group on Transnational Organized Crime. Since 1997, there has been an information sharing arrangement between the US and Canada with respect to suspected terrorists. The *Immigration Act* provides authority for the seizure of travel or other identity documents discovered during normal border inspection; persons importing or exporting such documents can be prosecuted. The Canadian

Security Intelligence Service (CSIS) provides inputs to the Enforcement Information Index, an automated system administered by Citizenship and Immigration Canada that acts to alert Immigration and Customs officers at ports of entry of the threats to national security posed by suspected and known terrorists seeking admission to Canada. CSIS information enables Canadian immigration officials to refuse applications from individuals suspected of involvement in terrorist activity, effectively barring their entry into Canada. Increased efforts have been placed at ports of entry to identify and intercept suspected terrorists attempting to enter Canada. On October 12, 2001 the Minister of Citizenship and Immigration introduced new measures specifically aimed at further combatting terrorism; these measures include the introduction of a more secure identity card for new immigrants by June 2002; increased detention and deportation capacity; and hiring up to 100 new staff to enforce upgraded security at ports of entry. Bill C-42 now before Parliament amends both the *Immigration Act* and the *Aeronautics Act* to require advance passenger information to be provided to the Government of Canada in order to identify and prevent the fraudulent use of identity papers and travel documents. Bill C-44 amends the *Aeronautics Act* to permit airlines to share this information with other governments where required to do so by the laws of the foreign state. It is the intention of the Royal Canadian Mounted Police (RCMP) to establish Integrated Border Enforcement Teams comprised of RCMP and other federal and municipal partners. It is planned to establish four teams initially and add another six if funding becomes available. With respect to passports, applications must satisfy the prescriptions of the Passport Order. Documentary Evidence of Citizenship (DEC) must be provided. Issuers of such documents (provinces and territories as well as Citizenship and Immigration Canada) are fully engaged in the improvement of the security of their documents and issuance processes. Greater emphasis on the examination of such documents has and will continue to be exercised by examiners. Automated verification against provincial records is currently being pursued by the Passport Office. In addition to DEC's being satisfactory, the identity of the applicant must be established. It is currently being verified by a guarantor, who countersigns the passport application form as well as the photo provided by the applicant. The Passport Office has increased significantly the number of guarantor checks since Sept. 11th. Moreover, additional information relative to employment and residency will shortly be asked from applicants. This will provide further means to verify the identity of applicants.

8.40 The Canadian Report explains that their electronic system provides in real time the photo of the applicant who applies for a renewal. Currently, the image base

comprises over a million photographs. Very soon, all passport applications will be processed by this system. Impersonators of a passport holder can be intercepted as their photo will not match the photo of the legitimate holder of a passport already processed by the system. Finally, the names of persons or applicants whose entitlement to a Canadian passport may be, for a variety of reasons, subject to review (which includes the possibility of refusal) are entered on an electronic "lookout" system and passports are not issued to such persons or applicants until and unless a clearance has been given by the Security and Entitlement Review Section of the Passport Office. The integrity of the Canadian passport arises from a variety of security features that have, to our knowledge, been fully effective in preventing counterfeiting of the document. However, no design remains foolproof forever. To counter threats posed by alteration, photo substitution, misuse, and counterfeiting of observation labels, the Passport Office has developed a new passport which will be introduced within a year. This passport contains new state of the art forensic attributes which inspection authorities will be able to authenticate more effectively. Once this new design has been introduced, the Passport Office will provide training aids designed to assist inspection authorities to determine that they are dealing with an example of the more robust digital design.

(xii) Ways of intensifying and accelerating exchange of operational information

8.41 Canada states that it coordinates its national policies to prevent and pre-empt terrorist activities. Work is ongoing with all partners, domestically and internationally, to improve information sharing and investigative methods to deal with new and emerging threats, including the threat posed by weapons of mass destruction. The Royal Canadian Mounted Police (RCMP) intends to build in an international component within the Integrated National Security Enforcement Teams. Participation by international agencies can be on a case-by-case basis or a permanent arrangement if this is deemed necessary. Essentially this is the current practice of the RCMP; however, as Canada seeks more integration from a law enforcement perspective, this process will become formalized. This, in addition to existing arrangements, will accelerate the exchange of operational information. The Canadian Security Intelligence Service (CSIS) has been engaged in an intense effort to enhance the international exchange of intelligence on terrorism through a network of liaison officers and country-to-country agreements. The Passport Office, upon receipt of intelligence or information on intercepted forged or falsified travel documents, investigates these reported cases with the support of the RCMP and immigration

intelligence. Criminal procedures can be instituted, but administrative procedures have also been instituted, which may result in the withholding of passport services for individuals, as well as the revocation of a passport if one was issued in the past. The Canadian Passport Order prescribes that the Passport Office may revoke a passport that has been used in committing an offence.

8.42 Bill C-36 will also put in place the necessary legislation to allow Canada to implement the *International Convention on the Suppression of Terrorist Bombing*. Bill C-42 amends both the *Immigration Act* and the *Aeronautics Act* to require advance passenger information to be provided to the Government of Canada in order to identify and prevent the fraudulent use of identity papers and travel documents. Bill C-44 amends the *Aeronautics Act* to permit airlines to share this information with other governments where required to do so by the laws of the foreign state.

- (xiii) Cooperate through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such attacks

8.43 Canada has a network of 27 bilateral Mutual Legal Assistance Treaties which cover legal cooperation on terrorism-related offences, as well as 51 bilateral extradition treaties. In addition, Canada is party to a number of multilateral conventions addressing legal cooperation against crime and terrorism, and extradition for such offences. Canadian police authorities, acting primarily through the RCMP, have numerous bilateral arrangements relating to cooperation in the investigation of criminal matters, as well as multilateral arrangements, notably through INTERPOL. These tools for cooperation are regularly used to assist foreign authorities and investigate terrorist offences and threats.

- (xiv) Become parties as soon as possible to relevant international conventions and protocols relating to terrorism, including the International Convention for Suppression of the Financing of Terrorism of 9 December 1999

8.44 Canada is a party to 10 of the 12 UN counter-terrorism conventions. The provisions of Bill C-36 will allow Canada to fulfil all obligations contained in the two remaining UN counter-terrorism conventions, the Convention against Terrorist Bombing and the Convention for the Suppression of the Financing of Terrorism, to which Canada is already a signatory. Should Parliament pass Bill C-36, Canada would

expect to ratify these two remaining conventions promptly.

- (xv) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001)

8.45 Canada says it will continue to widen its cooperation with other states in combatting terrorism. Canada fully implements its obligations under the terrorism conventions that it has ratified through provisions in its criminal law, its extradition legislation, and its legislation related to mutual legal assistance, and will ratify the remaining two when the legislative capacity to implement (presently contained in Bill C-36) is in place. Regulations under the United Nations Act fully implement the domestic legal aspects of Security Council resolutions 1269 and 1368.

- (xvi) Taking appropriate measures before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts

8.46 Canada has implemented the 1951 *Convention and Protocol relating to the Status of Refugees* through its *Immigration Act*. This *Convention* excludes persons from obtaining refugee status if they have been involved in serious non-political crimes or acts against the purpose and principles of the United Nations; terrorism falls within the parameters of both exclusion clauses which are applied in Canada regularly (this was decided in 1998 by the Supreme Court of Canada in the Pushpanathan case). In addition to using the exclusion clauses, Canada also makes use of a provision in the *Immigration Act* which makes refugee claimants ineligible to access the refugee determination process if they have been found involved in terrorism by an immigration adjudicator or even to revisit an eligibility decision after an immigrant has been allowed such access (if Bill C-42 now before Parliament becomes law). This provision was applied in the case of Tejinder Pal Singh, a member and supporter of Dal Khalsa, a Sikh political group which aims to establish a separate and independent Khalistan in India through violent means, who with four others committed a terrorist act by hijacking an Indian airplane; he was removed from Canada in December 1997. A process for enhanced front-end screening of refugee claimants for security and criminality concerns was already underway before the September 11 terrorist attacks in the United States. Since the attacks, and the passage of Security Council resolution 1373, the Government of Canada announced on October 12, 2001 strengthened immigration measures to counter terrorism.

- (xvii) Ensure that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for extradition of alleged terrorists

8.47 Canada remarks that it has implemented article 33(2) of the 1951 *Convention and Protocol relating to the Status of Refugees* which allows the removal of persons who have obtained refugee status and who subsequently engage in very serious criminality; if they constitute a danger to the security of the country of refuge they can be removed to their country of origin even if they fear persecution there. In Canada persons who have been involved in terrorism or are members of a terrorist organization are subject to this provision if the Minister of Citizenship and Immigration is of the view that they pose a danger to the security of Canada. This provision was used in the case of Iqbal Singh who was involved in fundraising, recruiting and organizing for the Babbar Khalsa International, an organization dedicated to terrorism and subversion against the Indian government. If another country has requested the extradition of a suspected terrorist who has claimed refugee status, the refugee process is adjourned until the extradition process has been completed; if the refugee claimant is ordered extradited, this order is also deemed to be a serious non-political crime for refugee purposes and the person is excluded.

- (xviii) Money Laundering and Financing Measures

8.48 It is explained that the core elements of Canada's anti-money laundering regime are set out in the *Proceeds of Crime (Money Laundering) Act* (PCMLA). Among other things, the PCMLA includes customer identification and record-keeping requirements. It also requires financial institutions, casinos, currency exchange businesses, as well as other entities and individuals acting as financial intermediaries (such as lawyers and accountants) to report transactions relevant to the identification of money laundering. The Act also established the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) in July 2000. FINTRAC's primary functions are to receive reports made under the Act, to analyse those reports for information relevant to money laundering, and to provide key identifying information to Canadian law enforcement, intelligence, and other authorities. The amendments contained in Bill C-36 broaden the scope of the PCMLA, including the mandate of FINTRAC, to address both money laundering and terrorist financing offences. These changes include:

- Individuals and entities that are required to report suspicions of money laundering would also be required to report suspicions of terrorist-financing activity to FINTRAC;
- FINTRAC's role would be broadened to include the analysis of these reports and the disclosure of key identifying information to law enforcement and intelligence authorities; and
- FINTRAC would also share information about terrorist-financing activities with its international counterparts, subject to safeguards with respect to its treatment and disclosure.

8.49 The RCMP has the primary investigative responsibility for the seizure and forfeiture of assets through the Integrated Proceeds of Crime Program. This is an established multi-disciplinary and multi-agency integrated program of government, designed to track criminal assets. The program will have an expanded mandate with a focus on terrorist financing. With links to FINTRAC and national and international partners, intelligence and enforcement links are firmly in place. It is also explained that on the international level, Canada is one of 31 members of the Financial Action Task Force (FATF) and participates actively in the ongoing review to update FATF's 40 Recommendations on Money Laundering. The FATF, which conducts mutual reviews of member states' anti-money laundering efforts, recently expanded its mandate to include terrorist financing. FATF has issued 8 special recommendations which commits its members to take action against terrorist financing. The G8 has agreed to coordinate G8 diplomatic, legal, law enforcement and security and intelligence services' efforts to address the issue of terrorist financing and to increase and coordinate G8 outreach to third countries in all counter-terrorism related activities, including in the suppression of financing of terrorism.

(xix) Chemical, Biological, Radiological and Nuclear Threats (Cbrn)

8.50 The Government of Canada, in consultation with provincial jurisdictions, has launched an interdepartmental process to strengthen our coordinated response to CBRN-related terrorist incidents. We have similarly established a coherent approach to prevention of CBRN terrorism. This approach includes a focus on illicit trafficking of CBRN agents in an effort to strengthen our capacity to deter, detect, and interdict in such cases. The strategy also includes strengthening CBRN import/export/border controls, improving security around sensitive facilities and outreach to the private sector in order to promote awareness of threats. Bill C-42 now before Parliament creates the *Biological and Toxin Weapons Convention Implementation Act* to supplement Canada's existing legislation to prevent the development and spread of biological weapons. Canada, USA and Mexico are discussing common approaches to the threat of CBRN terrorism. Part of this approach will involve improvements to the capacity of border authorities to identify and interdict in cases of illicit

movement of CBRN agents/materials. In the Organization of American States (OAS), Organization for Security and Cooperation in Europe (OSCE), ASEAN Regional Forum (ARF), Francophonie and Commonwealth, Canada is working to ensure that illicit trafficking of CBRN agents is identified as a risk and that efforts are made to collectively address the risk.

8.51 Canada is committed to strengthening the international treaties and conventions whose aim is combatting CBRN terrorism or the non-proliferation of CBRN agents. We also support efforts to strengthen the organisations (IAEA, Organization for the Prohibition of Chemical Weapons) that implement these instruments. Canada intends to ratify the *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*. Canada also supports international efforts to strengthen CBRN import/export/border controls, improve security around sensitive facilities along with the destruction of excess CBRN agents and weapons. Within the G8, Canada is committed to combat terrorism-related activities in the field of CBRN, in consultation with the Non-Proliferation Experts Group, starting with an assessment of the threat and the definition of best practices.

(xx) International Crime

8.52 Canada is a longstanding member of the UN Crime Commission and has been at the forefront of work on crime and terrorism in the G8, where experts meet on terrorism and on trans-national organized crime. The mandates of the G8 Experts Group on Transnational Organized Crime (Lyon Group) and the Counter-Terrorism Experts Group (CTEG) are designed to provide member Governments with advice on public policy, information and expertise sharing, as well as in some cases operational cooperation. The work of the G8 on terrorism has been focussed on UN priorities set out in the 1996 General Assembly Declaration on Measures to Eliminate Terrorism. The work on transnational organized crime has focussed on judicial cooperation, migration, high-tech, and law enforcement cooperation. Canada will continue this work during our forthcoming Presidency of the G8 in 2002 where the two groups are expected to combine their efforts on developing measures to stop the flow of funds to terrorists, improve aviation security, and the control of arms exports.

(xxi) Drugs

8.53 The G8 have agreed to map current known links between drug trafficking and terrorists; to identify possible linkages for further investigation and to produce a template of key indicators of drug trafficking likely to be contributing to terrorism; to support the United Nations Drug Control Programme (UNDCP) major donors' efforts to coordinate counter-

narcotics assistance to combat the drug trade emanating from Afghanistan and to work together to maximise the effectiveness of UNDCP programmes in the region; to coordinate G8 demarches to countries, with the aim of raising awareness of the relation between drug trafficking and the financing of terrorism. In the fight against drugs, Canada is a major donor to the UNDCP efforts to coordinate counter-narcotics assistance to combat the drug trade and is a member of the Dublin Group on drug-trafficking. Canada is a member of the OAS and is an active contributor to the work of the OAS Committee on Terrorism (CICTE) and to its crime and drug program (CICAD). In addition we have important bilateral arrangements with the USA in the fight against crime and terrorism, including a Bilateral Consultative Group on Terrorism, a Ministerial level Cross Border Crime Forum and inter-agency task forces. We meet regularly with other partners in the Hemisphere and have regular dialogue on drug and crime issues with Mexico.

(xxii) Illicit Trafficking in Firearms

8.54 The G8 has pledged to intensify ongoing efforts to prevent and combat illicit trafficking in firearms, ammunition and explosives used in terrorist activities through strict enforcement of export control procedures and enhanced exchange of information on the sources, routes and methods used by traffickers.

CHAPTER 9

INDIA

A. THE PREVENTION OF TERRORISM ORDINANCE, 2001 (POTO)

(a) Introduction

9.1 On 24 October 2001 the *Prevention of Terrorism Ordinance, 2001 (POTO)* was promulgated in India. The long title says that the aim of the Ordinance is to make provisions for the prevention of, and for dealing with, terrorist activities and for matters connected therewith. The ordinance applies to the whole of India and also to citizens of India outside India, persons in the service of the Government, wherever they may be, and persons on ships and aircraft, registered in India, wherever they may be.

9.2 The promulgation of the *POTO* led to fierce criticism in India.¹ Mr Justice Verma,

¹ It was reported that Justice Ranganath Misra, former Chief Justice of India and the first chairperson of the National Human Rights Commission, finds the *Prevention of Terrorism Ordinance* “an easy way out” for law-enforcing agencies, that he feels that India is yet to develop a culture for protecting human rights, that *POTO* is an easy way out for Govt, and there should be no short-cuts for human rights’ <http://www.indian-express.com/ie20011102/op4.html>

Pamela Philipose said one would have thought that those who went through the experience of the Emergency would have been more circumspect about rushing in more draconian laws than India already has and that the *POTO* belies such a hope. She noted that it appears that the present government — many of whose members were inhumanly denied their liberty under Mrs Gandhi’s infamous spell of dictatorship — hopes to utilise the present public concern about terrorism to push through legislation of the kind that had once manacled them. She points out that during the 635 days of Emergency, 34630 people were locked up under the *Maintenance of Internal Security Act* — or *MISA* and under the *Terrorism and Disruptive Activities (Prevention) Act (TADA)*, which was in force from 1987 to 1995, an estimated 76036 people had been arrested. “A kinder *TADA*? Take another” look Pamela Philipose 23 October 2001 *Indian Express* <http://www.indian-express.com/ie20011023/ed5.html>

“The *Prevention Of Terrorism Ordinance (POTO)* displays the hallmarks of intellectual laziness and worse on the part of the Union home ministry. *TADA* had to be scrapped because of its failure to meet its objectives. *POTO* cannot be any different. Some of its features could affect press freedom and result in harassment of the kin of the so-called “terrorist”, a loosely defined term. In the Northeast, for example, politicians and others have relatives in the underground, who often visit their families over ground and receive food and accommodation. The families do not share their views but are often harassed by security forces. Thus, one prominent politician was accused of supporting terrorism because he had allowed his militant son to stay over at home during a night visit. There are many such cases in the region. *POTO* will lead to further alienation in the Northeast.” KS Subramanian “*POTO* is no answer to terrorism” 6 November 2001 *Indian Express* <http://www.indian-express.com/ie20011106/ed5.html>

See also “Straight Face: A *POTO*genic nation” *Indian Express* 18 November 2001 <http://www.indian-express.com/columnists/pame/20011118.html> where the writer stated tongue in cheek, that the *POTO* was fully deserving of support, and that the constant hectoring of the Home ministry over its noble project of thrusting the law down everyone’s

the Chairperson of the Human Rights Commission of India (NHRC) noted on 4 December 2001² that the Law Commission of India published its *Prevention of Terrorism Bill*, in 2000.³ He explained that in giving its opinion on the Bill NHRC referred to the existing laws on the subject and emphasized that the real deficiency was in their implementation and not the content. The NHRC's conclusion was:

“ . . . consistent with the view that it took in respect of *TADA*, the Commission is now unanimously of the considered view that there is no need to enact a law based on the Draft

throat, is shameful and worthy of the strongest condemnation. The commentator noted that the trouble is that the people of India's brains have got so addled with utterly misguided concepts like democracy, fundamental rights, human rights and other naive, air-headed nonsense, that they actually believe they know what is good for India, and as the ministers have pointed out so painstakingly in their public statements and newspapers articles, what India really need is an extended and happy spell in the cooler, all expenses paid, no questions asked.

Another commentator noted that it is not the severity of the law that makes it effective but that there are simply no short cuts, no substitutes, for good old fashioned investigation and prosecution. It is remarked that although these are insecure times we live in, in times such as these, it is even more necessary to maintain a sense of proportion. It is suggested that instead of rushing through a new quick-fix that promises to make the country a safer place, the Indian government needs to pay some attention to strengthening the existing crime investigation and prosecution machinery and the criminal justice system. “*TADA* by another name: There is no substitute to meticulous policing” *Indian Express* 18 October 2001 <http://www.indian-express.com/ie20011018/ed2.html>

“It is fear of the police misusing the *Prevention of Terrorism Ordinance, 2001 (POTO)*, that had fuelled much of the public disquiet about the proposed legislation. The country's experience with the *Terrorism and Disruptive Activities (Prevention) Act (TADA)* provided enough reason for such a response. As has often been cited, *TADA* was used as a substitute for proper policing with due attention being paid to surveillance and investigation, rather than as a legal instrument to complement it.” “Hot *Poto*-ato: The ordinance flunks its first test at Srinagar” *Indian Express* <http://www.indian-express.com/ie20011201/ed1.html>

² Second Bodh Raj Sawhny Memorial Oration on “Combating Terrorism Under the Rule of Law”.

³ In June 2000 Amnesty International (AI) reported that the *Prevention of Terrorism Bill* of India, bears many similarities to the former *TADA*. AI was concerned that it did not provide sufficient safeguards to prevent human rights violations and said that it was not compatible with international treaties to which India is a party. They said that there are human consequences to the proposed legislation which cannot and must not be ignored. They warned that there are individuals whose lives have been irrevocably damaged by provisions of *TADA* and whose experiences could be repeated if identical provisions are re-enacted. AI stated that they were aware of widespread public concern about violence perpetrated by armed groups and that there was a desire to address this violence. They however considered that enacting legislation which in turn violates the fundamental rights of individuals as a short cut to tackling terrorism is not the answer. AI explained that if passed, the proposed Bill would give enhanced powers to a police force which was widely acknowledged to resort to torture during investigations, and that it will also withdraw the right to presumption of innocence in a situation where fabrication of evidence is widespread. They also pointed out that in a country where many people await trial for longer than their ultimate sentence, the Bill would also deny bail prior to trial unless the court is convinced of the innocence of a detainee. AI acknowledged that in proposing the draft Bill, the Law Commission of India had omitted certain provisions which existed in *TADA* which were violative of international standards and included some provisions aimed at preventing abuse of powers granted in the legislation. AI urged that such safeguards be more than just paper thin promises.

Prevention of Terrorism Bill, 2000 and the needed solution can be found under the existing laws, if properly enforced and implemented, and amended, if necessary. The proposed Bill, if enacted, would have the ill-effect of providing unintentionally a strong weapon capable of gross misuse and violation of human rights which must be avoided particularly in view of the experience of the misuse in the recent past of *TADA* and earlier of *MISA* of the emergency days.

This Commission regrets its inability to agree with the opinion of the Law Commission in its 173rd Report and recommends that a new law based on the Draft *Prevention of Terrorism Bill, 2000* be not enacted. Such a course is consistent with our country's determination to combat and triumph over terrorism in a manner also consistent with the promotion and protection of human rights."

9.3 He pointed out that the proposal for the enactment of the new law was later shelved, but after the incident of September 11, 2001 and the global fixation with the war against terrorism, the issue has resurfaced and the *Prevention Of Terrorism Ordinance* promulgated. He stated that a debate was on in the country pertaining to the need for enactment of such a law and that too by an ordinance. He explained that certain provisions thereof are seen to possess dangerous potential of misuse by the enforcement agencies posing grave threat to the human rights of innocents. He indicated that the NHRC takes the same view of the Ordinance as it did of the earlier Bill for substantially the same reasons as given in its earlier opinion of July 14, 2000. He noted that this has been reiterated in NHRC's opinion of November 19, 2001 which says, inter alia:

"Undoubtedly, national security is of paramount importance. Without protecting the safety and security of the nation, individual rights cannot be protected. However, the worth of a nation is the worth of the individuals constituting it. Article 21 which guarantees a life with dignity is non-derogable. Both national integrity as well as individual dignity are core values in the Constitution, and are compatible and not inconsistent. The need is to balance the two. Any law for combating terrorism should be consistent with the Constitution, the relevant international instruments and treaties, and respect the principles of necessity and proportionality.

9.4 Justice Verma noted some salient features of *POTO*. He considered that the reversal of burden of proof for bail for a period of one year and before filing of charge-sheet is contrary to a basic principle of criminal jurisprudence, apart from the unfair requirement from the accused to perform the impossible task of proving at that stage that he is not guilty. He remarked that admissibility in evidence of statement recorded by a police officer for graver offence under *POTO*, when the *Evidence Act* continues to make it inadmissible for any offence under the general law is incongruous. He considered that the provision for general immunity for any action taken in the course of any operation directed towards combating terrorism, in addition to that under the existing law for *bona fide* acts of public servants with the need of prior sanction to prosecute have the propensity to further degenerate the existing tendency of custodial torture. He also noted that the definition of the offence is also vague and nebulous enlarging the scope for misuse of power, given the earlier experience under the *Maintenance of Internal Security Act (MISA)* and *TADA*. He

pointed out that there is no attempt made at systemic reforms inspite of long pending recommendations made in the National Police Commission Reports and Supreme Court decisions.

9.5 Justice Verma noted that experience in the working of such laws has shown that there is need to make systemic reforms in the functioning of the enforcement agencies, the police force being the main enforcement agency, its constitution, autonomy and accountability. He stated that the reports of the National Police Commission making copious recommendations to this effect including the need for autonomy of the police force to insulate it from political and other extraneous influences and its accountability continue to gather dust, and the Supreme Court also dealt with this aspect at length and made recommendations, many of which have yet to receive serious attention. He suggested that the experience of the working of stringent laws like the *Maintenance of Internal Security Act* (MISA) during the emergency and *TADA* in the recent past with no improvement in the performance and police culture is a lesson to be remembered while devising new strategies to combat terrorism. He considered that if the so-called stricter *TADA* did not serve the purpose, as is well known, how can the *POTO* professed as a milder version do better in the same hands? He noted that the inefficacy of *TADA* to combat terrorism is self evident from the statistics, and that the substantial area of deficiency lies elsewhere, that is, in implementation of the laws which must be remedied. He considered that quarrel with the tools without improving efficiency and integrity of performance is meaningless.

9.6 Justice Verma's conclusion was that these facts indicate the need for identification of, and emphasis on the real areas of deficiency in the implementation of the existing laws together with the assurance of speedy trials. He considered that the remedy does not appear to be in the enactment of more stringent laws which transfer judicial power into executive hands and result in the denial of a fair trial to the accused with the added potential danger of harassment of innocents and the violation of their human rights without effective remedies. He said that the need is of systemic reforms to improve the image and performance of the enforcement agencies with effective accountability to prevent misuse of public power, and conferment of larger powers, if needed even then, must follow only thereafter. He remarked that after performing such meaningful exercise, if any deficiency is found in the existing laws, then, and then alone there would be need to supplement the existing laws to the extent of the felt need, instead of adding to the burden of plethora of existing laws which make the judicial process more cumbersome and protracted. He considered that even though unwisdom of legislation and its potential for misuse are no grounds of constitutional invalidity, yet they are strong factors which must influence the legislature in considering the necessity of enacting new and stricter legislation. He pointed

out that to combat terrorism in the true sense, the strategies adopted must not be confined merely to identification of terrorists and their elimination by revenge, not justice, but must extend to diagnosis of the malady and finding a permanent cure, and that combating terrorism under the rule of law must necessarily have this meaning. He noted that a limited approach may help eliminate some present terrorists but not the causes or the phenomenon of terrorism which produces terrorists; and that too at the cost of violation of human rights of many innocents. He considered that a proper balance between the need and the remedy requires respect for the principles of necessity and proportionality, that performance of this balancing trick is the mission of the rule of law to which the Indian nation is committed.

(b) The need for a legislative measure

9.7 The criticism levelled against *POTO* caused the Union Minister for Law and Justice, Arun Jaitley to defend *POTO* earlier in the press.⁴ He pointed out that India's battle against terrorism did not commence on September 11, 2001, and nor was it going to end with either the capture of one individual or a possible change of the Taliban regime. He said that India has been among the worst victims of terrorist attacks and has to wage its battle not as a soft state but as a determined nation with its security, investigative and legislative systems well equipped to punish terrorists and eliminate terrorism. He stated that most liberal nations have enacted strong anti-terrorism laws. However, there is a concerted effort to dilute the national determination against terrorism by the opposition to the *Prevention of Terrorism Ordinance*. He remarked that *POTO* is a legislation which effectively deals with terrorist acts, that it imposes punishment for terrorism, for abetment of terrorism, for harbouring terrorists and for being a member of a terrorist organisation, and that the ordinance has special provisions which penalise acquisition of terrorists' funds⁵ and provide for their forfeiture and seizure. He also noted that it imposes a penalty for intimidation of witnesses, as well as an obligation on a citizen to provide the police any information which is of material assistance in preventing a terrorist act or in securing the conviction of a terrorist, and also penalises acquisition of such weapons and other lethal instruments intended to be used for

⁴ Arun Jaitley "POTO counters terrorism by necessary, legitimate means: Ask your lawyers, Ms Gandhi" *Indian Express* editorials & analysis 5 November 2001 see <http://www.indian-express.com/ie20011105/ed4.html>

⁵ Section 22(1) provides that a person commits an offence if he or she - (a) invites another to provide money or other property, and (b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism. Subsection (2) says that a person commits an offence if he or she - (a) receives money, or other property, and (b) intends that it should be use or has reasonable cause to suspect that it may be used, for the purposes of terrorism. In terms of section 22(3) a person commits an offence if he or she - (a) provides money or other property, and (b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

terrorism. He explained that *POTO* seeks to publish a list of terrorist organisations banned⁶ by the government, and seeks action against holding profits of crime, i.e. property acquired by earnings from terrorism.

(c) Safeguards

9.8 The Minister said that the Ordinance provides several safeguards: acquisition of property with funds of terrorist organisations will need an approval of a designated authority or the special court;⁷ several actions taken under the ordinance will be reviewed by a review committee headed by a sitting or retired high court judge; banned organisations can also move the review committee; there are detailed procedures permitting interceptions which can be made for a limited period and need ratification of the review committee and the annual report of interceptions is required to be placed either before parliament and, in the state, before the state legislature. He also noted that strict bail provisions apply only for one year and thereafter normal bail provisions shall apply; confessions made to the police officers of the rank of a superintendent of police are admissible in evidence; and the person making the confession is to be produced before a judicial officer within 48 hours who shall record the statement of the person with regard to whether or not such confession has been made voluntarily.

9.9 The Minister further explained that the scheme of *POTO* is to seize and confiscate the financial resources of the terrorists, and the property acquired as profit of terrorism. He pointed out that it is extremely important for intelligence agencies to beat the terrorists in their own game rather than expect the sub-inspectors of police stations to tackle and resolve terrorist crimes particularly when international terrorist groups are equipped with modern gadgets of communication. He remarked that it is not as though these provisions are new to the Indian government, as there are also state laws against organised crime and organised criminal syndicates⁸ containing detailed provisions providing for the confiscation of property

⁶ The Ordinance says in section 20. (1) A person commits an offence if he belongs or professes to membership belong to a terrorist organisation: Provided that this sub-section shall not apply where the person charged is able to prove- (a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and (b) that he has not taken part in the activities of the organisation at any time during its inclusion in the Schedule as a terrorist organisation.

⁷ According to a statement issued by the Home Ministry Clause 8 has been amended to vest power of forfeiture of the proceeds of terrorism in the special court, instead of the designated authority, and "property", as defined under Clause 2(1) (D) "shall now include bank accounts". "POTO repromulgated after changes" *Indian Express* 1 January 2002 <http://www.indian-express.com/ie20020101/nat14.html>

⁸ He noted the Congress government in Maharashtra is effectively implementing the *Maharashtra Control of Organised Crime Act*, 1999, that almost identical is the law introduced by the Telugu Desam Party in Andhra Pradesh, that the Congress government in Karnataka

and funds.⁹

has approved a near identical legislation which is awaiting presidential assent, and that very similar to these was the law approved by the West Bengal government for passage but electoral compulsions of the Left Front compelled the CPI(M) to direct its government to withdraw the anti-terrorist law.

⁹ “Hot Poto-ato: The ordinance flunks its first test at Srinagar” *Indian Express* <http://www.indian-express.com/ie20011201/ed1.html> The writer noted that section 8 of PTO refers to property “seized or attached in the belief that it constitutes proceeds of terrorism and is produced before the Designated Authority”. The designated authority on being satisfied that property consists of proceeds of terrorism will then order forfeiture of such property. He pointed out that in this case the police, characteristically impatient with the finer points of legislation, proceeded on the assumption that since Dar’s house served, according to their evidence, as a hideout for Al-Badr militants, they had every right to evict his family and seal the doors and windows. He explained that a full four days after this blind and draconian action the government discovered that the sealing of the house was not in accordance with the relevant sections of POTO since it cannot be deemed as the “proceeds of a terrorist act”, and it was finally restored to the family. He noted that in the meanwhile, there was widespread public anger at the injustice done to the Dar family as was evident in the response to the state-level bandh called over the issue on Wednesday — something that should have been strictly avoided in an already alienated society. He considered that the property clauses in POTO have not been adequately highlighted in the ongoing debate over it, perhaps because such a provision was not there in TADA, and that even the definition of “property” in the ordinance is an extremely broad one: “Property’ means property and assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, or interest in, such property or assets”.

(d) **Duty to disclose information to Police**

He suggests that there are other aspects too that need to be considered: Is there a time frame for the “designated authority” to come to a conclusion that the said property “consists of proceeds of terrorism” — a difficult fact to establish in the best of times. Also, even if one member of the family is found guilty of harbouring terrorists, is it fair to evict the entire family from a home? He asks whether this does not constitute a blatant violation of their right to life? He states that these are just some of the questions that the first case registered under POTO presents, and that it is only to be hoped that the then imminent parliamentary debate on the ordinance will examine these aspects thoroughly.

9.10 He also explained that a complete myth has been published in some newspapers that journalists publishing interviews of terrorists would be liable under POTO, although section 3(8) merely requires that a person in possession of information which he knows or believes to be of material assistance in prevention of a terrorist offence, must, unless there is reasonable cause otherwise, disclose this to the police. He noted that the section is based on a salutary principle that every citizen in a civil society owes an obligation to the larger public interest, that this is a responsibility every citizen must discharge, and that no one segment can claim immunity from this. He said that this provision merely imposes an obligation on a citizen to give information relating to crime, and that publishing an interview of a terrorist is obviously not covered by this. He noted that even this is not a new provision as there is an identical provision relating to IPC crimes under section 39 of the CrPC which imposes an obligation on every citizen to give information to the police of any offence covered under several provisions of the Indian Penal Code and which makes non-compliance punishable. (On 1 January 2002 it was announced that the Indian Parliament decided to delete this subsection when it considered the Ordinance.¹)

9.11 The Minister noted that terrorists use extraordinary techniques and therefore he considered that the rules of evidence in *POTO* as in the other organised crime laws are the only effective methods of dealing with terrorism. He observed that the Congress party is running down *TADA*, the law it enacted, and it opposes *POTO*, though the party has been among the worst sufferers of terrorist attacks having lost two former prime ministers. He explained that the rules of evidence under *TADA*, as also under *POTO*, and the laws against organised crime, permit admissibility of confessions made to senior police officers (and under *POTO* ratified before a court). He pointed out that but for these special rules of evidence under *TADA*, not a single conviction of the conspirators in the *Ghandi* case would have been possible, and India would have appeared a pathetically soft state, where terrorist groups kill a former prime minister and no one is convicted. He stated that where the accused are powerful, where powerful terror groups intimidate innocent witnesses,² where

¹ "POTO repromulgated after changes" *Indian Express* 1 January 2002 <http://www.indian-express.com/ie20020101/nat14.html> It was announced that the contentious sub-clause 8 of Clause 3, which made it mandatory for everybody to divulge to police any information he knows or believes could be of material assistance in preventing commission of a terrorist act, was deleted. See also *Tara Shankar Sahay* "Cabinet decides on 3 amendments in POTO" *Rediff.com* 6 December 2001 <http://www.rediff.com/news/2001/dec/06poto2.htm>

² The Ordinance contains the following provisions on the protection of witnesses:
30(1) Notwithstanding anything contained in the Code, the proceedings under this Ordinance may, for reasons to be recorded in writing, be held in camera if the Special Court so desires.
(2) A Special Court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.
(3) In particular, and without prejudice to the generality of the provisions of sub-section (2),

secret communications of terrorist groups are not accessible to the outside world, special rules of evidence are required.

9.12 One commentator noted that the National Human Rights Commission of India (NHRC) was neither consulted in drawing up *POTO* nor given a copy of it, that in opposing the earlier Bill, the NHRC had maintained that there were enough anti-terrorism laws and what was needed was stricter implementation of the existing laws, not any more new ones.³ It was said that the opposition feels the government is using the events of September 11 as a smokescreen to sneak in a law to replace the draconian *Terrorist and Disruptive Activities (Prevention) Act TADA* — which expired in 1995. The government reportedly said that after September 11, terrorism has attained global dimensions and India is only complying with the United Nations Security Council Resolution 1373 of September 28, 2001, enjoining member-states to undertake comprehensive measures to deal with terrorism. A Minister said on television that it was necessary to arm the police with *POTO* because "it is no longer possible to get information out of a terrorist over a cup of tea". Terrorism, he says, has claimed 54,000 lives in the last 15 years.

(e) Sweeping powers granted to the Police?

9.13 It was pointed out that the manner in which the government has defined "terrorism"⁴

the measures which a Special Court may take under that sub-section may include – (a) the holding of the proceedings at a place to be decided by the Special Court; (b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public; (c) the issuing of any directions for securing that the identity and address of the witnesses are not disclosed; (d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a court shall not be published in any manner.

³ The Rediff Special/Krishna Prasad "Everything you wanted to know about POTO" *rediff.com* 19 November 2001 <http://www.rediff.com/news/2001/nov/19spec.htm> She also notes that former Delhi high court chief justice Rajinder Sachar said since terrorism in India is mostly of the cross-border kind, the *National Security Act*, the *Unlawful Activities (Prevention) Act*, and the *Armed Forces Special Powers Act* are sufficient to deal with any situation thrown up by terrorists. She also remarks that the national president of the People's Union of Civil Liberties wrote that for more than 50 years, the Centre has been dealing with J&K and the Northeast as a law-and-order issue, repressive laws have been employed to rule them, and repression over time produces mindless violence.

⁴ It says that a person commits a terrorist act, who,

- (d) with intent to
- (f) threaten the unity, integrity, security or sovereignty of India or strike terror in the people or any section of the people
- (h) does any act or thing by
- (j) using bombs, dynamite or other explosive substances or inflammable substances or fire arms or other lethal weapons or poisons or

and "terrorist acts" under *POTO* has kicked up a ruckus. It was said that the sweeping powers it invests in the police to arrest, detain and interrogate⁵ those it considers terrorists, and the tight bail provisions, have heightened fears of their misuse, leading to harassment, extortion and torture of innocent people. The PUCL points out that the first 23 outfits to be notified as militant organisations under *POTO* all belong to the minorities who have opted for self-determination.⁶ It was explained that *POTO* contains the following "sweeping powers"

-
- noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever,
- (l) in such a manner as to cause or likely to cause,
 - (n) death of; or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;
 - (p) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 or
 - (q) voluntarily does an act aiding or promoting in any manner the objects of such association and
 - (r) in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and
 - (s) commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property.

The Ordinance also provides that for the purposes of section 3(2), "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism.

⁵ Pamela Philipose states that in some ways *POTO*'s scope is more limited than that of *TADA*. It does not, for instance, criminalise "disruptive activities" — a provision in the earlier law that allowed the authorities to apprehend people agitating peacefully for their political convictions. Besides this, under *POTO* appeals can be filed, not just in the Supreme Court but the High Courts as well. In other ways, however, *POTO*'s scope is wider, since it contains provisions that were not in *TADA* — particularly those seeking to curb the right to information and freedom of expression. Section 3(8) of the Ordinance punishes those in possession of information of material assistance in preventing a "terrorist act". Section 14 empowers investigating officers to extract information from individuals whom they suspect of having such information. Failure to do so could invite a three-year imprisonment term. The media is directly hit by such measures. ("A kinder *TADA*? Take another look" at <http://www.indian-express.com/ie20011023/ed5.html>)

⁶ The Schedule to the Ordinance lists the following organisations as terrorist organisations: 1. Babbar Khalsa International; 2. Khalistan Commando Force; 3. Khalistan Zindabad Force; 4. International Sikh Youth Federation; 5. Lashkar-e-taiba/pasban-e-ahle Hadis; 6. Jaish-e-mohammed/tahrik-e-furqan; 7. Harkat-ul-mujahideen/harkar-ul-ansar/karkat-ul-jehad-e-islami; 8. Hizb-ul-mujahideen/hizb-ulmujahideen Pir Panjal Regiment; 9. Al-umar-mujahideen; 10. Jammu and Kashmir Islamic Front; 11. United Liberation Front of Assam (Ulfa); 12. National Democratic Front of Bodoland (Ndfb); 13. People's Liberation Army (Pla); 14. United National Liberation Front (UNLF); 15. People's Revolutionary Party of Kangleipak (PREPAK); 16. Kanleipak Communist Party (KCP); 17. Kanglei Yaol Kanba.lup (KYKL); 18. Manipur People's Liberation Front (MPLF); 19. All Tripura Tiger Force; 20. National Liberation Front of Tripura; 21. Liberation Tigers of Tamil Eelam (LTTE); 22.

—

- arrests can be made on mere suspicion that a person is a terrorist;¹
- premises can be searched without a warrant;
- all kinds of messages and communications can be intercepted without warrant;
- the identity of witnesses deposing against an accused can be withheld from the suspect/arrested person;
- confessions to the police can be used as evidence;
- passport and travel documents of any citizen suspected to be a terrorist or having links with terrorists can be suspended;
- charge sheets can be delayed for up to 180 days;
- property acquired through terrorist activities can be confiscated;²
- bail can be applied for and obtained only after a year;
- there is no time frame for special courts to deal with cases;
- the onus of proving innocence is on the accused, not on the investigating authorities.

9.14 The government's stand on these allegations according to the Rural Development Minister is that civil rights are for civil people and human rights are for human beings, not for terrorists. According to the Home Minister conviction of terrorists is not possible unless legal provisions are of the nature of *TADA* and *POTO*. The question arose whether *TADA* resulted in increased conviction. It was noted that it is estimated at between 1 and 2 per cent of the total number of arrests (75000 to 77000), when even under existing laws, the

¹ KS Subramanian remarked that the issue in the Indian police is not the non-existence of adequate laws but their lackadaisical, often corrupt, implementation compounded by poor supervision. He noted that in the eighties, a study on the implementation of the National Security Act, done by the research and policy division of the Union home ministry, found that in all the states, most of those picked up under the law did not deserve to be in jail. He said that the issue of undertrials in Indian prisons who are neither convicted nor released but are kept in prison indefinitely is an important one. He pointed out that the basic problem is the discretion enjoyed by the street level security personnel to pick up people under various draconian laws — as the use of the Armed Forces (Special Powers) Act has demonstrated. "POTO is no answer to terrorism" 6 November 2001 *Indian Express* <http://www.indian-express.com/ie20011106/ed5.html>

² Pamela Philipose says that civil libertarians have already pointed out the untenability of Section 3 (3) of *POTO* that can punish someone for abetting "terrorist acts", without spelling out requisite intent. Similarly, people holding property derived from the commission of "terrorists acts" or acquired through "terrorist funds" can be punished, even if they did so unknowingly. Section 4 of *POTO* is just a regurgitation of Section 5 of *TADA*, under which it is presumed that if a person is found in unauthorised possession of arms in a "notified area", it will be automatically presumed to be linked with "terrorist acts". There is a larger principle at stake here — the right of a person to be presumed innocent until proved guilty. These then are some of the aspects that make *POTO* — in spirit and intent — totally unacceptable in a society that cherishes the rights to liberty, to a fair trial and to information and freedom of expression. It would be ironic in the extreme if a law that seeks to attack terrorism ends up terrorising the innocent. ("A kinder *TADA*? Take another look" at <http://www.indian-express.com/ie20011023/ed5.html>)

conviction rate is as high as 6.2 per cent. It was reported that most of the police seem to be in favour of the Ordinance. One commentator who investigated the Rajiv Gandhi assassination, said the existing laws are antiquated to deal with modern-day terrorists, and others like Bombay Police Commissioner feel that with terrorist groups ruthlessly using modern technology and operating across international borders, the agencies facing them need strong laws and proper equipment to deal with them.³

³

KS Subramanian commented that conventional crime is committed by the man on the street and is dealt with. He noted that it is the issue of non-conventional crime that is more complex — crimes such as offences against international law, criminal law violations committed for patriotic, ideological, revolutionary and other reasons, and crimes committed under the cover of official and semi-official government positions. Terrorism, he pointed out, notoriously difficult to define, does include state terrorism within its ambit. Complex violations of law such as terrorism, espionage, drug trafficking and so on, have been characterised as “multinational systemic crimes”. He said that these are crimes by various kinds of organisations that operate across national boundaries and in two or more countries simultaneously. These crimes are not individual acts but are part of highly complicated, well-organised systems which function much like modern business corporations and are integrated with powerful legal and illegal institutions of several nation-states. No global criminal justice system exists to deal with the challenge of globalised crime. Narrow parochial concepts of correction do not help here. The application of insights, not just from criminology and criminal justice, but also from the broader perspectives of other social sciences, is called for. He stated that law enforcement agencies, lacking a definition of terrorism, have focused on specific and well-defined criminal acts committed by terrorists such as murder, assault, hijacking and so on. A regional and global approach must be evolved to deal with crimes of this kind. Prejudices stemming from narrow “national security” concerns of individual nation states must not set the agenda. He considered that force is not a viable policy option in containing multinational crime, but it continues to retain its seductive power since it lends commitment to the expansion of police, paramilitary and military bureaucracies. “POTO is no answer to terrorism” *Indian Express* <http://www.indian-express.com/ie20011106/ed5.html>

(f) **Definition of terrorist act**

9.15 The maximum punishment for committing a terrorist act is death, and the minimum punishment is five years' imprisonment. *POTO* defines a terrorist act as: "An act done by using weapons and explosive substances or other methods in a manner as to cause or likely to cause death or injuries to any person or persons or loss or damage to property or disruption of essential supplies and services or by any other means necessary with intent to threaten the unity and integrity of India or to strike terror in any section of the people." It was pointed out that critics feel that all the acts of violence mentioned in *POTO* are already illegal under the Indian Penal Code; so what is the need for *POTO* if it is not to "criminalise dissent", they ask. It was explained that the human rights group Amnesty International feels the vague definition of a "terrorist act" might expose non-violent human rights defenders, minority communities and the media to a discriminatory enforcement of *POTO*, and that the leader of the Communist Party of India, feels that the "by any other means necessary" clause is so open-ended that even legitimate political activities such as a *bandh* against the government's economic policies or a trade union meeting can be interpreted as a terrorist act.

9.16 It was reported that under *POTO* journalists have to reveal sources. *POTO* compels journalists to disclose all information regarding any person or persons perceived by the police as terrorists, with provision for imprisonment (from a period of one year to 10 years) for failure to do so. In other words, a journalist can be arrested for not revealing his sources, for refusing to tell the police what he/she knows about a terrorist's plans or hideouts, and/or for meeting sources and receiving information.¹ The Minister for Law and Justice said the provision doesn't make it an offence to meet a terrorist or report news of a terrorist organisation, unless the purpose was to support² the activities of the terrorist or terrorist

¹ The government has included the contentious clause that makes it mandatory for everyone — including the media — to furnish information about terrorism offences to investigation officials. Freedom of the media depends upon the right of journalists to keep the identity of their sources confidential, among others. If draconian laws rob them of this right, valuable sources may dry up. True, the rights and privileges of mediapersons are no greater than those of other citizens, but the media performs a function other citizens are not called upon to do and which is so vital to any democracy — of providing information. This ordinance can gravely jeopardise their work as professionals. "TADA by another name: There is no substitute to meticulous policing" *Indian Express* 18 October 2001 <http://www.indian-express.com/ie20011018/ed2.html>

² Section 21(1) says that a person commits an offence if (a) he or she invites support for a terrorist organisation, and (b) the support is not, or is not restricted to, the provision of money or other property within the meaning of section 22. Section 22(2) provides that a person commits an offence if he or she arranges, manages or assists in arranging or managing a meeting which he or she knows is — (a) to support a terrorist organisation, (b) to further the activities of a terrorist organisation, or (c) to be addressed by a person who belongs or professes to belong to a terrorist organisation. Under section 21(3) a person commits an offence if he addresses a meeting for the purpose of encouraging support for a terrorist

organisation³. But information should be provided if asked for, which he says applies to everybody else as well, not just journalists. The Home Secretary pointed out that these provisions are merely a reiteration of similar provisions in section 39 of the CrPC and section 187 of the IPC. It was noted that media bodies were not consulted on this and that Law Commission of India said that national security comes above freedom of the press, having said that it has been repeatedly upheld by the Supreme Court that the rights and privileges of the press are no greater than those of any citizen of India, and that even in the UK and US, no immunity in favour of journalists or the press is recognised.

9.17 On the question whether *POTO* has enough safeguards to prevent its indiscriminate use and misuse, it was explained that the Home Secretary said that—

- unlike TADA, the confession of an accused will not be admissible as evidence against a co-accused under *POTO*;

organisation or to further its activities.

³ The Ordinance provides that any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist acts, shall be liable on conviction to imprisonment for a period which may extend to imprisonment for life or to a fine. "Terrorist organisation" means an organisation which is concerned with or involved in terrorism. An organisation shall be deemed to be involved in terrorism if it— (a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise involved in terrorism.

- the maximum period of police custody under *POTO* is 30 days as against 60 days under *TADA*;¹
- under section 48(7), a magistrate needs to satisfy himself only about the innocence of the accused before granting bail, not whether he is also unlikely to commit a similar offence after being let out, as required by *TADA*;
- appeals against an order of a *POTO* special court can be made to a high court instead of the Supreme Court as required by *TADA*.

9.18 Other safeguards under *POTO*, are —

¹ Pamela Philipose says that the most disturbing sections of *POTO* are those that actually mimic *TADA*, and while *TADA* allowed for people to be detained in police custody for six months without charge or trial, *POTO* brings this down to three months. However, the effect of such arbitrary detention is just as dire. There is, incidentally, no provision to challenge the sufficiency of the evidence cited by the prosecution before trial. This means that people can stew in jail despite the fact that there is not a shred of evidence against them. (See "A kinder *TADA*? Take another look" at <http://www.indian-express.com/ie20011023/ed5.html>)

- intimation of the arrest of an accused will have to be provided to a family member immediately after the arrest and this fact has to be recorded by a police officer;¹
- the time for the confirmation of the first information report has been reduced;
- confessions made to an officer below the rank of deputy superintendent of police will not be admissible as evidence;
- a legal practitioner shall be allowed to be present during interrogation, but not throughout the interrogation.

B. THE LAW COMMISSION OF INDIA'S REPORT

(a) Need for legislation

¹ The ordinance suffers from another false conceit: It projects itself as less draconian than TADA. While it does introduce new safeguards to those arrested — such as confirmation of the FIR by the Director-General of Police and the Review Committee within 10 days and a month respectively, and immediate intimation of the arrest of the accused to a family member — their efficacy is questionable. There is no provision, for instance, for the detainee make a representation before the Review Committee. “TADA by another name: There is no substitute to meticulous policing” *Indian Express* 18 October 2001 <http://www.indian-express.com/ie20011018/ed2.html>

9.19 In its April 2000 report on the *Prevention of Terrorism Bill*, the Law Commission of India noted that militant and secessionist activities in Jammu and Kashmir and the insurgency-related terrorism in the North-East have been major areas of concern, that bomb blasts in different parts of the country constituted another disquieting feature, that there has been extensive smuggling in of arms and explosives by various terrorists groups, and that in Jammu and Kashmir there have been 45182 incidents of terrorist violence since 1988 up to March 1999. They explained that in this violence, 20506 persons have lost their lives, 3421 incidents of violence took place in Jammu and Kashmir which included 2198 cases of killing in 1997 alone.¹

9.20 The Law Commission of India said that since their Working Paper was released, the security situation has worsened. The hijacking of Indian Airlines flight, IC-814, the release of three notorious terrorists by the Government of India to save the lives of the innocent civilians and the crew of the flight, the subsequent declarations of the released terrorists and their activities both in Pakistan and the Pakistan-occupied Kashmir, have raised the level of terrorism both in quality and extent. The repeated attacks upon security forces and their camps by terrorists including suicide squads was a new phenomenon adding a dangerous dimension to the terrorist activity in India. The Commission pointed out that a perception has developed among the terrorist groups that the Indian State was inherently incapable of meeting their challenge, that it has become soft and indolent, and parties and groups appear to have developed a vested interest in a soft State, a weak government and an ineffective implementation of the laws. They noted that certain foreign powers were interested in destabilising India and foreign funds were flowing substantially to various organisations and groups which serve, whether wittingly or unwittingly, the long-term objectives of the foreign powers.

¹ They further pointed out that in Punjab militancy showed an upward trend in 1998, accounting for 735 incidents (603 killings) as against 427 incidents (370 killings) in 1997, and the first eight months of 1999 had witnessed 298 incidents (208 killings). In Manipur there has been a sharp rise in the overall violence, and a particularly high rate of security forces casualties - 111 personnel lost their lives in 92 ambushes in 1997 as against 65 killed in 105 ambushes in 1996. As against total 417 incidents and 241 killings in 1996, these groups were responsible for 742 incidents in which 575 persons were killed in 1997. In 1998, 250 persons were killed in 345 incidents. Until August 1999 there have been 153 incidents claiming 100 lives. In Nagaland, there were 202 incidents in 1998 which claimed 40 lives, and until August 1999, 10 persons had been killed in 126 violent incidents. In Tripura there were 303 violent incidents during 1997 involving 270 deaths, as against 391 incidents (178 deaths) in 1996, and in 1998, 251 persons were killed in 568 violent incidents, whereas during 1999 until August, 417 incidents of violence have been reported, resulting in 152 deaths. The Commission noted that the violence in all of the above-mentioned cases mostly took the form of ambushes, looting, extortion, kidnapping for ransom, highway robberies and attacks on trucks/vehicles as well as attacks on the security forces personnel, government officials and suspected informers.

9.21 The Law Commission of India said that after consideration of the various viewpoints, it was of the opinion that legislation to fight terrorism is a necessity in India. They remarked that it is not as if the enactment of such a legislation would by itself subdue terrorism, although it may arm the State to fight terrorism more effectively. The Commission considered that there is a good amount of substance in the submission that the Indian Penal Code (IPC) was not designed to fight or to check organised crime of the nature they were facing. They pointed out that it is a case of organised groups or gangs trained, inspired and supported by fundamentalists and anti-Indian elements trying to de-stabilise the country who make no secret of their intentions, and that the act of terrorism by its very nature generates terror and a psychosis of fear among the populace. They stated that because of the terror and the fear, people are rendered sullen, they become helpless spectators of the atrocities committed before their eyes, and they are afraid of contacting the Police authorities about any information they may have about terrorist activities much less to cooperate with the Police in dealing with terrorists. They said that it is difficult to get any witnesses because people are afraid of their own safety and safety of their families, and that it is well known that during the worst days in Punjab, even the judges and prosecutors were gripped with such fear and terror that they were not prepared to try or prosecute the cases against the terrorists. The Commission also noted that it is also stated to be the position in Jabu and Kashmir. They remarked that this is one reason which is contributing to the enormous delay in going on with the trials against the terrorists, that in such a situation, insisting upon independent evidence or applying the normal peace-time standards of criminal prosecution, may be impracticable, and that it is necessary to have a special law to deal with a special situation. It was also suggested to the Commission that an extraordinary situation calls for an extraordinary law, designed to meet and check such extraordinary situation.

9.22 The Law Commission of India remarked that it is one thing to say that they should create and provide internal structures and safeguards against possible abuse and misuse of the Act and altogether a different thing to say that because the law is liable to be misused, India should not have such an Act at all. They noted that the Supreme Court of India has repeatedly held that mere possibility of abuse cannot be a ground for denying the vesting of powers or for declaring a statute unconstitutional.

(b) Definition of terrorist act

9.23 The Commission explained that Clause 3 of the Bill defines the expression "terrorist act" and that it also provides for punishment and allied provisions. The Commission pointed out that merely threatening the unity or integrity of India is not by itself sufficient to attract the offence in that sub-clause. They noted that what is necessary is that the person who

threatens the unity, integrity, security or sovereignty of India also does an act or thing by using bombs, dynamite, etc. in a manner which causes or is likely to cause death of or injuries to any person or persons or loss of or damage to or destruction of property or disruption of any supplies or services essential to the life of the community or detains any person and threatens to kill and injure such person in order to compel the government or any other person to do or abstain from doing any act.

9.24 The Commission observed that crimes in the field of electronics or computers are increasingly being used for international terrorism, and that they noted section 805 of the US Anti-terrorism and Effective Death Penalty Act of 1996, which provides deterrent sentences for any terrorist activity damaging a federal interest computer. The Law Commission was of the opinion that any damage to equipment installed or utilised for or in connection with defence or for any other purposes of the government is equally an act of terrorism if it is done with intent to threaten the unity, integrity, security, or sovereignty of India. They proposed the following provision:

- "3(1) Whoever,
- (a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage to or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act,
 - (b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 or voluntarily does an act aiding or promoting in any manner the objects of such an association and is either in possession of any unlicensed firearm, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property,
- commits a terrorist act."

9.25 The Commission pointed out that its definition of terrorist act is set out in one clause, whereas the UK legislation defines "terrorism" in section 1 and "terrorist" in section 38 in more extensive terms. They noted that the definition of "terrorist" in the UK Act speaks of a person who has committed an offence under any of the sections 10, 11, 14 to 17, 52 and 54 to 56 of that Act.¹ They were of the view that it would be appropriate that

¹ Sections 10 to 17 of the UK Act deal with helping, raising funds or otherwise having

their Act too contains provisions which make the membership of a banned organisation and/or raising funds for or otherwise furthering the activities of a banned organisation, a terrorist act, and, similarly, possession of unlicensed firearms and explosives and other weapons of mass destruction may also be treated as an act of terrorism.

(c) Harbouring or concealing a terrorist

9.26 The Law Commission of India noted that clause 3(4) seeks to punish a person who "harbours or conceals or attempts to harbour or conceal any person knowingly that such person is a terrorist". They explained that it was pointed out by certain participants at their seminar that this clause would also take in the mother, father, sister or brother of a terrorist who came home to hide himself and that it would be wholly unjust to punish such relative of the terrorist merely because he was allowed to stay in the house by such a relative. They said that it was also pointed out by some other participants that such harbouring or concealing might be out of fear or under the threat of violence by a terrorist, and, in such a situation, the person supposed to be harbouring or concealing a terrorist was himself a victim. They also noted that on the other hand, certain other participants pointed out that terrorists should not be provided any sanctuary and that any person who harboured or concealed a terrorist knowing that he or she was a terrorist, should be held guilty of the offence under sub-section (4). The Commission said that on a consideration of the opposing submissions, they were of the opinion that it would be appropriate to add the word "voluntarily" after the word "whoever" and before the words "harbours or conceals". They explained that this would exclude a situation where a person harbours a terrorist under threat or coercion even though he or she may be knowing that that person is a terrorist, and so far as the wife/husband harbouring the terrorist is concerned, they recommended an addition of an exception to section 212 of the Indian Penal Code to read as follows:

"Exception.- This sub-section shall not apply to any case in which the harbour or

connections with proscribed organisations, while section 52 and 54 to 56 speak of weapons training, directing terrorist organisations and possession of an article for the purpose connected with terrorist activities.

concealment is by the husband or wife of the offender".²

(d) **Threatening witness with violence**

9.27 The Commission also pointed out that in its Working Paper, they had recommended the addition of the following sub-clause: "(7) Whoever threatens any person who is a witness or any other person in whom such witness may be interested, with violence, or wrongfully restrains or confines the witness, or any other person in whom the witness may be interested, or does any other unlawful act with the said intent, shall be punishable with imprisonment which may extend to three years and fine." The Commission explained that no objection was taken to this proposal during the seminars or in the responses received by them pursuant to the Working Paper, except in the written representation of the South Asia Human Right Documentation Centre (SAHRDC). They saw no reason to abandon this proposal which they considered to be in the interests of a free and fair trial.

(e) **Obligation to inform Police of knowledge about terrorist activity**

9.28 The Commission also noted that in its Working Paper, it proposed the addition of a sub-clause which would place an obligation upon the persons receiving or in possession of information as to any terrorist activity to inform the Police as soon as practicable. They were of the view that it may be that when terror prevails, people may be afraid of speaking out, and pointed out that one of the prime objects of creating terror is to silence the people by instilling a psychosis of fear in them. They also explained that at the same time it cannot also be forgotten that such an obligation has to be placed upon the citizens of India for effectively fighting terrorism. They considered that the incorporation of such a clause does not mean that any or every person not giving information would necessarily be punished, but that if and when a person is prosecuted under the proposed clause, the court will take into consideration all the relevant facts and circumstances and even where he or she is punished, the quantum of punishment to be awarded would be within the discretion of the court and may even be a mere fine of a small amount.

² The Ordinance says that if a person voluntarily harbours or conceals, or attempts to harbour or conceal any person knowing that such person is a terrorist faces imprisonment for a term not less than three years which may be extended to imprisonment for life as well as a fine. The Ordinance also says, however, that this provision shall not apply to any case in which the harbour or concealment is by the husband or wife of the offender.

9.29 The Law Commission of India pointed out that at the two seminars and in the responses received, an objection was raised that this would take in even a journalist/media person who interviews a terrorist and he or she would be obliged to disclose the information relating to the terrorist interviewed and that therefore this provision is not consistent with the freedom of press and media. They remarked that it may, however, be noted that in India, freedom of press flows from sub-clause (a) of clause (1) of Article 19 of the Constitution of India and it has been repeatedly held by their Supreme Court that rights and privileges of the Press are no greater than that of any of the citizens of India, and that even in the UK and the USA, no immunity in favour of journalists or the Press is recognised.¹

9.30 They recommended the following clause:

"3(8) A person receiving or in possession of information which he knows or believes might be of material assistance -
 (i) in preventing the commission by any other person of a terrorist act; or
 (ii) in securing the apprehension, prosecution or conviction of any other person for an offence involving the commission, preparation or instigation of such an act, and fails, without reasonable cause, to disclose that information as soon as reasonably practicable to the police, shall be punished with imprisonment for a term which may extend to one year or fine or both."

(f) Disruptive activities

9.31 The Law Commission of India noted Clause 4 which deals with disruptive activities which said that "whoever questions, disrupts, whether directly or indirectly, the sovereignty or territorial integrity of India or supports any claim whether directly or indirectly for the cession of any other part of India or secession of any part of India from the Union, commits a disruptive act". They noted that the expressions "cession" and "secession" are defined and

¹ They cite DD Basu's *Law of the Press* page 203 3rd edition: "The same view, as in UK, has been arrived at by the American Supreme Court, recently, holding that the guarantee of freedom of the Press does not immunise the Press to render assistance to the investigation of crimes which obligation lies on every citizen. They are, accordingly, bound to disclose the information gathered by journalists, with their sources, even though such information may have been obtained under an agreement not to disclose, provided such information is relevant to the investigation, in a particular case, and they are not compelled to disclose more than is necessary for such purpose."

that "trade union activity or other mass movement without the use of violence or questioning the sovereignty or territorial integrity of India or supporting any claim for cession of any part of India or secession of any part of India" is excluded from the purview of the clause (1). They also explained that sub-clause (2) seeks to punish those who commit, conspire or attempt to commit or abet, advocate, advise or knowingly facilitate the commission of any disruptive act or any act preparatory thereto, and that sub-clause (3) seeks to expand the scope of disruptive activity. According to this sub-clause, "any action taken whether by act or by speech or through any other media or in any other manner whatsoever, which (a) advocates, advises, suggests or incites or (b) predicts, prophesies or pronounces or otherwise expresses, in such manner as to incite, advise, suggest or prompt the killing or the destruction of any person bound by or under the Constitution to uphold the sovereignty and integrity of India or any public servant" amounts to disruptive activity. Sub-clause (4) provides punishment for persons who knowingly harbour a *disruptionist*. The Commission pointed out that a reading of clause 4 shows that it seeks to punish speech, and though sub-clause (3) uses the expression "act", it again appears to be confined to an act of speech. They noted that some respondents have suggested the segregation of offences relating to disruptive activities from the provisions of the anti-terrorism legislation.

9.32 In the Law Commission of India's opinion, inclusion of mere offensive speech in the Bill was liable to be termed a case of over-reaction and a disproportionate response. They said that they were not suggesting that such speech is either valid or that such speech should not be made punishable, but that they were suggesting that such speech or its punishment should not find place in an anti-terrorism law. They therefore recommended that clause 4 either be deleted from the Bill or be redrafted so as to take in physical acts directed towards disturbing the integrity or sovereignty of India so as to take in acts other than those mentioned in clause 3. They considered that mere offensive speech may be dealt with by another enactment - may be by amending the Indian Penal Code and that this is a matter for the government to decide.

(g) Seizing and attaching terrorist property

9.33 The Law Commission pointed out that Clauses 6 and 7 of the Bill, provide for the following:

- (a) If an officer investigating an offence under the Act has reasons to believe that "any property in relation to which an investigation is being conducted" is property derived from terrorist activity and includes proceeds of terrorism, he shall seize/attach that property after making an order in that regard so that such property is not transferred or otherwise dealt with except with his permission or with the permission of the special court. The officer

seizing/attaching such property has to inform the special court of the said fact within 48 hours and it shall be open to the court to either confirm or revoke the order.

(b) It is equally open to the special court trying an offence under this Act to attach properties belonging to the accused and where such trial ends in conviction, the property shall stand forfeited to the government free from all encumbrances.

(c) Where a person is convicted under the Act, the special court may, in addition to awarding any punishment, direct forfeiture of the properties belonging to him.

(d) If the property forfeited represents shares in a company, the company shall forthwith register the government as the transferee of such shares.

9.34 The Law Commission explained that it had suggested in its Working Paper that in addition to the provisions contained in clauses 6 and 7, there should be a parallel procedure providing for forfeiture/confiscation of proceeds of terrorism. They noted that the expression "proceeds of terrorism" was defined to mean "all kinds of properties which have been derived or obtained from commission of any terrorist act or disruptive activity or has been acquired through funds traceable to terrorist act or disruptive activity". They also proposed in the Working Paper that there should be a specific section declaring the holding of proceeds of terrorism itself as illegal and providing for their confiscation, and that it was suggested that there should be provisions prescribing the procedure following which proceeds of terrorism can be seized/attached and forfeited to the government. They said that it was clarified that for this purpose it is not necessary that the person holding such proceeds or owning such proceeds or in possession of such proceeds should have been prosecuted under the Act. The Law Commission explained that the object behind the provision has been to reach the properties of the terrorists, who, for some reason or other cannot be arrested or prosecuted including for the reason that they are safely ensconced abroad. They remarked that reference was made to the fact that certain persons are said to be directing, controlling and carrying on terrorist activities within India while stationed outside the country, and that it was pointed out that attaching and forfeiting the properties belonging to such persons, irrespective of the fact in whose name and in whose possession they were held, would be an effective way of fighting terrorism. The Commission noted that it was suggested that such attachment could be made only by an officer not below the rank of Superintendent of Police and that he or she should inform the special court of such seizure/attachment within 48 hours.

9.35 The Commission explained that it was further provided that it shall be open to the officer seizing/attaching the properties to either produce them before the court where the person owning such properties is prosecuted under the Act or to produce the same before the designated authority (who must be distinct from a designated court). They pointed out

that if the property seized/attached was produced before the designated authority, he or she must issue a notice to the person in whose name it is standing or in whose possession they are found, to show cause as to why the said properties should not be declared to be the proceeds of terrorism and forfeited/confiscated in favour of the government. It was further proposed that in such a proceeding, the burden would lie upon the person to whom a notice is issued to establish that the properties mentioned in the notice do not represent the "proceeds of terrorism" or that they were earned by legitimate and lawful means. After making appropriate inquiry (into facts in case if there is a dispute as to facts), the Designated Authority would pass final orders either forfeiting such property in favour of the government or releasing it as the case may be. The Commission noted that detailed procedure on the lines of the procedure contained in SAFEMA was provided and that the only objection which has been put forward in the course of seminars to these provisions is that the power to forfeit the properties should not be vested in an administrative authority like the Designated Authority but that it should vest in a court or a special court, as the case may be. The Commission considered that though it cannot be said that the said objection is totally without any substance, it is necessary to mention at the same time that even under SAFEMA, the power to forfeit is vested in an administrative officer and not in a court. The Commission said that more important — though the Designated Authority might be an administrative officer, once he is designated as a Designated Authority, he becomes a tribunal for all purposes and would be obliged to observe the principles of natural justice while conducting the inquiry and while passing the final orders, and that an appeal is provided from the orders of the Designated Authority to the High Court directly. The Commission considered that in such a situation, there can be no room for any valid apprehension that the proceedings under this parallel procedure would result in a miscarriage of justice. The Commission therefore proposed the following provision:

"6. Holding of proceeds of terrorism illegal:

- (2) No person shall hold or be in possession of any proceeds of terrorism.
- (2) Proceeds of terrorism, whether they are held by a terrorist or by any other person and whether or not such person is prosecuted or convicted under this Act shall be liable to be forfeited to the Central Government in the manner hereinafter provided.

6A. Powers of investigating officers:

- (1) If an officer (not below the rank of Superintendent of Police) investigating an offence committed under this Act has reason to believe that any property in relation to which an investigation is being conducted is a property derived or obtained from the commission of any terrorist act or represents proceeds of terrorism, he shall, with the prior approval in writing of the Director General of the Police of the State in which such property is situated, make an order seizing such property and where it is not practicable to seize such property, make an order of attachment directing that such property shall not be transferred or otherwise dealt with except with the prior permission of the officer making such order, or of the Designated Authority, or the Special Court, as the case may be, before whom the properties seized or attached are produced. A copy of such order shall be served on the person concerned.
- (2) The investigating officer shall duly inform the Designated Authority or, as the case may be, the Special Court, within forty-eight hours of the attachment of such property.
- (3) It shall be open to the Designated Authority or the Special Court before whom the seized or attached properties are produced either to confirm or revoke the order of

attachment so issued.

(4) In the case of immovable property attached by the investigating officer, it shall be deemed to have been produced before the Designated Authority or the Special Court, as the case may be, when the Investigating Officer so notifies in his report and places it at the disposal of the Designated Authority or the special Court, as the case may be.

6B Forfeiture of proceeds of terrorism:

Where any property is seized or attached in the belief that it constitutes proceeds of terrorism and is produced before the Designated Authority, it shall, on being satisfied that the said property constitutes proceeds of terrorism, order forfeiture of such property, whether or not the person from whose possession it is seized or attached, is prosecuted in a Special Court for an offence under this Act.

6C Issue of show-cause notice before forfeiture of proceeds of terrorism:

(1) No order forfeiting any proceeds of terrorism shall be made under section 6B, unless the person holding or in possession of such proceeds is given a notice in writing informing him of the grounds on which it is proposed to forfeit the proceeds of terrorism and such person is given an opportunity of making a representation in writing within such reasonable time as may be specified notice against the grounds of forfeiture and is also given a reasonable opportunity of being heard in the matter.

(2) No order of forfeiture shall be made under sub-section (1), if such person establishes that he is a bona fide transferee of such proceeds for value without knowing that they represent proceeds of terrorism.

(3) It shall be competent to the designated Authority to make an order, in respect of property seized or attached,

- (i) in the case of a perishable property directing it to be sold: and the provisions of section 459 of the Code shall, as nearly as may be practicable, apply to the net proceeds of such sale;
- (ii) in the case of other property, nominating any officer of the Central Government to perform the function of the Administrator of such property subject to such conditions as may be specified by the Designated Authority.

6D Appeal

(1) Any person aggrieved by an order of forfeiture under section 6B may, within one month from the date of the communication to him of such order, appeal to the High Court within whose jurisdiction the Designated Authority, who passed the order to be appealed against, is situated.

(2) Where an order under section 6B is modified or annulled by the High Court or where in a prosecution instituted for the violation of the provisions of this Act, the person against whom an order of forfeiture has been made under section 6B, is acquitted and in either case it is not possible for any reason to return the proceeds of terrorism forfeited, such person shall be paid the price therefor as if the proceeds of terrorism had been sold to the Central Government with reasonable interest calculated from the day of seizure of the proceeds of terrorism and such price shall be determined in the manner prescribed.

6E Order of forfeiture not to interfere with other punishments

The order of forfeiture made under this Act by the Designated Authority, shall not prevent the infliction of any other punishment to which the person affected thereby is liable under this Act.

6F Claims by third parties:

(1) Where any claim is preferred, or any objection is made to the forfeiture of any property under section 6C on the ground that such property is not liable to such forfeiture, the Designated Authority or the Special Court, as the case may be, before whom such property is produced, shall proceed to investigate the claim or objection. Provided that no such investigation shall be made where the Designated Authority or the Special Court considers that the claim or objection was designed to cause unnecessary delay.

(2) In case claimant or objector establishes that the property specified in the notice issued under section 6C is not liable to be attached or confiscated under the Act, the notice under section 6C shall be withdrawn or modified accordingly.

6G Powers of the Designated Authority:

The Designated Authority, acting under the provisions of this Act, shall have all the powers of a Civil Court required for making a full and fair enquiry into the matter before it.

6H Obligation to furnish information:

(1) Notwithstanding anything contained in any other law, the officer investigating any

offence under this Act, shall have power to require any officer or authority of the Central Government or a State Government or a local authority or a Bank, a company, a firm or any other institution, establishment, organisation or any individual to furnish information in their possession in relation to such persons, on points or matters as in the opinion of such officer, will be useful for, or relevant to, the purposes of this Act.

(2) Failure to furnish the information called for under sub-section (1), or furnishing false information shall be punishable with imprisonment for a term which may extend to three years or a fine or with both.

(3) Notwithstanding anything contained in the Code, the offence under sub-section (1) shall be tried as a summary case and the procedure prescribed in Chapter XXI of the said Code [except sub-section (2) of section 262] shall be applicable thereto.

(4) Any officer in possession of any information may furnish the same suo motu to the officer investigating an offence under this Act, if in the opinion of such officer such information will be useful to the investigating officer for the purposes of this Act.

6I Certain transfers to be null and void:

Where after the issue of an order under section 6A or issue of a notice under section 6B(1), any property referred to in the said notice is transferred by any mode whatsoever, such transfer shall, for the purpose of the proceedings under this Act, be ignored and if such property is subsequently confiscated, the transfer of such property shall be deemed to be null and void."

(h) **Jurisdiction of courts**

9.36 The Commission noted that Clause 10 of the Bill provided for jurisdiction of Special Courts and transfer of cases from one Special Court to any other Special Court in another State, on motions being brought by the Attorney-General of India before the Supreme Court. They considered that it would be fair if the right of applying for a transfer of a case should were to be given to the interested party. Clause 11 was an incidental provision of a procedural nature to which they believed no exception can be taken by any one as it provided that when trying an offence, a Special Court may also try any other offence with which the accused may, under the Code of Criminal Procedure, be charged at the same trial if the offence is connected with such other offence.

(i) **Samples of handwriting, finger prints, foot prints, photographs, blood, saliva, semen, hair**

9.37 The Commission also considered Clause 11(1) which said that "when a Police officer investigating a case requests the court of a Chief Judicial Magistrate or the court of a Chief Metropolitan Magistrate in writing for obtaining samples of handwriting, finger prints, foot prints, photographs, blood, saliva, semen, hair of any accused person reasonably suspected to be involved in the commission of an offence under the Bill, it shall be lawful for the court of a Chief Judicial Magistrate or the court of a Chief Metropolitan Magistrate to direct that such samples be given by the accused person to the Police officer either through a medical practitioner or otherwise, as the case may be". The Commission stated that Sub-clause (2) then said that "if any accused person refuses to give samples as provided in sub-clause (1)

in a trial under this Act, the court shall presume until the contrary is proved that the accused person had committed such offence".

9.38 In the Working Paper, the Law Commission had observed that in view of the decision of the Supreme Court in *State of Bombay v Kathikalu*, AIR 1961 SC 1808, a direction of the kind contemplated by clause 11A(1) cannot be held to contravene article 20(3) which declares that "no person accused of any offence shall be compelled to be a witness against himself". The Commission said that it cannot be denied that such a provision is necessary in an enactment designed to check terrorist activities. They argued that one must keep in mind the difficulty of procuring witnesses and the difficulty in the way of collecting independent evidence against terrorists. The Commission noted a letter received from Sri Veeranna Aivalli, Commissioner of Security (Civil Aviation) who stated that he has spent more than three decades in Jammu and Kashmir and on the basis of his experience, he commented as follows:

"Our experience of TADA in J&K has not been good. There has not been a single case, which has been decided by the Court of Law. The difficulties encountered have been with regard to the non-availability of witnesses to testify in the Courts of Law on account of fear of reprisal. There is another difficulty and that is the collection of evidence in cases where the search, seizure and arrest in areas where there is no habitation and many a time these have been by security forces. In such a case, the arrested persons' confession to the security forces leading to the recovery of arms and ammunition and explosives is the only thing, which can be brought on record. Even the security force personnel do not come forward for tendering evidence because they keep on moving from place to place for performance of their duties not only within J&K but even outside J&K and sometimes outside India. The security force personnel are reluctant to depose in any case as they feel that they are not attuned for this kind of exercise. In the last 15 years of militancy in J&K, thousands of people have been arrested, lakhs of weapons seized and millions of rounds collected and quintals of explosive material seized. These figures are real eye openers and the fact that not a single case has ended in conviction nor has there been any recording of evidence and even this itself is very disturbing. TADA had a provision that no arrested person could be released on bail without giving an opportunity to the State to present its viewpoints. In thousands of cases, the bails were granted in situations far from satisfactory and full of suspicion. The State High Court did not interfere in the matter on the ground that the appellate jurisdiction rested with the Supreme Court. The Supreme Court did not interfere in the matter nor did they take cognizance on the ground that no one has filed a petition before it in this matter... The High Court Bar Association had passed a resolution that no Member of the Bar should appear for the State and they wanted the judiciary to pass the orders ex-parte. Above facts are only indicators of the malady, which has been prevailing in J&K on account of terrorism... Expression of honest opinion have become difficult on account of the damocles sword of contempt of court hanging on the heads of the people..." The proposed clause 11A provides a legally permissible method of collecting evidence. It is only one method of collecting evidence and proving the offence. Indeed, if the accused is not guilty, such a provision would in fact help him in establishing his innocence. For the above reasons, the insertion of sub-clause (1) of clause 11A cannot be legitimately opposed. However, we propose to add the word "voice" after the word "hair" but before the words "of any accused" in sub-clause (1) so that sample of the voice of the accused can be obtained by the police officer.

9.39 The Law Commission of India considered that once sub-clause (1) is held to be necessary and constitutionally valid, no real objection can be taken to the presumption

created by sub-clause (2) but it appeared that the amplitude of the presumption provided was disproportionate and excessive. The Commission suggested that instead of presuming that the accused person had committed such an offence, it would be appropriate and consistent with fair play and good sense to provide merely that on such failure, the Court would draw the appropriate adverse inference against the accused person.

(j) Measures for the protection of witnesses

9.40 The Commission pointed out that Clause 14 of the Bill provide for measures for the protection of witnesses, and that sub-clause (1) says that notwithstanding anything contained in the Code of Criminal Procedure, the proceedings under the Act may be held in camera if the Special Court so desires. The Commission however considered that it may not be fair to leave this discretion totally unregulated or unguided and suggested that it would be fair and proper to provide that the Special Court must record its reasons for holding the trial in camera. The Commission also explained that clause 14(2) sought to empower the special court to take appropriate measures for keeping the identity and address of a witness secret if it is satisfied that the life of a witness in any proceedings before it is in danger. The Commission noted that the court of course has to record the reasons for taking such measures, and that this power can be exercised either on the application made by the witness or by the public prosecutor or suo motu. The Commission remarked that clause 14(3) sought to specify some of the measures contemplated by sub-clause (2) such as — (a) the holding of the proceedings at a place to be decided by the special court; (b) avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to the public; (c) issuing of any direction for securing that the identity and addresses of the witnesses are not disclosed; and (d) passing orders to the effect that it is in the public interest that all or any of the proceedings pending before such a court shall not be published in any manner. The Commission pointed out that in its Working Paper, it had opined that while it may be necessary to protect the witness by keeping his or her identity and address secret, the right of the accused to cross-examine such witness must also be protected at the same time, and that it was observed that there may be several methods by which effective cross-examination could be undertaken without disclosing the identity and address of the witness. The Commission remarked that it was accordingly, suggested that clause 14(3)(c) be substituted by the following:

"(c) The making of necessary arrangements for securing that the identity and address of the witness is not disclosed even during his cross-examination".

9.41 The Commission pointed out that at the seminars, two conflicting view points were

raised, one set of participants submitting that no effective cross-examination was possible unless the identity of the witness was known to the accused and his counsel and that therefore concealing the identity of the witness would really mean denying to the accused an effective opportunity to cross-examine the witness. The Commission remarked that proponents of this view emphasised the absolute necessity of affording to the accused a reasonable opportunity to cross-examine the witness. The Commission also explained that, on the other hand, certain other participants stressed the necessity of concealing the identity of the witness from the accused and his counsel in cases where such a course was necessary for protecting the life or safety of the witness and his relatives, and that they emphasised the practical difficulty in procuring witnesses in such matters. These participants submitted that if a person came forward as a witness but apprehended danger to his or her life on that account, it was the duty of the court and the State to provide protection.

9.42 The Law Commission of India said that they have considered both the points of view, and that clause 14(3) was illustrative of the provision contained in sub-clause (2), that in other words, sub-clause (3) is not an independent provision but a continuation and elaboration of sub-clause (2). They explained that this meant that before taking any of the steps elaborated in sub-clause (3), the special court had to be satisfied that the life of a particular witness is in danger and must also record reasons for reaching such satisfaction. They considered that the requirement that the court must be satisfied that the life of the witness was in danger and the further requirement that the special court is bound to record its reasons for reaching such satisfaction are adequate safeguards against abuse of the power conferred by sub-clause (2) upon the special court. They thought Sub-clause (2) is based upon the doctrine of necessity, a cruel necessity. They considered that it obviously took note of the fact that the life of witnesses deposing against terrorists may be in danger in many cases and provided for such cases. the rule. The Commission was of the view that if for the reasons mentioned in the sub-clause, it is necessary to keep the identity and address of the witness secret, it may have to take appropriate measures and make the necessary arrangements for ensuring both the right of cross-examination and the protection of the witness. The Commission remarked that they are also of the opinion that the power of the court to take appropriate measures to permit cross-examination even while protecting the identity of the witness must be deemed to be implicit in sub-clauses (2) and (3) as they are found in the Bill, and it is not really necessary to amend any of the paragraphs in sub-clause (3) as proposed in the Working Paper inasmuch as the Bill does not propose to take away the right of cross-examination. They therefore withdrew their suggestion for the substitution of 14(3)(c).

(k) Confessions

9.43 The Law Commission of India noted that a new clause 15A was sought to be introduced and that it made the confession made by a person before a police officer not lower in rank than a Superintendent of Police admissible in evidence provided it was recorded in accordance with the provisions of the said clause. A proviso to the clause provided that a confession made by a co-accused shall be admissible in evidence against another co-accused. The Commission explained that this provision would override the provisions to the contrary in the Code of Criminal Procedure and the Indian Evidence Act. Clause 15(2) sought to provide that a police officer must, before recording any confession, explain to such person in writing that he or she is not bound to make a confession and that if he or she makes any confession, it could be used against him. A proviso to the clause said that if such a person prefers to remain silent, the police officer shall not compel him or induce him to make any confession. The Commission noted that clause 15(3) said that the confession shall be recorded in an atmosphere free from threat or inducement and shall be recorded in the same language in which it is made, and clause 15(4) created an obligation upon the police officer, who has recorded a confession under sub-clause (1), to produce the person along with the confessional statement, without unreasonable delay, before the court of a Chief Metropolitan Magistrate or the court of a Chief Judicial Magistrate. Sub-clause (5) provided that the Magistrate before whom the person is so produced, shall record the statement, if any, made by the person so produced and get his signature thereon. It provided further that if there is any complaint of torture by such a person, the officer must be directed to produce the confessor for medical examination before a medical officer not lower in rank than an Assistant Civil Surgeon. They said that in their opinion, clause 15A is a necessary provision. They explained that it is not as if the confession made before a police officer is made admissible without further ado, but that not only is the police officer under a duty to record a confession in the same language in which it is made and if possible by employing mechanical devices like cassettes, tapes or sound tracks, the officer is also under an obligation to explain in writing to the person that any confession made by him or her will be used against him or her. They considered, however, that the more important and truly effective safeguard is the one contained in sub-clauses (4) and (5)¹ which read with sub-clause (1) meant that unless a confession is recorded in accordance with the several provisions contained in clause 15A, such confession will not be valid and admissible.

9.44 The Law Commission of India was of the view that it is difficult to find any legitimate

¹ They noted that it was evident that they have been inserted in the light of and in pursuance of the observations made by the Supreme Court in *Kartar Singh's* case while dealing with section 15 of TADA.

objection to such a provision in an anti-terrorism law. They explained that as had been repeatedly pointed out during the course of seminars and the responses received, in an extraordinary situation (such as India was facing on account of external and internal threats of terrorism), an extraordinary law is called for. The Commission said that in fact, during the seminars, no serious objection was taken to this provision except the general objection that confessions made before the police officers should not be made admissible because in that event they will resort to third degree methods to obtain confessions and as an excuse for their inability to investigate the crime effectively. The Commission considered that in the light of the safeguards contained in clause 15A and, in particular, the safeguards contained in sub-clauses (4) and (5) read with sub-clause (1), the criticism must be held to be untenable.

9.45 The Law Commission of India pointed out that so far as the proviso to sub-clause (1) of clause 15A is concerned, a little explanation would be in order. They stated that in the *TADA* section 21(1)(c) provided that the confession of a co-accused was admissible, however, by virtue of an 1993 amendment to the *TADA*, section 21(1)(c) was omitted and at the same time clause 15(1) was amended by introducing the words "are co-accused, abettor or conspirator" after the words "trial of such person", and a proviso was also introduced in subsection (1) which read: "provided that co-accused or conspirator is charged and tried in the same case together with the accused". They noted that the effect of the 1993 amendment was that unless the co-accused was charged and tried in the same case together with the accused, his or her confession was not admissible or relevant against the accused. They pointed out that in *State v Nalini*, 1993 SCC (Cri.) 691 the majority held that because of the clear and unambiguous language employed in section 15 and, in particular, having regard to the non-obstante clause with which the sub-section opens, there is no reason to read any limitation upon the admissibility of confession of co-accused as indicated in *Kalpna Rai's* case. They remarked that the majority held that the confession of the co-accused is substantive evidence and though it may not be substantial evidence in the sense that the value to be attached to such evidence is a matter of appreciation of evidence in a given case, it is wrong to say that it requires to be re-corroborated before it is admissible. The Commission noted that at the same time, the majority cautioned that as a matter of prudence, the Court may look for some corroboration if the confession is to be used against the co-accused.

9.46 The Commission pointed out that the question remains whether the proposed provision is desirable, and that it is one thing for the Court to uphold its validity because the Court looks at the provision from the point of view of its constitutional validity and it is altogether a different thing when the question arises about its desirability. The Commission

considered that in their opinion, if this provision is retained, the very concept and necessity of the provision regarding the approver's evidence may become unnecessary, and, since the evidence of a co-accused is ordinarily not admissible, necessity arises for granting pardon to one of the accused and make him or her an approver so that his or her evidence may be relevant and admissible against the other co-accused. They stated that section 30 of the Evidence Act merely says that the evidence of a co-accused can be taken into consideration against the other accused, that it is based upon good reason and that they are, therefore, of the opinion that the proviso to sub-clause 15A(1) as suggested should be dropped.

9.47 The Commission pointed out that Clause 16 sought to provide for transfer by the special court of an offence to an ordinary court where the special court finds it is not an offence triable by it, that it was a necessary procedural provision and no objection had also been raised. They remarked that clause 17 provided for an appeal against the orders of the special court, and as originally provided, the appeal was provided to a High Court both on facts and law and it sought to provide that such an appeal must be heard by a Bench of two Judges. They stated that an appeal against an interlocutory order was, of course, barred, that the period of limitation for filing an appeal was prescribed as 30 days but the High Court was given the power to condone the delay on proof of sufficient cause. The Commission pointed out that several participants in the seminars and others have expressed the opinion that an appeal to the Supreme Court would make the remedy almost unavailable inasmuch as many accused may not be in a position to approach the Supreme Court having regard to the cost involved and, in many cases, the distance and other inhibiting factors. The Commission was therefore of the opinion that the amendment ought to be dropped and that clause 17 as originally drafted in the Bill should remain unchanged.

(k) Duty on police to inform of arrest

9.48 The Commission explained that it was sought to insert a new clause 19A dealing with arrest which provided in subclause (1) that "whenever a person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or to a relative of such person by telegram, telephone or by any other means which shall be recorded by the police officer under the signature of the person arrested". Clause 19A(2) said that where a police officer arrests a person, he shall provide a custody memo of the person arrested, and clause 19A(3) provided that "during the interrogation the legal practitioner of the person arrested shall be allowed to remain present and the person arrested shall be informed of his right as soon as he is brought to the police station". The Commission explained that in its Working Paper, the Commission had supported these

provisions, and in particular, they appreciated sub-clause (3) which was evidently put in, in the light of the decision of the Supreme Court in *Nandini Satpathy's* case. They also pointed out that certain participants in the seminar opposed, however, the proposed subclause (3) and submitted that it is an impractical provision and would be likely to hinder the proper interrogation of accused persons. The Commission said they did not think it appropriate to recommend the deletion of this provision which has been designedly introduced by the Government of India.

9.49 The Commission explained that it was suggested to them that this protection should be confined only to Indian citizens and should not be made available to non-citizens, that foreign mercenaries and foreign terrorists outnumber local terrorists, particularly, in Jammu and Kashmir and that on account of their activities, a situation of proxy war was prevailing in Jammu and Kashmir. The participant suggested that classifying foreign terrorists for the purpose of clause 19A(3) as a separate group and denying them the said protection would be a case of reasonable and valid classification. The Commission remarked that the suggestion is not only appealing, but that there is good amount of justification the contention that the entry in large numbers (according to certain estimates there were already 5000 foreign terrorists in Jammu and Kashmir and another 15000 to 30000 terrorists were waiting to enter the State with a view to creating conditions of total anarchy and chaos) was certainly creating a situation which was unparalleled anywhere in the world. They pointed out that the more disturbing factor was that the neighbouring country whose hostile intentions towards India are not a secret, was actively training, arming, directing and helping the foreign terrorists in all possible ways. They considered that in such a situation, classifying foreign terrorists as a distinct category from the local terrorists and restricting the protection in clause 19A(3) only to local terrorists ie, who are citizens of India, might not be either unreasonable or unconstitutional. They said that it was highly relevant to notice that their Constitution itself makes such a distinction. They also noted that clause 22(1) says that "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice" and that clause 22(2) says that "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate". They also remarked that clause 22(3) provides, however, that "Nothing in clauses (1) and (2) shall apply- (a) to any person who for the time being is an enemy alien". They explained that the very significant constitutional safeguards contained in clauses 22(1) and (2) are not available to enemy aliens, and that the requirement in clause 22(1) and more particularly the one in

clause 19A(1) is possibly not applicable in the case of a foreign terrorist, in as much as "a family member" or "a relative" of such foreign terrorist may not be in India and may also be difficult to locate. They therefore suggested that the requirement of informing the family member or relative shall be confined only to the person arrested if he or she is an Indian citizen.

CHAPTER 10

AUSTRALIA

A. INTRODUCTION

(i) New legislative measures

10.1 It was announced on 2 October 2001 that new Counter-terrorism measures were to be adopted in Australia¹ **and that the Australian Cabinet approved the preparation of legislation that will assist in dealing with international terrorism, for introduction after the election. It was explained that the legislation will:**

- **Supplement the existing warranting regime under which the Australian Security Intelligence Organisation (ASIO) exercises special powers;**

¹ “New Counter-terrorism Measures”
http://www.law.gov.au/aghome/agnews/2001newsag/1057_01.htm see also
capabilities.<http://www.law.gov.au/aghome/agnews/2001newsag/1080a%5F01.htm>

- **Create a new general offence of terrorism and an offence related to preparing for, or planning, terrorist acts;¹ and**
- **Amend the *Proceeds of Crime Act 1987* to allow terrorist property to be frozen and seized.²**

10.2 It was also said that Cabinet agreed that Australia should sign the *Convention for the Suppression of the Financing of Terrorism* as soon as practicable. It was noted that the measures were recommended as part of a high-level review of the implications for Australian security and counter-terrorism arrangements of the terrorist attacks in the United States. It was pointed out that the Government was confident that Australia has well practised and cooperative counter-terrorism plans, and that it has a raft of Commonwealth, State and Territory legislation that deals with terrorism. It was noted that while there is no intelligence available to indicate that Australia is an intended target of further terrorist attacks, Australians must remain vigilant and take appropriate defensive measures.

10.3 It was explained that under the legislative reforms agreed to by Cabinet, the Director-General of Security will be able to seek a warrant from a federal magistrate, or a legal member of the Administrative Appeals Tribunal, that would require a person to appear before a prescribed authority (such as a federal magistrate or a legal member of the Administrative Appeals Tribunal), to provide information or to produce documents or things. These reforms would allow ASIO, before a prescribed authority, to question people not themselves suspected of terrorist activity, but who may have information that may be relevant to ASIO's investigations into politically motivated

¹ More details was announced on 18 December 2001. It was said that the envisaged terrorism offences to be inserted into the Criminal Code will relate to 'terrorist activity' which will be defined as an act or omission that constitutes an offence under the UN and other international counter-terrorism instruments, or an act committed for a political, religious or ideological purpose designed to intimidate the public with regard to its security and intended to cause serious damage to persons, property or infrastructure. It was further noted that the Criminal Code will also cover ancillary conduct such as aiding, abetting, conspiracy, attempt and incitement. The offences will carry a maximum penalty of life imprisonment. Funding of terrorism will be explicitly criminalised in the Criminal Code. This will cover collection, receipt, use and provision of funds for the preparation and planning of terrorist activities. Knowingly assisting in any of these activities will also be an offence. The offences will carry a maximum penalty of 25 years imprisonment. See <http://www.law.gov.au/aghomes/agnews/2001newsag/1080a%5F01.htm>

² It was also announced on 18 December 2001 that amendments will be made to the Financial Transaction Reports Act of 1988 to ensure the reporting of possible terrorist-related transactions and international funds transfers. The Act will also be amended to enable AUSTRAC to share financial transaction reports information with other countries and to enable ASIO and the AFP, subject to appropriate monitoring and approvals, to share such information with equivalent agencies overseas.

violence.³ The legislation would also authorise the State or Federal Police, acting in conjunction with ASIO, to arrest a person and bring that person before the prescribed authority. Such action only would only be authorised where the magistrate or tribunal member was satisfied it was necessary in order to protect the public from politically motivated violence.

10.4 It was noted that while these are significant new powers, to deal with significant new threats, stringent safeguards will be introduced in relation to the exercise of these powers. It was proposed that the Parliamentary Joint Committee on ASIO, ASIS and DSD be required to review these provisions and report to the Attorney-General by 1 December 2002. It was also proposed that, under the legislation, ASIO would be required to give the Inspector-General of Intelligence and Security a copy of the warrant and a statement containing details of any detention that has taken place as soon as possible after such action has taken place. It was stated that new general offences of terrorism modelled largely on those in the UK *Terrorism Act* of 2000 and subject to a maximum penalty of life imprisonment, would be introduced. These offences were to cover violent attacks and threats of violent attacks intended to advance a political, religious or ideological cause which are directed against or endanger Commonwealth interests. It was envisaged that the proposed new offences will provide a useful adjunct to the fight against terrorism.

10.5 It was pointed out that a large number of terrorist acts are already covered by existing Commonwealth and State and Territory criminal laws. The Australian Federal Police and Customs officers will be given increased powers under the *Proceeds of Crime Act* to search for and seize property of any kind that is used or intended to be used for terrorism or is the proceeds of terrorism. This would cover, for example,

³ It was announced on 18 December 2001 that ASIO will be given the power to question people who may have information about terrorism, including those who may not themselves be involved in terrorist activity. Cabinet agreed that ASIO will be given the power to seek to detain people for up to 48 hours without legal representation only in very serious cases where such a step is necessary to prevent a terrorist attack. For example, a terrorist sympathiser who knows of a planned bombing on an embassy could be held incommunicado for questioning so authorities could close in on the would-be perpetrators of this serious crime. It was said that this power will have strict safeguards and it is anticipated will be used only rarely. The Director-General of Security, with the consent of the Attorney-General, will be required to seek a warrant requiring a person to appear before a prescribed authority to provide information or produce documents or things. A warrant would be issued by a federal magistrate, or a senior legal member of the Administrative Appeals Tribunal (AAT) with legal qualifications. ASIO will also be required to give the Inspector-General of Intelligence and Security a copy of any warrant that is issued and a statement containing details of any detention that takes place. The Parliamentary Joint Committee on ASIO, ASIS and DSD will be asked to review the new powers and provide a report on their operation. <http://www.law.gov.au/aghome/agnews/2001newsag/1080a%5F01.htm>

money derived from stock-market manipulation of the kind that is alleged to have occurred shortly before the incidents of 11 September.

10.6 In September 2001 it was announced that Australia will support United State initiatives to freeze the financial assets of terrorists and their sponsors,⁴ and that the Government will be doing everything in its power to suppress terrorist financing. It was considered that Australia is well placed to immediately implement measures similar to those being imposed in the US, including using the *Banking (Foreign Exchange) Regulations* to freeze and block the financial flows of terrorists and their sponsors. It was stated that the Government will direct the Reserve Bank of Australia to use the *Banking (Foreign Exchange) Regulations* to stop any payments in Australia by or to the 27 terrorists and terrorist organisations identified in the US President's Executive Order. It was pointed out that this action builds on Australia's existing sanctions against the Taliban, which have been in place since December 1999. Australia would also be taking action to strengthen the *Charter of the United Nations (Sanctions – Afghanistan) Regulations 2001* to enable Australia to freeze the funds and other financial assets of Usama bin Laden and his associates.

10.7 It was noted that the *Australian Transaction Reports and Analysis Centre* (AUSTRAC) will provide its full support to the relevant US counterpart (FinCEN) in obtaining information in relation to financial intelligence. It was said that the Attorney-General's Department will facilitate inquiries for the purpose of tracing financial transactions suspected of being related to terrorist activities, and will assist in the enforcement in Australia of restraining orders or confiscation orders made in the US in respect of serious offences under US law. The Government was also looking at further ways to reinforce Australia's capacity to identify and suppress terrorist financing. Measures then being examined include:

- strengthening Australia's ability to combat the use of false identities in the conduct of financial transactions;
- enhancing the reach of Australian law beyond national borders under the *Charter of the United Nations (Sanctions-Afghanistan) Regulations 2001*; and

⁴ "Australian Financial Controls on Terrorists and their Sponsors" media release by the Prime Minister, The Hon John Howard 28 September 2001.

- encouraging a more proactive sharing arrangement of financial transactions information with our US counterparts.

10.8 At a press conference on 18 December 2001 the Australian Federal Attorney-general, Daryl Williams shed more light on what the measures to strengthen Australia's counter-terrorism capabilities entailed. He said while there is no known specific threat of terrorism in Australia, the Cabinet had endorsed a raft of measures to enhance Australia's ability to meet the challenges of the new terrorist environment. He pointed out that since the terrorist incidents in the United States, the Australian Government has taken a wide range of measures to enhance the safety and security of all Australians: security at all major airports has been strengthened, including the upgrading of the screening of passengers and luggage, and a policy of randomly placing highly trained and armed security officers on flights was being implemented.

10.9 Daryl Williams explained that the particular powers that have been a focus of some media attention relate to ASIO. ASIO would be given the power to question people who may have information about terrorism, who may be suspected of being involved in terrorist activity, or who may not be suspected of being involved themselves. There would be a range of ways of dealing with these people, but one proposal that would be covered by the legislation is ASIO would have, with the assistance of police, the capacity to detain a person up to 48 hours under conditions set out in a warrant. A warrant would be sought by the Director-General of Security, it would require the approval of the Attorney-General and would have to be approved by a federal magistrate or a member of the Administrative Appeals Tribunal with legal qualifications. The conditions of detention and interrogation would also be determined in the warrant application. On the suggestion that these powers are very extensive and whether the public can be assured they won't be abused, he replied that he considers there to be a number of safeguards in relation to those powers, and his expectation was that they would only be used in very serious cases where there is a very serious threat to life or property and there is a reasonable suspicion that a person may be able to assist by providing information that would hinder or prevent the activity occurring. He pointed out that there are numerous safeguards: the Director-General of Security personally signs the warrant; it has to be approved by a Minister, namely the Attorney-General, and it has to be approved by an independent judicial officer, either a federal magistrate or legal member of the Administrative Affairs Tribunal; in addition, the warrant would have to be notified to the Inspector-General of Intelligence and Security who would have the capacity to observe everything that goes on and would have the capacity to report to Parliament; the

Intelligence Services Parliamentary Committee would be able to review and report on any actions exercising those powers.

10.10 On the question whether the period of containment could be extended beyond 48 hours, Mr Williams responded that there will be some detail in relation to that but it was not contemplated that a person who is not arrested would be detained beyond 48 hours, and different provisions would apply in relation to a person who is arrested and there may be an extension of time in relation to arrest where a charge is contemplated. It was put to Mr Williams whether he isn't blurring the line between security analysis and policing with ASIO. He considered that it is not really the case and explained that the detention and arrest of people would not be carried out by ASIO itself; it would be carried out by police, either the Federal Police or the relevant state or territory police; the only role that ASIO would really have is to determine the person who is to be interrogated and then to conduct the interrogation and that the interrogation would be done under conditions settled by the Director-General, by the Minister and by a judicial officer.

10.11 Mr Williams was asked since there have been suggestions by the Government in the past that terrorists, or suspected terrorists, might enter Australia posing as asylum seekers whether he anticipates using the proposed legislation to detain asylum seekers, or even inside Australian detention centres. He remarked that he wouldn't exclude any category of person from being a person who, in appropriate circumstances, may be able to assist in preventing terrorist activity occurring, and that the Minister for Immigration has, on many occasions, explained that in processing asylum seekers, one of the issues that is assessed is any security risk that's already undertaken. He pointed out that if he had any concern that there was going to be an attempt by an asylum seeker to engage in terrorist activity, that would be passed on and would be dealt with in the appropriate way, although he would be very surprised if the appropriate way, in the ordinary circumstances, involved a requirement of detention and interrogation using the special powers.

10.12 It was put to Mr Williams that Mr Cris Puplick, the State Privacy Commissioner, expressed concern that any counter-terrorism measures would necessarily impinge on privacy rights, whether he agrees with him, and what impact will these measures have on the rights of privacy of individuals. Mr Williams responded that the exercise of protecting privacy is an important one, and that what the Government seeks to do is to balance the interests of keeping personal information private - that's something that most people in the community strongly desire - with the other public interest of

ensuring that people can go about their lives safe and secure from malicious acts by others, in particular terrorists. He considered that the balancing process that they have undergone in working out the ASIO powers is a fair one which he believes that the public will strongly support.

10.13 In a radio programme the Mr Daryl Williams, Federal Attorney-General was asked why Australia needs a separate offence for terrorism acts.¹ He responded that what is sought to do is to identify a distinction between ordinary criminal activity such as murder or malicious damage to property on the one hand, and those offences that are done for a politically, ideologically, religiously or racially motivated cause. The penalty in respect of terrorism offences also needs to be addressed since as it can be a very serious offence directed at a large number of people or extensive property, it needs to be much higher than it previously has been. Chris Maxwell² said Liberty disputes the need for separate offences relating to terrorism. In their view, murder is murder whether it's done in domestic circumstances or in pursuit of some political or ideological goal, they see no justification for regarding terrorist criminal conduct as some special different species of human misbehaviour, it can and should be dealt with by the existing processes of the criminal law, and likewise, investigated by the existing extensive powers which police forces and ASIO have.

10.14 It was noted that the argument will be put though, that the scale, the motivation, the conspiracy element, although they're all applied at different degrees and different circumstances, mean that terrorism or terrorist activity is in a different ball park.³ Chris Maxwell's answer to this was that he understands that, and at one level he considered that it is plainly right. He remarked that a single incident where one person injures or kills another is different from an incident in which tens or hundreds or, as in New York, thousands of people are killed although the moral quality of murder in their view doesn't change, it remains the most profoundly immoral act whether there is a little or a large loss of life. To the extent that a different view would be taken, that should in their view be reflected in the sentencing of the person upon conviction for murder, not in the definition of the offence.

¹ Radio Programme hosted by Damien Carrick to *The Law Report* where he discussed the topic "Australia's proposed anti-terrorism laws, an appropriate response to a dangerous new post-September 11 world or a dangerous over-reaction that tramples on civil rights?"

² QC, of the civil rights group Liberty Victoria.

³ A point raised by the presenter of the programme, Damien Carrick.

10.15 It was suggested that perhaps the most controversial part of the proposed legislation is ASIO, together with the police, being given the power to detain someone for questioning who may have information useful in countering any terrorist act for 48 hours without access to a lawyer. It was noted that the Federal Attorney-General, Mr Williams says the power will be rarely invoked. Terry O’Gorman, President of the Australian Council for Civil Liberties, was however, not comforted by the Attorney-General’s assurances. Mr Terry O’Gorman said he does not accept that it will be used in extreme circumstances; that’s the sort of line that people like the Attorney-General throw out to try to sell what is otherwise an unpalatable proposal. He pointed out that one only have to have a look at the significant number of non-US citizens that have been detained by security and Immigration personal in the US since September 11 to show that it’s not used in extreme circumstances. Terry O’Gorman remarked that their sister organisation the American Civil Liberties Union, have indicated that there’s estimated up to 3,000 people being held in detention, and many of them incommunicado, since September 11, not because many of them are accused of actual complicity in the September 11 tragedy, but because they are perhaps overstayers of visas, and they’re being interrogated, many of them, without access to lawyers. He considered therefore that Mr Williams’ extreme circumstances applied to what is happening in the US, are not extreme, they are run-of-the-mill and across the board involving up to 3,000 people.

10.16 Federal Attorney-General, Daryl Williams dismissed the idea that the proposed power to allow detention by authorities for 48 hours would lead to abuse. He said that if the critics examine the safeguards that are built into the scheme, they will see that it is not a fundamental attack on human rights at all. He stated that it needs to be borne in mind that what they are dealing with is potentially people determined to take lots of lives and destroy lots of property, that requires a balancing of the interests of an individual to exercise their civil rights freely, on the one hand, and the lives and protection of the lives of potentially large numbers of people, on the other hand. He believes the balance is appropriately struck. He noted that when somebody has information about prospective terrorist action that could help prevent that action occurring, it would be seen by many as their duty to co-operate, if they refused to co-operate, they should be compelled to co-operate, and that is all that the additional powers proposed to be given to ASIO and to the police, seek to do.

10.17 Asked what does he mean by compelled or coerced to co-operate, Mr Williams said that under the legislation, it is proposed that there be a power for the police at the request of ASIO to detain a person without charge, that is not arresting them, but simply detaining them, and to take them for interrogation under terms and conditions

that have been approved by first the Director General of Security, the Head of ASIO, secondly the Attorney-General, and thirdly an independent legal officer who is either a Federal magistrate or a senior legal member of the Administrative Appeals Tribunal. He noted that the person may not necessarily be suspected of being involved in prospective terrorist activity, but there must be a reasonable suspicion that they have information relating to such an activity. He stated that that seems to him to be quite a reasonable step or a reasonably limited intrusion on the rights of that individual, having regard to the rights of everybody else in the community.

10.18 Damien Carrick noted that the Attorney-General talked about having the use of coercion or the use of force to answer questions; and asked what does he mean by that. Daryl Williams said that the only coercive power that there is, is the power to charge someone with an offence for failing to answer, that would be the limit of it and that they are not talking about physical beatings, since that is not under consideration at all. Damien Carrick pointed out that Mr Williams has said in the past that it will include anybody who may have information, and that could include journalists and lawyers. The question was raised whether it could also include children. Daryl Williams said he hadn't contemplated that this sort of provision would be used very often at all and that it would only be likely to be sought to be used where there is a reasonable suspicion that some action is imminent. He remarked that in those circumstances, anybody who has information would be appropriate to be detained, that it is highly unlikely children would have that information. He considered that it is possible, but not necessarily the highest likelihood that journalists would have that information although there is no reason for making an exception in respect of any particular category of person since what they were seeking to do is to save large numbers of lives.

10.19 Damien Carrick pointed out that civil rights lawyers say that where authorities have been given similar kinds of rights in other countries, there has inevitably been abuse of process, and lawyers point to well-documented cases in the UK where the detention of suspects leads to miscarriages of justice. He asked why would it be any different in Australia if the fundamental balance between the rights of the individual and the rights of the State were shifted, and why would there not be scope for miscarriage of justice. Mr Williams stated that there would always be scope for abuse of powers, and that is why safeguards need to be built in, to attempt to ensure that the abuse is either eliminated or minimised. He was of the view that the safeguards they have built in are quite considerable, that they are not necessarily contained in overseas models, and in any event, the power to detain, while it must be

on conditions approved by the relevant authorities is only for a period of 48 hours.

10.20 Damien Carrick pointed out that an offence would also be created under these new laws for a detainee failing to answer a question where he or she is being held for 48 hours, and that it is removing the right to silence. He remarked that it is a fundamental right which is at the heart of the Australian criminal justice system. Daryl Williams noted that although it is at the heart of the criminal justice system, it is a right that has in the public interest, been to some extent eroded over recent decades. He stated that there is quite a range of situations where it is compulsory to answer a question, and there is what is called coercive interrogation that occurs in relation to a number of regulatory authorities like in the corporations, security and the taxation areas, as well as in others. He pointed out that the trade-off is that the information that is obtained under that sort of interrogation can only be used for limited purposes, and generally cannot be directly used for prosecution of the person. He considered that here one has an extraordinary situation where someone may have information about a possible terrorist offence, what they are saying is if someone is reasonably believed to have information, he or she has an obligation to answer the question, if they do not answer the question they commit an offence which carries a penalty of up to five years' imprisonment. That seems to him, in all the extraordinary circumstances, that these powers are designed to counter a reasonable response.

10.21 Damien Carrick noted that civil rights lawyer, Terry O'Gorman says there is nothing reasonable about throwing away the right to silence. Terry O'Gorman stated that it is window dressing, and it is taking away a fundamental pillar of their free society, simply as a stunt. He considered that the reality is, where for argument's sake, the security services pick up an individual who they think is part of a terrorist act that is about to happen, it is believed that that person is not going to talk, and is not going to answer questions, and the only way that person is going to talk is if that person is the recipient of torture. He considered that this is the sheer reality of it, and what they are really talking about is people will only talk if they are part of a terrorist organisation if torture is applied. He pointed out that Australians have got to ask themselves do they want to lower themselves to the standards of terrorists and start to engage in torture activity, because that is the logical end result of Mr Williams' extreme scenario.⁴**10.22** Damien Carrick also noted that Dr Jude McCulloch⁵ says a

⁴ See also "On guard against suspect use of detention powers" <http://www.smh.com.au/news/0112/12/opinion/opinion4.html> where Bret Walker, SC, the president of the NSW Bar Association argues that war threatens civil liberties as much at home as in the foreign battlegrounds where civil order has been destroyed. He notes that the battle cry is "Emergency!", and one of the first weapons taken up is the power of government officials to take into custody people of various descriptions. He asks whether Australia will

power to detain for 48 hours incommunicado, won't just affect the detainee and that effectively, that person will disappear for 48 hours with friends, loved ones, relatives not being in a position to know where they are. Likewise the person will not be able to communicate and let them know. He said that although the proposal is 48 hours, whilst in detention a person may not know when he or she will be released and may in fact think that he can be or will be indefinitely detained. Damien Carrick stated that what Dr McCulloch is suggesting is that even if they're kept in good conditions and there's no abuse of power, it would still be highly disturbing to be kept in those situations. Jude McCulloch confirmed that it would be extremely disturbing, even without any overt physical coercion, even if the surroundings were relatively comfortable, one would be removed from everything that one found psychologically and physically comforting, and in a position where one would be in effective limbo, not knowing what was going to happen.

10.23 Jude McCulloch stated that one can look to Northern Ireland, where in 1971 there was an internment where people could be detained. Dr McCulloch said that in

stray over the line and notes that in the United States and Britain, with their respective anti-terrorist detention and punishment laws, one is seeing the latest example of Western liberal-democratic societies giving up freedoms - supposedly to save them. Mr Walker explains that the whole point of habeas corpus in Australia is to check that government officials such as those employed by ASIO, the attorney-general and the Federal Police use the emergency powers given to them only to the extent Parliament has allowed this, and that these powers involve breaking into a person's home, taking them from their family, holding them in a prison cell incommunicado, depriving them of legal assistance and subjecting them to interrogation. He says judges should be able to entertain a complaint that the limits imposed by Parliament on the exercise of those powers have been exceeded in a particular case.

He asks why else does one have limits and safeguards in emergency legislation and what is the point of a law imposing limits on government, if citizens and resident foreigners are not allowed to demand that it be obeyed by the government? He considers that there are two quite distinct kinds of cases when it comes to detention under emergency powers. First, he says, there is the kind being contemplated in legislation being prepared by the federal Attorney-General, Daryl Williams, and from what was known of it then, this is the genuine emergency case where detention is authorised for the purpose of questioning a person who may not be a criminal suspect, but is thought to have information which could avert death and destruction. He considers that with appropriate safeguards, this intrusion into usual freedom to be left alone and to not be required to answer questions from the government can easily be justified but that the devil is in the details of any safeguards. He says that these must surely include an absolute guarantee that nothing revealed by a person under compulsory questioning can ever be used to prove that person's guilt of any other offence. Otherwise, he considers one should stop beating around the bush and start devising regulated torture. The second kind of case he explains (of which he notes there is mercifully no hint in anything Mr Williams has revealed up to that stage) is the drumhead military tribunal where soldiers or security officials take a person into custody, give them some form of trial and punish them which can include the most serious sentence such as death. He considers that there is nothing to be proud of when legal systems fall into that kind of decay. Mr Walker points out that it is to be hoped that Australia continues to stay firmly within the realm of detention only for genuine emergency questioning, properly safeguarded, and always challengeable by habeas corpus.

that case it was for indefinite periods and the police and security services there used sensory deprivation, bashing, electrocution. Dr McCulloch noted that in 1974 when the *Prevention of Terrorism Act* was introduced in the UK, notorious instances of miscarriages of justice occurred, people could be detained without access to legal advice, without people knowing where they were, the police did physically and psychologically torture people, and people did make false confessions and many people spent extended periods of time in prison. Noting the Guildford Four, or the Birmingham Six, Dr McCulloch remarked that the terrible thing about that was that the real people responsible got away with it and presumably went on to commit other atrocities, and the Guildford Four was only the first in a series of what have become infamous miscarriages of justice facilitated by that *Prevention of Terrorism* legislation, which really allowed police to get away with very sloppy, unprofessional and ultimately terrible abuses of human rights instead of professional crime investigation that would have ensured that the correct people were convicted of those crimes. Dr McCulloch pointed out that these measures have the flavour usually of emergency, temporary legislation to deal with a crisis, but once they're on the books, they're not removed. He remarked that these measures are usually extended, even if there is research like there has been in the UK which suggests that the legislation is being abused in that people are being arrested not on really suspicion of terrorism but because of their political beliefs or their religious, racial, ethnic background, and that it facilitates miscarriages of justice.

10.24 Dr Jenny Hocking was concerned that the proposed laws blur the line between policing and intelligence gathering.⁶ She remarked that ASIO currently has quite extensive powers, and these are powers to break and enter premises to search the premises, to copy and remove any articles or documents that may be considered of use to national security. ASIO can also intercept telephonic and electronic communications, it can use listening devices, it can inspect mail, postal articles, and it can also place tracking devices on people, and in this way place them under very close surveillance. She noted these are extensive and very unusual, unique powers, which it has to receive warrants in order to exercise, and so she would suggest that the very extensive powers that ASIO already has ought to be sufficient for it to maintain intelligence and surveillance on any newly developing terrorist groups. Damien Carrick asked whether she sees the proposed changes flagged by the Attorney-General as a shift away from intelligence gathering towards policing. Jenny Hocking said that it is an interesting intersection of the two, to date there has always a very clear demarcation between ASIO's intelligence collection powers and the sort

⁶ Head of the National Centre for Australian Studies at Monash University.

of work that is done in domestic policing by the State and Federal police forces. She considered that what can, however, be seen happening with this proposed power of detention is the sort of merging of the two fields.

10.25 Damien Carrick raised the question whether ASIO is subject to the same levels of accountability as the police to which Jenny Hocking responded that she thinks when one is looking at a quite a significant shift in ASIO's traditional functions, one has to look at the fact that both their purposes and their functions and their accountability provisions are quite different. She suggested that this is something to be worked through very carefully, whether the much more autonomous role of ASIO in terms of its intelligence gathering is appropriate to this type of activity which takes it much more into policing which does normally have stronger accountability provisions.

10.26 Damien Carrick asked whether she considers that if something does go wrong in an interview situation during the 48 hours detention, whether the legal avenues for people who've been kept in detention will be altered by the fact that they've been dealing with ASIO as well as with the police. Jenny Hocking was of the view that if a person is held for 48 hours, and if something does go wrong, such as that a person has some sort of a breakdown or there is some distress caused and subsequently there is a desire on their part to pursue legal avenues, it is difficult to see how that sort of avenue could actually be pursued. She believed it is a great concern that this particular proposed change could in effect take ASIO officers outside the usual standards of legal redress that might otherwise be able to be applied by individuals.

10.27 Damien Carrick asked whenever there is civil liberties implications, and are the proposed new powers of any practical use in preventing or solving terrorist crimes? He noted that according to Clive Williams,⁷ the answer is yes, and that he says, while nobody can know for sure, it is possible that organisations like Al Qu'aida do have cells in Australia. Clive Williams stated that it is certainly a possibility, there was no direct evidence of any cells existing in Australia at the moment, but the situation in Singapore was like that until December when the Americans provided a videotape that they'd found in the rubble in Afghanistan which showed that there actually was a cell active in Singapore, and since then 13 people have been arrested. He pointed out that it is certainly possible because Singaporeans are very conscientious and maintain high levels of security, and yet it managed to exist in

⁷ Director of Terrorism Studies at the Australian National University Centre for Defence and Strategic Studies and expert on ASIO .

Singapore for probably as much as eight years. Damien Carrick asked whether in busting open these cells and preventing or solving crimes, what powers and resources do the actual investigators need. Clive Williams considered that the sort of proposal of having the ability to detain people for 48 hours is quite a good one. He used the example of somebody who was trying to buy say 2 tonnes of ammonia nitrate, whilst it was expected that the US Secretary of State would be visiting, that it would obviously start alarm bells and one would want to detain somebody like that. He noted one would want to find out why someone wanted to buy the explosives if they obviously weren't farmers or if they are urban dwellers or whatever. He therefore considered that one certainly want to detain that person for a period to try and ascertain what their purpose was. He stated if one compared that with other countries around the world, he does not think that it is particularly draconian, because in Japan for example, one can hold someone for 23 days, in the UK he believed it to be 7 days, in Singapore and Malaysia it is 2 years. Therefore many countries have these capacities, and of course the United States has now introduced that kind of capability too and has been detaining people for quite a protracted period. He considered that kind of measure not to be that unacceptable.

10.28 Damien Carrick asked Clive Williams from a crime-fighting perspective, whether he saw value with these kinds of measures. Clive Williams answered that he thinks in terms of dealing with terrorism it has value because people that conduct acts of terrorism very often have got fraudulent documents, or they've got a means to disappear rapidly if they need to. He pointed out that the example of previous terrorist activities in Australia has shown that those sort of people are very mobile, they have a good support system, and it's very difficult to pick them up once they were released. Damien Carrick asked him also with the current balance that Australia has between the rights of the individual to their civil liberties, and the powers of the State to prevent or solve a terrorist act, whether Clive Williams is suggesting that maybe the balance is weighted too heavily in favour of the individual. Clive Williams responded that he thinks it does favour the operations of terrorists. He remarked that forty-eight hours is not an unreasonable period to detain somebody initially, because that will give one a chance to check the story one is provided with, and to ascertain whether it's a legitimate activity that they are engaged upon. He noted say for example somebody was videoing the US Embassy in Canberra, one might want to know what they were doing it for, it might turn out that they are interested in that kind of architecture, but it gives one the chance then to ascertain what the reason is. He stated that the alternative is one lets people get away with these sorts of things, and one could well end up with a bombing or a major loss of life. He considered that if

one weighs one thing against the other, the detention of one person for 48 hours against the lives possibly of a number of people, there is really no contest there.

10.29 Terry O'Gorman said that diluting civil rights doesn't translate into a world free from terrorism and that he thinks it is a false choice. Terry O'Gorman remarked that innocent family members, who may have some knowledge of the whereabouts of a suspected terrorist, could be held, neighbours could be held, arguably journalists could be held. He pointed out that similar laws in less democratic countries have ensnared journalists, and that lawyers could be held. He pointed out that the fact is that what Mr Williams won't acknowledge is a widespread recognition including from the former Director of the CIA, that the failure with September 11 was not a failure of the legal system, it was not the result of inadequate laws, and it was not the result of police and security services not having the power to detain people incommunicado. He noted that many CIA or ex-CIA operatives, including the former Director of the CIA, and a number of fairly convincing commentators in the US have said that the failure to detect those terrorists who flew those planes into the World Trade Center, was a failure by the security services to do their job and to act on existing intelligence which they simply failed to follow up. He was of the view that the laws in the US, the Patriot Act, the laws in the UK, and the new terrorism laws in Australia are simply designed to exploit community concern after September 11. He considered that the reality is that the security services should do their job properly, as under existing ASIO laws in Australia, they have a wealth of power already at their disposal, which was increased considerably only two years ago for the Sydney Olympics.

B. THE CHARTER OF THE UNITED NATIONS (ANTI-TERRORISM MEASURES) REGULATIONS 2001

10.31 Following the terrorist attacks on the United States on 11 September 2001, the United Nations Security Council passed Resolution 1373 of 28 September 2001 which requires States to take wide-ranging measures to suppress the financing of terrorism. The *Australian Charter of the United Nations (Anti-terrorism Measures) Regulations 2001* (Anti-terrorism Regulations) commenced on 15 October 2001. The Regulations are designed to implement in Australia paragraph 1(c) of UNSC Resolution 1373, which requires the freezing of funds and other financial assets⁸ **or economic resources of persons associated with**

⁸ The Regulation said that *asset* includes the following:

- (a) funds;
- (b) financial assets;
- (c) tangible and intangible assets;
- (d) property rights;

terrorist acts. The *Anti-terrorism Regulations* allow the Minister for Foreign Affairs to proscribe persons, entities and assets in that regard. Pursuant to regulation 7 of the *Anti-terrorism Regulations*, the Minister for Foreign Affairs issued the first two lists of proscribed persons and entities in the *Government Gazette* on 21 December 2001. The first list contains the names of individuals and groups that have been linked to Al Qaida, Osama bin Laden and the Taliban.⁹ The second list contains the names of internationally recognised foreign terrorist organisations.

10.32 Sub-regulation 7(1) provides that once the Minister for Foreign Affairs is satisfied a person or entity is a person or entity relevant to paragraph 1(c) of UNSC Resolution 1373 he must list the name or names of the person or entity in the *Gazette*. A person or entity so listed becomes a proscribed person or entity. Pursuant to sub-regulation 7(2), the Minister may also list assets or classes of assets that the Minister is satisfied are owned or controlled by an entity or person mentioned in UNSC Resolution 1373. Under regulation 6, assets of proscribed persons or entities, or assets listed by the Minister, are 'freezable assets'.¹⁰ Under regulation 9, it is an offence for any person who holds an asset owned or controlled by a proscribed person or entity, or an asset derived or generated from an asset owned or controlled by a proscribed person or entity, to use or deal with the asset, allow it to be used or dealt with, or facilitate the use of or dealing with it. It is also an offence, under regulation 10, directly or indirectly to make any asset available to a proscribed person or entity (except as permitted by a notice under regulation 8). In effect, therefore, organisations or individuals are obliged under the *Regulations* to act to freeze funds or other assets of persons or entities on the proscribed list. A person or entity, which contravenes regulations 9 or 10, will commit an offence punishable by a fine of up to \$5,500 for each offence. Regulation 11 provides that a person is not liable to suit for anything done in good faith, and without negligence, in purported compliance with the *Regulations*.

-
- | | |
|-----|---|
| (e) | publicly and privately traded securities; |
| (f) | publicly and privately traded debt instruments; |
| (g) | income from, or proceeds from the sale of, assets mentioned in paragraphs (a) to (f). |

⁹ The detailed lists and explanatory material are available at <http://www.dfat.gov.au/icat/index.html>.

¹⁰ *Freezable asset* means an asset that:

- is owned or controlled by a proscribed person or entity; or
- is an asset listed under subregulation 7(3); or
- is derived or generated from assets mentioned in paragraph (a) or (b).

10.33 While the *Anti-terrorism Regulations* do not of themselves impose reporting obligations on persons or organisations, the identification of relevant assets or assets owned or controlled by proscribed entities or persons may, in the case of ‘cash dealers’ (as defined in the *Financial Transaction Reports Act 1988* (the FTR Act)) who are party to a transaction, trigger the suspect transaction reporting obligations contained in section 16 of the FTR Act. Under section 3 of the FTR Act, ‘cash dealer’ means:

- (a) a financial institution;
- (b) a body corporate that is, or, if it had been incorporated in Australia, would be, a financial corporation within the meaning of paragraph 51(xx) of the Constitution;
- (c) an insurer or an insurance intermediary;
- (d) a securities dealer;
- (e) a futures broker;
- (f) a Registrar or Deputy Registrar of a Registry established under section 14 of the *Commonwealth Inscribed Stock Act 1911*;
- (g) a trustee or manager of a unit trust;
- (h) a person who carries on a business of issuing, selling or redeeming travellers cheques, money orders or similar instruments;
- (i) a person who is a bullion seller.
- (j) a person (other than a financial institution or a real estate agent acting in the ordinary course of real estate business) who carries on a business of:
 - (i) collecting currency, and holding currency collected, on behalf of other persons; or
 - (ii) exchanging one currency for another, or converting currency into prescribed commercial instruments, on behalf of other persons; or
 - (iii) remitting or transferring currency or prescribed commercial instruments into or out of Australia on behalf of other persons or arranging for such remittance or transfer; or
 - (iv) preparing pay-rolls on behalf of other persons in whole or in part from currency collected; or
 - (v) delivering currency (including payrolls);
- (b) a person who carries on a business of operating a gambling house or casino; and
- (c) a bookmaker, including a totalisator agency board and any other person who operates a totalisator betting service.

10.34 Under section 16 of the FTR Act, should any organisation or individual defined as a ‘cash dealer’ have reasonable grounds to suspect that information concerning a transaction, or an attempted transaction, may be relevant to the investigation of a breach of a law in Australia, the cash dealer must make a report to the Director of AUSTRAC. Irrespective of whether there is a recent transaction, a cash dealer is required to lodge a suspect transaction report as soon as practicable after forming a suspicion. Once a suspect transaction report is made to AUSTRAC, under section 27 of the FTR Act, the Director of AUSTRAC may authorise the AFP to have access to the information for the purpose of the AFP performing its functions. The AFP can only use the information provided by AUSTRAC for official law enforcement purposes, and misuse is punishable by a maximum of 2 years imprisonment. Further, under subsection 16(4) of the FTR Act, where a cash dealer makes a suspect transaction report, they may be required, if requested by AUSTRAC or the AFP, to provide further information should it be available.

10.35 Section 16(5) of the FTR Act provides cash dealers with protection against action, suit or proceedings in relation to provision of a suspect transaction report to the Director of AUSTRAC, even if a report is provided on a mistaken belief that such a report was required under section 16 of the FTR Act. Under section 28 of the FTR Act, cash dealers commit an offence if they refuse or fail to communicate information to AUSTRAC when and as required under Part II or III of the Act (which includes section 16). In accordance with subsection 28(4) of the FTR Act, a person who commits an offence in this regard is punishable by imprisonment of not more than 2 years and/or monetary penalties.

10.36 Who is Subject to Offences under the Regulations

- any person (including a body corporate) in Australia, or an Australian citizen outside Australia, who uses or deals with an asset owned or controlled directly or indirectly by a person or entity mentioned in the ‘proscribed list’, or allowing or facilitating the use of or dealing with such an asset.
- Any person (including a body corporate) in Australia, or an Australian citizen outside Australia, who makes an asset available to a person or entity mentioned in the ‘proscribed list’.
- As an FSP: FSPs who are ‘cash dealers’ for the purposes of the Financial Transaction Reports Act 1988 (FTRA).

10.37 The Regulations created the following obligations in regard to the freezing or refusing to use or deal in assets owned or controlled by suspected terrorists —

- **for new business —**
- **the law states that it is an offence to use, deal or make available, a freezable asset;**
- **In practice, this would mean ensuring that all relevant staff in the FSP do not authorise or undertake new business before first satisfying themselves that the other party is not on the ‘proscribed list’. However, this does not mean that FSPs have to introduce new or additional proof of identity procedures, beyond any measures they currently have in place.**
- **If an attempt is made to use or deal by a party on the ‘proscribed list’, FSPs should consider their obligations under the FTRA to report suspect transactions to AUSTRAC (noting that the FTRA provides that this information may be passed to the AFP).**
- **for existing business —**
- **For transactions with existing clients, in circumstances where the FSP has not yet completed its records check, the FSP should report suspect transactions to AUSTRAC in the usual manner.**
- **In circumstances where the FSP has completed its records check, the FSP should as soon as is practicable, alert all of its relevant staff of any positive matches against the proscribed list and ‘tag’ or otherwise implement measures to try and ensure that their relevant staff do not use, deal with or make the asset/accounts available to parties on the ‘proscribed list’.**
- **If an attempt is made to use or deal by a party on the ‘proscribed list’, the FSP should again consider its obligations under the FTRA to report suspect transactions to AUSTRAC.**

(The Anti-terrorism Regulations do not impose reporting obligations on FSPs who do not operate under the Financial Transaction Reports Act 1988 (FTRA).)

10.38 Obligations in regard to the freezing or refusing to use or deal with assets owned or controlled by suspected terrorists:

- While the law states that any person is committing an offence if they use, deal or make an asset available to a person or entity on the 'proscribed list', FSPs may be more likely than the general public, to find themselves in this situation.
- To help ensure that FSPs are using their best endeavours to avoid committing an offence, they should:
 - If they have received the 'proscribed list', satisfy themselves as far as is practicable, that they are not holding assets owned or controlled by parties on the 'proscribed list', and that they or their employees do not use, deal or make assets/accounts available to parties on the 'proscribed list'.
 - If the FSP suspects that it is holding such an asset it may wish to notify or discuss this fact with the AFP;
 - If the FSP has not yet satisfied itself that it is not holding assets owned or controlled by parties on the 'proscribed list', the FSP should notify the AFP of any suspicions in relation to proposed transactions.

10.39 From 21 December 2001, the Privacy Act 1988 was extended to apply to the private sector. Most private sector organisations, including Australian financial institutions, must comply with the National Privacy Principles (NPPs), or an industry code that meets these standards. The *Privacy Amendment (Private Sector) Act 2000* amended the Privacy Act to include the NPPs. The NPPs are set out in Schedule 3 of the Privacy Act. NPP 2 contains a general prohibition on the use and disclosure of personal information. However, it describes a number of circumstances in which use and disclosure of personal information is permitted. These exceptions include :

- The organisation reasonably believes that the disclosure is necessary to prevent or lessen a threat to an individual's life or safety or public health or safety;
- The organisation suspects unlawful activity and discloses personal information in reporting the matter to relevant persons or authorities; or
- The organisation believes that the disclosure is reasonably necessary for the prevention, detection or investigation of breaches of the criminal law.

Private sector organisations must ensure that any disclosure of personal information is consistent with the new privacy legislation.¹

10.40 Affected organisations and individuals defined as ‘cash dealer’ (by the FTR Act) should make relevant inquiries of their records to identify accounts held by, operated by or under the control of proscribed persons or entities. In the case of a match or suspected match ‘cash dealers’ should pass relevant information to AUSTRAC. This information may contain the following details:

- Name ‘matched’
- Date and place of birth
- Passport details
- Residential address
- Postal/mailing address
- Date account established
- Account location/number and account usage précis

10.41 If after making relevant inquiries a ‘cash dealer’ is satisfied no accounts have been identified relevant to proscribed persons or entities, the ‘cash dealer’ may wish to file a ‘nil return’ with the Australian Federal Police (AFP) to indicate that the current search cycle has been completed. A copy of any such Return should be forwarded to the Australian Federal Police. Information concerning a transaction, or an attempted transaction, which may be relevant to the investigation of a breach of a law in Australia, must be reported to AUSTRAC. The FTR Act provides that this information may then be passed to the AFP. Cash dealers should note that subsection 16(5) of the FTR Act provides them with protection against action, suit or proceedings in relation to provision of a suspect transaction report to the Director of AUSTRAC, even if a report is provided on a mistaken belief that such a report was required under section 16 of the FTR Act.

10.42 Affected organisations and individuals should make relevant inquiries of their records - paper and/or electronic - to identify accounts and assets held, operated by or under the control of proscribed persons or entities. It should be noted that it is an offence under the Anti-terrorism Regulations for any affected organisation or person to deal with the assets of proscribed persons or entities.

¹ Further information is available from the Federal Privacy Commissioner's website at www.privacy.gov.au.

10.43 The Australian Federal Police (AFP) has established Operation Drava in response to the events of 11 September 2001. Operation Drava inquiries and investigations have received (and continue to receive) priority within the organisation, including support to a multitude of United States inquiries. AFP regional teams around Australia have been established to handle local investigations including assisting partner agencies with executing entry and search warrants, conducting interviews and obtaining relevant documentation from financial institutions. An AFP Headquarters coordinating team has also been established, with specialised staff seconded from various areas within the organisation, to oversee the activities of the regional teams. AFP Operation Drava inquiries are also being progressed through co-operation with a number of overseas police services, Interpol, the Federal Bureau of Investigation and AFP domestic partner agencies including the Australian Customs Service, the Department of Immigration and Multicultural and Indigenous Affairs, Department of Defence and the Australian Security and Intelligence Organisation.

C. REPORT OF AUSTRALIA TO THE COUNTER-TERRORISM COMMITTEE OF THE UNITED NATIONS SECURITY COUNCIL

(a) Introduction

10.44 In its report to the Counter-Terrorism Committee of the United Nations Security Council pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001, Australia noted that at the adoption of Resolution 1373, Australia already had in place extensive measures to prevent in Australia the financing of, preparations for and basing from Australia of terrorist attacks on other countries. Australia also said that it has sophisticated electronic systems to track the movement of persons and assets that have been utilised in tracking the movement of terrorists and their assets to assist law enforcement agencies in the United States investigate the surviving perpetrators of the terrorist attacks against the United States on 11 September 2001. It was also pointed out that Australia has an extensive network of out-placed law enforcement liaison officers and bilateral treaties on extradition and mutual legal assistance in criminal matters to facilitate cooperation with other countries in the prevention, investigation and prosecution of terrorist acts. Australia has developed a highly coordinated domestic counter-terrorism response strategy incorporating law enforcement, security and defence agencies, with the operational experience of protecting the Summer Olympic Games held in Sydney in September 2000 and in full readiness to protect the meeting of the Commonwealth Heads of Government to take place in Queensland, Australia in March, 2002.

(b) **What measures have been taken to prevent and suppress the financing of terrorists acts?**

10.45 Australia noted that the Australian Government established a Working Group on *Australian Financial Controls on Terrorists and Sponsors of Terrorism* to coordinate and implement the Commonwealth Government's financial control initiatives in relation to the blocking of terrorist funds. The Working Group comprises the Federal Departments of Foreign Affairs and Trade, the Treasury and the Attorney-General's Department, the Australian Federal Police (AFP), the Australian Security Intelligence Organisation (ASIO), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Director of Public Prosecutions and the Reserve Bank of Australia. The report noted that on 3 October 2001, the Government directed the Reserve Bank of Australia under the *Banking (Foreign Exchange) Regulations* to stop any payments in Australia by, or to, the terrorists and terrorist organisations identified in US Executive Order 13224. The effect of this direction is to prohibit all transactions involving the transfer of funds or payments to, by the order of, or on behalf of, the listed persons and entities. Any accounts in Australia of such persons and entities are thus effectively frozen. Further names were subsequently added to the proscribed list on 17 October and 9 November 2001.

10.46 The Report said that on 6 October 2001, AUSTRAC issued a notification to all cash dealers under the *Financial Transactions Reports Act 1988* (Information Circular Number 22) annexing the list of suspected terrorist names and entities identified in US Executive Order 13224. The Report explained that under the Act, any cash dealer that has reasonable grounds to suspect that information concerning a transaction, or an attempted transaction, may be relevant to the investigation of a breach of a law in Australia, must make a report to the Director of AUSTRAC. The effect of AUSTRAC's notification is to oblige cash dealers to report suspect transactions and international funds transfers involving persons or entities on the list. A cash dealer is required to lodge a suspect transaction report as soon as practicable after forming a suspicion. The Report noted that the Government will formalise this arrangement through amendments to the *Financial Transaction Reports Act 1988* to ensure the reporting of possible terrorist-related transactions and international funds transfers. The report noted that "cash dealers" include:

- financial institutions and corporations, insurers or insurance intermediaries, securities dealers, futures brokers, and stock market Registrars;
- trustees or managers of unit trusts;
- persons who sell bullion or carry on a business of issuing, selling or redeeming travellers cheques, money orders or similar instruments;

- persons who deliver currency (including payrolls) or who deal with currency on behalf of other persons in the following ways: collecting and holding currency, exchanging one currency for another, converting currency into prescribed commercial instruments, remitting or transferring currency or prescribed commercial instruments into or out of Australia or arranging for such remittance or transfer, preparing pay-rolls in whole or in part from currency collected; and
- bookmakers and persons who carry on a business of operating a gambling house or casino.

(c) **What are the offences and penalties with respect to provision and collection of funds to provide support to terrorists?**

10.47 The report pointed out that section 7 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence to, *inter alia*:

- give money or goods to, or perform services for, any other person or any body or association of persons, or
- to receive or solicit money or goods, or the performance of services, for the purpose of supporting or promoting:
- a person to enter a foreign State with intent to engage in a hostile activity in a foreign State, or
- a person to engage in a hostile activity in that foreign State.

10.48 Section 6 of the Act defines “engaging in a hostile activity in a foreign State” as consisting of doing an act (other than in the course of, and as part of, service in any capacity in or with the armed forces of the government of a foreign State; or any other armed force in respect of which a declaration by the Minister under the Act is in force) for the purpose of achieving any one or more of the following objectives (whether or not such an objective is achieved):

- the overthrow by force or violence of the government of the foreign State or of a part of the foreign State;
- engaging in armed hostilities in the foreign State;
- causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;
- causing the death of, or bodily injury to, a person who is the head of state of the foreign State or holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or

- unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State.

(d) **What legislation and procedures exist for freezing accounts and assets at banks and financial institutions?**

10.49 The Report drew attention to clause 10(1) of the *Charter of the United Nations (Anti-terrorism Measures) Regulations* which makes it an offence to, directly or indirectly, make an asset available to a person or entity listed by the Minister for Foreign Affairs in the *Commonwealth Gazette* for being a person or entity mentioned in paragraph 1(c) of Resolution 1373. Clause 9(1) of the *Charter of the United Nations (Anti-terrorism Measures) Regulations* makes it an offence for a person who holds:

- an asset that is owned or controlled by a person or entity listed by the Minister in the *Commonwealth Gazette* as a person or entity mentioned in paragraph 1(c) of Resolution 1373, or
- an asset that is listed by the Minister for Foreign Affairs in the *Commonwealth Gazette*, or
- an asset that is derived or generated from either of the above classes of assets,

to use or deal with the asset; or allow the asset to be used or dealt with; or to facilitate the use of the asset or dealing with the asset. Thus the assets referred to in Clause 9(1) are effectively frozen. Section 7(1) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence for a person, whether within or outside Australia, to do any of the following acts in preparation for, or for the purpose of, engaging in a hostile activity in a foreign State, whether by that person or by another person:

- any preparatory act;
- accumulate, stockpile or otherwise keep arms, explosives, munitions, poisons or weapons;
- train or drill or participate in training or drilling, or be present at a meeting or assembly of persons with intent to train or drill or to participate in training or drilling, any other person in the use of arms or explosives, or the practice of military exercises, movements or evolutions;
- allow himself or herself to be trained or drilled, or be present at a meeting or assembly of persons with intent to allow himself or herself to be trained or drilled, in the use of arms or explosives, or the practice of military exercises, movements or evolutions;

- give money or goods to, or perform services for, any other person or any body or association of persons;
- receive or solicit money or goods, or the performance of services;
- being the owner, lessee, occupier, agent or superintendent of any building, room, premises or place, knowingly permit a meeting or assembly of persons to be held in the building, room, premises or place for any of the above purposes; or
- being the owner, charterer, lessee, operator, agent or master of a vessel or the owner, charterer, lessee, operator or pilot in charge of an aircraft, knowingly permit the vessel or aircraft to be used for any of the above purposes.

(e) **What legislation or other measures are in place to prevent persons from providing any form of support to persons involved in terrorist acts, including recruitment, eliminating the supply of weapons and what offences prohibit recruitment to terrorist groups and supply of weapons?**

10.50 The Report set out that section 8 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence for a person in Australia to recruit another person to become a member of, or to serve in any capacity with, a body or association of persons the objectives of which are or include:

- the overthrow by force or violence of the government of the foreign State or of a part of the foreign State;
- engaging in armed hostilities in the foreign State;
- causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;
- causing the death of, or bodily injury to, a person who is the head of state of the foreign State or holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or
- unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State.

(f) **What other steps are being taken to prevent the commission of terrorist acts, and in particular, what early warning mechanisms exist to allow exchange of information?**

10.51 The Report explained that the Australian Government imposes strict controls on the import and possession of firearms, and the export of defence and dual-use goods from

Australia, which would have the effect of preventing such goods being supplied to terrorists. In Australia, the Federal Government has responsibility for importation, export and international aspects of firearms control, while the States and Territories are responsible for domestic licensing and registration regimes. All persons who wish to possess a firearm must be licensed for the particular category of firearm they are seeking, having established that they have a genuine reason to use such a firearm. In addition, all firearms must be registered against a licence and all licence holders must acquire a permit for the purchase of each firearm. The *Customs (Prohibited Imports) Regulations* 1956 prohibit, except for defined special purposes, the importation of certain classes of firearms.¹

10.52 The Report stated that export controls cover a wide range of defence and related goods and technologies, nuclear related goods and goods and technologies with both civil and military applications. The controls also cover goods being exported after or for repair, and the temporary export of items for demonstration or loan purposes. The list of goods controlled forms the Defence and Strategic Goods List and includes equipment, assemblies and components, associated test, inspection and production equipment, materials, software and technology. Goods listed in the Defence and Strategic Goods List may only be exported from Australia with the permission of the Minister for Defence or a person authorised by the Minister to issue permits and licences. Only the Minister for Defence may deny an approval to export or revoke a permit or licence if a condition of the permit or licence is breached or foreign policy or strategic circumstances change significantly in the country to which goods are to be exported.²

10.53 The Report stated that Australia has in place sophisticated counter-terrorism arrangements. These arrangements have been regularly exercised and refined, most recently in the lead up to the September 2000 Sydney Olympic Games and the lead up to the Commonwealth Heads of Government Meeting that had been scheduled to take place in Brisbane in October 2001. The Report explained that following the terrorist attacks on the United States on 11 September 2001, the Government reviewed Australia's counter-terrorism preparedness and that it will introduce new measures

¹ The Report noted that broadly, classes of firearms which are prohibited under this regime include high-powered automatic and semi-automatic firearms and pump action shotguns and fully automatic firearms can only be imported for the Australian military, while semi-automatic firearms and pump action shotguns can only be imported for use by police or other government purposes or specified occupational purposes (eg primary producers, hunters of feral animals).

² More detailed information on Australia's export control regime, and a copy of the Defence and Strategic Goods List, is available on the Defence Materiel Organisation's website: http://www.dmo.defence.gov.au/id/export/dsec/dld_dsgl.cfm

designed to further strengthen counter-terrorism capabilities. These measures deal mainly with giving the Australian Security Intelligence Organisation (ASIO) the power to question people who may have information about terrorism; amending the *Telecommunications (Interception) Act 1979* to include terrorism offences in the definition of “class 1 offences” for the purposes of telecommunications interception warrants; and to permit access to unread e-mails where another form of lawful access to the system or device capable of displaying the communication is held by the relevant agency (at present, an agency with a valid search warrant cannot access e-mail communications unless they have been read, or otherwise consciously dealt with, by the intended recipient).) The Report noted that, in addition, the Australian Government has announced a number of measures that will be put in place either immediately or in the very short term to shore up Australia’s counter-terrorism arrangements:

- an air security officers program on flights provided by Australian air carriers by 31 December 2001;
- introduction of new laws about transmission of dangerous substances and hoax offences.

10.54 The Australian Federal Police (AFP) has established Operation Drava in response to the events of 11 September 2001. Operation Drava inquiries and investigations have received (and continue to receive) priority within the AFP. The AFP has established regional teams around Australia to handle local investigations, including assisting partner agencies with executing entry and search warrants, conducting interviews and obtaining relevant documentation from financial institutions. The activities of the regional teams are overseen by an AFP Headquarters coordinating team, with specialised staff seconded from various areas within the organisation. AFP Operation Drava inquiries are also being progressed through co-operation with a number of overseas police services, Interpol, the US Federal Bureau of Investigation and AFP domestic partner agencies including the Australian Customs Service, the Department of Immigration and Multicultural and Indigenous Affairs, Department of Defence and the Australian Security and Intelligence Organisation.

(g) What legislation or procedures exist for denying safe haven to terrorists?

10.55 On the issue whether Australia has measures in place to deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens, Australia noted that it has a comprehensive system to exclude or remove non-Australian citizens from Australia on the grounds that they are of character or security concern to Australia. Persons

who finance, plan, support or commit terrorist acts, or who provide safe haven for such persons, would be of character and security concern to Australia and character and security checks are conducted. The Report pointed out that only Australian citizens have the unrestricted right to travel freely in and out of Australia — non-citizens must have an authority, in the form of a visa, to enter and stay in Australia, and non-citizens who arrive without valid visas are interviewed in immigration clearance and a decision is made to either allow or refuse entry. The Report noted that where non-citizens without a valid visa apply for Australia's protection in immigration clearance, a record of the entry screening interview is forwarded to a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs for a decision as to whether the person *prima facie* engages Australia's protection obligation under the *Convention relating to the Status of Refugees* (Geneva, 1951). If the person is not assessed as engaging Australia's protection obligations, the person will be refused immigration clearance and detained until they can be removed from Australia.

10.56 The report explained that non-citizens who apply to enter or stay in Australia must be of good character. If the Minister (or his or her delegate) is satisfied that the applicant does not meet the good character requirement, the *Migration Act 1958* provides a power to refuse to grant a visa and to cancel a visa that has already been granted. A person is not of good character if:

- the person has a substantial criminal record; or
- the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or
- having regard to the person's past and present criminal conduct and/or the person's past and present general conduct, the person is not of good character; or
- in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:
 - (i) engage in criminal conduct in Australia; or
 - (ii) harass, molest, intimidate or stalk another person in Australia;
 - or
 - (iii) vilify a segment of the Australian community; or
 - (iv) incite discord in the Australian community or in a segment of that community; or
 - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become

involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

10.57 The Report explained that in addition to the character test, all applicants for permanent residence visas and certain classes of visa for temporary stay must meet a security standard, according to which they must be assessed as not posing a direct or indirect risk to Australian national security. The security requirement protects the resident Australian community from the actions and influence of people who may threaten the security of the nation through activities such as: espionage, sabotage, politically-motivated violence, promotion of communal violence, attacks on Australia's defence system; or acts of foreign interference.

10.58 The Report stated that the Australian Government has established a computerised database known as the Movement Alert List (MAL) that stores details about people and travel documents of immigration concern to Australia. All visa applicants are checked against the MAL, making it a key tool used by Australia to apply the legislation governing the entry to and presence in Australia of non-citizens who are of character or security concern. As at October 2001, the names of more than 179,000 people and more than 1,1 million documents of concern – for example lost, stolen or fraudulently altered passports – were entered on MAL. People are entered on MAL when they have serious criminal records, are otherwise barred by migration legislation from entering Australia or when the Government assesses that their presence in Australia may constitute a risk to the Australian community. Details identifying people of concern are recorded on MAL as a result of liaison with law enforcement agencies and other agencies in Australia and overseas.

10.59 The Report pointed out that if a person is already in Australia on a visa that is subsequently cancelled on character or security grounds, such cancellation of the visa renders that person liable to removal from Australia. If the visa is cancelled because of that person's criminal conduct, that person will be permanently excluded from re-entering Australia. Deportation action is also available against permanent residents who, in their first ten years of residence, commit an offence for which they are sentenced to imprisonment for one year or more. In such cases, deportation usually takes place at the end of the prison sentence imposed by the Courts. A person deported from Australia on criminal grounds is permanently excluded from Australia. Deportation action can also be taken against a non-citizen who is the subject of an adverse security assessment, or who has been convicted of very serious offences against the state (treason, treachery, terrorist activity and assassination, etc).

(h) **What legislation or procedures exist to prevent terrorists acting from Australian territory against other states or citizens and what steps have been taken to establish terrorist acts as serious criminal offences and to ensure that the punishment reflects the seriousness of such terrorist acts?**

10.60 On the issue of preventing those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens, Australia reported that one of the purposes of the *Crimes (Foreign Incursions and Recruitment) Act 1978* is to prevent Australian territory being used as a base for hostile activities against foreign States. It was noted that this purpose will be enhanced through the introduction of new counter terrorism measures. Australia pointed out that Resolution 1373 requires information on measures to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts. Australia said that section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence:

- to enter a foreign State with intent to engage in a hostile activity in that foreign State; or
- to engage in a hostile activity in a foreign State. The penalty for such an offence is imprisonment for 14 years.

10.61 Australia noted that section 7 of their *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence to contribute to the preparation or promotion of the commission of an offence under section 6 and that the penalty for such an offence is imprisonment for 10 years. The report also stated that section 8 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence to recruit persons to a group, the objectives of which include the commission of an offence under section 6. The penalty for such an offence is imprisonment for 7 years. The Australian *Crimes (Aviation) Act 1991* makes the offences provided for in the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo, 1963), the *Convention for the Suppression of Unlawful Seizure of Aircraft* (The Hague, 1970) the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal, 1971) and the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (Montreal, 1988) criminal offences under Australian law. Penalties for the offences range from two years to life imprisonment, depending upon the gravity of the offence.

10.62 The *Crimes (Ships and Fixed Platforms) Act 1992* makes the offences provided for in the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (Rome, 1988) and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (Rome, 1988) criminal offences under Australian law. Penalties for the offences range from two years to life imprisonment, depending upon the gravity of the offence. The report also set out that the *Nuclear Non-Proliferation (Safeguards) Act 1987* makes the offences provided for in the *Convention on the Physical Protection of Nuclear Material* (Vienna, 1980) criminal offences under Australian law and that the penalty for each of the offences is A\$20,000 or ten years imprisonment or both. Furthermore, their *Crimes (Hostages) Act 1989* makes the offences provided for in the *International Convention against the Taking of Hostages* (New York, 1979) criminal offences under Australian law. The maximum penalty for the offence of “hostage taking” is life imprisonment. The *Crimes (Internationally Protected Persons) Act 1976* makes the offences provided for in the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* (New York, 1973) criminal offences under Australian law. Penalties for the offences range from seven years to life imprisonment, depending upon the gravity of the offence.

10.63 Australia pointed out that section 8 of the *Crimes (Biological Weapons) Act 1976* makes it an offence to develop, produce, stockpile or otherwise acquire or retain:

- microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or
- weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.¹

10.64 Section 12 of the *Chemical Weapons (Prohibition) Act 1994* makes it an offence to intentionally or recklessly:

¹ The maximum penalty for these offences in the case of a natural person is a fine of A\$10,000 or imprisonment for life or both. In the case of a corporation, the maximum penalty is a fine of A\$200,000.

- develop, produce, otherwise acquire, stockpile or retain chemical weapons; or
- transfer, directly or indirectly, chemical weapons to another person; or
- use chemical weapons; or
- engage in any military preparations to use chemical weapons; or
- assist, encourage or induce, in any way, another person to engage in any activity prohibited to a State Party under the Convention; or
- use riot control agents as a method of warfare.¹

10.65 The Report also explained that Australian criminal legislation in addition prohibits activities that may be committed as part of a terrorist operation. The *Crimes Act 1914*, for example, creates offences such as treason, treachery, sabotage, sedition and espionage. Australia said that the *Criminal Code Act 1995* creates offences with respect to causing, or threatening to cause, harm to Commonwealth public officials. The Report noted that the Government would introduce amendments to the *Criminal Code Act 1995* to consolidate the treatment of terrorist offences in Australian criminal law by providing for general terrorism offences into the Code. These would relate to “terrorist activity” which would be defined as an act or omission that constitutes an offence under the UN and other international counter-terrorism instruments, or an act committed for a political, religious or ideological purpose designed to intimidate the public with regard to its security and intended to cause serious damage to persons, property or infrastructure. It was also explained that these amendments will also cover ancillary conduct such as aiding, abetting, conspiracy, attempt and incitement. The offences will carry a maximum penalty of life imprisonment.

(i) **Mutual Assistance in Criminal Matters**

10.66 On the issue of *Mutual Assistance in Criminal Matters* Australia pointed out that the *Mutual Assistance in Criminal Matters Act 1987* allows Australia to provide the following kinds of international assistance in criminal matters at the request of a foreign country:

- the taking of evidence, or the production of any document or other article, for the purposes of a proceeding in the foreign country;
- the issue of a search warrant and the seizure of any thing relevant to a proceeding or investigation in the foreign country;

¹ The penalty for the offence is imprisonment for life.

- the forfeiture or confiscation of property in respect of a foreign serious offence;
- the recovery of pecuniary penalties in respect of a foreign serious offence;
- the restraining of dealings in property that may be forfeited or confiscated, or that may be needed to satisfy pecuniary penalties imposed, because of the commission of a foreign serious offence.

10.67 The report pointed out that the *Mutual Assistance Act* applies to all foreign countries, subject to any mutual assistance treaty between that country and Australia and any multilateral mutual assistance treaty to which both Australia and the other country are Parties. The Act does not prevent the provision of other forms of international assistance in criminal matters. It was explained that although the Act precludes assistance in relation to political offences, none of the offences established by the international counter-terrorism instruments to which Australia is Party is considered a “political offence” for the purpose of the Act. It was also noted that the Act includes safeguards to prevent assistance where there are substantial grounds to believe the request was made on account of the person’s race, sex, religion, nationality or political opinions, or where the prosecution or punishment concerned would violate the principle of double jeopardy. The Act also allows assistance to be refused where there is no double criminality or on national interest grounds. Finally, the Act restricts the capacity for Australia to provide assistance if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country.

10.68 Australia pointed out that their *Extradition Act 1988* provides for proceedings by which Australian courts may determine whether a person is to be, or is eligible to be, extradited, without determining the guilt or innocence of the person of an offence, and to enable Australia to carry out its obligations under extradition treaties. Their Act applies in relation to countries that are declared by regulations made under the Act to be “extradition countries”, subject to the terms of applicable bilateral extradition treaties, multilateral extradition treaties (in force between Australia and the Party concerned) or as may otherwise be provided for in regulations made under the Act. A magistrate must first be satisfied that the necessary supporting documents have been presented to the magistrate, the offence for which the person’s extradition is sought would also be an extraditable offence under Australian law and the person whose extradition is sought has not demonstrated a valid ground to prevent the extradition. The Federal Attorney-General must then be satisfied that there are no valid grounds to prevent the extradition, that the person whose extradition is sought will not be subjected to torture and will not be subjected to the death penalty for the offence for which the person’s extradition is sought.

10.69 Australia explained that valid grounds to prevent an extradition are specified in the Act and include the fact that the offence for which extradition is sought is a political offence. The Act specifies, however, that none of the offences established under the international counter-terrorism instruments to which Australia is a Party is a political offence. The report noted that other valid grounds to prevent extradition are that the extradition is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions, that the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions, that the prosecution would infringe the principle of double jeopardy, or that the conduct or equivalent conduct would have constituted an offence under the military law, but not also under the ordinary criminal law of Australia.¹

(j) **How do border controls prevent the movement of terrorists, how do the procedures for issuance of identity papers and travel documents support this and what measures exist to prevent their forgery etc?**

10.70 Australia noted that the two main aspects of Australian Border Control are the obligations of international carriers bringing persons to Australia and the requirement that all persons arriving at Australian ports must undergo immigration clearance before entering the country. Under the *Migration Act 1958*, international carriers are obliged to ensure that passengers they bring into Australia:

¹ Australia noted that the Australian Federal Police Operation Drava Team receives regular electronic updates of the "Watch List" compiled by the US Federal Bureau of Investigation of persons of interest in relation to the 11 September 2001 terrorist attacks on the US. The AFP coordinates an Australia-wide response to this list, running the names and other details in it through Australian law enforcement databases and reporting any matches or related intelligence to the FBI Legal Attaché based in the US Embassy in Canberra. It was remarked that Australia's security and intelligence agencies have, in addition, in place well established arrangements with international counterparts to facilitate the exchange of security and intelligence information. The AFP has liaison officers with regional responsibilities based in Australian diplomatic missions in Washington, Los Angeles, Buenos Aires, London, Rome, The Hague, Beirut, Islamabad, Beijing, Hong Kong, Singapore, Hanoi, Jakarta, Rangoon, Bangkok, Kuala Lumpur, Manila and Port Moresby.

- have in their possession evidence of a valid visa for travel to Australia;
or
- have in their possession an Australian passport or other prescribed evidence of identity and Australian citizenship; or
- are eligible for the grant of a special category visa; or
- hold a special purpose visa; or
- hold an Electronic Travel Authority.

10.71 The report pointed out that the Australian Act provides for penalties of up to A\$10,000 on carriers who bring inadequately documented passengers to Australia or who have one or more concealed persons on board the vessel on arrival in Australia. It was said that at some overseas airports, where there is a known high risk of abuse of Australia's entry and visa systems, Australia based staff assist carrier staff to identify bogus, forged or inadequate documentation held by passengers seeking to board flights for Australian ports. Automated information systems developed by the Australian Government assist international carriers meet their obligations. The Advance Passenger Processing System allows certain private sector organisations, such as airlines and shipping companies, to provide information about persons intending to travel Australia in advance of their arrival. The Report noted that currently, advanced passenger information is received on nearly 50% of arriving passengers and that some carriers also have access to the Electronic Travel Authority System, which enables these carriers to check the visa status of non-citizens to prevent persons who may be of concern to Australia from travelling.

10.72 It was explained that the *Migration Act 1958* requires non-citizens seeking entry to Australia to present to a clearance officer evidence of their identity and of a visa that is in effect and is held by the person as well as a completed incoming passenger card. The authenticity of visas and travel and identity documents presented at immigration clearance is established by cross checking with data contained in Australian Government databases. The Travel and Immigration Processing System (TRIPS) provides access to details of all Australian visas issued overseas. When passengers arrive in Australia, the scanning or manual entry of a visa or passport number provides confirmation that the document was issued to that particular passenger. The Passenger Analysis Clearance and Evaluation (PACE) system in place at the border links with TRIPS to obtain the relevant data, to determine if the passenger is on any immigration alerts list and detect any anomalies. Officers of the Australian Customs Service undertake primary immigration examination of passengers on behalf of the Department of Immigration and Multicultural and Indigenous

Affairs. The Report explained that the responsibilities of Customs Officers include the following:

- identifying passengers and their citizenship against travel documents (face to passport check);
- checking the completed passenger cards against the passport and ensuring that the passenger cards are correctly completed; and
- checking passenger's passport/visa numbers against the PACE/TRIPS system.

10.73 Australia said that in addition, Immigration and Customs staff working at airports undergo training in document fraud to assist them in identifying bogus documents. Where a passenger's documentation is not in order, or where there are suspicions regarding their *bona fides*, an Immigration Inspector is called to the primary line to undertake secondary examination. If necessary, the passenger is taken to a room to be interviewed. If required, an interpreter is telephoned to assist with the interview. A decision is made to either allow or refuse entry.¹

10.74 Australia noted on the issue of documents for travel to Australia that the Department of Immigration and Multicultural and Indigenous Affairs issues a document for travel to Australia (DFTTA) to visa applicants who have met the criteria for grant of a visa in one of the offshore humanitarian subclasses, or a provisional spouse visa, where the visa holder does not hold, or cannot obtain, an acceptable travel document for visa evidencing and travel to Australia. In both cases, the visa applicants would have been assessed against the criteria for the grant of a visa, including the character requirements. The DFTTA provides for a single journey to Australia and is not meant to be a long-term substitute for a passport or other identity documents. A DFTTA is not generally issued to holders of visitor or temporary entry

¹ Australia pointed out that its passport issuing systems are "state of the art" and are based on the latest available scanning, imaging, character recognition and workflow technologies. There are more than one hundred identity and integrity checks built into the systems. On line verification is used with citizenship and births, deaths and marriages databases. The issuing systems are built around the Passport Issuing and Control System (PICS). PICS incorporates inventory and stock controls and a data base that contains full details of all applications and passports issued including digital images of the holders of all current past pass20 December 2001port holders back to 1990. The data base is available on line for interrogation by officers processing passport applications. Limited access to the data base is also available to border control agencies. The Australian passport was the first to incorporate the printing of digital images on the reverse of laminate substrates. A new passport is currently under developments and will be introduced in mid 2003. It will embrace the latest available technologies and will include several innovations which will result in enhanced security and integrity.

visas as it does not provide a right of return to their country of origin or entry to another country.²

10.75 On the question of firearms, the report noted that the Federal Government, along with the States and Territories, have taken steps to enhance the exchange of information in regard to the illicit trafficking of firearms within Australia and its region. A dedicated Firearms Trafficking Intelligence Desk was established within the NSW Police Service, to enhance the analysis and exchange of intelligence relating to firearms trafficking in Australia. The illicit trade of firearms is an offence in all Australian States and Territories. Jurisdictions routinely exchange operational information in regard to such offences where there is a cross-jurisdictional dimension. At the regional level, Australia participated in a sub-committee of the South Pacific Forum, the South Pacific Chiefs of Police Conference, which developed a common regional approach to weapons control. Part of this common approach included a framework for the exchange of information in relation to the illicit trafficking of firearms. Australia has also hosted a Pacific Islands Forum Small Arms Workshop, to further enhance the ability of Pacific Island states to counter the illicit trafficking of firearms through measures including the effective exchange of operational information.

10.76 In addition to the general measures relating to law enforcement cooperation set out above, the Australian government's report mentioned that amendments to their *Financial Transaction Reports Act 1988* will enable the Australian Transaction Reports and Analysis Centre to share financial transaction reports information with other countries and the Australian Security Intelligence Organisation and the Australian Federal Police, subject to appropriate monitoring and approvals, to share such information with equivalent agencies overseas.

²

The report set out that the Australian Government has intensified its collection of operating information in relation to the actions or movements of terrorists or their networks, the illegal use of travel documents, trafficking in conventional arms or sensitive materials, and on the threat posed by terrorists' possession of weapons of mass destruction. The Australian Government has also accelerated the exchange of such information, through new formal consultative mechanisms as well as the encouragement of more regular informal exchanges. The Department of Foreign Affairs and Trade has established an Anti-Terrorism Taskforce, which, in addition to providing timely advice to Ministers of State on the international aspects of Australia's response to terrorist attacks, serves as the main point of liaison and coordination with other departments and agencies and with foreign governments on anti-terrorism issues. The Report noted that the Taskforce ensures that all government agencies and organisations with an anti-terrorist role are undertaking their duties in accordance with Australia's responsibilities under Resolution 1373.

10.77 Australia said it was working with Member States of the Commonwealth of Nations to identify a constructive role for the Commonwealth in global efforts to combat terrorism, and that this will build on the Commonwealth Leaders Statement on Terrorism. A Commonwealth Ad Hoc Ministerial Meeting on Terrorism was to take place in London on 29 January 2002 and Ministers would recommend to Commonwealth Leaders practical measures the Commonwealth can take to assist members to become parties to and implement the UN anti-terrorism Conventions, to enhance law enforcement cooperation and exchange of information. Australia also noted that it is also a member of the Financial Action Task Force on Money Laundering, and is participating in developing, implementing and promoting new international standards to combat terrorist financing designed to deny terrorists and their supporters access to the international financial system.

10.78 Australia pointed out that it is already a Party to the following conventions and protocols relating to terrorism:

- .. Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo 1963).**
- .. Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague 1970)**
- .. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971)**
- .. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal, 1988)**
- .. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 1988)**
- .. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10 March 1988)**
- .. Convention on the Physical Protection of Nuclear Material (Vienna, 1980)**
- .. International Convention against the Taking of Hostages (New York, 1979)**
- .. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 1973)**

10.79 Australia noted that it has signed but not yet ratified the *International Convention for the Suppression of the Financing of Terrorism* and that it intends to ratify the *International Convention for the Suppression of the Financing of Terrorism* and accede to the *International Convention for the Suppression of Terrorist Bombings* as soon as the necessary legislation is in place to implement them.

10.80 Australia explained that it has fully implemented the nine instruments relating to terrorism to which it is a Party. The *Crimes (Aviation) Act 1991* implements the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo 1963), the *Convention for the Suppression of Unlawful Seizure of Aircraft* (The Hague 1970) the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal, 1971) and the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (Montreal, 1988). The *Crimes (Ships and Fixed Platforms) Act 1992* implements the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (Rome, 1988) and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (Rome, 1988). The *Nuclear Non-Proliferation (Safeguards) Act 1987* implements the *Convention on the Physical Protection of Nuclear Material* (Vienna, 1980). The *Crimes (Hostages) Act 1989* implements the *International Convention against the Taking of Hostages* (New York, 1979). The *Crimes (Internationally Protected Persons) Act 1976* implements the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* (New York, 1973).

10.81 Australia noted in its Report that aspects of the instruments relevant to law enforcement cooperation are implemented through the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987* and regulations made under these Acts. Australia pointed out that a protection visa may be refused pursuant to Article 1F of the *Convention relating to the Status of Refugees* (Geneva, 1951), which states that the Convention does not apply where there are serious reasons for believing that a person has committed certain crimes, including war crimes, crimes against humanity and serious non-political crimes. All offences established by the counter-terrorism instruments to which Australia is a Party are considered serious non-political offences. Claims of all protection visa applicants are carefully scrutinised. The report stated that officers assessing such claims receive thorough training that provides guidance and assistance on aspects such as weighing evidence, including issues of credibility and bias. They have access to guidelines on what constitutes serious reasons for considering a relevant crime has been committed, the standard of

proof necessary and a definition of the relevant crimes. These officers also have access to extensive advice on a case by case basis should relevant information arise during assessment of claims.

(k) **What legislation, procedures and mechanisms are in place for ensuring asylum seekers have not been involved in terrorist activity before granting refugee status?**

10.82 The Report explained that all visa applicants are required to declare if they have ever committed, or been involved in the commission of, war crimes, crimes against humanity or human rights abuses. Applicants who declare that they have been involved in such activities are liable to have their visas refused under section 501 of the *Migration Act 1958* or Article 1F of the Convention in the protection visa application context. Information about involvement in such crimes may be disclosed by an applicant on their application or during the interview process to explain why they fear persecution and to strengthen their claims for protection. Such information may also come from community sources. If any information relating to terrorism or other serious criminal activity comes to light during the protection assessment process, appropriate law enforcement and security agencies are alerted to enable more thorough investigations to commence. Decision-makers retain discretion not to refuse or cancel a visa under the character provisions of the *Migration Act 1958*. In considering the exercise of the discretion, decision-makers must have regard to various factors and, where for example a child is involved, the best interests of the child must be considered. International obligations arising under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment* and the *International Covenant on Civil and Political Rights* must also be considered before a person can be removed.

10.83 It was explained that the procedures for establishing whether a non-Australian citizen applying for a visa to enter Australia is of character or security concern also apply in relation to protection visas. None of the offences established by the international counter-terrorism instruments to which Australia is a Party is recognised as a “political offence” for the purposes of extradition or the provision of mutual legal assistance in criminal matters under Australian law.

D. SUPPRESSION OF THE FINANCING OF TERRORISM BILL 2002

(a) **Introduction**

10.84 This Bill amends the *Criminal Code Act 1995* (Criminal Code), the *Financial Transactions Reports Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987* and the *Charter of the United Nations Act 1945* to enhance the Australian counter terrorism legislative framework by:¹

¹ During the second reading speech on the Bill Mr Daryl Williams the federal Attorney General said the following:

One of the terrible realities of the terrorist attacks on the United States on 11 September 2001 was that those attacks were extremely well planned and financed. Financial arrangements are central to organised terrorist activity. Law enforcement efforts against terrorist groups must therefore target those financial arrangements. This government is determined to ensure that our law enforcement agencies have the resources and legal tools to carry out this task. The Suppression of the Financing of Terrorism Bill 2002 is a key component of the government's counter-terrorism legislative package. It is designed to equip law enforcement agencies with the legislative tools to enable them to target the financing of terrorism. This bill implements a range of obligations under international law. The bill implements obligations under the International Convention for the Suppression of the Financing of Terrorism. Australia has signed this treaty, and the government intends to ratify the treaty in the near future, subject to the usual consultation processes. The bill also implements obligations under United Nations Security Council resolution 1373. The bill supplements the freezing of suspected terrorist assets pursuant to this resolution, already put in place late last year under the Charter of the United Nations Act 1945.

The financing offence

The bill makes it an offence, punishable by up to life imprisonment, to provide or collect funds in connection with terrorism. Consistent with the wording of resolution 1373, the offence extends to the direct or indirect provision or collection of funds. The offence applies where the person is reckless as to whether those funds will be used to facilitate a terrorist act. The offence will have the broadest geographical jurisdiction available under the criminal code. This means that those who structure their activities to cross national borders will not be able to escape liability under this offence.

Financial transaction reports

The bill places explicit obligations and requirements on 'cash dealers', as defined in the Financial Transaction Reports Act 1988, to report suspected terrorist financing transactions. This information will be reported to AUSTRAC, which can then make it available to specified law enforcement and intelligence agencies. Potentially, this information could provide vital leads to uncover not only the financial arrangements of terrorist groups but the groups themselves and their financiers. International cooperation in this area is vital.

There are existing mechanisms for the sharing of financial transaction reports information with foreign law enforcement and intelligence agencies, but they are too cumbersome.

There is a time consuming process under the Mutual Assistance in Criminal Matters Act 1987 that involves providing formal written assistance only after the Attorney-General has provided approval. This process was established for evidentiary purposes, whereas, to be effective financial intelligence needs to be provided urgently. There is an international commitment to streamline mechanisms for international cooperation to combat transnational crime and terrorism. The amendments in this bill have been framed accordingly. The intention of this bill is to allow swift action to be taken where necessary. Under the amendments in the bill, the AUSTRAC Director will be able to provide FTR information direct to foreign agencies. The Director-General of Security and the Australian Federal Police Commissioner will also be empowered to provide FTR information direct to their foreign counterparts. This particular amendment is not confined to the terrorism context. The government recognises the importance of balancing the proposed new powers with appropriate safeguards. A range of measures will be put in place to

- .. **creating an offence directed at those who provide or collect funds with the intention that they be used to facilitate terrorist activities;**
- .. **requiring cash dealers to report transactions that are suspected to relate to terrorist activities;**
- .. **enabling the Director of the Australian Transaction Reports and Analysis Centre, the Australian Federal Police Commissioner and the Director-General of Security to disclose financial transaction reports**

ensure that privacy and confidentiality considerations are properly respected, and that sharing is only undertaken with appropriate agencies.

First, arrangements for direct sharing by ASIO and AFP will require an overarching authorisation from the AUSTRAC Director. This will be underpinned by revised memoranda of understanding between AUSTRAC, ASIO and the AFP. These will deal with matters such as independent monitoring and auditing, and identifying appropriate agencies for information sharing. In addition, a foreign agency will be required to make undertakings about protecting the confidentiality of the information and ensuring its proper use.

The bill also contains a provision for an independent review of the financial transactions reports amendments after two years. This will be conducted by a committee consisting of nominees of the Attorney-General, the AFP Commissioner, the Director-General of ASIO, the Inspector-General of Intelligence and Security, the AUSTRAC Director and the Privacy Commissioner.

The report will be tabled in parliament, subject to the exclusion of sensitive material. If inadequacies are identified in the report, a further review will be required within two years.

Charter of the United Nations

The bill contains a number of amendments to the Charter of the United Nations Act, administered by my colleague the Minister for Foreign Affairs.

In the aftermath of the events of 11 September 2001, Australia implemented the freezing of terrorist assets pursuant to United Nations Security Council resolution 1373. This was done by regulations under the Charter of the United Nations Act. The government considers that parliamentary scrutiny and transparency in this area are important. It therefore proposes to take this opportunity to move key provisions relating to the freezing of assets out of the regulations and into the primary act. New, simplified, regulations will be made to commence at the same time as these amendments. Under the amendments to the act, there will be a specific framework for listing persons, entities or assets that are to be frozen. The offences of dealing with a freezable asset and providing an asset to a listed person or entity will also be moved into the act. Importantly, the maximum penalty for this offence will be significantly increased. The maximum fine under the regulations is a mere \$5,500. This is clearly an insufficient deterrent to the facilitation of terrorist transactions. The new offences in the bill will provide for a maximum penalty of five years imprisonment and/or a \$33,000 fine. Existing provisions relating to indemnity and compensation, the use of injunctions to back up the freeze, and enabling the Minister for Foreign Affairs to authorise dealings will also be placed in the act.

Conclusion

The measures in this bill are an important part of the government's broader antiterrorism package. The government is firmly committed to ensuring that our law places us in the best possible position to detect, prosecute and penalise those involved in terrorism and its financing. The measures in this bill will assist both our domestic intelligence and law enforcement efforts, and our cooperation with like-minded countries internationally.

I commend the bill to the House.

- information directly to foreign countries, foreign law enforcement agencies and foreign intelligence agencies; and
- introducing higher penalty offences for providing assets to, or dealing in assets of, persons and entities engaged in terrorist activities.

10.85 The measures in the Bill implement obligations under United Nations Security Council Resolution 1373 and the *International Convention for the Suppression of the Financing of Terrorism*. Australia has signed the Convention and the Government intends to ratify the Convention in the near future, subject to the usual consultation processes.¹ Schedule 1 amends the Criminal Code Act 1995 by inserting a new Chapter 5 which deals with the integrity and security of the Commonwealth and a proposed new Part 5.3 dealing with terrorism into the Criminal Code. Proposed Division 103 of Part 5.3 contains a new offence directed at the financing of terrorism. Proposed Division 100 contains definitions and application provisions relevant to the new financing of terrorism offence and to proposed terrorism offences in the Security Legislation Amendment Terrorism Bill 2002, which will also be inserted into Part 5.3.

(b) Definitions

10.86 Proposed section 100.1 contains definitions of terms used in proposed Part 5.3 of the Criminal Code:

- **Commonwealth place** is given the same meaning as in the *Commonwealth Places (Application of Laws) Act 1970* where it means a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth. The new financing of terrorism offence in proposed section 103.1 will extend to actions that take place in a Commonwealth place. This definition is one of the mechanisms that aligns the ambit of the offence with the scope of Commonwealth legislative power under the Constitution.

¹ The Proceeds of Crime Bill 2002 will give effect to the Article 8 of the Convention, which requires State parties to take appropriate measures to provide for the forfeiture of property that is the proceeds of terrorist activity or that it has been used, or is intended to be used, in terrorist activity.

- **constitutional corporation** is defined to mean a corporation within the terms of paragraph 51(xx) of the Constitution. Paragraph 51(xx) of the Constitution covers foreign, trading and financial corporations. The new financing of terrorism offence in proposed section 103.1 will extend to actions that affect constitutional corporations or that are carried out by constitutional corporations. This definition is one of the mechanisms that aligns the ambit of the offence with the scope of Commonwealth legislative power under the Constitution.
- **funds** is defined as property and assets of every kind and legal documents or instruments in any form. The definition is broad in scope and is derived from Article 1 of the *International Convention for the Suppression of the Financing of Terrorism*. The breadth of the definition will ensure that the financing of terrorism offence applies regardless of whether a person facilitates a terrorist act through the provision of money, equipment or weapons.
- **organisation** is defined as a body corporate or an unincorporated body, whether or not it is based in Australia, consists of persons who are not Australian citizens, or is part of a larger organisation. The definition of organisation is relevant to the proscribed organisations offence in Schedule 2 to Security Legislation Amendment (Terrorism) Bill 2002. The definition is included to defeat any argument that a group of persons is not an organisation because it does not have a particular formal attribute or structure.
- **terrorist act** is defined to mean a specified action or threat of action that is made with the intention of advancing a political, religious or ideological cause. The types of actions covered by the definition of "terrorist act" are set out in proposed subsection 100.1(2) and include actions involving serious harm to persons, serious damage to property and interference with essential electronic systems. The new offence in proposed section 103.1 will apply to the financing of actions which fall within this definition. Lawful advocacy, protest and dissent, and industrial action are expressly excluded from the ambit of the definition.

10.87 Proposed subsection 100.1(2) sets out the types of **action** referred to in the proposed subsection 100.1(1) that can constitute a "terrorist act". The types of actions listed involve serious harm, damage or disruption. A terrorist act includes action that involves serious harm to a person or serious damage to property, endangers life, creates a serious risk to the health or safety of the public or a section of the public, or is designed to seriously

interfere with, seriously disrupt, or destroy, an electronic system. Electronic systems include information systems; telecommunications systems; financial systems; and systems used for essential government services, essential public utilities and transport providers. Proposed subsection 100.1(3) provides that a reference to **any person or property** is a reference to any person or property within or outside Australia. It also provides that a reference to **the public** includes a reference to the public of a foreign country.

(c) Constitutional basis for offences

10.88 Proposed section 100.2 provides a broad constitutional basis for the new financing of terrorism offence in proposed section 103.1 and the proposed terrorism offences in the Security Legislation Amendment (Terrorism) Bill 2002, which will also be inserted into Part 5.3. An action or threat of action will give rise to an offence under Part 5.3 where it is within the scope of the Commonwealth's legislative power under the Constitution. Proposed subsection 100.2(2) draws on the various bases of Commonwealth legislative power in section 51 of the Constitution to specify particular circumstances in which an action or threat of action will give rise to an offence. These include circumstances where the action:

- affects the interests of the Commonwealth, a Commonwealth authority, or a foreign, trading or financial corporation;
- disrupts foreign or interstate trade or commerce, banking or insurance;
- takes place outside Australia; or
- is an action in relation to which the Commonwealth is obliged to create an offence under international law (for example, United Nations Security Council Resolution 1373 obliges Australia to criminalise the collection and provision of funds for terrorist acts).

(d) Financing terrorism

10.89 Proposed section 103.1 makes it an offence for a person to provide or collect funds where the person is reckless as to whether those funds will be used to facilitate or carry out a terrorist act (as defined in proposed section 100.1). The maximum penalty for the offence is imprisonment for life. The maximum fine is \$220,000 for a natural person and \$1,100,000 for a body corporate under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act, and the provisions for calculating maximum fines in section 4B of that Act. The maximum penalty of life imprisonment is consistent with the penalties applicable to the proposed terrorism offences in the Security Legislation Amendment (Terrorism) Bill 2002. Financing terrorism warrants a penalty comparable to engaging in a terrorist act because

financing is central to organised terrorist activity and influences both the extent and the seriousness of those activities.

The offence implements Article 2 of the Convention for the Suppression of the Financing of Terrorism and paragraph 1(b) of United Nations Security Council Resolution 1373, and draws on the language used in those international instruments.

10.90 Proposed subsection 103.1(3) applies Category D geographical jurisdiction, as set out in section 15.4 of the Criminal Code, to an offence against subsection 103.1(1). Category D jurisdiction is unrestricted. Its application to the financing of terrorism offence means that the offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia. In view of the very serious nature of this offence and the depth of international concern regarding the financing of terrorism it is appropriate for Australia to criminalise this conduct regardless of where it occurs. However, where the conduct constituting the offence occurs wholly in a foreign country and the person charged or to be charged is not of Australian nationality, section 16.1 of the Criminal Code will require that the Attorney-General's consent be obtained for a prosecution for an offence against proposed section 103.1. The consent requirement enables the Attorney-General to decide in his or her discretion whether it is appropriate that a prosecution should proceed having regard to considerations of international law, practice and comity, international relations, prosecution action that is being or might be taken in another country, and other public interest considerations. However, an arrest may be made and charges laid before consent is given.

(a) **Amendments relating to the reporting of financial transactions**

10.91 Part 1 of Schedule 2 introduces amendments to the *Financial Transaction Reports Act 1988* (FTR Act) and *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act) to require cash dealers to report suspected terrorist-related transactions and streamline the procedures for the disclosure of financial transaction reports information (FTR information) to foreign countries. Part 2 of the Schedule provides for a review of the proposed amendments to be conducted two years after their commencement.

10.92 A proposed subsection 16(1A) is inserted into the FTR Act. Subsection 16 (1A) requires a "cash dealer" to report a transaction to the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC) if he or she has reasonable grounds to suspect that the transaction is preparatory to the commission of a financing of terrorism offence or that information he or she has concerning the transaction may be relevant to the investigation or prosecution of such an offence. "Cash dealer" is defined in section 3 of the

FTR Act to include financial institutions, financial corporations, insurers, securities dealers, futures brokers, trustees and persons who collect, hold, exchange, remit or transfer cash and non-cash funds on behalf of others. Cash dealers are currently required to report other types of suspicious transaction, including transactions relevant to the investigation or prosecution of Commonwealth offences. This amendment makes it clear that cash dealers also have an obligation to report transactions that they suspect are related to terrorist activity. The amendment is consistent with Article 18 of the International Convention for the Suppression of the Financing of Terrorism.

10.93 References to proposed subsection (1A) are inserted into section 16 of the FTR Act consequent upon the insertion of proposed subsection (1A) into that section by Item 1. This ensures that the provisions in section 16 that specify the details to be included in reports, prevent cash dealers from disclosing information contained in reports and prohibit the use of reports in legal proceedings, apply to reports made under proposed subsection (1A). A definition of financing of terrorism offence is inserted into subsection 16(6) of the FTR Act. A "financing of terrorism offence" means an offence under section 103.1 of the Criminal Code or section 20 or 21 of the *Charter of the United Nations Act 1945* (UN Charter Act). A cash dealer's reporting obligations under proposed subsection 16(1A) relate specifically to these offences. The offence in section 103.1 of the Criminal Code applies to persons who collect or provide funds to facilitate terrorist activities. The offences in sections 20 and 21 of UN Charter Act prohibit dealings in the assets of proscribed persons or entities engaged in terrorist activities.

10.94 The existing paragraph 27(1)(d) of the FTR Act, which entitles the Attorney-General to access FTR information for the purpose of dealing with a request from a foreign country for assistance with a criminal matter will be repealed. The existing paragraph 27(1)(d) is replaced by a new paragraph, which gives the Commissioner of the Australian Federal Police power to access FTR information for the purpose of communicating that information to a foreign law enforcement agency. The repeal of the existing paragraph 27(1)(d), in conjunction with other proposed amendments to the FTR Act and the Mutual Assistance Act made by this Schedule, removes the current requirement for foreign country requests for FTR information to be dealt with by the Attorney-General in accordance with the provisions of the Mutual Assistance Act. The proposed amendments instead give the Director of AUSTRAC general responsibility for disclosure of information outside of Australia. The Australian Federal Police Commissioner and the Director-General of Security will also be able to communicate FTR information directly to foreign law enforcement and intelligence agencies (see Items 14 and 17).

10.95 The Director of AUSTRAC currently has the responsibility for disclosure of FTR information within Australia. By enabling the Director to also disclose information to foreign countries both spontaneously and upon request, the proposed amendments will make the procedures for sharing information with other countries significantly faster and more efficient. The current mutual assistance procedures for communicating FTR information are unnecessarily cumbersome and hamper the rapid exchange of information. In the context of international investigations and intelligence gathering, delays in the transmission of information can have significant consequences. Australia's current requirements were adopted because of the strict secrecy attaching to FTR information but they are not geared to enabling urgent sharing of financial intelligence. The proposed amendment will give effect to Recommendation 32 of 'The Forty Recommendations' of the Financial Action Task Force on Money Laundering (FATF), which is an inter-governmental body whose purpose is the development and promotion of policies to combat money laundering. FATF Recommendation 32 states that 'each country should make efforts to improve a spontaneous or upon request international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.' Most FATF members do not require foreign country requests for FTR information to be processed via the mutual assistance channel as Australia currently does.

The amendment is also consistent with paragraph 3(a) of United Nations Security Council Resolution 1373, which calls upon States to "find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks...". The confidentiality of the information disclosed to a foreign country will be protected by the requirement that the Director be satisfied that the foreign country has given appropriate undertakings for protecting the confidentiality, and controlling the use, of that information. There would also be a review of the proposed amendments to be conducted two years after their commencement, which would consider whether the privacy of persons identified in FTR information is adequately protected.

10.96 The proposed new paragraph 27(1)(d) will enable the Australian Federal Police (AFP) Commissioner to access FTR information for the purpose of communicating it to a foreign law enforcement agency, where access has been authorised in writing by the Director of AUSTRAC. In practice, the written authority will take the form of a Memorandum of Understanding between AUSTRAC and the AFP, which address issues relating to notification protocols and procedures to protect privacy. The AFP currently has access to FTR information for the purpose of performing its functions. However, in order to provide foreign law enforcement agencies with FTR information relevant to their investigations (see

Item 14), the AFP Commissioner also needs to be able to access information for that purpose. Permitting the AFP Commissioner to communicate FTR information directly to foreign law enforcement agencies will enable relevant information to be exchanged, without delay, at an agency level. The spontaneous exchange of information between the AFP and foreign law enforcement agencies will enhance the ability of those agencies to act rapidly in response to international terrorism and transnational crime. The notes in Item 9 insert headings in section 27 for clarity.

10.97 Subsection 27(3A) is repealed which enables the Attorney-General to communicate FTR information to a foreign country under the Mutual Assistance Act where the Attorney-General is satisfied that the country has given appropriate undertakings as to confidentiality and use. The repeal of subsection 27(3A), in conjunction with other proposed amendments to the FTR Act and the Mutual Assistance Act made by this Schedule, will remove the current requirement for foreign country requests for FTR information to be dealt with by the Attorney-General in accordance with the provisions of the Mutual Assistance Act. The proposed amendments will instead give the Director of AUSTRAC the general responsibility for disclosure of information outside of Australia. A new subparagraph 27(6)(a)(iii) will permit the AFP Commissioner, or an AFP member authorised by the Commissioner, to communicate FTR information to a foreign law enforcement agency in accordance with proposed subsections 27(11B) to (11D). Permitting the AFP Commissioner to communicate FTR information directly to foreign law enforcement agencies will enable relevant information to be exchanged, without delay, at an agency level. The spontaneous exchange of information between the AFP and foreign law enforcement agencies will enhance the ability of those agencies to act rapidly in response to international terrorism and transnational crime.

10.98 Proposed subsections 27(11A), (11B), (11C) and (11D) stipulate the conditions upon which the Director of AUSTRAC and the AFP Commissioner may communicate FTR information to a foreign country or a foreign law enforcement agency. The conditions are intended to safeguard privacy and confidentiality and ensure that information is used only for proper purposes. There would also be a review of the proposed amendments to be conducted two years after their commencement, which would consider whether the privacy of persons identified in FTR information is adequately protected. Proposed subsection (11A) provides that the Director may communicate FTR information to a foreign country if it is appropriate in all the circumstances to do so and if the Director is satisfied that the foreign country has given appropriate undertakings for protecting the confidentiality of the information and ensuring it is properly used. Proposed subsection (11B) provides that the AFP Commissioner may communicate FTR information to a foreign law enforcement agency

if it is appropriate in all the circumstances to do so and the Commissioner is satisfied the foreign law enforcement agency has given appropriate undertakings for protecting the confidentiality of the information, and for ensuring that it is used in the performance of the foreign law enforcement agency's functions. The Commissioner may authorise a member of the AFP to communicate FTR information to a foreign law enforcement agency on his or her behalf (proposed subsection (11C)). When considering whether it is appropriate to grant a request by a foreign country or foreign law enforcement agency for FTR information, the Director and Commissioner may need to take into account a range of issues, including whether the request was made for the purpose of persecuting or punishing a person on the ground of sex, race, nationality or religion and whether the granting of the request would prejudice the sovereignty, security or national interest of Australia.

10.99 Proposed subsection (11D) provides that if the Commissioner of the AFP accesses FTR information for the purpose of communicating it to a foreign law enforcement agency and that information is not relevant to the performance of the AFP's functions, neither the Commissioner, nor a person authorised by the Commissioner to communicate the information, may record, communicate or divulge the information except for the purpose of communicating the information to a foreign law enforcement agency. This provision is designed to ensure that where the AFP obtains FTR information for the purpose of communicating it to an overseas agency, it cannot make use of that information for its own purposes where it would not currently be able to do so.

10.100 A proposed subsection 27(20) provides that a reference to a ***foreign law enforcement agency*** is a reference to an agency that has responsibility for law enforcement in a foreign country.¹ **A new subparagraph 27AA(4)(a)(iv) will permit the Director-General of Security, or an Australian Security Intelligence Organisation (ASIO) employee authorised by the Director-General, to communicate FTR information to a foreign intelligence agency in accordance with proposed subsections 27AA(5A) and (5B). Permitting the Director-General of Security to communicate FTR information directly to foreign intelligence agencies will enable relevant information to be exchanged, without delay, at an agency level. The spontaneous exchange of information between ASIO and foreign intelligence agencies will enhance the ability of those agencies to act rapidly in response to international terrorism and other national security issues. In contrast to the AFP, ASIO does not require a provision expressly enabling the Director-General to access information for the purpose of**

¹ The amendment is consequent upon the insertion of paragraph 27(1)(d), subparagraph 27(6)(a)(iii) and subsections 27(11B), 27(11C) and 27(11D) by Items 9, 13 and 14, which enable the AFP Commissioner to disclose FTR information to foreign law enforcement agencies.

communicating it to a foreign intelligence agency. ASIO is currently able to access information for the purpose of performing its functions (subsection 27AA(1)). As ASIO's functions include the provision of information to foreign countries in relation to security matters, it is able to access information under subsection 27AA(1) for the purpose of communicating it to a foreign intelligence agency. However, the Memorandum of Understanding between AUSTRAAC and ASIO, under which ASIO currently accesses FTR information, will be revised to take account of the amendments permitting the Director-General to communicate FTR information to foreign intelligence agencies.

10.101 New subsections (5A) and (5B) are inserted into section 27AA and these subsections stipulate the conditions upon which the Director-General of Security may communicate FTR information to a foreign intelligence agency. The conditions are intended to safeguard privacy and confidentiality and ensure that information is used only for proper purposes. There would also be a review of the proposed amendments to be conducted two years after their commencement, which would consider whether the privacy of persons identified in FTR information is adequately protected. Proposed subsection (5A) provides that the Director-General of Security may communicate FTR information if it is appropriate in all the circumstances to do so and the Director-General is satisfied the foreign intelligence agency has given appropriate undertakings for protecting the confidentiality of the information and ensuring that it is used in the performance of the foreign intelligence agency's functions. The Director-General may authorise an ASIO employee to communicate FTR information to a foreign intelligence agency on his or her behalf (proposed subsection (5B)). When considering whether it is appropriate to grant a request by a foreign intelligence agency for FTR information, the Director-General may need to take into account a range of issues, including whether the request was made for the purpose of persecuting or punishing a person on the ground of sex, race, nationality or religion and whether the granting of the request would prejudice the sovereignty, security or national interest of Australia.

10.103 A definition of *foreign intelligence agency* is inserted in subsection 27AA(8). Foreign intelligence agency means an agency that has responsibility for intelligence gathering for a foreign country or the security of a foreign country. The amendments requiring cash dealers to report suspected terrorist-related transactions will not apply to transactions that are finalised before the amendments commence.

10.104 Part VIA of the Mutual Assistance Act is repealed which provides that where a foreign country asks the Attorney-General for information, the Attorney-General may direct the Director of the AUSTRAC to give the Attorney-General access to FTR information for the purpose of enabling the Attorney-General to deal with the request. The repeal of Part VIA, in conjunction with the proposed amendments to the FTR Act made by this Schedule, will remove the current requirement for foreign country requests for FTR information to be dealt with by the Attorney-General in accordance with the provisions of the Mutual Assistance Act. The proposed amendments will instead give the Director of AUSTRAC the general responsibility for disclosure of information outside of Australia.

10.105 The Bill requires the Attorney-General to cause an independent review of the amendments made by Part 1 of Schedule 2 to be undertaken as soon as possible after the second anniversary of the commencement of the amendments. The review will consider the extent to which the amendments made by Part 1 of the Schedule have contributed to the enforcement of financing of terrorism offences, whether the amendments sufficiently regulate the sharing and use of FTR information and whether the privacy of persons identified in that information is adequately protected. The review will be conducted by a committee consisting of members nominated by the Attorney-General, the AFP Commissioner, the Director-General of Security, the Inspector-General of Intelligence and Security, the Director of AUSTRAC and the Federal Privacy Commissioner. However, the Attorney-General may reject a nomination on the grounds that a the person nominated does not possess the requisite qualifications or an appropriate security clearance. A written report of the review must be given to the Attorney-General, who is required to table the report in each House of Parliament within 15 sitting days of its receipt by the Minister. However, the Attorney-General must remove information from the report if, on advice given by the AFP Commissioner or Director-General of Security, the Attorney-General is of the view that it may endanger a person's safety, prejudice an investigation or compromise the operational activities or methodologies of ASIO or the AFP.

10.106 If the review identifies any inadequacies, a further review would have to be undertaken within two years to ascertain whether those inadequacies had been dealt with. The provision for review of the proposed amendments was included to address the privacy considerations that they raise. They will provide an opportunity to ensure that the regulation of the use of FTR information under legislation, memoranda of understanding and guidelines is adequate and appropriate. The involvement of the Privacy Commissioner in the review will ensure that privacy interests are represented. There is a precedent for such a review in section 23YV of the *Crimes Act 1914*, which requires an independent review of the operation of the provisions in the Act dealing with forensic procedures.

10.107 Schedule 3 introduces amendments to the UN Charter Act to prohibit dealings in the assets of persons and entities involved in terrorist activities and to prevent others from making assets available to those persons or entities. The provisions in proposed Part 4 implement paragraph 1(c) of the United Nations Security Council Resolution 1373. Paragraph 1(c) requires States to: "freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons or entities". The amendments to the UN Charter Act will supersede the existing provisions in the *Charter of the United Nations (Anti-terrorism Measures) Regulations 2000*. New simplified regulations giving effect to these amendments will be made to commence at the same time as the amendments. Moving the provisions relating to the freezing of assets from the regulations to the Act will enable the penalty for the offences to be increased.

10.108 A new Part 4 (Offences to give effect to Security Council decisions) is inserted into the UN Charter Act. Part 4 creates new offences directed at those who provide assets to, or deal in the assets of, persons and entities involved in terrorist activities. The Part also contains associated provisions that, amongst other things, provide for the Minister for Foreign Affairs to list persons and entities for the purpose of the offences, to revoke a listing and to permit a specified dealing in a freezable asset.

(f) **Proposed section 14 definitions**

10.109 Proposed section 14 contains definitions of terms used in proposed Part 4 of the Charter:

- **asset** is defined as property and assets of every kind and legal documents or instruments in any form. The definition is broad in scope and is derived from Article 1 of the International Convention for the Suppression of the Financing of Terrorism. The breadth of the definition will ensure that the requirement to freeze an asset applies regardless of whether that asset is money, equipment or a weapon.
- **freezable asset** means an asset that is listed by the Minister for Foreign Affairs or owned or controlled by a person or entity listed by the Minister or proscribed by regulations, or is derived or generated from such an asset.

- **listed asset** means an asset listed by the Minister under proposed section 15. Proposed section 15 provides for the Minister to list assets if satisfied of the matters prescribed by the Governor-General in regulations. The prescribed matters must give effect to a United Nations Security Council decision related to terrorism and dealing in assets (eg, Resolution 1373).
- **proscribed person or entity** means a person or entity listed under proposed section 15 or proscribed by regulation under proposed section 18. Proposed sections 20 and 21 make it an offence to provide assets to, or deal in the assets of, proscribed persons and entities.
- **superior court** means the Federal Court of Australia or the Supreme Court of a State or Territory. These courts are able to grant an injunction under proposed section 26 to restrain a person from engaging in conduct which would constitute an offence against proposed section 20 or 21.

(g) **Proposed section 15 - Listing persons, entities and assets**

10.110 Proposed section 15 provides that the Minister must list a person or entity, and may list an asset or class of assets, if satisfied of certain prescribed matters. The Governor-General may make regulations prescribing the matters of which the Minister must be satisfied. A matter may only be prescribed if it would give effect to a United Nations Security Council decision that Article 25 of the Charter of the United Nations requires Australia to carry out and that relates to terrorism and dealings with assets. A person, entity or asset is listed by notice in the *Gazette*. The listing of a person, entity or asset by the Minister will attract the application of the offences in proposed section 20 and 21. The offences will apply to a person who makes an asset available to a listed person or entity or who deals in a listed asset or an asset owned by a listed person entity.

(h) **Proposed section 16 - Minister may revoke the listing**

10.111 Proposed section 16 provides for the Minister for Foreign Affairs to revoke a listing of a person, entity or asset by notice in the *Gazette* if he or she is satisfied that the listing is no longer necessary to give effect to a United Nations Security Council decision that Article 25 of the Charter of the United Nations requires Australia to carry out and that relates to terrorism and dealings with assets. The revocation may be made at the Minister's own instigation or on application by a listed person or entity (see proposed section 17). The proposed section will ensure that the legislation provides an express mechanism for listed persons and entities to have their listing reviewed and, if appropriate, revoked.

(i) **Proposed section 17 - Listed person or entity may apply to have the listing revoked**

10.112 Proposed section 17 enables listed persons and entities to apply in writing to the Minister for Foreign Affairs to have the listing revoked. However, the Minister is not required to consider an application if the person or entity has already made an application within the previous 12 months. The application must set out the circumstances justifying a revocation of the listing. For example, evidence that the person is not associated with a terrorist organisation or involved in terrorist activities.

(j) **Proposed section 18 - Proscription by regulation**

10.113 Proposed section 18 provides a means of proscribing persons and entities by reference to a decision of the United Nations Security Council that identifies persons and entities to which the decision relates. Security Council decisions often list the persons or entities against whom sanctions should be applied. Enabling those lists to be directly incorporated by the regulations as they exist from time to time is more expedient than requiring the Minister to list each person and entity by notice in the *Gazette*. However, the ability for the Minister to list persons and entities by notice in the *Gazette* is necessary to cover Security Council decisions, like Resolution 1373, which do not specifically identify persons or entities to which sanctions should be applied.

(k) **Proposed section 19 - Effect of resolution ceasing to bind Australia**

10.114 Proposed section 19 provides for the listing of a person or entity under proposed section 15 to be automatically revoked when the Security Council decision to which the listing gives effect no longer binds Australia. The section also provides that regulations proscribing a person or entity under proposed section 18 cease to have effect when the Security Council decision to which the regulations give effect no longer binds Australia. The section makes it clear that the offences cease to apply in relation to persons, entities or assets listed by the Minister or proscribed by regulation from the time the Security Council decision to which the listing or proscription gives effect ceases to bind Australia, without the need for the Minister to revoke the listing or for the regulations to be repealed.

(l) **Proposed section 20 - Offence-dealing with freezable assets**

10.115 Proposed section 20 provides that a person who holds a freezable asset is guilty of an offence if the person uses or deals with the asset, or allows or facilitates a use or dealing,

and is reckless as to whether the asset is a freezable asset, and the use or dealing is not in accordance with a notice under section 22. The maximum penalty for dealing with a freezable asset is 5 years imprisonment. The maximum fine will be \$33,000 for a natural person and \$165,000 for a body corporate under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act, and the provisions for calculating maximum fines in section 4B of that Act. The penalty for the existing offence against the regulations is only \$5,500, which is clearly inadequate. Under section 12 of the UN Charter Act, this is the maximum penalty that may be applied to offences against the regulations. Moving the offence to the Act will enable the penalty to be significantly increased. Strict liability applies to the fact that the use or dealing with the asset is not in accordance with a notice under section 22. The application of strict liability means that the prosecution does not have to prove any fault element, such as knowledge or recklessness, in respect of this element of the offence. However, the defence of mistake of fact is still available. The application of strict liability is necessary to ensure that a defendant who uses or deals with an asset which he or she knows to be a freezable asset cannot escape liability by demonstrating that they were not aware that the use or dealing was not in accordance with a notice under section 22. A person wishing to deal in a freezable asset will have to ensure that the dealing has been permitted by a notice given under section 22. However, it is a defence to a prosecution for an offence against section 20, if a person shows that he or she dealt with a freezable asset in the mistaken but reasonable belief that the dealing was in accordance with a notice. It is also a defence if the person can show that the use or dealing was solely for the purpose of preserving the value of the asset. Category A geographical jurisdiction, as set out in section 15.1 of the Criminal Code, will apply to an offence against subsection 20(1). Category A geographical jurisdiction is satisfied if —

- the conduct constituting the offence occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or an Australian ship;
- a result of the conduct occurs wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship; or
- at time of the alleged offence the person charged with the offence was an Australian citizen or body corporate.

10.116 Where the conduct constituting an offence occurs wholly in a foreign country and only a result occurs in Australia, there is a defence available if there is no corresponding offence in that foreign country. However, that defence is not available if jurisdiction is to be exercised on the basis of the person's nationality. The application of Category A jurisdiction to the offence will mean that a person (including a body corporate) who uses or deals with a freezable asset in Australia or an Australian citizen or corporation who uses or deals with a freezable asset in a foreign country will commit an offence against section 20. The offence

would not apply to foreign citizens or corporations that engage in a use or dealing with a freezable asset in a foreign country as those persons and corporations could not be expected to act with regard to a listing made under Australian law.

(m) Proposed section 21 - Offence-giving an asset to a proscribed person or entity

10.117 Proposed section 21 makes it an offence for a person to directly or indirectly make an asset available to a proscribed person or entity, if the person is reckless as to whether the person or entity is a proscribed person or entity and the making available of the asset is not in accordance with a notice under section 22. The offence carries a maximum penalty of 5 years imprisonment. The maximum fine will be \$33,000 for a natural person and \$165,000 for a body corporate under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act, and the provisions for calculating maximum fines in section 4B of that Act. The penalty for the existing offence against the regulations is only \$5,500, which is clearly inadequate. Under section 12 of the UN Charter Act, this is the maximum penalty that may be applied to offences against the regulations. Moving the offence to the Act will enable the penalty to be significantly increased. Strict liability applies to the fact that the making available of the asset is not in accordance with a notice under section 22. The application of strict liability means that the prosecution does not have to prove any fault element, such as knowledge or recklessness, in respect of this element of the offence. However, the defence of mistake of fact is still available. The application of strict liability is necessary to ensure that a defendant who makes an asset available to a person whom he or she knows to be a proscribed person cannot escape liability by demonstrating that they were not aware that the making available of the asset was not in accordance with a notice under section 22. A person wishing to make an asset available to a proscribed person or entity will have to ensure that the making available has been permitted by a notice given under section 22. However, it is a defence to a prosecution for an offence against section 20, if a person shows that he or she made an asset available to a proscribed person or entity in the mistaken but reasonable belief that the making available was in accordance with a notice.

10.117 Category A geographical jurisdiction, as set out in section 15.1 of the Criminal Code, will apply to an offence against subsection 21(1). Category A geographical jurisdiction is satisfied if —

- (i) the conduct constituting the offence occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or an Australian ship;
- (ii) a result of the conduct occurs wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship; or

- (iii) at time of the alleged offence the person charged with the offence was an Australian citizen or body corporate.

10.118 Where the conduct constituting an offence occurs wholly in a foreign country and only a result occurs in Australia, there is a defence available if there is no corresponding offence in that foreign country. However, that defence is not available if jurisdiction is to be exercised on the basis of the person's nationality. The application of Category A jurisdiction to the offence will mean that a person (including a body corporate) who makes an asset available to a proscribed person or entity in Australia or an Australian citizen or corporation who makes an asset available to a proscribed person or entity in a foreign country will commit an offence against section 21. The offence would not apply to foreign citizens or corporations that make an asset available to a proscribed person or entity in a foreign country as those persons and corporations could not be expected to act with regard to a listing made under Australian law.

(n) **Proposed section 22 - Authorised dealings**

10.119 Proposed section 22 provides that the owner of an asset may apply in writing to the Minister for Foreign Affairs for permission to make the asset available to a proscribed person or entity or, if the asset is a freezable asset, to use or deal with the asset in a specified way. The Minister, or a delegate, may grant permission by written notice. The notice may be subject to conditions and must be given to the owner of the asset as soon as practicable after it is made. The provision will allow the Minister to exempt a particular dealing in an asset from the application of the offences in proposed section 20 and 21. This power would only be exercised in exceptional circumstances, for example, to protect the rights of third parties.

(o) **Proposed section 23 - Part prevails over conflicting legal obligations**

10.118 Proposed section 23 provides that the provisions of Part 4 prevail over Commonwealth, State or Territory laws that would otherwise require a person to act in contravention of this part. The section makes it clear that Commonwealth, State and Territory employees are covered by the offences in Part 4 and should not comply with any statutory obligation or exercise any statutory power to make a payment to a person or entity (eg, a social security payment) where the making of the payment is prohibited by Part 4. This underscores the general point that Commonwealth officers, servants and agents of the Crown have no immunity from the ordinary criminal law: see, eg, *Jacobsen v Rogers* (1995) 182 CLR 572 at 587.

(p) Proposed section 24 - Indemnity for holder of assets

10.119 Proposed section 24 provides that a person is not liable to an action, suit or proceeding for anything done or omitted to be done in good faith and without negligence in compliance or purported compliance with this Part.

(r) Proposed section 25 - Compensation for persons wrongly affected

10.120 Proposed section 25 provides for the Commonwealth to compensate the owner of an asset where the holder of the asset refuses, in good faith and without negligence, to deal with the asset in accordance with the owner's instructions, on the basis that the asset is a freezable asset, when it is not in fact a freezable asset. For example, if a bank freezes the funds in a person's account in the mistaken but honest belief that the person is a listed person or entity, that person will be entitled to compensation from the Commonwealth for any loss he or she suffers as a result.

(s) Proposed section 26 - Injunctions

10.121 Proposed section 26 provides for a superior court to grant an injunction restraining a person from engaging in conduct where the person has engaged, is engaging, or proposes to engage conduct involving a contravention of Part 4 (ie, dealing in a freezable asset or making an asset available to a proscribed person or entity). An injunction may only be granted on application by the Attorney-General. A superior court may grant an injunction by consent of all parties to the proceedings even if it is not satisfied that the person has engaged, is engaging, or proposes to engage in conduct involving a contravention of Part 4. A court may grant an interim injunction pending its determination of an application and may discharge or vary an injunction it has granted. Injunctions are currently available under section 13 of the UN Charter Act for conduct involving a contravention of the regulations. Proposed section 26 will enable an injunction to be granted in relation to conduct that would constitute an offence against section 20 or 21.

E. SECURITY LEGISLATION AMENDMENT (TERRORISM) BILL 2002

10.122 The Security Legislation Amendment (Terrorism) Bill 2001 (the Bill) amends the *Criminal Code Act 1995* (the Criminal Code) to combat terrorism by ensuring that there are criminal offences to deal with terrorism and membership of a terrorist organisation, or other links to a terrorist organisation, may be an offence. The Bill inserts a series of new terrorism offences into the Criminal Code, all of which carry a penalty of life imprisonment. The

offences are: engaging in a terrorist act; providing or receiving training for a terrorist act; directing organisations concerned with a terrorist act; possessing things connected with a terrorist act; collecting or making documents likely to facilitate a terrorist act; and acts in preparation for, or planning, a terrorist act. With the exception of the offence of engaging in a terrorist act, it is not necessary for a terrorist act to actually occur for a person to be prosecuted for a terrorism offence. The Bill also includes a regime for the Attorney-General to proscribe an organisation that has a specified terrorist connection or that has endangered, or is likely to endanger, the security or integrity of the Commonwealth, and to make membership or other specified links with such an organisation an offence. The Bill replaces the treason offence in the *Crimes Act 1914* with a new offence, framed in accordance with contemporary drafting practice and the standard approach under the Criminal Code. Finally, the Bill proposes amendments to the *Australian Protective Service Act 1987* and the *Crimes (Aviation) Act 1991* to ensure that Australian Protective Service has powers to deal with terrorist related offences, and to exercise the aircraft security officer function on intra-state flights.

(a) Amendments relating to treason and terrorism

10.123 Proposed section 80.1 of the Criminal Code replicates the existing treason offence in section 24 of the Crimes Act subject to changes designed to modernise the offence and remove certain anomalies and limitations.¹ **Each paragraph of proposed subsection 80.1(1) is an alternative basis on which the offence of treason may be made out. Paragraph 80.1(1)(f) is entirely new and its inclusion reflects the most significant difference between the proposed section 80.1 and the existing section 24. The other paragraphs in subsection 80.1(1) are based on paragraphs of the existing subsection 24(1) of the Crimes Act. Proposed paragraph 80.1(1)(a) makes it an offence for a person to cause the death of the Sovereign, the heir apparent or the Consort of the Sovereign. The proposed offence uses the phrase "causes the death of" which is the modern drafting style reflected in, for example, paragraph 71.2(1)(c) of the Criminal Code. This replaces the more old fashioned and limited term "kills", which appears in the existing subsection 24(1). The phrase 'causes the death of' is also employed in sections 5.1.9 to 5.1.11 of the Model Criminal Code (see Discussion Paper: *Fatal Offences Against the Person*, June 1998). The Model Criminal Code Discussion Paper concludes that "the reckless killer foreseeing the probability of causing death is 'just as blameworthy' as the intentional killer"(p.59) . This paragraph is mirrored on part of**

¹ The explanatory memorandum notes that a number of the amendments to the treason offence reflect recommendations of the Gibbs Committee review of Commonwealth Criminal Law and the Canadian Law Reform Commission report on Recodifying Criminal Law.

the existing paragraph 24(1)(a) and part of the existing paragraph 24(1)(b) of the Crimes Act.

10.124 Proposed paragraph 80.1(1)(b) makes it an offence to cause harm to the Sovereign that results in their death. The proposed offence uses the phrase "causes harm" in line with Criminal Code precedents at paragraph 71.6(1)(a) and paragraph 147.1(1)(b). The term 'harm' is defined in the Criminal Code Dictionary as physical harm or harm to a person's mental health, whether temporary or permanent. However, it does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community. The proposed offence also uses the phrase "resulting in the Sovereign's death". This paragraph is mirrored on part of the existing paragraph 24(1)(a). The two new phrases reflect the modern drafting style of the Code and replace the older terms of "maims and wounds" in the existing paragraph 24(1)(a) of the Crimes Act. References to the "eldest son" and to the "Queen" in the existing paragraph 24(1)(b) have been amended to employ gender neutral language. Proposed paragraph 80.1(1)(c) makes it an offence to cause harm to, imprison or restrain the Sovereign. As noted above, 'harm' is defined in the Criminal Code Dictionary. Unlike proposed paragraph 80.1(1)(b), this offence does not require that the physical harm directed at the Sovereign leads to death. This paragraph is mirrored on part of the existing paragraph 24(1)(a) of the Crimes Act.

10.125 Proposed paragraph 80.1(1)(d) makes it an offence to levy war, or do any act preparatory to levying war, against the Commonwealth. This is a replication of the existing paragraph in section 24(1)(c) of the Crimes Act. Proposed paragraph 80.1(1)(e) makes it an offence for a person to engage in conduct that assists by any means whatever, with the intent to assist, an enemy at war with the Commonwealth, whether or not the existence of a state of war has been declared. The "enemy" is defined within the section as one specified by proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth. This is a replication of the existing paragraph 24(1)(d) of the Crimes Act. Proposed paragraph 80.1(1)(f) makes it an offence to engage in conduct that assists by any means whatever, with the intent to assist, another country or an organisation that is engaged in armed hostilities with the Australian Defence Force. "Organisation" is defined as a body corporate or an unincorporated body whether or not the body is based outside of Australia, consists of persons who are not Australian citizens, or is part of a larger organisation (see proposed section 80.1(8)). This paragraph ensures that treason provisions can apply not only when Australia is "at war" but also when Australia is

engaged in armed hostilities that do not constitute a formally declared war. The paragraph also removes the need for an enemy to be proclaimed and makes it clear that hostilities can involve a foreign organisation rather than a foreign country. These amendments are designed to ensure that the offence of treason reflects the realities of modern conflict that do not necessarily involve a declared war against a proclaimed enemy. The new paragraph is therefore a contemporary variant of the existing paragraph 24(1)(d) of the Crimes Act, now to be reflected in proposed paragraph 80.1(e).

10.126 Proposed paragraphs 80.1(1)(e) and 80.1(1)(f) now both include the term "engages in conduct" because under the Criminal Code, fault attaches to individual physical elements of conduct, circumstance or result. The proposed paragraphs distinguish the conduct element of the offence, for which intention must be proven, from the result element, for which recklessness or knowledge must be proven. This is the way section 24 probably would have been read, but this amendment makes this explicit. Proposed paragraph 80.1(1)(g) makes it an offence for a person to instigate a person who is not an Australian citizen to make an armed invasion of the Commonwealth. The "person" who instigates a non-Australian citizen to undertake such action would not necessarily have to be an Australian citizen either. This ensures that action by, for example, Australian residents, can be treated as treasonous. This paragraph is mirrored in part on existing paragraph 24(1)(e).

10.127 Proposed paragraph 80.1(1)(h) makes it an offence for any person to form an intention to do any act referred to in the proceeding paragraphs and to manifest that intention by an overt act. This paragraph is mirrored on existing paragraph 24(1)(f). The maximum penalty for an offence against this section is life imprisonment. Although the existing subsection 24(1) of the Crimes Act is expressed as carrying the death penalty as a maximum, this is to be read as a maximum of life imprisonment under the *Death Penalty Abolition Act 1973*. The explicit reference to a maximum penalty of life imprisonment is therefore merely a tidying up amendment. Proposed subsection 80.1(2) replicates the existing subsection 24(2) as contained in the Crimes Act with some minor language changes. Proposed paragraph 80.1(2)(a) makes it an offence for anyone to assist in anyway a person who has committed treason with the intention of allowing him or her to escape apprehension or punishment. The offence has been extended slightly by adding to "escape apprehension", as well as punishment. The terminology "in order to enable" has been replaced with the more modern Code style language of "with the intention of allowing". Proposed paragraph 80.1(2)(b) makes knowledge of proposed treason an offence and requires a person

with that knowledge to inform a constable, as defined in the new proposed subsection 80.1(8), of that fact. Alternatively, a person with that knowledge must use other reasonable endeavours to prevent the treason occurring. The penalty for an offence against this subsection is life imprisonment.

10.128 Proposed subsections 80.1(3) and 80.1(4) replace the existing procedural requirements for the offence of treason as contained in subsections 24AC(1) and (2) of the Crimes Act. Proposed subsection 80.1(3) specifies that any proceedings brought in respect of a treason offence in proposed subsections 80.1(1) or 80.1(2) must be instituted with the written consent of the Attorney-General. This is a departure from the Crimes Act model where the written consent of a person authorised by the Attorney-General was sufficient for the purposes of the section. This is in line with section 270.11 of the Code, which requires the Attorney-General's consent before proceedings for an offence against Division 7 can be commenced. The language of the proposed subsection is also further modernised to omit the old trial/summary distinction and replace it with "proceedings for an offence" in line with the language of section 270.11 of the Criminal Code. The consent requirement still applies to any form of proceeding, but is worded more efficiently.

10.129 Proposed subsection 80.1(4) provides that a person may be arrested for a treason offence or a warrant for their arrest issued without subsection 80.1(3) consent. The person may then be charged and remanded in custody or on bail. At this point no further proceedings may be taken until consent under subsection 80.1(3) is obtained. The section also provides that a person must be discharged if proceedings are not continued within a reasonable time. This is a standard corollary to an Attorney-General's consent provision, and ensures that the requirement for consent regulates the conduct of proceedings, but does not prevent arrest, charge and remand, which may require urgent action and be incompatible with the careful consideration of the consent decision. The consent requirement is appropriate because the treason offence is an offence against the nation and therefore special considerations are relevant as to whether a prosecution is justified. This supplements the general requirement for the Attorney-General's consent in certain cases where the conduct constituting an offence occurs wholly in a foreign country, under section 16.1 of the Criminal Code.

10.130 Proposed subsection 80.1(5) replicates the existing Crimes Act subsection 24(3). This subsection contains a rule of procedure which provides that where a person is charged with intent to commit any of the treason offences under subsection

24(1) and that intention was manifested by an overt act, evidence of the overt act is not to be admitted unless the overt act is alleged in the indictment. Proposed subsection 80.1(6) extends the application of 24F of the Crimes Act to this new section 80.1 in the same way it would if this section were a provision of Part II of that Act. Section 24F outlines circumstances where specified acts done in good faith (for example, legitimate criticism or protest) are not unlawful, including for the purposes of the treason offence. Proposed subsection 80.1(7) would apply Category D geographical jurisdiction, as set out in section 15.4 of the Criminal Code, to the offences proposed in 80.1(1) and 80.1(2).

10.131 Category D geographical jurisdiction will be satisfied whether or not the conduct constituting the alleged offence occurs in Australia and whether or not a result of the conduct constituting the alleged offence occurs in Australia. This jurisdiction is appropriate due to the transnational nature of terrorist activities, to ensure that a person cannot escape prosecution or punishment based on a jurisdictional loophole.

10.132 Proposed subsection 80.1(8) contains definitions of terms used in proposed Part 5.1 of the Criminal Code:

Constable is defined as a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory. This definition corresponds to the definition of "constable" in section 3 of the Crimes Act . This definition is used in proposed subsection 80.1(2) to define those to who a treason offence must be reported.

Organisation is defined to mean a body corporate or an unincorporated body, whether or not the body is based outside Australia, consists of persons who are not Australian citizens or is part of a larger organisation. This definition is used in proposed subparagraph 80.1(f)(ii) to describe groups, the assistance of which is treason. The definition is used in the same sense in proposed subsection 102.2(1).

10.133 Proposed section 100.1 contains definitions of terms used in proposed Part 5.3 of the Criminal Code:

Commonwealth place is given the same meaning as in the *Commonwealth Places (Application of Laws) Act 1970* where it means a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the

peace, order, and good government of the Commonwealth. The new financing of terrorism offence in proposed section 103.1 will extend to actions that take place in a Commonwealth place. This definition is one of the mechanisms that aligns the ambit of the offence with the scope of Commonwealth legislative power under the Constitution.

constitutional corporation is defined to mean a corporation within the terms of paragraph 51(xx) of the Constitution. Paragraph 51(xx) of the Constitution covers foreign, trading and financial corporations. The new financing of terrorism offence in proposed section 103.1 will extend to actions that affect constitutional corporations or that are carried out by constitutional corporations. This definition is one of the mechanisms that aligns the ambit of the offence with the scope of Commonwealth legislative power under the Constitution.

funds is defined as property and assets of every kind and legal documents or instruments in any form. The definition is broad in scope and is derived from Article 1 of the International Convention for the Suppression of the Financing of Terrorism. The breadth of the definition will ensure that the financing of terrorism offence applies regardless of whether a person facilitates a terrorist act through the provision of money, equipment or weapons.

organisation is defined as a body corporate or an unincorporated body, whether or not it is based in Australia, consists of persons who are not Australian citizens, or is part of a larger organisation. The definition of organisation is relevant to the proscribed organisations offences in Schedule 1 to Security Legislation Amendment (Terrorism) Bill 2002. The definition was included to defeat any argument that a group of persons is not an organisation because it does not have a particular formal attribute or structure.

terrorist act is defined to mean a specified action or threat of action that is made with the intention of advancing a political, religious or ideological cause. The types of actions covered by the definition of "terrorist act" are set out in proposed subsection 100.1(2) and include actions involving serious harm to persons, serious damage to property and interference with essential electronic systems. The new offence in proposed section 103.1 will apply to the financing of actions which fall within this definition. Lawful advocacy, protest and dissent, and industrial action are expressly excluded from the ambit of the definition.

10.134 Proposed subsection 100.1(2) sets out the types of **action** referred to in the proposed subsection 100.1(1) that can constitute a "terrorist act". The types of actions listed involve serious harm, damage or disruption. A terrorist act includes action that involves serious harm to a person or serious damage to property, endangers life, creates a serious

risk to the health or safety of the public or a section of the public, or is designed to seriously interfere with, seriously disrupt, or destroy, an electronic system. Electronic systems include information systems; telecommunications systems; financial systems; and systems used for essential government services, essential public utilities and transport providers.

10.135 Proposed subsection 100.1(3) provides that a reference in proposed Division 100 to **any person or property** is a reference to any person or property within or outside Australia. It also provides that a reference to **the public** includes a reference to the public of a foreign country. The Explanatory memorandum to the Bill explains that proposed section 100.2 provides a broad constitutional basis for the new financing of terrorism offence in proposed section 103.1 and the proposed terrorism offences which will also be inserted into Part 5.3. An action or threat of action will give rise to an offence under Part 5.3 where it is within the scope of the Commonwealth's legislative power under the Constitution. Proposed subsection 100.2(2) draws on the various bases of Commonwealth legislative power in section 51 of the Constitution to specify particular circumstances in which an action or threat of action will give rise to an offence. These include circumstances where the action:

- affects the interests of the Commonwealth, a Commonwealth authority, or a foreign, trading or financial corporation;
- affects foreign or interstate trade or commerce, banking or insurance;
- takes place outside Australia; or
- is an action in relation to which the Commonwealth is obliged to create an offence under international law (for example, United Nations Security Council Resolution 1373 obliges Australia to criminalise the collection and provision of funds for terrorist acts).

(b) Engaging in a terrorist act

10.136 Proposed subsection 101.1(1) provides that it is an offence for a person to engage in a terrorist act. *Terrorist act* is defined in proposed section 100.1. The maximum penalty is life imprisonment. Proposed subsection 101.1(2) applies Category D geographical jurisdiction, as set out in section 15.4 of the Criminal Code, to an offence against subsection 101.1(1). Category D jurisdiction is unrestricted. Its application to the offence of engaging in a terrorist act means that the offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia. Proposed section 101.2(1) provides that a person commits an offence if the person provides or receives training in the making of use of firearms, explosives, or chemical, biological, radiological or nuclear weapons and the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act. *Terrorist act* is defined in proposed section 100.1. The maximum penalty is life

imprisonment. Proposed subsection 101.2(2) provides that absolute liability applies to the provision or receipt of training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act. This means that, as long as the person's provision or receipt of the training was voluntary, the person's mental state is not relevant. Subsection 6.2(2) of the Criminal Code provides that if a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

- (a) there are no fault elements for that physical element; and
- (b) the defence of mistake of fact under section 9.2 of the Criminal Code is unavailable in relation to that physical element.

10.137 Absolute liability is appropriate where fault is required to be proven in relation to another element or other elements of the offence, and there is no legitimate ground for the person to allow a situation to occur where the absolute liability element occurs. In this case, a person who provides or receives training in the making or use of firearms, explosives or weapons should be on notice that this should not be done if there is any possibility of this being connected to a terrorist act. The person must avoid this possibility arising, and if they cannot, they should not provide or receive the training. It is therefore not necessary to prove fault in relation to the terrorist connection. If it exists in fact, the person is liable.

10.138 Subsection 6.2(3) of the Criminal Code provides that the existence of absolute liability does not make any other defence unavailable. Criminal Code defences that may be relevant and that would prevent a person being liable notwithstanding the application of absolute liability include intervening conduct or event (section 10.1), duress (section 10.2), sudden or extraordinary emergency (section 10.3) and self-defence (section 10.4). Proposed subsection 101.2(3) provides that a person commits an offence under subsection (1) even if the terrorist act does not occur. Proposed subsection 101.2(4) provides that the offence in subsection (1) does not apply if the person proves that he or she was not reckless with respect to the circumstance in paragraph (1)(b). Proposed subsection 101.2(5) applies Category D geographical jurisdiction, as set out in section 15.4 of the Criminal Code, to an offence against subsection 101.2(1). Category D jurisdiction is unrestricted. Its application to the offence of providing or receiving training for terrorist acts means that the offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia.

(c) Directing organisations concerned with terrorist acts

10.139 Proposed subsection 101.3(1) provides that a person commits an offence if the person directs the activities of an organisation that is directly or indirectly concerned with

fostering preparation for, the engagement of a person in, or assistance in a terrorist act. *Terrorist act* is defined in proposed section 100.1. The maximum penalty is life imprisonment. Proposed subsection 101.3(2) provides that a person commits an offence under subsection (1) even if the terrorist act does not occur. Proposed subsection 101.3(3) applies Category D geographical jurisdiction, as set out in section 15.4 of the Criminal Code, to an offence against subsection 101.3(1). Category D jurisdiction is unrestricted. Its application to the offence of directing organisations concerned with terrorist acts means that the offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia.

(d) Possessing things connected with terrorist acts

10.140 Proposed subsection 101.4(1) provides that a person commits an offence if the person possesses a thing and the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act. *Terrorist act* is defined in proposed section 100.1. The maximum penalty is life imprisonment. Proposed subsection 101.4(2) provides that absolute liability applies to the possession of things connected with preparation for, the engagement of a person in, or assistance in a terrorist act. Subsection 6.2(2) of the Criminal Code provides that if a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

- (a) there are no fault elements for that physical element; and
- (b) the defence of mistake of fact under section 9.2 of the Criminal Code is unavailable in relation to that physical element.

10.141 Absolute liability is appropriate where fault is required to be proven in relation to another element or other elements of the offence, and there is no legitimate ground for the person to allow a situation to occur where the absolutely liability element occurs. In this case, a person who possesses things in connection with preparation for, the engagement of a person in, or assistance in a terrorist act, should be on notice that this should not be done if there is any possibility of this being connected to a terrorist act. The person must avoid this possibility arising, and if they cannot, they should not possess the thing. It is therefore not necessary to prove fault in relation to the terrorist connection. If it exists in fact, the person is liable. Subsection 6.2(3) of the Criminal Code provides that the existence of absolute liability does not make any other defence unavailable. Criminal Code defences that may be relevant and that would prevent a person being liable notwithstanding the application of absolute liability include intervening conduct or event (section 10.1), duress (section 10.2), sudden or extraordinary emergency (section 10.3) and self-defence (section 10.4). Proposed subsection 101.4(3) provides that a person commits an offence under subsection (1) even if

the terrorist act does not occur. Subsection 101.4(4) provides that the offence in subsection (1) does not apply if the person proves that he or she was not reckless with respect to the circumstance in paragraph (1)(b). Proposed subsection 101.4(5) applies Category D geographical jurisdiction, as set out in section 15.4 of the Criminal Code, to an offence against subsection 101.4. Category D jurisdiction is unrestricted. Its application to the offence of possessing things connected with terrorist acts means that the offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia.

(e) Collecting or making documents likely to facilitate terrorist acts

10.141 Proposed subsection 101.5(1) provides that a person commits an offence if the person collects or makes a document and the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act. *Terrorist act* is defined in proposed section 100.1. The maximum penalty is life imprisonment. Proposed subsection 101.5(2) provides that absolute liability applies to paragraph (1)(b). Subsection 6.2(2) of the Criminal Code provides that if a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

- (a) there are no fault elements for that physical element; and
- (b) the defence of mistake of fact under section 9.2 of the Criminal Code is unavailable in relation to that physical element.

10.142 Absolute liability is appropriate where fault is required to be proven in relation to another element or other elements of the offence, and there is no legitimate ground for the person to allow a situation to occur where the absolutely liability element occurs. In this case, a person who collects or makes a document likely to facilitate a terrorist act should be on notice that this should not be done if there is any possibility of this being connected to a terrorist act. The person must avoid this possibility arising, and if they cannot, they should not collect or make the document. It is therefore not necessary to prove fault in relation to the terrorist connection. If it exists in fact, the person is liable. Proposed subsection 6.2(3) of the Criminal Code provides that the existence of absolute liability does not make any other defence unavailable. Criminal Code defences that may be relevant and that would prevent a person being liable notwithstanding the application of absolute liability include intervening conduct or event (section 10.1), duress (section 10.2), sudden or extraordinary emergency (section 10.3) and self-defence (section 10.4). Proposed subsection 101.5(3) provides that a person commits an offence under subsection (1) even if the terrorist act does not occur.

10.143 Proposed subsection 101.5(4) provides that the offence in subsection (1) does not apply if the person proves that he or she was not reckless with respect to the circumstance in paragraph (1)(b). Proposed subsection 101.5(5) applies Category D geographical jurisdiction, as set out in section 15.4 of the Criminal Code, to an offence against subsection 101.5(1). Category D jurisdiction is unrestricted. Its application to the offence of collecting or making documents likely to facilitate terrorist acts means that the offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia.

(f) **Other acts done in preparation for, or planning, terrorist acts**

10.144 Proposed subsection 101.6(1) provides that a person commits an offence if the person does any act in preparation for, or planning, a terrorist act. *Terrorist act* is defined in proposed section 100.1. The maximum penalty is life imprisonment. Proposed subsection 101.6(2) provides that a person commits an offence under subsection (1) even if the terrorist act does not occur. Proposed subsection 101.6(3) applies Category D geographical jurisdiction, as set out in section 15.4 of the Criminal Code, to an offence against subsection 101.6(1). Category D jurisdiction is unrestricted. Its application to the offence of collecting or making documents likely to facilitate terrorist acts means that the offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia.

(g) **Proscribed organisations**

10.144 Proposed section 102.1 contains definitions of terms used in the proposed Division 102 of the Criminal Code.

member of an organisation includes a person who holds informal membership, a person who has taken steps to become a member of the organisation and in the case of an organisation that is a body corporate, a director or officer of the body corporate. This definition is used in proposed paragraph 102.2(1)(b) to describe an affiliation with a group, which may then lead to a group being declared proscribed. This definition ensures that a person cannot evade liability by a technical argument about their lack of formal membership status.

proscribed organisation means an organisation in relation to which a declaration under section 102.2 is in force.

the Commonwealth is defined to include the Territories when used in a geographical sense. This term is used in the proscription power in proposed paragraph 102.2(1)(d) and in the defence in proposed paragraph 102.4(3)(c). The effect of the definition is

to ensure that threats to the integrity and security of an external Territory can be considered to be threats to the integrity and security of the Commonwealth and can therefore provide grounds for a proscription or nullify the existence of a defence to the proscribed organisations offence.

(h) Declarations of proscribed organisations

10.145 Proposed section 102.2 provides that the Attorney-General may make a declaration in writing that one or more organisations is a proscribed organisation. This declaration must effectively particularise the organisation to ensure that other organisations not intended to be proscribed are not covered by the declaration. Once an organisation has been proscribed, having specified links to that organisation is a serious offence under proposed section 102.4. The Attorney-General may declare an organisation proscribed if he/she is satisfied on reasonable grounds that one or more of proposed paragraphs 102.2(1)(a)-(d) apply in relation to the organisation. If an organisation is a body corporate and the organisation is committing, or has committed an offence against this part, that is, the terrorism offences, then proposed paragraph 102.2(1)(a) would allow the Attorney-General to declare the organisation proscribed. This could occur regardless of whether the organisation has been charged or convicted with an offence. If a member of the organisation is committing, or has committed an offence against this Part on behalf of the organisation, then proposed paragraph 102.2(1)(b) would allow the Attorney-General to declare the organisation proscribed. Similarly, this could occur regardless of whether the member has been charged or convicted with an offence. Proposed paragraph 102.2(1)(c) allows the Attorney-General to declare an organisation proscribed if he/she is satisfied that the declaration is reasonably appropriate to give effect to a decision of the United Nations Security Council that the organisation is an international terrorist organisation. Proposed paragraph 102.2(1)(d) allows the Attorney-General to declare an organisation proscribed if he/she is satisfied that the organisation is likely to endanger or has endangered the security or integrity of the Commonwealth or another country. The lawfulness of the Attorney-General's decision making process and reasoning is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

10.146 Proposed subsection 102.2(2) specifies that the Attorney-General must publish the declaration in the *Gazette* and a newspaper circulating in each State, in the Australian Capital Territory and in the Northern Territory. This wide circulation of such a declaration allows individuals the opportunity to discontinue their involvement with such an organisation at the earliest possible notice. Proposed subsection 102.2(3) clarifies that such a declaration would come into force when it is published in the *Gazette*. The declaration then would stay in

force until it is revoked or until a day, as specified in the declaration, as the day the declaration ceases to be in force. Proposed subsection 102.2(4) allows the Attorney-General to delegate powers and functions under subsection (1) to a Minister. This is a limited delegation power, which reflects the importance of the power to declare an organisation as proscribed and the need for that decision to be made out at a senior level.

(i) **Revocation of declarations**

10.147 Proposed section 102.3 gives the Attorney-General power to revoke a declaration that an organisation is proscribed. Proposed subsection 102.3(1) obliges the Attorney-General to revoke a declaration that an organisation is proscribed if the Attorney-General is satisfied on reasonable grounds that none of the paragraphs in proposed subsection 102.2(1) apply in relation to the organisation. This could be done on the Attorney-General's own motion, or on application. Proposed subsection 102.3(2) confers a discretionary power upon the Attorney-General to revoke a declaration that an organisation is proscribed. Proposed subsection 102.3(3) obliges the Attorney-General to publish a revocation in the *Commonwealth Gazette* and a newspaper circulating in each State, in the Australian Capital Territory and the Northern Territory. Proposed subsection 102.3(4) clarifies that a revocation made under this section comes into force when it is published in the *Gazette*.

10.148 Proposed subsection 102.3(5) allows the Attorney-General to delegate powers and functions under subsection (1) or (2) to a Minister. This is a limited delegation power, which reflects the importance of the power to declare an organisation as proscribed and the need for that decision to be made at a senior level.

(j) **Offences in relation to proscribed organisations**

(aa) Directing activities etc. of proscribed organisations

10.149 Proposed section 102.4 specifies what kind of interaction with proscribed organisations constitutes an offence. Proposed subsection 102.4(1) provides that a person commits an offence if the person: (i) directs the activities of a proscribed organisation; (ii) directly or indirectly receives funds from or makes funds available to a proscribed organisation; (iii) is a member of a proscribed organisation; (iv) provides training to, or trains with, a proscribed organisation; or (v) assists a proscribed organisation. In a prosecution of an offence against subsection 102.4(1) it is not necessary to prove that the defendant knew the organisation is a proscribed organisation. Proposed subsection 102.4(2) provides that strict liability applies to this section. This is based on the fact that it is not legitimate to be a

member of or have links to an organisation of a kind that could be proscribed. Therefore, the onus is on the person to make out one of the defences in the proposed section. Fairness to the individual is safeguarded by the requirement that a proscription be published in the gazette and newspapers (proposed section 102.2) and by the defences of ceasing to being a member and having no knowledge of the existence of grounds for proscription (proposed subsections 102.3(3) and (4)).

10.150 Proposed subsection 102.4(3) creates a defence for a person prosecuted for an offence against subsection 102.4(1). The defendant must satisfy all three criteria. First, they must prove that they did not know nor were reckless that the organisation, or a member of the organisation, had committed or was committing an offence against this Part. Second, that they did not know nor were reckless that the UN Security Council had resolved that the organisation is an international terrorist organisation. Finally, that they did not know nor were reckless that the organisation was likely to endanger or had endangered the security or integrity of the Commonwealth or another country. The defendant bears a legal burden to prove this fact. The legal burden is outlined at section 13.4 of the Criminal Code. A legal burden of proof on the defendant must be discharged on the balance of probabilities (section 13.5). Proposed subsection 102.4(4) creates a defence to the membership limb of the offence. The defence applies if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the organisation was proscribed. As with proposed subsection 102.4(3) the defendant bears a legal burden to prove this.

10.151 Proposed subsection 102.4(5) would apply Category D geographical jurisdiction, as set out in section 15.4 of the Criminal Code, to the offences proposed in subsection 102.4(1). Category D geographical jurisdiction will be satisfied whether or not the conduct constituting the alleged offence occurs in Australia; and whether or not a result of the conduct constituting the alleged offence occurs in Australia. This jurisdiction is appropriate due to the transnational nature of terrorist activities, and to ensure that a person cannot escape prosecution or punishment based on a jurisdictional loophole. Item 5 outlines the application of proposed section 102.2. Once the power to make declarations has commenced, the Attorney-General can use the power on the basis of events prior to commencement.

(bb) Amendments relating to air security officers: Australian Protective Service Act 1987

10.152 The purpose of these amendments is to extend the list of specified offences in relation to which members of the Australian Protective Service (APS) may exercise their

arrest without warrant powers to include the proposed terrorist-bombing and terrorism offences. The amendments are necessary as members of the APS are only empowered to exercise those powers whilst performing their security and protective function in relation to specified offences. The amendments will further enhance the role of the APS in combating terrorism. A new paragraph (ba) of subsection 13(2) will empower members of the APS to exercise powers in relation to the proposed terrorist-bombing offences, which will be included in Division 72 of the Criminal Code. A new paragraph (bb) of subsection 13(2) of the Ac. will empower members of the APS to exercise powers in relation to the proposed terrorism offences, which will be set out in Division 101 of the Criminal Code. This item will commence following the commencement of Division 101 of the Criminal Code.

10.153 Members of the Australian Protective Service (APS) are currently able to exercise their arrest without warrant powers in relation to offences set out in Part 2 of the Crimes (Aviation) Act (in particular the offence of hijacking), but those offences do not operate on intra-state flights. The purpose of these amendments is to extend the coverage of those offences to aircraft that are operating on intra-state flights. This is to ensure that members of the APS who are engaged as air security officers are able to provide an immediate and effective anti-hijacking capability for all Australian civil aviation. A new paragraph (c) will be inserted into the definition of "prescribed flight" in subsection 3(1) of the Act to extend that definition to include flights within a State. As offences set out in Part 2 of the Crimes (Aviation) Act operate on, amongst other things, prescribed flights this will extend the operation of those offences to those intra-state flights. The proposed section 8A will set out the circumstances in which a flight will be regarded as being within a State for the purposes of the definition of a prescribed flight.

F. THE CRIMINAL CODE AMENDMENT (SUPPRESSION OF TERRORIST BOMBINGS) BILL 2002

10.154 The Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (the Bill) amends the *Criminal Code Act 1995* by inserting a new division, Division 72 - International terrorist activities using explosive or lethal devices, into the *Criminal Code*. The purpose of Division 72 is to create offences relating to international terrorist activities using explosive or lethal devices and give effect to the *International Convention for the Suppression of Terrorist Bombings (the Convention)* which is a response by the international community to terrorist attacks using bombs and other lethal devices. The *Convention* came into effect on 23 May 2001. The passage of the Bill will enable Australia to become a party to the Convention. The Convention will come into force for Australia thirty days after its instrument of accession has been deposited. The main effect of the Bill is to establish offences in the *Criminal Code* which make it an offence to place bombs or other lethal

devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss. The Bill does not establish jurisdiction over an offence where the circumstances relating to the alleged offence are exclusively internal to Australia. The Bill also prescribes a penalty of life imprisonment for persons who are convicted of offences under this Division of the *Criminal Code*. The Bill requires that proceedings for an offence under the Division must not commence without the Attorney-General's written consent. In determining whether to bring proceedings under the Division the Attorney-General must have regard to, amongst other things, State and Territory law governing the conduct that would give rise to an offence under this Division and to whether a prosecution has been or will be initiated under that State or Territory law. The Bill also amends the *Extradition Act 1988* to ensure that the offences in the Bill shall not be regarded, for the purposes of extradition, as political offences.

10.155 Clause 3 provides that the *Criminal Code Act 1995* and the *Extradition Act 1988* are amended as set out in Schedule 1. The *Criminal Code Act 1995* has a schedule that contains the *Criminal Code*. Chapter 4 of the Criminal Code deals with the integrity and security of the international community and foreign governments. This item inserts a new division, Division 72 - International terrorist activities using explosive or lethal devices, into Chapter 4 of the Criminal Code. Section 72.1 defines the purpose of Division 72 as the creation of offences relating to international terrorist activities using explosive or lethal devices and to give effect to the International Convention for the Suppression of Terrorist Bombings ('the Convention'). Section 72.2 provides that a member of the Australian Defence Force who is acting for the defence or security of Australia may not be prosecuted under this Division.

(a) Subsection 72.3 (1) - Offence Causing death or serious harm

10.156 Subsection 72.3(1) provides the elements of an offence under the Division. The elements of the offence are set out in paragraphs (a) to (d). The effect of section 13.1 of the *Criminal Code* is that the prosecution in any criminal proceeding bears the legal burden of proving the existence of each of these elements. This principle applies in respect of the offences established in Division 72. Paragraph 72.3(1)(a) requires that the person committing the offence intentionally puts the device in place or sets it off. Paragraph 72.3(1)(b) requires that the device be an explosive or other lethal device. This element is satisfied if the person is reckless that what he or she is delivering, placing, discharging or detonating is such a device and would be satisfied if the person was aware that there was a substantial risk that it was such a device and in the circumstances known to that person it was unjustifiable to take that risk. The element would also be satisfied if the person knew

that it was such a device. The term 'explosive or other lethal device' has the same meaning as that term has in the Convention. The Convention defines the term in paragraph 3 of Article 1 to mean —

- (a) an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or
- (b) a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.

10.157 'Weapon or device' includes not only things which are specifically made for explosive or lethal purposes but also things adapted for those purposes and things which are neither made nor adapted for those purposes although they are used for those purposes. For example, while an aircraft may not be designed for the purpose, it clearly has the capacity to cause death, injury and damage. Therefore, where aircraft are used as they were in the attacks on 11 September 2001 in the United States of America, they would be 'weapons or devices' for the purposes of the Convention and for this legislation. Paragraph 72.3(1)(c) requires that the place where the device is delivered, placed, discharged or detonated be either a place used by the public, a government facility, a public transportation system or an infrastructure facility. Strict liability applies to the nature of the place. This means that there are no fault elements for this particular element of the offence and, therefore, it is immaterial whether the person knows the nature of the place. However, section 6.1 of the *Criminal Code* provides that the defence of mistake of fact at section 9.2 of the Code is available.

10.158 Paragraph 72.3(1)(d) requires that the person committing the offence intends to cause death or serious harm. The definitions of death and serious harm in the Dictionary in the *Criminal Code* will apply. The maximum penalty for committing an offence against subsection 72.3(1) is imprisonment for life.

(b) Offence causing extensive destruction

10.159 Paragraphs 72.3(2)(a) to (c) are the same as paragraphs 72.3(1)(a) to (c) but paragraph 72.3(2)(d) requires that the person committing the offence intends to cause extensive destruction to a place, facility or system. Paragraph 72.3(2)(e) requires that the person be reckless as to whether the destruction could result in major economic loss but actual destruction or loss is not required. The maximum penalty for committing an offence against subsection 72.3(2) is imprisonment for life.

(c) Jurisdiction requirement

10.160 Section 72.4 provides the situations where the jurisdictional requirements of Division 72 will be satisfied. A person commits an offence where one of the following paragraphs apply and the circumstances are not exclusively internal as described in subsection 72.4(2). Paragraph 72.4(1)(a) provides that a person commits an offence where the conduct constituting an alleged offence occurs wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship as required by Article 6, paragraph (1)(b) of the Convention. Paragraph 72.4(1)(b) provides that a person commits an offence if, at the time of the alleged offence, the alleged offender is an Australian citizen. This provision meets the obligation at article 6, paragraph 1(c) of the Convention that a country which is a party to the Convention must establish jurisdiction where the alleged offender is a national of that country. Paragraph 72.4(1)(c) provides that a person commits an offence if, at the time of the alleged offence, the alleged offender is a stateless person whose habitual residence is in Australia. Article 6, paragraph 2(c) of the Convention allows for jurisdiction to be established in this circumstance. Paragraph 72.4(1)(d) provides that a person commits an offence if the conduct is subject to the jurisdiction of another country which is a party to the Convention established in accordance with paragraph 1 or 2 of article 6 of the Convention and the person is in Australia. This provision complies with the obligation at article 6, paragraph 4 of the Convention.

10.161 Paragraph 72.4(1)(e) provides that a person commits an offence if a Commonwealth, State or Territory government facility that is outside Australia is the target of, or suffers damage as the result of, the alleged offence. Article 6, paragraph 2(b) of the Convention allows for jurisdiction to be established where the offence is perpetrated against such a facility. Paragraph 72.4(1)(f) provides that a person commits an offence if an Australian citizen or a body corporate incorporated in Australia is the target of, or suffers damage as the result of, the alleged offence. Article 6, paragraph 2(a) of the Convention allows for jurisdiction to be established where the offence is perpetrated against an Australian citizen or body corporate. Paragraph 72.4(1)(g) provides that a person commits an offence if the person engaging in the conduct intends to compel the Commonwealth, a State or a Territory to do or not do anything. Article 6, paragraph 2(d) of the Convention allows for jurisdiction to be established in this circumstance. Subsection 72.4(2) defines alleged offences as being exclusively internal if:

- (a) the relevant conduct occurs exclusively in Australia; and
- (b) the alleged offender is an Australian citizen; and

- (c) the offence is perpetrated only against Australian citizens or incorporated bodies; and
- (d) the alleged offender is in Australia; and
- (e) no other country which is a party to the Convention has a basis under paragraph 1 or 2 of Article 6 of the Convention for exercising jurisdiction, that is the alleged offence was not committed in that other country or on board one of its ships or aircraft.

(d) Saving of other laws

10.162 Section 72.5 preserves the operation of all other Commonwealth, State and Territory laws. Section 72.6 - Double jeopardy and foreign offences Section 72.6 prevents a person being convicted in respect of a Division 72 offence in respect of conduct where he or she has already been convicted or acquitted of an offence against the law of a foreign country.

(e) Bringing proceedings with consent of Attorney-General

10.163 Subsection 72.7(1) provides that no prosecution for an offence under Division 72 can be commenced without the written consent of the Attorney-General. This provision is intended to prevent a prosecution being brought under this Division in cases where a prosecution under a different Commonwealth law would be appropriate or where a prosecution would not be appropriate at all, for example, because of the operation of subsection 72.7(4). Notwithstanding subclause (1), the effect of subclause (2) is to allow preliminary steps to be taken prior to the giving of consent by the Attorney-General to a prosecution under subclause (1). Subsection 72.7(3) requires the Attorney-General, when deciding whether to bring proceedings for an offence under this Division, to have regard to the terms of the Convention, particularly paragraph 2 of Article 19, which excludes, from the operation of this Convention, the activities of armed forces during an armed conflict and the activities undertaken by military forces in the exercise of their official duties to the extent those activities are governed by other rules of international law. Subsection 72.7(4) requires the Attorney-General, when deciding whether to bring proceedings for an offence under this Division to also have regard to:

- (a) whether the conduct in question would be an offence under the law of a State or Territory; and
- (b) whether the State or Territory has commenced or will commence a prosecution relating to that conduct.

(f) Ministerial certificates relating to proceedings

10.163 Subsection 72.8(1) provides that the Minister for Foreign Affairs, who is referred to in the subsection as the Minister administering the *Charter of the United Nations Act 1945*, may issue a certificate stating when the Convention entered into force for Australia, stating that the Convention remains in force on a specified day for Australia or any other party to the Convention or making a statement on the establishment of jurisdiction under paragraph 1 or 2 of Article 6 of the Convention by any country that is a party to the Convention. Subsection 72.8(2) provides that the Minister for Immigration and Multicultural and Indigenous Affairs, who is referred to in the subsection as the Minister administering the *Australian Citizenship Act 1948*, may issue a certificate stating that a person is or was an Australian citizen at a particular time or that a person is or was a stateless person whose habitual residence is or was in Australia at a particular time. A certificate issued under the new section 72.8 will be prima facie evidence, in any proceedings, of the matters in the certificate.

(g) Jurisdiction of State courts preserved

10.164 Section 72.9 excludes the operation of section 38 of the *Judiciary Act 1903* in relation to matters arising under this Division, including any questions of interpretation of the Convention. The effect of this provision is to prevent prosecutions under this Division falling within the exclusive jurisdiction of the High Court. Section 68 of the *Judiciary Act 1903* will vest jurisdiction in the State and Territory courts.

(h) Definitions

10.165 Section 72.10 lists definitions of a number of terms for the purpose of Division 72. These definitions adopt the meanings given to the same terms in the Convention. However Division 72 refers to *government facility* rather than to *State or government facility* which is the term used by the Convention but *government facility* is defined for the purposes of Division 72 as having the same meaning as *State or government facility* in the Convention.

(i) Extradition Act 1988

10.166 Item 2 amends the *Extradition Act 1988* by inserting at the end of paragraph (a) of the definition of political offence a new subparagraph (ix) referring to Article 2 of the Convention. The amendment to the *Extradition Act 1988* implements the requirement in Article 11 of the Convention that none of the offences in Article 2 of the Convention shall be regarded, for the purposes of extradition, as a political offence. Article 11 provides that a

request for extradition based on such an offence may not be refused on the sole ground that it concerns a political offence.

**G. CRIMINAL CODE AMENDMENT (ANTI-HOAX AND OTHER MEASURES) BILL
2002**

(a) Introduction

10.167 This Bill would amend Part 10.5 of the *Criminal Code Act 1995* by adding new offences relating to the sending of dangerous, threatening or hoax material through the post or similar services. The new offences would replace the existing outdated postal offences in sections 85S, 85X and 85Y of the *Crimes Act 1914*. The amendments would ensure that federal offences cover the use of all postal and other like services and not just Australia Post as at present. Services which would be covered by the proposed amendments include commercial courier and parcel and packet carrying services. The amendments would also increase the penalties for the offences to more appropriate levels to properly reflect the harm that can be caused by the sending of threatening, dangerous or hoax material.

10.168 Clause 2 provides that sections 1 to 3 and Schedule 2 to the Act commence on the day on which the Act receives Royal Assent. The clause also provides that Schedule 1 to the Act is taken to have commenced at 2pm on 16 October 2001. This is the time and date at which the Prime Minister publicly announced the proposed new offence for sending hoax material, which is contained in the Schedule. The Prime Minister indicated that the offence would commence from the time of the announcement. The Government does not lightly pursue retrospective legislation. However, in this case there were exceptional circumstances justifying retrospectivity. During October 2001, hoaxes were causing significant concern and disruption. It was necessary to ensure that such conduct was adequately deterred in the period before the resumption of Parliament. The Prime Minister's announcement provided this deterrence. Furthermore, one of the criticisms that can be directed at retrospective criminal legislation is that people will be unaware that their conduct is an offence. In this case, the Prime Minister's announcement was in very clear terms, and received immediate, widespread publicity. The amendments operate only from the time of that announcement. An additional consideration is that there is no circumstance in which the perpetration of a hoax that a dangerous or harmful thing has been sent could be considered a legitimate activity in which a person was entitled to engage pending these amendments. The amendments do not retrospectively abrogate a legitimate right or entitlement. For all these reasons, the retrospective application of these amendments is not considered to contravene fundamental principles of fairness or due process. Schedule 1 - Amendments commencing on 16 October 2001: This Schedule inserts into the Criminal Code a new offence dealing with the use of the post or a similar service to send hoax material. This offence is dealt with in a separate schedule to the other proposed offences because it has retrospective operation, whereas the other offences commence on Royal Assent. The amendments contained in Schedule 1 are taken to have commenced at 2pm on 16 October 2001. This is the time and date at which the Prime Minister publicly announced the proposed new offence for sending hoax material, which is contained in the Schedule. The Prime Minister stated that the offence would commence from the time of the announcement.

10.169 Item 1 inserts a definition of the term **constitutional corporation** into section 470.1 of the Criminal Code Act of 1995. A "constitutional corporation" is a foreign, trading or financial corporation as referred to in paragraph 51(xx) of the Constitution. The new offences would extend to courier services and parcel or packet carrying services that are provided by a constitutional corporation. This definition is one of the mechanisms that aligns the ambit of the offences with the scope of Commonwealth legislative power under the Constitution. A definition of the term **postal or similar service** is also inserted into section 470.1 of the Criminal Code. The definition is designed to extend the application of the new offences in proposed sections 471.10, 471.11, 471.12 and 471.13 to all postal services, courier services

and parcel or packet carrying services, to the extent they are within Commonwealth constitutional power. The definition provides a number of links with Commonwealth constitutional power, namely, Commonwealth power with respect to postal and other like services; overseas and interstate trade and commerce; and foreign, trading and financial corporations. This definition, and hence the offence, draw on these particular heads of power because they have a clear relationship to commercial postal, courier and parcel carrying services.

10.170 Section 471.9 of the Criminal Code is amended to ensure that Category C geographical jurisdiction only applies to the existing postal offences in Part 10.5 of the Criminal Code and not to the proposed offences in this Bill (excepting the offence in proposed section 471.15). Category C geographical jurisdiction is unrestricted and applies whether or not the conduct or the result of the conduct constituting the alleged offence occurs in Australia. It is not appropriate to apply Category C geographical jurisdiction to the proposed offences because, unlike the existing offences, the new offences in proposed sections 471.11, 471.12 and 471.13 would apply to all postal and like services and not just Australia Post. The application of Category C geographical jurisdiction to the proposed offences would mean that they would cover conduct which has no relevance to Australia, for example, where a person posts dangerous goods within the United States. Proposed section 471.14 would apply the more limited Category A geographical jurisdiction to the proposed offences (see Item 4). Proposed section 471.10 contains the new anti-hoax offence and proposed section 471.14 sets out the geographical jurisdiction for that offence.

(b) Hoaxes: explosives and dangerous substances

10.171 Proposed section 471.10 would make it an offence to cause an article to be carried by a postal or similar service with the intention of inducing a false belief in another person that the article contains an explosive, dangerous or harmful thing or that an explosive, dangerous or harmful thing will be left in any place. A maximum penalty of 10 years imprisonment would apply. The maximum fine would be \$66,000 for a natural person and \$330,000 for a body corporate under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act, and the provisions for calculating maximum fines in section 4B of that Act. Following the terrorist acts of 11 September 2001, there have been a significant number of false alarms involving packages or letters containing apparently hazardous material, which have highlighted the need for tough penalties to deter such malicious and irresponsible actions. The new hoax offence would attract a higher penalty (in place of the existing 5 year penalty offence) and would also apply more broadly to any postal or similar service, rather than being limited to Australia Post. For that reason, the limited definition of "carry by post"

under the *Australian Postal Corporation Act 1989*, as applied by section 470.1 of the Criminal Code, is expressed not to apply to this offence. The new offence would operate retrospectively to 16 October 2001 (see section 2). This is the time and date at which the Prime Minister publicly announced the new offence.

(c) Geographical jurisdiction

10.172 Proposed section 471.14 would apply Category A geographical jurisdiction, as set out in section 15.1 of the Criminal Code, to the offence in proposed section 471.10. Category A geographical jurisdiction would also apply to the offences in proposed sections 471.11, 471.12 and 471.13 (Item 5 of Schedule 2 inserts references to those offences into section 471.14). Category A geographical jurisdiction will be satisfied if (i) the conduct constituting the offence occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or an Australian ship; (ii) a result of the conduct occurs wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship; or (iii) at time of the alleged offence the person charged with the offence was an Australian citizen or body corporate. Where the conduct constituting an offence occurs wholly in a foreign country and only a result occurs in Australia, there is a defence available if there is no corresponding offence in that foreign country. However, that defence is not available if jurisdiction is to be exercised on the basis of the person's nationality. The application of Category A jurisdiction to the offences in this Bill would mean that, regardless of where conduct constituting an offence occurs, if the results of that conduct affect Australia the person responsible would generally be able to be prosecuted in Australia. For example, a person in the United States who sends a letter containing a death threat to a recipient in Australia would commit the offence.

(d) Amendments commencing on Royal Assent

10.173 Section 85S of the Crimes Act, 1914 will be repealed. It deals with the sending of menacing, harassing or offensive material through Australia Post. This offence would be replaced with the new offences in proposed sections 471.11 and 471.12. Section 85X of the Crimes Act will be repealed. Section 85X makes it an offence to post dangerous or deleterious substances and things through Australia Post. This offence would be replaced with the new offences in proposed sections 471.13 and 471.15 (see Items 4 and 6). Item 3 would repeal section 85Y of the Crimes Act, which deals with the sending of hoax material, will be repealed. The offence in section 85Y would be replaced by the offence in proposed section 471.10. Although the offence in proposed section 471.10 would be taken to have commenced 16 October 2001, the repeal of the existing offence in section 85Y would not

take effect until the day after Royal Assent. This is necessary to ensure that prosecutions instituted under the existing provision for offences committed after 16 October 2001 but before Royal Assent are not affected. New offences directed at the use of postal and similar services to make threats or to send material which is menacing, harassing, offensive or dangerous are inserted into the Act. Section 471.15 applies to the posting of dangerous goods through Australia Post.

(e) Using a postal or similar service to make a threat

10.174 Proposed section 471.11 contains offences dealing with threats to kill and threats to cause serious harm. Proposed subsection 471.11(1) would make it an offence for a person to use a postal or like service to make to another person a threat to kill that other person or a third person with the intention of causing the other person to fear that the threat will be carried out. A maximum penalty of 10 years imprisonment would apply. The maximum fine would be \$66,000 for a natural person and \$330,000 for a body corporate under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act, and the provisions for calculating maximum fines in section 4B of that Act. The proposed offence is drawn from section 5.1.20 of the Model Criminal Code (*Non Fatal Offences Against the Person Report*). Proposed subsection 471.11(2) would make it an offence for a person to use a postal or like service to make to another person a threat to cause serious harm to that other person or a third person with the intention of causing the other person to fear that the threat will be carried out. A maximum penalty of 7 years imprisonment would apply. The maximum fine would be \$46,200 for a natural person and \$231,000 for a body corporate under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act, and the provisions for calculating maximum fines in section 4B of that Act. The proposed offence is based on section 5.1.21 of the Model Criminal Code (*Non Fatal Offences Against the Person Report*).

10.175 The explanatory memorandum to the Bill explains that the key fault element of the threat offences is the intention to intimidate or instil fear in the victim. However, there is no requirement that the threats actually instil fear in the victim. A threat can be express or implied and may be conditional or unconditional (proposed subsection (3)). At present, the Crimes Act only contains an offence relating to the sending of menacing, harassing or offensive material, which attracts a penalty of 1 year imprisonment (section 85S). The new offences would target those who use postal services to make serious threats and provide for higher penalties to reflect the seriousness of the conduct involved.

(f) Using a postal or similar service to menace, harass or cause offence

10.176 Proposed section 471.12 would make it an offence for a person to use a postal or like service in such a way as would be regarded by a reasonable person as being, in all the circumstances, menacing, harassing or offensive. A maximum penalty of imprisonment for 2 years would apply. The maximum fine would be \$13,200 for a natural person and \$66,000 for a body corporate under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act, and the provisions for calculating maximum fines in section 4B of that Act. This offence draws on the terms of the existing section 85S offence, but broadens the scope of the offence in relation to menacing or harassing material by removing the requirement that the recipient be in fact menaced or harassed and replacing it with an objective standard. The new offence also increases the existing penalty of 1 year imprisonment to 2 years, in line with the suggested penalty for the draft Model Criminal Code "threat to cause harm" offence (*Non Fatal Offences Against the Person Report*). In practice, the offence would cover material that would make a person apprehensive as to his or her safety or well-being or the safety of his or her property as well as material containing offensive or abusive language or derogatory religious, racial or sexual connotations.

(g) Causing a dangerous article to be carried by a postal or similar service

10.177 Proposed section 471.13 would make it an offence for a person to use a postal or similar service to send an article in a way that gives rise to a danger of death or serious harm to another person, where the first person is reckless as to the danger of death or serious harm. A maximum penalty of 10 years imprisonment would apply. The maximum fine would be \$66,000 for a natural person and \$330,000 for a body corporate under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act, and the provisions for calculating maximum fines in section 4B of that Act. Proposed subsections (2), (3), (4) and (5) clarify the meaning of the phrase "danger of death or serious harm". Subsection (2) provides that exposing a person to a disease that may give rise to a danger of death or serious harm to that person is to be treated as equivalent to exposing them to that danger. Subsection (3) specifies that for the offence to be committed the danger must be real and not merely theoretical. However, subsection (4) provides that a person's conduct may give rise to a danger of death or serious harm whatever the degree of risk involved, and subsection (5) makes it clear that the offence is concerned with potential rather than actual danger.

10.178 "Serious harm" is harm that endangers, or is likely to, endanger a person's life or that is likely to be significant and longstanding and includes harm to a person's mental health (section 475.1, Criminal Code). The proposed offence draws on the endangerment offences in sections 5.1.25 and 5.1.26 of the Model Criminal Code (*Non Fatal Offences Against the Person Report*). The offence is designed to prohibit in general terms the sending of

dangerous goods through a postal or like service in a manner which creates a risk of death or serious harm, but to allow for goods to be sent where they are safely packaged. The offence would extend to all postal and similar services rather than being limited to Australia Post, a limitation that applies under the existing offence in section 85X of the Crimes Act. However, a separate offence specific to Australia Post would be retained in proposed section 471.15. As the offence applies to the use of services other than Australia Post, the limited definition of "carry by post" in the *Australian Postal Corporation Act 1989* is expressed not to apply to this offence.

10.179 The offence, together with the offence in proposed section 471.15, would replace the existing offences in section 85X of the Crimes Act. Section 85X currently contains three offences dealing with the carriage of dangerous or deleterious substance or things by Australia Post. Under the existing offences, causing a "totally prohibited substance or thing" to be carried by Australia Post attracts a penalty of up to ten years. Causing a "standard regulated substance or thing" to be carried by Australia Post otherwise than in accordance with terms and conditions set by Australia Post carries a penalty of up to 5 years imprisonment. Causing a "specially regulated substance or thing" to be carried other than in accordance with permission granted by Australia Post attracts a penalty of up to 2 years imprisonment. The terms of the existing offences were not appropriate for general application to all postal and similar services for a number of reasons. First, the offence was not designed to cover services other than Australia Post. Some courier and parcel and packet carrying services carry goods that could be regarded as dangerous or deleterious, provided the goods are properly packaged and labelled. Accordingly, it is not possible to continue the complete prohibition on the sending of specified "dangerous and deleterious" substances. The new offence would allow postal services to continue to carry certain "dangerous goods" but would require the goods to be packaged in such a way that they do not present any risk of serious harm.

10.180 Second, under the existing offence, if Australia Post permits certain types of goods to be posted in accordance with specified conditions, those goods fall into the category of "standard regulated substances or things" and a failure to comply with those conditions can only attract a penalty of up to 5 years imprisonment. As a consequence, posting anthrax, for example, would only be punishable by up to 5 years imprisonment under the existing offence because Australia Post terms and conditions permit the postage of infectious biological substances in certain circumstances. Under the amendments, a 10 year imprisonment maximum penalty would apply in all cases. Section 471.14 would apply Category A geographical jurisdiction to the offences in those sections.

(h) Causing an explosive, or a dangerous or harmful substance, to be carried by post

10.181A proposed section 471.15 is inserted into the Criminal Code. Proposed section 471.15 would make it an offence for a person to cause to be carried by post an explosive or a dangerous or harmful substance or thing that is prescribed in the regulations. The maximum penalty for the offence would be 10 years imprisonment. The maximum fine would be \$66,000 for a natural person and \$330,000 for a body corporate under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act, and the provisions for calculating maximum fines in section 4B of that Act. It is necessary to have the scope to add items by regulation, because the specific items that are prohibited for posting with Australia Post may change at short notice, including where new types of goods come into existence. The proposed offence replicates the existing offence in subsection 85X(2) of the Crimes Act. Like the existing offence, the proposed offence would only apply where the dangerous goods are lodged for carriage by Australia Post, because the term "carry by post" is given the same meaning as in the *Australian Postal Corporation Act 1989* (section 470.1, Criminal Code) where it means "carried by or through Australia Post" (section 4).

10.182 The explanatory memorandum notes that it is necessary to include this offence in addition to the broader dangerous goods offence in proposed section 471.13 in order to maintain the current prohibition on posting explosives and other prescribed dangerous substances through Australia Post while also ensuring that all postal and similar services are covered by a general offence. It is not appropriate to completely prohibit the sending of explosives or other specified substances in the general offence as some postal and courier services carry explosives and other dangerous articles provided they are packaged in such a way that they do not present any risk of harm. However, a more prescriptive offence is justified in relation to Australia Post, as Australia Post specifically prohibits the carriage of explosives and also deals with a high volume of mail. Proposed subsection (2) would apply Category C geographical jurisdiction, as set out in section 15.3 of the Criminal Code, to the offence. Category C geographical jurisdiction is unrestricted and applies whether or not the conduct or the result of the conduct constituting the alleged offence occurs in Australia. It is appropriate to apply Category C geographical jurisdiction to the proposed offence because the offence only applies where articles are posted through Australia Post.

H. LEGISLATIVE MEASURES IN AUSTRALIA GOVERNING POLICE POWERS OF DETENTION AND INTERROGATION

10.183 The Discussion Paper noted that the powers of the police in regard to detention and interrogation is set out in detail in Australian legislation. It was noted that the *Tasmanian Criminal Law (Detention and Interrogation) Act of 1995* sets out the powers of the police and the rights of detainees during custody and interrogation as follows:

- 4(1) Subject to subsection (2), every person taken into custody must be brought before a magistrate or a justice as soon as practicable after being taken into custody unless released unconditionally or released under subsection (3) or under section 34 of the Justices Act 1959.
- (2) Every person who has been taken into custody may be detained by a police officer -
- (a) for a reasonable time after being taken into custody for the purposes of questioning the person, or carrying out investigations in which the person participates, in order to determine his or her involvement, if any, in relation to an offence; and
 - (b) during the period reasonably required to arrange to bring the person before a magistrate or justice and to transport the person to a magistrate or justice.
- (3) Where the reasonable time referred to in subsection (2)(a) expires, the person in custody may be admitted to bail by a person mentioned in section 34 of the Justices Act 1959.
- (4) In determining what constitutes a reasonable time for the purposes of subsection (2)(a), consideration must be taken of, but is not limited to, the following matters:
- (d) the number and complexity of the offences to be investigated;
 - (e) any need of the police officer to read and collate relevant material or to take any other steps that are reasonably necessary by way of preparation for the questioning or investigation;
 - (f) any need to transport the person from the place of apprehension or detention to a place where facilities are available to conduct an interview or investigation;
 - (g) the number of other people who need to be questioned during the period of custody in respect of the offence for which the person is in custody;
 - (h) any need to visit the place where the offence is believed to have been committed or any other place reasonably connected with the investigation of the offence;
 - (i) the time during which questioning is deferred or suspended to allow the person to communicate with a legal practitioner, friend, relative, parent, guardian or independent person or, in the case of a child, a person called by the police officer conducting the investigation to accompany the child;
 - (j) any time taken by a legal practitioner, friend, relative, parent, guardian, independent person or interpreter or, in the case of a child, a person called by the police officer conducting the investigation to accompany the child to arrive at the place where the questioning or investigation is to take place;
 - (k) any time during which the questioning or investigation of the person is suspended or delayed to allow the person to receive medical attention;
 - (l) any time during which the questioning or investigation of the person is suspended or delayed to allow the person to rest or receive refreshment;
 - (m) the period of time when the person cannot be questioned because of his or her intoxication, illness or other physical condition;
 - (n) the need to detain the person whilst an identification parade is being arranged or conducted;
 - (o) the need to detain the person whilst searches or forensic examinations are carried out;
 - (p) any other matters reasonably connected with the investigation of the offence.

(5) Before any questioning or investigation may commence, a police officer must ensure that the person in custody is informed that he or she does not have to say anything but that anything the person does say may be given in evidence.

(6) The person in custody must be informed of the matters referred to in subsection (5) in a language in which the person is able to communicate with reasonable fluency, but need not be informed in writing.

6(1) Before any questioning or investigation under section 4 may commence, the police officer conducting the investigation must inform the person in custody that he or she -

- (a) may communicate with, or attempt to communicate with, a friend or relative to inform the friend or relative of the whereabouts of the person in custody; and
- (b) may communicate with, or attempt to communicate with, a legal practitioner.

(2) Where a person in custody requests -

- (a) to communicate with a friend or relative to inform that person of his or her whereabouts; or
- (b) to communicate with a legal practitioner; or
- (c) to communicate with a friend or relative to inform that person of his or her whereabouts and with a legal practitioner -

the police officer conducting the investigation must, subject to subsection (3), defer the questioning and investigation for a time that is reasonable in the circumstances to enable the person to make, or attempt to make, the communication.

(3) Where a person in custody is of or over the age of 17 years, the police officer conducting the investigation may deny the person in custody communication with all or any of the persons referred to in subsection (2)(a), (b) or (c) for a period not exceeding 4 hours if the police officer believes on reasonable grounds that -

- (a) any communication referred to in subsection (2) is likely to result in the escape of an accomplice or the fabrication or destruction of evidence; or
- (b) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed.

(4) The police officer conducting the investigation or another police officer acting on his or her behalf may, before the expiration of the 4 hour period referred to in subsection (3), apply to a magistrate for an order authorising the police officer to deny the person in custody communication with all or any of the persons referred to in subsection (2)(a), (b) or (c) for a further period.

(5) An application under subsection (4) for an order specified in that subsection -

- (a) is, except as provided in section 7, to be made in writing; and
- (b) is to set out the grounds for seeking that order.

(6) If the magistrate is satisfied that there are reasonable grounds for doing so, the magistrate may make an order authorising the police officer to deny the person in custody communication with all or any of the persons referred to in subsection (2)(a), (b) or (c) for such period as is specified in the order.

(7) Subject to subsections (3) and (6), if a person in custody wishes to communicate with a friend, relative or legal practitioner, the police officer in whose custody the person is -

- (a) must afford the person reasonable facilities as soon as practicable to enable the person to do so; and
- (b) must allow the person's legal practitioner to communicate with the person in custody in circumstances in which as far as practicable the communication will not be overheard.

(8) This section does not apply to questioning or investigation in connection with an offence under section 4, 6 or 14 of the Road Safety (Alcohol and Drugs) Act 1970.

8(1) In this section -

"confession or admission" means a confession or an admission -

- (a) that was made by an accused person who, at the time when the confession or admission was made, was or ought reasonably to have been suspected by a police officer of having committed an offence; and
- (b) that was made in the course of official questioning;

"official questioning" means questioning by a police officer in connection with the investigation of the commission or the possible commission of an offence;

"serious offence" means an indictable offence of such a nature that, if a person of or over the age of 17 years is charged with it, the indictable offence cannot be dealt with summarily without the consent of the accused person and, in the case of a person under the age of 17 years, includes any indictable offence for which the person has been detained.

(2) On the trial of an accused person for a serious offence, evidence of any confession or admission by the accused person is not admissible unless -

- (a) there is available to the court a videotape of an interview with the accused person in the course of which the confession or admission was made; or
- (b) if the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why a videotape referred to in paragraph (a) could not be made, there is available to the court a videotape of an interview with the accused person about the making and terms of the confession or admission or the substance of the confession or admission in the course of which the accused person states that he or she made a confession or an admission in those terms or confirms the substance of the admission or confession; or
- (c) the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why the videotape referred to in paragraphs (a) and (b) could not be made; or
- (d) the court is satisfied that there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence.

(4) For the purposes of subsection (2), "reasonable explanation" includes but is not limited to the following:

- (a) the confession or admission was made when it was not practicable to videotape it;
- (b) equipment to videotape the interview could not be obtained while it was reasonable to detain the accused person;
- (c) the accused person did not consent to the interview being videotaped;
- (d) the equipment used to videotape the interview malfunctioned.

10.184 In its investigation into *Police Powers of Detention and Investigation after Arrest* the New South Wales Law Reform Commission considered, inter alia, the question of the duration of the period the police should be entitled to for conducting further investigation after having taken a suspect in custody. They considered that detention up to four hours is reasonable.¹ **The New South Wales Law Reform Commission noted that what is a "reasonable period" for detention for the purpose of investigation must be determined by reference to all of the relevant circumstances, including:**

- (a) **whether the presence of the arrested person is necessary for the conduct of any investigation which is intended to be conducted after arrest;**
- (b) **the number and complexity of the matters under investigation;**

¹ Report LRC 66 1990.

- (c) whether the person has indicated a willingness to make a statement or to answer any questions;
- (d) whether a police officer reasonably requires time to prepare for any interview of the person in custody;
- (e) whether appropriate facilities are available to conduct an interview or other investigations;
- (f) the number and availability of other persons (including alleged co-offenders, the alleged victim, and other material witnesses) who need to be interviewed or from whom statements need to be obtained in respect of the offence for which the person is in custody;
- (g) any need to visit the place where the alleged offence is believed to have been committed or any other place reasonably connected with the investigation of the offence;
- (h) the total period of time during which the person has been in the company of an investigating official before and after the commencement of custody;
- (i) the time taken for police connected with the investigation to attend at the place where the arrested person is being held;
- (j) the time taken to complete any forensic examinations which are reasonably necessary to the investigation; and
- (k) any other matters which are reasonably necessary to the proper conduct of the investigation.

10.185 The New South Wales Commission considered that preoccupation with the criminal trial, and its attendant safeguards, has resulted in inadequate attention and resources devoted to the criminal investigation process, which affects vastly more people and shapes the outcome of every criminal matter, and that despite the rhetoric about the concern for fundamental liberty, and the higher stakes involved in the criminal sanction, the criminal process has fallen far behind in terms of fairness and accountability — most particularly in the funding, infrastructure, and review procedures necessary to ensure effective police accountability. The Commission said that the procedures designed to ensure that any interference with the liberty of the subject accords with rules of procedural fairness must not be avoided merely because such procedures have financial or administrative implications for the agencies of enforcement. They considered that it would be perverse if the executive government could control not only compliance with basic legal rights but also their very existence simply by declining to provide adequate facilities to ensure that those rights are enjoyed in practice.

10.186 The New South Wales Commission noted that the recommended rights and safeguards are qualified by practical exigencies, as are virtually all rights, and that, for example, a person in custody should normally be entitled to communicate with a friend or relative, or a consular officer (in the case of a foreign national) as soon as practicable, but these communications may be delayed if this is necessary to prevent the escape of an accomplice, tampering with evidence, or the recovery of a missing person or property relevant to the alleged offence. They considered similarly, that a person in custody should, normally have the right to have the friend or relative, lawyer or consular official present at the police station, but the necessity for police to wait for the arrival of such persons is limited to a reasonable period of up to two hours.⁶ (There is no such time qualification on the arrival of an interpreter, however, whose presence is necessary before any police interview of a suspect may take place.) The Commission remarked that the assertion of rights will inevitably come with some costs to persons held in police custody — possibly financial, if they are asked to pay for part or all of the services provided, but more likely in terms of time.²

I. THE RIGHT TO SILENCE

10.187 The New South Wales Commission noted that the traditional "right to silence" is a concept which embodies a number of procedural aspects: a person is not obliged to answer police questions, in general (although there are increasing numbers of statutory exceptions); police must inform (caution) suspects of this before questioning them; no negative inference (of guilt) should be drawn by a jury from the exercise of the right to silence; and the defendant is a competent but not compellable witness at trial - that is, he or she is not obliged to give evidence. The Commission pointed out that the Australian High Court has stated that this right derives from the -

cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt. Moreover the existence of such a power tends to lead to abuse and to "the concomitant moral deterioration in methods of obtaining evidence and in the general administration of justice".

²

The New South Wales Commission pointed out that all of the studies of the take-up of rights by suspects in England after the *PACE* reforms indicate that only a small proportion of people in custody actually ask to see a lawyer, even when informed that there is a free-of-charge duty solicitor service available. They noted that a study found, to the surprise of the researchers that suspects really do not want advice much of the time and are far more concerned about getting out of the station quickly than about getting help in order to start their case on strong ground.

10.188 The New South Wales Commission remarked that despite the *right* to remain silent and the reminder of this right by police, the fact is that a very large proportion of suspects in custody do make admissions, and that studies³ **have confirmed this phenomenon. They noted that there is a considerable body of literature on the psychological and other pressures which compel confessions, and there has been much controversy in recent years over allegations of fabricated confessions. The Commission noted that the rationale for the right to silence and the pros and cons regarding retention have been canvassed at great length by the Australian Law Reform Commission and others. They explained that their recommendation is in the nature of a savings clause; that is, nothing in their recommendations is intended to affect the existing right.**

10.189 The New South Wales Commission noted that retention of the right to silence was strongly supported by most of the submissions and that the main proponents of abolition were the New South Wales Police Commissioner and the Commonwealth Director of Public Prosecutions, who both argued in their submissions, in essence, that if the safeguards for suspects in custody were going to be strengthened (such as access to legal advice) there should be a "trade-off" with the right to silence. The Commission explained that it does not accept, however, that giving practical effect to the rights and safeguards which suspects are already meant to possess at common law is sufficient justification to abandon other protections. The New South Wales Commission pointed out that all of the empirical evidence available suggests the marginal effect of the right to silence and that there is no empirical evidence linking the right with increased acquittal rates or any other problem with the administration of criminal justice. They considered that apart from the operational significance of the right to silence in the legal system, there is also an important underlying democratic value that there should be some distance allowed between the citizen and the State, with its massive power and resources. The New South Wales Commission considered that the proponents of the abolition of an ancient common law right, based on democratic values and continually reaffirmed by the High Court of Australia, bear a heavy persuasive burden which has not yet been met.

J. THE RIGHT TO CONTACT A FRIEND OR RELATIVE

10.190 The New South Wales Commission explained that their recommendation reflects what should be the current practice in New South Wales (and the rest of Australia) of allowing a friend or relative to be notified of the circumstances and whereabouts of the

³ They note *Stevenson's Study of District Court trials in New South Wales* which found that confessional evidence was tendered by police in over 96 per cent of cases.

person in police custody, provided that this does not endanger the police investigation. The Commission pointed out that the period immediately following an arrest is recognised as being an emotionally demanding time, during which time the person may well be vulnerable and exercise poor judgment because of feelings of shame, despair and hopelessness, and that the comfort provided by contact with friends and family can do much to alleviate the difficulty. The Commission pointed out that the Australian Law Reform Commission has noted that:

Some psychological advantage is doubtless obtained by a police investigator keeping the suspect isolated from any contact with the outside world. This justification is clearly insufficient ... to deny a person in custody - who is still, let it not be forgotten, presumed by our law to be innocent until proven guilty - the opportunity to communicate with at least one friend or relative in order to explain his position and make any necessary arrangements.

10.191 The New South Wales Commission noted that the right to notification assists not only the person in custody, but that person's family, who may be concerned over the person's absence, particularly if the detention is extended (overnight or on the weekend). The Commission remarked that there was unfortunately no empirical study available of police practices and suspect take-up rates in this area in Australia. They remarked that in England and Wales, the *Police and Criminal Evidence Act 1984*, (*PACE*) and the subordinate Code of Practice, also provide a right to have someone informed when arrested (known there as "intimation"). The New South Wales Commission noted that several studies of police records after the introduction of *PACE* indicate that only one in four or five suspects in police custody actually avail themselves of this right, with a higher take-up rate in the city than in rural areas. They recommended that the right to notify friends and family be qualified, so that police may delay the communication if necessary to prevent the escape of an accomplice, tampering with evidence, or interference with the recovery of a missing person or property relevant to the alleged offence but that police discretion in exercising this delaying power should be closely monitored to ensure that it is used sparingly. The New South Wales Commission also pointed out that notwithstanding anti-terrorist legislation and other problems in England, the notification of family and friends was delayed in less than one per cent of cases there in 1989.

K. THE RIGHT TO LEGAL ASSISTANCE

10.192 The New South Wales Commission pointed out that the Australian Law Reform Commission has noted that the right to consult with a lawyer during the course of pre-trial police investigations is one of those traditionally claimed civil rights to which an almost universal obeisance is paid in principle, but which is greeted with very great circumspection

in practice by law enforcement authorities. The New South Wales Commission considered that the common law authorities have consistently referred to the "right" to legal advice as "one of the most important and fundamental rights of a citizen" but that this is another one of those common law "rights" that lacks meaning in practice, translating into something like "if you have your own private lawyer, the police should not unreasonably deny you access to him or her".

10.193 The New South Wales Commission pointed out that legal assistance in court is normally available in New South Wales under State law but that the Commission believed that there is also an urgent need for legal advice at the police station *before* trial, when it could make some difference. They stated that there is a trend towards statutory recognition of - and funding for - the provision of legal assistance in the criminal investigation phase in those jurisdictions which authorise detention in police custody for the purpose of investigation, for example, statutory provisions to this effect were included in Victoria in 1988, and in England and Wales by the *Police and Criminal Evidence Act 1984 (PACE)*, and were recommended at the federal level by the *Review Committee of Commonwealth Criminal Law*.

10.194 The New South Wales Commission noted that the purpose of the right to legal advice whilst in custody is to ensure that the arrested person is treated fairly by the criminal process, and that the recognition of such a right not only helps to ensure that the right to silence and the privilege against self-incrimination receive due attention, but also means that if a statement is made by the arrested person it cannot later be objected to on the ground that it was involuntarily made or unfairly obtained. The Commission explained that a lawyer attending a police station could be expected to perform several valuable services for a client: informing a client who is not under arrest that he or she is under no obligation to remain at the police station; informing a client who has been arrested of his or her legal rights and assisting the client to exercise those rights; ensuring that the client is not unfairly treated; and assisting the client to secure release on bail.

10.195 The New South Wales Commission further considered that lawyers can also aid communication between police and suspects, by explaining the suspect's legal situation, including the obligation to answer questions in some circumstances and the benefits of cooperation in others. The Commission pointed out that the lack of enthusiasm by police for the presence of lawyers is no doubt based on a general conviction that lawyers interfere with the smooth operation of the investigation process and, most particularly, discourage their clients' cooperation with the police. They noted that this was certainly the view of English police forces before the introduction of the *PACE* legislation in 1984, but that there is

evidence that the police have now come to live with the routine presence of lawyers at police stations. The New South Wales Commission further remarked that a survey of police officers in the North of England after *PACE* found that 72 per cent now believe that the presence of a lawyer affects the interview "not at all" (40%) or "not much" (32%) and that similarly, 78 per cent of police reported that the presence of a lawyer did not affect the suspect's exercise of the right to silence.

10.196 The New South Wales Commission considered that given the growing number of statutory exceptions to the right to silence, lawyers often may be placed in the position of advising clients who are asserting their right to silence that they actually do have to answer certain questions (or face the adverse consequences of a refusal to do so). They pointed out that one recent study which was critical of the quality of legal assistance offered at police stations in England after *PACE* suggests that the presence of lawyers may benefit the police more than suspects, by "giving the false impression of complete police compliance with the law" and that another recent English study has found that all too often, legal advisers are largely passive and non-interventionist in police interrogations and that the self-perceived role of many is to act purely as witness to the proceedings (often making a full contemporaneous note) and consequently as a check on how interrogations are conducted. The New South Wales Commission noted that because of this passivity on the part of English legal advisers, very few police officers reported the need to ever challenge a legal adviser's interventions in interrogations although it seemed less likely that New South Wales lawyers would show the same degree of deference or passivity. The Commission explained that the same study noted that it is often clerks or "runners" who actually attend at the police station (rather than solicitors) - many of them ex-police officers, who are retained because of their experience with criminal procedure and useful contacts.

10.197 The New South Wales Commission recommended that all persons in police custody be informed of the right to contact a lawyer and be given a realistic opportunity to exercise that right and that further details could be provided in a Code of Practice. They considered that since the communication between lawyer and client is confidential and privileged, it is essential that this be conducted in private and that most police stations have adequate facilities to enable lawyer-client communications to take place out of the hearing of both police officers and any other persons who may be present at the police station. The New South Wales Commission pointed out that it has been suggested to them that there should be a restriction on communications with lawyers similar to that placed on communications with friends and family, whereby a police officer could delay the exercise of the right to contact a lawyer if the officer believed on reasonable grounds that the investigation will be endangered.

10.198 The New South Wales Commission considered that although some lawyers have been suspected of, or even convicted of, involvement in criminal activity, any person who is admitted to practise as a lawyer in New South Wales has been accepted by the Supreme Court to be a person of "good fame and character" and as such is entitled to be entrusted to provide legal representation and advice without first having to satisfy an additional test determined by a police officer on an occasional basis. To authorise police to delay or forbid communications with lawyers would permit police to effectively *black ban* certain lawyers and disadvantage their clients. The New South Wales Commission was of the view that the proceedings to remove a lawyer from the Roll for character reasons involve a lower standard of proof than in criminal proceedings; if police have evidence that a lawyer is involved in criminal or unethical conduct then it is imperative that they should launch a criminal or disciplinary action and that the only possible exception which they can envisage as a valid ground for denying the right of access to a lawyer is where there is in existence a warrant for arrest or other criminal process issued by a court or justice in relation to the lawyer sought to be contacted by the arrested person.

CHAPTER 11

A. Germany

11.1 The Federal Government announced in September 2001 that in its budget for 2002 the German government has earmarked an additional three billion marks for the fight against terrorism. The cabinet approved this move at its meeting on 19 September 2001 in light of the terrorist attacks in the United States. The anti-terror package contains additional funding for the armed forces, for the intelligence agencies to enable them to intensify terrorism-related investigations, additional funding for the Federal Border Guard, for the Office of the Prosecutor-General at the Federal Supreme Court, and for security checks. Speaking after the cabinet meeting on September 19, 2001 Finance Minister Hans Eichel stressed that there would be no deviation from the government's policy on financial consolidation. "What is at stake here is the security of our country here and now and for this reason the measures need to be financed now," Eichel said, and referred to this as a "moderate tax increase". The cabinet also approved measures aimed at improving the ability of the government to fight terrorist organizations and to increase domestic security. The cabinet approved the abolition of religious privilege in the law on private associations. Section 2, paragraph 2, item 3 of the law will be struck.¹ **In doing so the German government is responding not just to the terrorist attacks in the United States. Interior Minister Otto Schily announced a corresponding initiative on September 5. The law on private associations dates back to 1964. Experience accumulated since then has made this change necessary. It has been shown in the past that it is necessary to prohibit organizations (even in the case of religious organizations) if their purpose or activities —**

- run counter to the provisions of criminal law,
- are directed against the constitutional system of government, or
- disregard the idea of international understanding.

11.2 In the past religious and ideological organizations have not been subject to prohibition under the law on private associations. The abolition of religious privilege in this context does not constitute a restriction of religious freedom or a violation of the law on relations between church and state but relates to —

- fundamentalist Islamic organizations who do not reject the idea of perpetrating violence against persons of a different faith in order to impose their beliefs,

¹ A week later the Bundesrat approved the change in the law governing private associations. The Bill was due to be debated in the Bundestag in mid-October.

- organizations with profit-making or political objectives that claim for themselves the status of a religious or a belief-related organization
- religious sects that commit murders or engage in mass suicides (thus far this has always been in other countries).

11.3 The German government said in future it wanted to be able to prosecute persons who are members of terrorist organizations based in other countries, something that was not possible under the then current legal situation. The cabinet approved the addition of a new section 129 b to the German Penal Code. Thus far the forming of a criminal organization (section 129, Penal Code) and the forming of a terrorist organization (section 129 a, Penal Code) were criminal acts. However, these acts were not punishable under German law unless the organizations in question existed in some formal sense inside Germany. On September 19 the cabinet approved Section 129 b of the Penal Code (the forming of criminal and terrorist organizations abroad). The provisions of sections 129 and 129a would also apply to illegal organizations based abroad. It was explained that in December 1998 the European Union (EU) issued a directive to its members to ensure that involvement in a criminal organization based in an EU country or carrying out illegal activities there can be prosecuted in any EU member state. It was pointed out that the decision by the German government goes beyond this. It was considered that the terrorist attacks in the United States have shown that these rules have to be extended beyond the borders of the EU since it is the only way that it will be possible to fight international terrorism effectively.¹

11.4 The cabinet also discussed taking more rigorous action against money laundering. In a statement made on September 19 Finance Minister Hans Eichel said there was still a considerable need both nationally and internationally to detect and put a stop to covert money flowing to terrorist and other criminal groups. Hans Eichel referred to the Fourth Financial Market Promotion Bill, which meant that in future banks will have to create a modern risk-management system with computer search systems, to be imposed through the bank supervisory authority to ensure that it will be possible to check the business relations between banks and their customers. Eichel noted that it is only with computer searches that it is possible to filter out those accounts where there are irregularities in money movements. At the same time he proposed creating a special investigation unit to improve the ability to monitor suspicious money flows. At that stage there was only a central register for information on suspected criminal activities at the Federal Office of Criminal

¹ The Bundesrat approved the new section of the Penal Code on 27 September 2001.

Investigation. The special investigators would have to sift through the information that is collected there and decide what needs to be sent on to the public prosecutors' offices. Eichel also said there was a need to improve cooperation between the supervisory authority for the financial markets and investigative authorities.

11.5 It was announced on 8 November 2001 that Germany's governing parties adopted new anti-terrorism measures aimed at preventing potential terrorists from using the country as a base of operations.² It was explained that the package will provide for closer scrutiny of asylum seekers, with provisions for withdrawing the asylum status of anyone who endangers the security of the state.³ It was stated that it

² http://www.ict.org.il/inter_ter/frame.htm

³ On November 7 the German cabinet approved a draft bill against international terrorism (anti-terrorism law). Under the law (also referred to as the 'second security package' or the 'second anti-terror package') numerous security laws as well as regulations governing the status of foreign residents are to be amended to give security authorities the powers they need to protect the population and to facilitate data exchange between authorities. The aim of the anti-terrorism law is to keep potential terrorists from entering Germany. At the same time the law is intended to make it possible to detect extremists already living in the country more easily and to put a stop to their activities more rapidly. To this end the following measures are to be taken:

- biometric features are to be included on passports and personal ID cards,

was agreed that some of the measures adopted should apply only for a five-year period, after which time they would be subject to further parliamentary review, and that a controversial proposal to allow federal police to investigate individuals and carry out searches without a court warrant was dropped. Some of the measures included in the new package were:

- **Digital "fingerprints" may be printed in German passports to thwart counterfeiters.**
- **Refugees given asylum in Germany may have their status withdrawn if it is proven that they represent "a serious risk to internal security" or were guilty of crimes against humanity in their own countries.**
- **Police will have more power to check the identity and background of applicants for visas or asylum, and to expel anyone trying to mislead them.**
- **Federal officials may outlaw any religious organizations in Germany that abuses its status to engage in criminal activities.**

-
- more relevant information is to be made available to security authorities (e.g. personal data),
 - identity checking measures are to be improved in connection with issuing visas,
 - checks on persons and security-relevant activities are to be strengthened,
 - border checks are to be improved, and
 - activities on the part of foreign extremist organizations in Germany are to be stopped more rapidly.

Officials of the Federal Border Guard are to be used as sky marshals to prevent airplane hijackings. They are the only persons who will be allowed to carry firearms on civilian aircraft.

The first anti-terror package, approved by the cabinet in September, eliminated religious privilege in the law on associations and made it a criminal offence to form or be part of a terrorist organization in another country.

- Sentences will be reduced for principal witnesses in return for cooperation with police in terrorism cases.
- Armed "sky marshals" may be placed on airliners to prevent hijackings.

11.6 It was noted that the package follows previous anti-terrorism measures adopted on September 19 after the US attacks. Among these measures was the launching of investigations into members of foreign extremist organizations. It was explained that three of the September 11 hijackers had lived and studied in Hamburg, Germany, where US and German authorities believe a wider cell operated, and a number of militants suspected of links to the hijackers or to Osama bin Laden have been arrested since the attacks. It is considered that Germany, with its strong privacy laws, high levels of technology, and convenient location within the open-bordered European Union, has served as a transient base for terrorists for many years, and the authorities, sensitive to the country's Nazi past, have been reluctant to introduce measures that could be seen as an intrusion on the rights of citizens. It is believed that for this reason, the German police are less likely to use electronic surveillance on telephone calls than their counterparts in other countries. Security officials estimate that some 3 500 Arab militants live in Germany and raise significant sums of money for Islamist organizations, including Osama bin Laden's al Qaeda and the Palestinian group, Hamas and that there are a number of networks providing counterfeit documents and safe haven for militants.

11.7 The Federal German Government announced on 5 October 2001 that it intends to stop flows of funds which serve the purposes of terrorism and to establish transparency in financial transactions.¹ Federal finance minister Eichel presented a catalogue of measures to this end at a press conference. The aim is to uncover non-transparent, global flows of capital and financial transactions of criminal origin, as these harm the economy and are furthermore used to provide economic resources for terrorist purposes. The 2nd law for the promotion of the financial market (the

¹ See <http://eng.bundesregierung.de/frameset/index.jsp> On 2 October 2001 it was announced that at that stage a total of 214 bank accounts have been frozen in Germany in the implementation of financial sanctions against suspected terrorist Osama bin Laden and his followers. (See "Assets of suspected terrorists being frozen" <http://eng.bundesregierung.de/frameset/index.jsp>). According to an Economics Ministry spokesman, the volume of frozen assets was then more than 8 million marks.

- Two accounts were frozen under the Foreign Trade Act, which makes it possible to freeze accounts at German banks under exceptional circumstances.
- The remaining 212 accounts were frozen under an EU regulation which, in turn, is based on a UN resolution.

Finanzmarktförderungsgesetz), which the federal minister presented on 4 September 2001, already contains important measures to combat money laundering and the financing of terrorism. It was explained that it is intended to set up an accounts registry at the Federal Banking Supervisory Office (BAKred). The name of the account holder and the name of the bank in charge of the account are to be stored in this registry for all accounts and deposits held in Germany. Information on account balances and account movements will not be stored. This is intended to enable flows of funds which serve terrorism and money laundering to be tracked down and to facilitate the identification of illegal banking transactions. A similar facility exists in France. Such a registry is also planned in the Netherlands. A "Centre for financial investigations independent of legal proceedings" was also to be set up at the Federal Ministry of Finance. This centre will receive and evaluate all notifications of suspected money laundering activities. If the suspicion is corroborated by the centre's analysis, the case will be referred to the investigating authorities (public prosecutor's office), together with additional facts. The centre will thus function as a filter prior to initiating preliminary investigations in preparation for legal proceedings, at the same time contribute to rationalising administrative processes.

11.8 The centre was not to be an investigating authority but rather a competency centre at which personnel from various fields (customs, supervision of the financial market, prosecuting authorities together with bankers and chartered accountants) would work together. The centre would also analyse money laundering methods. The information gained were to be supplied to the banks subject to notification requirements, thus facilitating their efforts to identify cases of money laundering. The centre would also facilitate international cooperation to combat money laundering. Financial institutions would be required to establish suitable internal security systems employing modern computer technology to combat money laundering and financial fraud, so-called risk management systems with computer-based research systems. This is intended to enable the examination of business relations according to risk groups and conspicuous characteristics. The identification of customers is also to be improved, and companies with credit card business would need a licence. These companies would also be subject to ongoing surveillance by the Federal Banking Supervisory Office. This was intended to ensure compliance with the anti-laundering standards which apply in credit card business.²

² On 6 October 2001 the G-7 Ministers announced a Action Plan to Combat the Financing of Terrorism which contained the following information:
We, the G-7 Finance Ministers, have developed an integrated, comprehensive Action Plan to block the assets of terrorists and their associates. We pledge to work together to deliver real results in combating the scourge of the financing of terrorism.
More vigorous implementation of international sanctions is critical to cut off the financing of

11.9 Since 1971, the German criminal law has define terrorist crimes in particular. In 1971 the law against hijacks and attacks on aircraft, manslaughter, kidnapping, and taking hostages was introduced. In 1976 the formation of terrorist organizations and supporting and encouraging serious violent crimes were criminalized by the first anti-terrorism law and the 14th Amendment Act of the Criminal Law respectively. In addition, among the newly criminalized acts were the following: membership in or public advocacy, supporting of a terrorist organization, non-reporting of a planned terrorist crime, public exhibition or glorification of violence, inducement to criminal acts, approbation and rewarding of criminal acts, threatening criminal acts and feigning a criminal act. The criminal procedure was amended to facilitate the investigation of acts of terrorism. The law governing the arrest of terrorists was strengthened. The limitation and exclusion of defence counsel was also instituted. Police procedures were also amended: the Federal Criminal Agency (BKA) was given

terrorism. We are implementing UNSCR 1333 and UNSCR 1373, which call on all States to freeze the funds and financial assets not only of the terrorist Usama bin Laden and his associates, but terrorists all over the world. Each of us will ratify the UN Convention on the Suppression of Terrorist Financing as soon as possible. We will work within our Governments to consider additional measures and share lists of terrorists as necessary to ensure that the entire network of terrorist financing is addressed.

The Financial Action Task Force (FATF) should play a vital role in fighting the financing of terrorism. At its extraordinary plenary meeting in Washington D.C., FATF should focus on specific measures to combat terrorist financing, including:

- Issuing special FATF recommendations and revising the FATF 40 Recommendations to take into account the need to fight terrorist financing, including through increased transparency;
- Issuing special guidance for financial institutions on practices associated with the financing of terrorism that warrant further action on the part of affected institutions;
- Developing a process to identify jurisdictions that facilitate terrorist financing, and making recommendations for actions to achieve cooperation from such countries.

Enhanced sharing of information among financial intelligence units (FIUs) is also critical to cut off the flow of resources to terrorist organizations and their associates. We call on all countries to establish functional FIUs as soon as possible. The G-7 countries will all join the Egmont Group, which promotes cooperation between national FIUs, and turn around information sharing requests as expeditiously as possible. We also call on the Egmont Group to enhance cooperation among its members, to improve its information exchange with the FIUs in other countries, and to exchange information regarding terrorist financing. We encourage all countries to establish a terrorist asset-tracking center or similar mechanism and to share that information on a cross-border basis.

Financial supervisors and regulators around the world will need to redouble their efforts to strengthen their financial sectors to ensure that they are not abused by terrorists. We welcome the guidance by the Basel Committee on Banking Supervision on customer identification to stop the abuse of the financial system by terrorists and urge that it be incorporated into banks' internal safeguards. We urge the International Monetary Fund to accelerate its efforts, in close relation with the Financial Stability Forum, to assess the adequacy of supervision in offshore financial centers and provide the necessary technical assistance to strengthen their integrity.

We ask all governments to join us in denying terrorists access to the resources that are needed to carry out evil acts.

the right to investigate cases of terrorism; contact between lawyers and detainees were restricted (meaning that a lawyer suspected of conspiring with his/her client to commit further crimes could be dismissed as a defence counsel; written communication between lawyers and detainees was overseen by the court, though oral communication was not; installation of dividing panes where communications were conducted with detainees suspected of being terrorists and the *Kontaktsperre* (preventing any contact between imprisoned terrorists, their lawyers, visitors, and other prisoners) was legalized; a defence lawyer could be excluded from trial if he/she was suspected of being involved in the crime of the detainee. German police were given the rights to intercept telephones of suspects, open and read suspicious mail crossing the country's borders, set up street checkpoints in pursuit of suspected terrorists and detain for up to 12 hours anyone incapable of producing proper identification.

11.10 The German *Kontaktsperre*gesetz of 1977 entails that an order (confinement incommunicado or *Kontaktsperre*) can be made to prevent contact between detainees or by them with anyone else. The Act was passed after a number of terrorist incidents occurred, specifically the abduction and murder of Hanns Martin Schleyer and the murder of his driver and four policemen in September 1977 and the abduction of a Lufthansa flight shortly thereafter.³ The German Constitutional Court was petitioned to reinstate access by lawyers representing the detained Baader-Meinhof members. In refusing access to the detainees the German Constitutional Court held that in balancing the interests concerned it came to the conclusion that the re-introduction of access to the detainees by their lawyers would endanger the negotiations for the release of the abducted Dr Hans-Martin Schleyer to the highest extent.⁴ Section 31 of

³ His abductors demanded the release of a number of 11 terrorists who were serving sentences or were detained in Germany. A suspicion existed that the abductors of Mr Schleyer were supported if not led by the terrorists who were serving sentences or who were detained pending investigations. The suspicion consequently existed that contact between the abductors and the incarcerated terrorists, the release of whom the abductors demanded, was at least assisting in the promotion of their offence. In an attempt to prevent the loss of life of Mr Schleyer and to promote his release, an order was made by the Federal Minister of Justice which prohibited visitations and contact with the terrorists. The body of Mr Schleyer was, however, found on 19 October 1977. On 17 October 1977 four terrorists high-jacked a Lufthansa aircraft and demanded, inter alia, the release of the 11 terrorists which was also demanded by the abductors of Mr Schleyer.

⁴ Das Gesetz zur Änderung des Einführungsgesetzes zum Gerichtsverfassungsgesetz vom 30. September 1977 (BGBl. I S. 1877) - sogenanntes Kontaktsperregesetz - ist mit dem Grundgesetz vereinbar. (Beschluss des Zweiten Senats vom 1. August 1978 - BvR 1013, 1019, 1034/77)
... 1. Die angegriffenen Maßnahmen richten sich nicht gegen die beschwerdeführenden Anwälte, sondern gegen ihre Mandanten, deren Kontakt zu Mitgefangenen und zur Außenwelt vorübergehend unterbrochen werden sollte ...
Ob eine unter dem Gesichtspunkt des Art. 12 GG verfassungsrechtlich erhebliche

Beeinträchtigung der Rechtsposition des Verteidigers in Fällen der vorliegenden Art denkbar ist, bedarf hier indessen keiner Entscheidung; denn das Vorbringen der beschwerdeführenden Anwälte läßt bereits hinreichende Angaben darüber vermissen, inwiefern die angegriffenen Maßnahmen ihre Tätigkeit als Verteidiger überhaupt verhindert haben sollen. Wie das Bundesverfassungsgericht durch Beschluß vom 4. Oktober 1977 ... entschieden hat, sind Verteidigerbesuche bei inhaftierten Mandanten nach §§148 StPO nur zu Zwecken der Verteidigung zulässig ... Rügt dieser im Wege der Verfassungsbeschwerde, die gegen seinen Mandanten verhängte zeitweilige Kontaktsperre verletze ihn - den Verteidiger - in seinem Grundrecht der freien Berufsausübung, so genügt zur Begründung der Verfassungsbeschwerde nicht die pauschale Behauptung, die Tätigkeit, an deren Ausübung er gehindert worden sei, habe Verteidigungszwecken dienen sollen. Vielmehr bedarf es konkreter Angaben darüber, um welche Art von Verteidigungstätigkeit es sich handeln sollte und - soweit dies den Beschwerdeführer nicht ausnahmsweise zur Preisgabe wesentlicher Teile seiner Verteidigungskonzeption zwingt - weshalb sie gerade zu dem in Frage stehenden Zeitpunkt erforderlich gewesen wäre ...

3. a) Das Grundgesetz verwehrt dem Staat nicht schlechthin, verfassungsrechtlich geschützte Rechtsgüter auf Kosten anderer Güter, deren Bestand ebenfalls verfassungsrechtlich verbürgt ist, zu bewahren, mag es sich bei solchen Rechtsgütern um Grundrechte oder andere, verfassungsrechtlichen Schutz genießende Belange handeln. Diese Abwägung ist verfassungsrechtlich unausweichlich, wenn sonst die staatlichen Organe die ihnen nach dem Grundgesetz und der verfassungsmäßigen Ordnung obliegenden Aufgaben nicht mehr sachgerecht wahrnehmen können. Dabei ist nach der ständigen Rechtsprechung des Bundesverfassungsgerichts davon auszugehen, daß die verfassungsmäßige Ordnung ein Sinnganzes bildet, ein Widerstreit zwischen verfassungsrechtlich geschützten Belangen mithin nach Maßgabe der grundgesetzlichen Wertordnung und unter Berücksichtigung der Einheit dieses grundlegenden Wertsystems zu lösen ist ... In diesem Rahmen können auch uneinschränkbare Grundrechte Begrenzungen erfahren ...; denn schlechthin schrankenlose Rechte kann eine wertgebundene Ordnung nicht anerkennen ... Eine zum Schutz von Leib, Leben oder Freiheit unerläßliche, zeitweilige Beschränkung des Beschuldigten in der Ausübung seiner gesetzlichen Verfahrensrechte, aus der ihm kein erheblicher bleibender Nachteil erwächst, verstößt deshalb auch nicht gegen das Gebot fairer Verfahrensführung. Damit verbundene unvermeidbare Verzögerungen laufen dem Beschleunigungsgebot nicht zuwider. Auch im Bereich des Grundrechts aus Art.6 Abs.1 GG kann eine Güterabwägung der vorbezeichneten Art Beschränkungen rechtfertigen ...

a) Das Gesetz zur Änderung des Einführungsgesetzes zum Gerichtsverfassungsgesetz ermächtigt die staatlichen Organe, zum Schutz einer gefährdeten Person in Grundrechte solcher Gefangener einzugreifen, die zwar in der Regel die Gefahr nicht unmittelbar verursacht haben, von denen aber nach den vorliegenden Erkenntnissen eine gefahrerhöhende Einflußnahme auf die Ereignisse außerhalb der Haftanstalten zu befürchten ist. Dem zu begegnen, ist die Verhängung einer - absoluten - Kontaktsperre, also die Unterbrechung jedweder Verbindung der betreffenden Gefangenen untereinander und mit der Außenwelt, geeignet. Daß es auch erforderlich war, den staatlichen Behörden die gesetzlichen Mittel zur Anordnung und Durchführung einer solchen Maßnahme in die Hand zu geben, zeigen die Ereignisse im Entführungsfall Dr. Schleyer mit exemplarischer Deutlichkeit. Der Senat verweist insoweit auf die Ausführungen des Bundesministers der Justiz in dessen Antragsschrift vom 4./11. Oktober 1977, die - über den konkreten Fall hinaus - die Notwendigkeit einer solchen Regelung überzeugend aufzeigen. Solange die Gefahr besteht, daß bestimmte Gefangene, die Kreisen des organisierten Terrorismus zugerechnet werden, die verfassungsfeindlichen Zielvorstellungen ihrer Organisation aus den Haftanstalten heraus verwirklichen, zu diesem Zweck den Informationsfluß zu ihren noch in Freiheit befindlichen Gesinnungsgenossen aufrechtzuerhalten und unter den tatsächlichen Voraussetzungen des §§31 Satz1 EGGVG die Geschehnisse außerhalb der Anstalten zum Nachteil der gefährdeten Person zu beeinflussen suchen, toleriert die Verfassung im Interesse der Selbsterhaltung des Staates und der Erfüllung der ihm obliegenden Aufgabe, Leben, Gesundheit und Freiheit seiner Bürger zu schützen, das Instrument der Kontaktsperre ...

c) Die nach dem Gesetz zulässigen Maßnahmen belasten die betroffenen Gefangenen nicht übermäßig." (See <http://www.nadir.org/nadir/archiv/PolitischeStroemungen/Stadtguerilla+>

the *EGGVG (Einführungsgesetz zum Gerichtsverfassungsgesetz)* provides that where a real danger exists regarding the life, person or freedom of a person, and where grounds exist which justify a suspicion that a terrorist organisation poses such a danger and if it is necessary to prevent this danger, the discontinuation of all contact between detainees themselves and by them to the outside world, including written and oral contact with their defending legal representatives, may be ordered. Such an order only applies in regard to a detainee who is serving a sentence for an offence committed in terms of paragraph 129a of the Criminal Code (*Strafgesetzbuch*) or an offence identified in the paragraph in respect of which a warrant was issued on suspicion of him or her having committed such an offence. Such an order also applies in respect of detainees which are serving sentences on other offences. Determinations must be limited to certain detainees or groups of detainees if it would suffice to limit the aforementioned suspected danger.

11.12 Where an order is made in terms of paragraph 31 of the *EGGVG*, paragraph 33 makes provision that the authorities concerned may take the steps necessary to ensure discontinuation of contact. Where such an order is made, the following measures apply:

- legal representatives are appointed for detainees who have no legal representatives and the detainees have no choice concerning the appointment of a representative - however, where a detainee serves a sentence, ie if he or she does not face additional criminal charges, no legal representative has to be appointed;
- criminal proceedings are not interrupted by an order being made and judicial, prosecutorial and police investigations may continue - however a detainee may not be called as a witness in proceedings;
- the right of the detainee to have access to dockets is excluded in so far as the aim of the order would be jeopardised;
- a detainee, who is an accused, may only be interrogated if he or she and his or her legal representative, who under general provisions has a right to be present, waive the right to be present;
- the legal representative has no right to be present when the issuing (*Verkündung*) of a warrant for the detention of the detainee is announced but he or she must be notified of the announcement of the warrant. The judge must inform the legal representative of the essential results of the questioning of the detainee and of the decision taken

when informing the representative of the detention of the accused in so far as the order will not be jeopardised;

- orally conducted review proceedings of the remand in custody of the detainee (*Haftprüfung*) as well as other orally conducted proceedings which have to be conducted according to certain prescribed time limits have to be executed, in so far as the detainee is present, in the absence of the legal representative. An orally conducted review proceeding of remand in custody (*Haftprüfung*) has to be repeated on application by the detainee or his or her legal representative, at the cessation of the measures in terms of paragraph 33 also where the grounds set out in par 118(3)⁵ are not present;
- trial proceedings are not to be continued and if they have already commenced, they are not continued and may be interrupted for a period of up to 30 days;
- a referral for a psychological evaluation in terms of the Criminal Procedure Act (*Strafprozesordnung*) may not be carried out;
- where the detainee is involved in a criminal proceeding conducted against him or her, he or she has the right to approach the court or prosecution in writing.

11.12 In December 1985 paragraph 34a was added to the *EGGVG* in order to improve the procedural guarantees of the detainee affected by an paragraph 34 order.⁶ A legal representative must be assigned to serve as a contact person to the detainee. The legal representative is responsible for the legal advice of the detainee in so far as there is such a need resulting from the paragraph 34 order. He or she must, however, also safeguard the aims of the order.⁷ The contact person may assist in the criminal investigation by lodging applications and making suggestions which indicate such exonerating facts and circumstances demanding prompt clarification.⁸ The contact person is authorised to inform the court and the prosecution of findings made as a result of discussions held with the detainee, if the detainee consents to such information being made known. The contact person may bring applications on behalf of the detainee. The contact person is authorised to participate, with the consent of

⁵ Where the remand of a detainee in custody was maintained, he or she has a claim for a further oral proceeding only if the remand in custody lasted at least three months and two months have already lapsed since the previous oral proceedings.

⁶ Wilhelm Krekeler "Änderung des sogenannten Kontaktsperregesetz" 1986 *NJW* at 417.

⁷ Paragraph 34a(l).

⁸ Paragraph 34a(l).

the detainee, in those interrogations and criminal investigations in which a legal representative may not be present in terms of paragraphs 34(iii)(3), (4) and (5). The contact person is entitled to make contact with third persons in so far as these are necessary to perform those functions contemplated in paragraph 34a(I).

11.13 The President of the Regional Court (*Landgericht*) must assign a contact person within 48 hours after receiving the application for the assignment of such a contact person⁹ from the ranks of those legal representatives who are admitted in terms of the *EGGVG* Act in the area of the institution in which the detainee is detained. The defending legal representative of the detainee may not be assigned as a contact person. The President is not bound by prescripts in making the choice or assignment. He exercises his authority in terms of paragraph 21 of the Judicature Act (*Gerichtsverfassungsgesetz*).¹⁰ Third persons may not be informed about the person who is assigned as a legal representative except where it falls within the exercise of the legal representative's duties in terms of paragraphs 34a(I) and (II). The assigned legal representative must take over the duties of a contact person. The assigned legal representative may request the giving up his or her assignment, if important grounds are present.¹¹ A detainee does not have the right of choice to propose a particular lawyer as a contact person.¹² The detainee may only have oral contact with his or her contact person. Steps must be taken to prevent the delivery or exchange of written or other objects during conversations by the contact person and the detainee.¹³ The detainee must be informed of his or her right to apply for the assignment of a contact person and the other provisions of paragraph 34a(I) to (V) when the determination in terms of paragraph 31 is announced to him or her.¹⁴ The order loses its legal validity if it is not confirmed within two weeks after it was ordered.¹⁵ The criminal division of the regional appeal court (*Strafsenat des Oberlandesgericht*) has jurisdiction to confirm an order made by a state authority (*Landesbehörde*) of the district in which the state government (*Landesregierung*) has its seat and a criminal division of the Federal Supreme Court (*Bundesgerichtshof*) has jurisdiction if the federal Minister of Justice made the order.

⁹ Paragraph 34a(II).

¹⁰ Which provides as follows:

¹¹ Paragraph 34a(III). The only grounds are that the duties as a contact person creates an untenable situation and that when the assignment was made, it was an abuse of discretion.

¹² Paragraph 34a(IV).

¹³ Paragrapg 34a(IV).

¹⁴ Paragraph 34a(V).

¹⁵ Paragraph 35.

11.14 Concern was raised that the provisions of the Act creates conflict and that the relationship between the detainee's defending lawyer and that the assigned contact person is not regulated under the abovementioned Act.¹⁶ The defending lawyer retains his or her duty of defending the detainee during the confinement incommunicado. The contact person, on the other hand, is authorised and obligated to perform duties which constitute defending the detainee. The following questions are raised in this context:

- which communication possibilities exist under the Act between the contact person and the defending lawyer; and
- in which way can the danger be met that the activities of the contact person does not influence or jeopardise the concept of the defence of the detainee?

11.15 It was suggested that although the Act is silent in this regard, the conflict referred to may be removed if the right is at least granted to a detainee of applying at any stage for the setting aside of the assignment of the contact person.¹⁷

B. JAPAN

11.16 In 1986, the Japanese government established a new inter-ministry intelligence group composed of representatives from the Prime Minister's Office, the Foreign Ministry, the National Police Agency, the Public Agency, the Public Security Agency and the Defence Agency. Facing the threat of mounting international terrorism, the National Police Agency established the International Terrorism Countermeasure Division within the agency to cope with international terrorism. This division gathers information on the activities of international terrorists and co-operates with police investigation in Japan. In respect of criminal law and procedure, Japan did not enact any special legislation against terrorist crimes, because it has been thought that the existing criminal law could cover terrorist crimes. Therefore, terrorist crimes are treated as criminal offenses in the criminal law and other supplementary penal provisions. However, as Japan ratified some of the international conventions against terrorism, Japan amended its criminal code, making it possible to arrest terrorists who have committed crimes as provided for in international conventions such as a hijacking perpetrated overseas. In 1970 an Anti-hijacking Act was enacted, in 1974 an Act dealing with the punishment of acts performed against the safety of aircraft, and in 1977 an Act

¹⁶ Wilhelm Krekeler *NJW* at 418.

¹⁷ Wilhelm Krekeler *NJW* at 418.

against hostage taking was enacted.

C. The Russian Federation

11.17 The Criminal Code of the Russian Federation, which came into effect on 1 January 1997, established criminal liability for such crimes as attempts on the life of a statesman or public figure, attacks on internationally protected persons or institutions, gangsterism, putting means of transport and transportation networks out of commission, kidnapping, taking hostages, organization of or membership in illegal armed formations, attempts on the life of law enforcement agents and hijacking of aircraft, vessels or railway rolling stock. The chapter "Crimes against public safety" of the Criminal Code of the Russian Federation contains article 205, "Terrorism", which is defined as "causing the explosion or committing arson or other acts entailing risk of loss of human life, substantial damage to property or other consequences dangerous to society, if these acts are committed for purposes of disrupting public safety, terrorizing the population or influencing the adoption of decisions by the authorities, and also threatening to commit such acts for the same purposes". Article 205(2) of the Criminal Code of the Russian Federation lists the identifying signs (commission of such acts by a group of persons acting in collusion, or more than once, or with the use of firearms) which place terrorism, pursuant to article 15(5) in the category of especially serious crimes. In comparison with the criminal legislation previously in force, the Criminal Code of the Russian Federation has increased the number of criminal law provisions and broadened the interpretation of terrorism and its identifying signs.

D. LEBANON

11.18 Lebanon pointed out in its report to the Chairman of the Security Council Committee established pursuant to resolution 1373 of 2001 concerning counter-terrorism that Lebanon reaffirms its condemnation of terrorism in all its forms and its fixed commitment to international legitimacy and to the implementation of the terms of Security Council resolution 1373. Lebanon also said that it reaffirms its readiness to cooperate with the United Nations in the suppression of international terrorism in accordance with the norms of international law and the established principles of national sovereignty, but drew attention to the distinction between terrorism and resistance to foreign occupation, and noted its commitment to strive constantly to promote the principles of right and justice.¹ **Lebanon**

¹ See "Lebanon: We will not freeze Hizballah assets" November 6, 2001 http://www.ict.org.il/inter_ter/frame.htm where it was reported that Lebanon apparently will refuse any United States request to freeze the assets of the Hizballah organization. It was explained that Washington has included the Iranian-backed Shi'ite organization on a list of 22 foreign terrorist groups that will be subject to blockage of financial assets and transactions. The Lebanese Finance Minister Fuad Saniora reportedly said that the government regards Hizballah as a "resistance organization," and will take no steps against it, that the subject would be discussed at a cabinet meeting, but that the government would likely not accede to

remarked that in the preparation of its report Lebanon has based itself on the distinction, as made in United Nations General Assembly resolution 46/51 of 19 January 1991 and in the 1998 *Arab Convention for the Suppression of Terrorism*, between terrorism on the one hand and the legitimate right of peoples to resist foreign occupation on the other, as well as on the international conventions relating to terrorism to which Lebanon has acceded and on the provisions of Security Council resolution 1333 (2000) of 19 December 2000. On the question of what measures if any have been taken to prevent and suppress the financing of terrorist acts, Lebanon said that such measures are contained in the general measures adopted to combat money-laundering, such as Law No. 318 of 20 April 2001 and in the decision of the Governor of the Bank of Lebanon No. 7818 of 18 May 2001, whereby banks and financial institutions are required to monitor certain transactions and to elaborate on means to combat money-laundering activities, and activities for the financing of terrorism. Under Law No. 318, a special board of inquiry was formed with the task of conducting inquiries into transactions suspected of constituting money-laundering offences, those involving the illegal proceeds of crimes, and the terrorist crimes stipulated in articles 314 to 316 of the Lebanese Penal Code. On the basis of this law, the special board of inquiry has sought information from banks concerning any accounts held with them that belong to persons and entities included in the lists issued by the

the U.S. request. It is reported that he stated that Lebanon's stance is that there is a difference between defining terrorism and the groups that seek to liberate their countries, Lebanon's decision will be based on this differentiation, and Lebanon will not take any measure concerning Hizballah.

It was also noted that the American ambassador to Lebanon presented the American position at an emergency meeting on Friday with Lebanese foreign minister Mahmud Hammud who expressed outrage at the US request, saying that Hizballah was responsible for Israel's withdrawal from a 9 mile-wide buffer zone along the Lebanese-Israeli border. It was explained that he said that Lebanese resistance has expelled Israel's occupation army from south Lebanon last year, that the Lebanese are proud of it, and that they view the resistance as a legitimate means to liberate their land from Israeli occupation, they hold fast to it, with the support of Syria and the rest of the Arab world. It was also explained that the impasse is indicative of the difficulties faced by the United States in reaching any kind of broad-ranging support for its efforts to block terrorist fundraising. It was stated that while the Bush administration has achieved some limited success in the Gulf states, the situation is more complicated in the rest of the Middle East, where militants are judged by their stated goals rather than by the means they use to achieve these goals, and that organizations such as the Lebanese Hizballah and the Palestinian Hamas are seen by many in the Arab world as the vanguard of the Islamic struggle to exterminate Israel; and any means to this end are seen as justified. In early October, the United States reportedly asked the Lebanese government to hand over more than 40 suspected terrorists, many of them Hizballah operatives, and that Lebanese officials said the government refused the US request, stating that it would not relay information on those living in the country. It was noted that the officials said, Beirut would not extradite Lebanese residents believed by the United States to be involved in terrorism, that their position is that there is absolutely no way that they could agree on considering the resistance and those who resisted Israel as terrorists, and that Lebanese Information Minister Ghazi Aridi said that he hopes the United States and others would consider this Lebanese position. It was pointed out that the Lebanese decision not to cooperate with the United States is seen as reflecting Syrian policy as well, since the Beirut government is controlled in matters of foreign policy by Damascus.

Security Council with a view to freezing or confiscating them. Lebanon reported that no accounts belonging to persons or entities included in the lists have been found.

11.19 On the question of what offences and penalties are provided for in Lebanon, the report stated that penalties for terrorist offences are provided for by articles 314 to 316 of the Lebanese Penal Code. Articles 217 to 222 of the Code penalize anyone who incites, participates in or is an accessory to the commission of crimes, including terrorism. The report set out that Lebanese jurisprudence regards the person who finances a crime as an accessory, and the penalty for the accessory is the same as for the perpetrator when it is evident that without his assistance the crime would not have been committed. This rule is applied whether an act of terrorism is financed within or by way of Lebanese territory (such as financing through a bank in Lebanon). It is sufficient for this purpose if one of the elements of a crime of terrorism or attempted terrorism is committed in Lebanese territory, or if a preparatory act occurs there, or if its outcome occurs or is expected to occur there, and it makes no difference whether the person providing funding is Lebanese or not (Penal Code, article 15). The Report explained that the same provisions apply to Lebanese nationals who finance terrorist operations from abroad, even if the acts are committed outside Lebanese territory (Penal Code, article 20) and they also apply to all foreigners or stateless persons residing or present in Lebanon who finance terrorist activities abroad if extradition is not requested or not granted. The Report said that it should be noted that by Law No. 57/99 the Lebanese Government acceded to the *Arab Convention for the Suppression of Terrorism* and under the Convention, the States parties undertake to suppress terrorist crimes in accordance with their domestic laws and internal measures and to prevent the financing of terrorist elements (article 3).

11.20 On the question of what legislation and procedures exist for freezing accounts and assets at banks and financial institutions, Lebanon pointed out that Law No. 318 of 20 April 2001, which relates to the suppression of money-laundering, establishes an independent special board of inquiry that has a judicial character and may have banking secrecy waived with respect to accounts held with banks and financial assets with financial institutions if those holding them commit offences punishable under the Law (including terrorist activities) and the funds in question may thus be frozen or confiscated (Penal Code, article 98; and Law No. 318/2001, article 14). The board may ask the Office of the Special Public Prosecutor to prosecute those responsible for committing such acts in the criminal courts. The report also noted that on 15 May 2001, the Bank of Lebanon issued its decision No. 7818, which instituted a system for monitoring financial and banking operations in order to combat money-laundering. It

set out rules which banks and financial institutions operating in Lebanon have to comply with to prevent money-laundering activities. A staff of auditors and investigators has been provided to the special board of inquiry as well as a special administrative unit, and advocacy and information campaigns are being conducted among the public.

11.21 On the question of what legislation or other measures are in place, and whether there are offences in Lebanon prohibiting the recruitment of terrorist groups and the supply of weapons to terrorists and what other measures help prevent such activities, Lebanon noted that there are Lebanese laws targeting these issues. The Report point out that article 314 of the Penal Code, the *Arms and Ammunition Law* (No. 137/59) and Law No. 318/2001, stipulate that anyone suspected of a punishable offence related to terrorism or of illegal possession of arms and ammunition must be investigated, arrested and prosecuted, and penalties are imposed whenever persons involved in terrorist activities commit acts that constitute terrorist offences as understood by Lebanese law. The report also noted that the security agencies are authorized to assist the Office of the Public Prosecutor in preventing terrorist activities and thwarting the elaboration of schemes against the security and safety of the international community and local society.

11.22 On the question of what other steps are being taken to prevent the commission of terrorist acts and, in particular, what early-warning mechanisms exist to allow exchange of information with other States, Lebanon pointed out that there is ongoing and direct coordination between the security services of the Ministry of the Interior and the security attachés accredited to Lebanon in the various embassies of other States. The Report noted that an exchange of information on terrorist activities was under way before 11 September 2001, and such cooperation still exists between Lebanese security agencies, especially the Interpol Division in the Office of the Director-General of the Internal Security Forces, and their counterparts in other States.

11.23 Lebanon said on the issue of legislation or procedures which exist for denying safe haven to terrorists, such as laws for excluding or expelling individuals, that legislation promulgated on 10 July 1962 provides that entry to, residence in and departure from Lebanon will be regulated in such a way as to prevent entry unless a person is provided with the documents and visas required by law. In accordance with the Code of Criminal Procedure, all security agencies are required to conduct the investigations required for the arrest of suspects against whom domestic or

international arrest warrants or search and inquiry orders relating to terrorist or other offences have been issued. The Report explained that such persons are arrested in Lebanese territory or on attempting to enter or leave it by way of the posts maintained by General Security, and they are remanded to the relevant jurisdiction. The provisions of the Criminal Code with respect to the punishment of the concealment of offenders against whom judicial orders or verdicts have been issued are applied to terrorist offenders, and the laws relating to aliens allow the Office of the Director of General Security to deport them from Lebanese territory. The extradition of aliens charged with an offence regarded as a terrorist offence under Lebanese law may be requested in accordance with the terms for extradition set out in the Penal Code and in accordance with bilateral agreements. Such persons may also be deported by administrative action taken by the Office of the Director of General Security. If such offenders have committed a terrorist act on Lebanese territory they are tried by the Lebanese courts and must be expelled from the country after serving or discharging the penalty imposed. Lebanon said that in general, Lebanon does not provide a safe haven for those who finance, direct, support or commit acts of terrorism, especially those stipulated in Security Council resolution 1333 (2000), and it does not permit them to enter its territory.

11.24 Lebanon responded to the question on what legislation or procedures exist to prevent terrorists acting from their territory against other States or citizens that Lebanese laws require the investigation and arrest of any fugitive charged with or convicted of an offence punishable under Lebanese legislation or under the provisions of the international conventions to which the Lebanese State has acceded and which got the force of law. Lebanon remarked that the Lebanese State is committed to applying the provisions of the protocols and conventions in the domain of the suppression of terrorism to which it has acceded to date. Lebanon pointed out that the *Arab Convention for the Suppression of Terrorism*, to which Lebanon has acceded, provides in article 3(i) that all the States parties undertake to prevent the use of their territory for the planning, organization or commission of terrorist offences and to prohibit terrorist elements from residing in their territory.

11.25 On what steps have been taken to establish terrorist acts as serious criminal offences and to ensure that the punishment reflects the seriousness of such terrorist acts, Lebanon said that Lebanese legislation impose penalties for terrorism that can include the death penalty. The report said that a penalty of hard labour for life can be imposed, and that the penalty becomes a death sentence if the terrorist act causes the death of a person, or the partial or total destruction of a building in which a

person is present, or the destruction, even the partial destruction, of a public building, industrial establishment, ship or other installation, or the disruption of information, communications or transport. The report noted that examples of the suppression of terrorist acts include Lebanon's past experience of a bloody clash with members of the Ansar group in northern Lebanon in early 2000 in which most of the members of the organization were arrested, and that they were being tried before the Judicial Council.

11.26 On the question of what procedures and mechanisms are in place to assist other States, Lebanon responded that under the supervision of the Special Public Prosecutor, the services of the Judicial Police have mobilized all of their resources in order to give the requesting State all the information or data available to them on persons suspected of committing terrorist acts. The Report explained that they undertake the investigations necessary to obtain the information required concerning travel documents, means of communication, movements, criminal records, etc. Lebanon pointed out that it should be said that after the events of 11 September 2001 the central criminal research services and the international (Interpol) liaison division provided to all the many countries who submitted requests through their Interpol divisions in those countries or their diplomatic missions, and the Bank of Lebanon has also cooperated with the authorities in various foreign countries for the suppression of money-laundering, including the laundering of proceeds of terrorist crimes.

11.27 On the question of how do border controls in Lebanon prevent the movement of terrorists, how do their procedures for issuance of identity papers and travel documents support this, and what measures exist to prevent their forgery etc, Lebanon stated that the border control authorities, especially General Security, have to date dealt with many cases of forgery of foreign passports. Their report said that there are many examples of how action is taken in this matter, and generally, the General Security arrests the bearer of a false passport and hands him or her over to the courts, and contact is made with the embassy of the country whose passport has been forged in order to inform it of the documents found and of the investigations under way.

11.28 On the question of what steps have been taken to intensify and accelerate the exchange of operational information, Lebanon stated that there is direct coordination of security officials in Lebanon and the security attachés at the embassies accredited to the country and through the Interpol Division in the Office of the Director-General of the Internal Security Forces. It was also noted that in accordance with international

law, the exchange of information takes place through Interpol in accordance with the principles set forth in the ICPO-Interpol Constitution. Cooperation in judicial matters takes place in accordance with the provisions of national law and pursuant to the principle of reciprocity and international cooperation in meeting requests for judicial assistance and the extradition of offenders in the event where there is no bilateral agreement, and where there is a bilateral agreement, then extradition takes place in accordance with the provisions of that agreement.

11.29 Lebanon noted that in the implementation of the *Arab Convention for the Suppression of Terrorism*, there is ongoing cooperation between the States parties and through the secretariat of the Council of Arab Ministers of the Interior in the exchange of information, in the investigation and arrest of suspects or convicts, in the extradition of offenders, and in meeting requests for judicial assistance and cooperation with respect to all the terrorist offences identified in the Convention. The report explained that this is also the case with regard to the 10 international conventions on terrorism to which Lebanon has acceded, the country being anxious to implement all the provisions of these conventions in regard to cooperation in combating terrorist acts.

11.30 On the issue of what are the Lebanese Government's intentions regarding signing and/or ratifying the conventions and protocols, Lebanon said it has signed and has acceded to 10 of the 12 conventions for the suppression of terrorism adopted by the United Nations and its specialized agencies. It noted that Lebanon was in the process of acceding to the two conventions that it has not signed up to that time, namely the *International Convention for the Suppression of Terrorist Bombings* of 15 December 1997 and the *International Convention for the Suppression of the Financing of Terrorism* of 9 December 1999. It also pointed out that in March 1999 the Lebanese National Assembly authorized the Government to ratify the *Arab Convention on the Suppression of Terrorism*. Lebanon stated that it is committed to implementing the conventions and protocols to which it has acceded or to which it is in the process of acceding in the knowledge that international cooperation can assist in the proper implementation of these conventions.

11.31 Lebanon explained on the question what legislation, procedures and mechanisms are in place for ensuring asylum-seekers have not been involved in terrorist activity before granting refugee status that Lebanese laws on political asylum prohibit refugees admitted to Lebanon from engaging in any political activity whatsoever. Lebanon remarked that terrorist activities of whatever kind will thus

cause them to forfeit their refugee status and make them subject to legal prosecution like any other resident of Lebanese territory. The right of asylum is granted only by decision of a committee whose members represent the ministries of the interior, justice and foreign affairs, and its decision is taken by a vote to grant or deny asylum.

11.32 Lebanon said on the question of what procedures are in place to prevent the abuse of refugee status by terrorists and the details of legislation and/or administrative procedures which prevent claims of political motivation being recognized as grounds for refusing requests for the extradition of alleged terrorists that legislation permits the extradition of a refugee in accordance with the provisions of articles 30 to 36 of the Penal Code. Lebanon noted that in such a case, the State that wishes to extradite a refugee must compile a judicial extradition dossier covering the legal aspects of the issue and submit it to the Lebanese judicial authorities, which are authorized to decide on the request.

11.33 Amnesty International remarked in 1997² that unlike the civil war period, when the state authority and the rule of law all but collapsed, it was then possible for the Lebanese Government to promote, protect and ensure respect for human rights in accordance with the rights and guarantees laid down in Lebanese law and the Constitution, and that, in addition, there were now enforceable mechanisms in place for Lebanon to comply with its obligations under international human rights treaties, such as the ICCPR. Amnesty International said that the fact that Lebanon submitted its second periodic report to the 59th Session of the Human Rights Committee is a positive step towards fulfilment of the country's obligations under international law, and may be regarded as a reaffirmation by the Government of the need to implement the ICCPR in practice. While welcoming this important step, Amnesty International considered that further measures had to be taken in order to bring law and practice into line with the ICCPR's provisions. Amnesty International also reported that it has also called on Lebanon to consider ratifying other international human rights treaties such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the First and Second Optional Protocols to the *International Covenant on Civil and Political Rights*.

11.34 Amnesty International pointed out that respect for individuals' rights and freedoms is enshrined in the Lebanese Constitution of 1943 and was further affirmed

² Amnesty International Report - MDE 18/19/97 October 1997: Lebanon Human Rights Developments and Violations, see <http://www.amnesty.org/ailib/aipub/1997/MDE/51801997.htm>

in amendments introduced after the war and that paragraph (c) of the preamble added to the Lebanese Constitution on 21 September 1991 provides that: “Lebanon is a democratic parliamentary Republic, based on respect for public freedoms, foremost among which is freedom of opinion and belief, and on social justice and equality of rights and obligations among all citizens without distinction or preference”. Amnesty International furthermore noted that Lebanese law provides for elaborate guarantees designed for the preservation of individuals' rights and their protection from any act of arbitrary deprivation of their freedoms, and that while acknowledging the improvement in the overall human rights situation in Lebanon during the post-war era, Amnesty International was concerned that there are clear disparities between the rights enshrined in the Constitution and international human rights standards and the guarantees provided by Lebanese law on the one hand, and human rights practices on the other. They said that reports of human rights violations committed by the Lebanese political or judicial authorities had been of continuing concern to Amnesty International since the end of the civil war in 1990.

11.35 Amnesty International noted that their specific concerns with regard to the current human rights situation in Lebanon included-

- waves of arbitrary arrests and detention of suspected political opponents;
- allegations of torture and ill-treatment which have not been fully investigated by the authorities;
- trials of political detainees which fail to meet fair trial standards;
- the 1994 legislation expanding the scope of the death penalty, and the carrying out of 12 executions since then.

11.37 Amnesty International stated that the *International Covenant on Civil and Political Rights* (ICCPR) and other international treaties to which Lebanon is a party prohibits arbitrary detention and requires the authorities to inform pre-trial detainees of the charges against them and their rights, and to grant such detainees prompt access to the outside world.³ Amnesty International noted that there is no administrative or preventive detention under Lebanese law and according to the Code of Criminal Procedures (CCP) no arrest or detention may be carried out by any force in the absence of an explicit order from a competent judicial authority. Amnesty International explained that the CCP strictly limits the right to order the arrest of a

³ Article 9 (1) of the ICCPR states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by the law”.

person or persons to three judicial authorities: a) Public Prosecutors; b) Examining Magistrates; and c) Courts of Law; (CCP Articles 10 and 11) and in investigation and execution of arrest warrants, the judiciary is assisted by judicial officers within the police, the gendarmerie, and other officials prescribed by the law (CCP Article 12). Amnesty International remarked that article 105 of the CCP states that detainees should only be arrested by warrant which should be signed by a judge or examining magistrate and that article 106 stipulates that the arrest warrant should include the offence and whether it is a misdemeanour, or a felony, and note the relevant penalty prescribed by the law. Amnesty International explained that under Article 102 of the CCP, the examining magistrate or, if this is not possible, another judge, must question an arrested person within 24 hours; otherwise the Prosecutor-General should order his release, and that article 103 provides that, if a defendant arrested under an arrest warrant is not questioned within 24 hours or is not brought before the Prosecutor General, his or her arrest is considered an arbitrary act and the official responsible will be prosecuted for deprivation of personal freedom under Article 368 of the Penal Code.

11.38 Amnesty International noted that the detainee's right to confidential access to his/her lawyer is guaranteed under Article 73 of the CCP, that article 427 requires that detainees should be held only in recognized places of detention and that Article 428 requires the immediate release of any detainee held without a proper arrest warrant. Amnesty International pointed out that notwithstanding and contrary to the provisions of Lebanese constitution and Lebanon's obligations under international human rights standards, the Lebanese authorities continue to arbitrarily arrest people for expressing or disseminating critical opinions. Amnesty International reported that arrest and detention procedures have consistently violated the guarantees laid down in the CCP and since the end of the civil war in 1990 until the time of their report, hundreds of people have been arrested for political reasons or on security grounds, by the army, security forces, military police, and Syrian military personnel in Lebanon, these arrests falling into three categories:

- the arrest and detention of prisoners of conscience and possible prisoners of conscience;
- waves of arbitrary arrests and detentions following politically motivated acts of violence, which target large numbers of a particular group or groups;
- the arrest, interrogation and detention outside proper legal procedures of Lebanese citizens by Syrian military or intelligence personnel in Lebanon.

11.39 Amnesty International noted that waves of mass arbitrary arrests and detentions have frequently followed politically motivated acts of violence. Amnesty International pointed out that it recognizes that the State has both a responsibility and a duty to bring to justice those responsible for acts of violence, however, the scope of arrests and the manner in which they were carried out has raised a number of concerns: in particular the Lebanese Government's failure to follow due legal procedure as prescribed by Lebanese law and international standards and the arbitrary character of these arrests which did not give sufficient regard to the right to liberty and security of person as provided for by Article 9 of the ICCPR and Lebanon's own legislation.

11.40 Amnesty International said that many aspects of these and similar waves of arrests contradict Lebanon's obligations under Article 9 of the ICCPR which prohibits arbitrary arrest or detention, as well as Lebanese legislation. Amnesty International noted that the fact that most of those arrested in connection with the church bombing of 1994 and the minibus bombing of 1996 were eventually released without charge suggests that most of those detained were arrested solely because of their political affiliation, rather than because evidence pointed to their involvement in the attack. Amnesty International pointed out that the majority of arrests were carried out without any arrest warrant by the military or military intelligence, detainees were kept in incommunicado detention without access to lawyers. Amnesty international stated that detainees in the church bombing case were held in the Ministry of Defence building at Yarzeh, which was not a recognized place of detention at that time and that they were not brought promptly before a judge to challenge the lawfulness of their detention.

11.41 Amnesty International reported that most of those arrested in December 1996 and held in the Ministry of Defence were held outside any judicial framework as no judges were involved in their interrogation, no formal charges were brought against them, and no case files submitted to any court in relation to them. Amnesty International stated that it was not aware that any *habeas corpus* remedies were made available to them during their unlawful detention. Amnesty International considered that incommunicado detention without access to lawyers and family facilitates the use of torture as does the failure to observe the procedures laid down by the Lebanese CCP.

11.42 Amnesty International pointed out that international human rights treaties, to

which Lebanon is a state party, prohibit torture and ill-treatment.⁴ Amnesty International further pointed out that article 401 of the Lebanese Penal Code forbids torture and provides for punitive measures against officials found responsible for torture or ill-treatment, but that the fact that arrests are sometimes carried out by forces with no legal authority and the routine use of incommunicado detention have nonetheless, placed detainees at risk of torture or ill-treatment. Amnesty International remarked that reports of torture and ill-treatment received by them relate to both political and criminal detainees and that torture may not be routine practice but some groups are more likely to face torture because they are usually more targeted by the authorities. Amnesty International said that it has repeatedly called on the Lebanese authorities to establish a prompt impartial and independent investigation into all reports and allegations of torture, as well as deaths in custody and that the methods and results of these investigations should be made public and anyone responsible for such abuses should be brought to justice.

11.43 Amnesty International stated that the International Covenant on Civil and Political Rights spells out the minimum guarantees to be observed for ensuring a fair trial for any person(s) charged with a criminal offence and that article 14 of the ICCPR provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. Amnesty International also noted that the article further stipulates that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law, and that article 14(3) provides that in the determination of any criminal charges against him, everyone shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him, to have adequate time and facilities for the preparation of his defence and to communicate with a counsel of his own choosing, to be tried without delay, and, not to be compelled to testify against himself or to confess guilt.

11.44 Amnesty International pointed out that as far as Lebanese legislation is concerned, the Lebanese judicial system provides for trial of suspects within the requirements of fairness and due process of law, such as under article 20 of the

⁴

Amnesty International noted the following: “Article 7 of the *ICCPR* stipulates that: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. The *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, passed without a vote by the United Nations General Assembly on 9 December 1988, states: ‘No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.’”

Lebanese Constitution⁵ and in addition to guarantees provided by the law for the accused in the pre-trial detention, the CCP also provides for the right of the accused to have guaranteed access to a lawyer. Amnesty International explained that under CCP Article 70 the accused may have a lawyer of their choice present with them when they appear before the examining magistrate, who should inform the accused of their right not to answer any questions without the presence of their lawyer, and if the accused are not able to appoint a lawyer of their choice, the examining magistrate should appoint one for them through the Bar Association.

D. Turkey

11.45 Amnesty International reported in 1997 that Turkey's amendment to detention procedures enacted that year was unlikely to prevent torture and that it actually differed little from an earlier draft described by the European Committee for the Prevention of Torture (ECPT) as "unacceptable".⁶ **Amnesty International reported that the amendment became law on 6 March and was announced by the Turkish Government as a measure to combat torture and ill-treatment and explained that the new law substantially shortened the maximum terms of police detention from 30 days to 10 days in provinces under a state of emergency legislation, and from 14 days to seven days throughout the rest of the country. Furthermore, people detained for offences within the jurisdiction of State Security Courts were to be permitted access to legal counsel after the first four days' detention.**

11.46 Amnesty International remarked: "Although we welcome the long-awaited reduction in detention periods, the provisions of this law are insufficient in scope to combat what has become an ingrained system of abuse," and "We also regret that our call for an end to incommunicado detention has not been answered." Amnesty International remarked that unfortunately, there is nothing in this law to support Deputy Prime Minister and Foreign Minister Tansu Çiller's claim that "from now on, Turkish norms conform with European norms on detention periods". Amnesty International noted that neither European human rights law nor international human rights law, endorse four days' incommunicado detention and that the ECPT, which has repeatedly found instruments and victims of torture during its visits to Turkish

⁵ Which provides that: "[t]he Judicial power shall be entrusted to the courts in their various instances and jurisdictions within the limits of a statute established by law and shall provide protection to judges and litigants. The law shall determine the judicial guarantees and limits. The judges are independent in the exercise of their functions ...".

⁶ "Unacceptable" law on detention procedures unlikely to prevent torture see <http://www.amnesty-usa.org/news/1997/44401897.htm>

police stations since 1990, was clear on this issue when discussing an earlier draft of this law: "... access to a lawyer shall continue to be denied for four days; this is not acceptable. The possibility for persons taken into police custody to have access to a lawyer from the outset of their deprivation of liberty is a fundamental safeguard against ill-treatment". Amnesty International pointed out that detainees are frequently not registered for the first few days, and in this case four days of incommunicado detention becomes a week - ample opportunity to inflict pain and hide the evidence. Amnesty International pointed out that rape in custody is a frequent allegation and that the new provisions will continue not only to expose detainees to such risks but also to conceal and confuse the evidence.

11.47 Amnesty International remarked that it would continue to press for a comprehensive package to tackle torture and that this should include access to a lawyer at an earlier stage; a clear definition of access so that the detainees have continuous and free access to a lawyer throughout custody and interrogation; practical remedies to ensure that access is respected (in the early 1990s those detained for political offences still had the right on paper to see a lawyer but this was routinely denied by police, gendarmes and prosecutors alike while courts and government looked on impassively); measures to protect children from extended incommunicado detention and torture; and as a safeguard against the newly established practice of "disappearance", explicit and detailed instructions of how relatives are to be promptly informed of detentions and of what records (open to inspection by lawyers and families) will be kept of detentions.

11.48 Amnesty International pointed out that they urged changes in the draft legislation on police detention in December 1996.⁷ And that they urged the Turkish parliament to amend the draft legislation on police detention and then to make it law without delay noting that the legislation is urgently needed, but that it was seriously defective. Amnesty International remarked that it is time that Turkey's democratic institutions made their mark on the question of human rights and that this was their opportunity. Amnesty International explained that the new law proposed that detainees suspected of political offences can be held for four days incommunicado, but that the detention should be extendable to seven days on the order of a judge, with access to a lawyer after the first four days, and in the provinces under state of emergency, the maximum detention period can be further extended to 10 days on the order of a judge. Amnesty International pointed out that the European Committee for the Prevention of Torture described the planned reduction in maximum police

⁷ <http://www.icomm.ca/aiusa/news/1996/44418596.htm>

detention periods as "a significant step in the right direction", but was categorical in describing the four days' incommunicado detention envisaged in the new bill as being "not acceptable" since access to a lawyer is the most effective safeguard against ill-treatment and torture.

11.49 Amnesty International noted that the European Court of Human Rights found that Turkish security forces were responsible for the torture of Zeki Aksoy in detention in November 1992 who was held in police custody for 14 days in Mardin, southeast Turkey, where he was subjected to beatings, electric shocks, hosing with cold water and being suspended by his arms which were tied behind his back. Amnesty International pointed out that the court ruled that this treatment amounted to torture, that the length of detention was excessive, and that insufficient safeguards were provided. Amnesty International stated that it saw the proposed legislation as a genuine effort by the Turkish Government to tackle torture, but believed that in order to make this legal change not just a gesture but a decisive break with the past it must contain the following additional elements:

- Detainees must have access to their lawyer at an earlier stage than the planned four days, which cannot be considered as fulfilling its obligation to provide "prompt access" (UN Basic Principles on the Role of Lawyers, Principle 7).
- The law must clearly define that access so that the detainee will have continuous and free access to a lawyer throughout custody and interrogation, should the detainee so wish.

11.50 Amnesty International pointed out that it stated in its report on Turkey *No security without human rights* that the most frustrating aspect of Amnesty International's work on Turkey over three decades has been to see the factors which cause the high incidence of human rights violations persist unchanged, that these factors have been the focus of Amnesty International's work on torture, they are contributing to the increasing incidence of "disappearances" and extrajudicial executions and are-

- extremely long periods of police detention;
- incommunicado interrogation;
- the concealment of abuse through false medical reports;
- official refusal to investigate allegations of human rights violations;
- the almost total impunity of the security forces responsible for

- violations; and
- a legal and judicial framework which sanctions these practices.

11.51 Amnesty International noted that it is widely recognized that lengthy incommunicado detention in police custody, especially before a detainee is brought before the courts, provides a prime opportunity for torture and can create the circumstances in which "disappearances" occur. Amnesty International pointed out that the maximum detention period for people detained under the Anti-Terror Law was 30 days in the 10 provinces under state of emergency and 15 days in the rest of Turkey and that not even those who advocate extended police detention in Turkey are able to offer a credible explanation of why police and gendarmes need to hold people for up to four weeks. Amnesty International stated that most detainees report that interrogation only takes place in the first few days and that it is difficult to avoid the conclusion that long periods of detention are designed primarily to allow time for wounds inflicted by torture to heal. Amnesty International noted that as a safeguard against arbitrary detention, detainees have a right to have the grounds for their arrest promptly examined by a judge, under Article 5 (3) of the European Convention on Human Rights, to which Turkey is a party and that an additional safeguard against arbitrary detention, torture and "disappearance" is found in Article 5 (4) of the European Convention on Human Rights.¹

11.52 Amnesty International noted that Turkey has consistently failed to implement this guarantee and that the Turkish authorities defend prolonged detention - as they defend so many institutions which violate human rights - on the grounds that it is necessary to combat terrorism. Amnesty International noted that this argument was examined in detail by the Commission of Human Rights of the Council of Europe in October 1995 and that while recognizing the emergency situation in southeast Turkey, the Commission questioned the necessity for prolonged detention without judicial control. Amnesty International stated that the Commission noted that there are no safeguards against torture in Turkey for prisoners held under the Anti-Terror Law, such as the remedy of habeas corpus or the right of access to lawyers, doctors,²

¹ "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

² See also <http://www.xs4all.nl/~kicadam/kurdistan/phr.html> Twee jaar lang heeft de Physicians for Human Rights (PHR) materiaal verzameld over de schendingen van de mensenrechten in Turkije. De PHR heeft haar onderzoek onlangs gepubliceerd. In 'Torture in Turkey & its unwilling accomplices' wordt de medeplichtigheid van artsen aan de mishandelingen van arrestanten door de Turkse veiligheidsdiensten nauwgezet gedocumenteerd. De jurist en politicoloog Manfred Wiegandt geeft een impressie van het boek in het onderstaande artikel.

friends or family members.

"The individual may therefore, to a large extent, be cut off from the outside world for a period of time which can lend itself to abuse... In these circumstances, the Commission is of the opinion that, despite the serious terrorist threat in Turkey, the measure which [allows detention] for 14 days or more without being brought before a judge ... exceeded the Government's margin of appreciation and could not be said to be strictly required by the exigencies of the situation."

11.53 Amnesty International stated that the Turkish Government was unable to bring safeguards to the Commission's attention because there are none, and indeed Turkey has done nothing to implement the decision of the Commission and detainees continued to be held incommunicado, at the mercy of their interrogators, for up to one month, they have no access to their lawyer, to a doctor, or to their relatives and when they are taken from their cells for interrogation, they are almost invariably blindfolded, making it difficult for them to identify their torturers. Amnesty International pointed out that the UN Special Rapporteur on torture has recommended that such incommunicado detention should be made illegal and that this is because secrecy breeds torture and other abuses. Amnesty International stated that incommunicado detention hides evidence and excludes potential witnesses.

Martelen (in Turkije, red.) wordt vergemakkelijkt door de beperkingen van het recht op een eerlijk proces en de vrijheid van meningsuiting. De regering intimideert artsen opdat zij martelingen niet rapporteren. Routinematig martelen gedurende de incommunicado-detentie vindt voornamelijk plaats in Turks-Kurdistan. In provincies waar de uitzonderingstoestand van kracht is, kun je 30 dagen zonder enig contact met de buitenwereld (incommunicado) gedetineerd worden. Het is dan niet toegestaan familie of een advocaat op de hoogte te brengen van je arrestatie. Door marteling verkregen verklaringen worden vaak als bewijsmateriaal tegen de aangeklaagden gebruikt. Deze situatie vergemakkelijkt het martelen. Tussen september 1991 en september 1994 werden 4149 klachten over martelingen, mishandelingen en willekeurige arrestaties ingediend bij de Mensenrechten Commissie van de Turkse regering. Hierbij komen nog de gegevens van de Turkse Stichting voor de Mensenrechten (TIHV); 3430 gemartelde personen tussen 1990 en 1994. Deze aanwijzingen, dat er systematisch gemarteld wordt, worden van officiële zijde als ongefundeerd van de hand gewezen.

Artsen zijn op de verschillende wijze betrokken bij martelingen, de PHR heeft met name onderzoek gedaan naar het ontkennen van de gevolgen van martelingen door artsen. In Turkije zijn artsen in overheidsdienst verplicht arrestanten bij hun vrijlating te onderzoeken. In theorie geeft dit artsen de mogelijkheid om gevolgen van martelingen te rapporteren. In praktijk worden deze onderzoeken echter uitgevoerd in opdracht van de veiligheidsdiensten. De artsen staan onder een enorme druk de gevolgen van martelingen te ontkennen. ...

De Turkse regering ontkomt er niet langer aan om toe te geven dat gedurende de incommunicado-hechtenis systematisch wordt gemarteld en dat artsen gedwongen worden hierbij te helpen. Arrestatiebevelen dienen een concrete aanklacht te bevatten. Gedetineerden hebben het recht één moeten de mogelijkheid krijgen om onmiddellijk na arrestatie contact op te nemen met hun familie en advocaat. Daarnaast moeten zij de medische verzorging krijgen die ze nodig hebben.

11.54 Amnesty International noted that detainees do not have free access to any medical practitioner, much less one of their own choosing, although this right is supposedly guaranteed under Rule 98 of the European Standard Minimum Rules for the Treatment of Prisoners. Amnesty International pointed out that this is an effective method of concealing torture and makes it particularly difficult to provide medical evidence of sexual torture. They pointed out that in Turkey there are strong cultural inhibitions against reporting sexual torture and that Amnesty International nevertheless frequently receives allegations of sexual torture.

11.55 Amnesty International pointed out that until 1992 all detainees had the right in theory to see a lawyer, but in practice this right was routinely denied, and in November 1992 the right to a lawyer was formally withdrawn for those detained under the Anti-Terror Law, although it was retained for people charged with criminal offences. Amnesty International noted that when safeguards are ignored Turkish citizens can be exposed to gross abuses and that even children are not secure. Amnesty International explained that all people detained for common criminal offences are supposed to be brought before a court after a maximum of 24 hours and the Criminal Procedure Code requires children to be interrogated by a prosecutor in the presence of a lawyer, and that both provisions are, however, sometimes ignored. Amnesty International commented that until all detainees have full access to lawyers, doctors and relatives, police stations will remain fortresses of arbitrary state power, places of secrecy and fear where torture can be practised without any restraint. Amnesty International stated that arbitrary detention practices, in which people are held unacknowledged for long periods, have also contributed to the rise of "disappearances" and in southeast Turkey this is compounded by a persistent failure to promptly register detentions. Amnesty International pointed out that the UN Working Group on Enforced or Involuntary Disappearances drew attention to this in its 1995 report:

Reportedly, procedures laid down in the Turkish Criminal Procedure Code for the prompt and proper registration and notification of their families are disregarded in the south-eastern provinces of Turkey. Furthermore, the lack of proper registration and notification is said to facilitate the disappearance of detainees.

11.56 Amnesty International said that in recent years it has become almost standard practice for police to delay registration of detainees until several days after detention and this means that detainees' families suffer mental torment for days or even weeks while they contact lawyers, human rights associations and others in a desperate

search for help and that families sometimes pay large sums in bribes in order to get confirmation that their son or daughter is in police custody. Amnesty International remarked that a member of the Ankara Bar Association told Amnesty International in November 1994:

People do not worry so much about torture nowadays -- if your son or daughter just comes out of police detention alive, it is cause for rejoicing. Because police now habitually fail to register properly, every detention is a crisis — the Human Rights Association and lawyers are being worn down.

11.57 Amnesty International reported that suppression of medical evidence and the production of false medical reports are the next elements in the system which facilitates human rights violations such as torture and extrajudicial execution. Amnesty International noted that on the last day of detention, most detainees are taken for medical examination by a state-appointed doctor and state-employed doctors can be put under enormous pressure to write "clean" reports for detainees who display medical evidence of torture. Amnesty International remarked that the Istanbul branch of the HRA, in its 1994 annual report on torture, documents no less than 29 examples of "clean" medical reports shown to be false by later reports documenting injuries. Amnesty International reported that pressure is even put on detainees to participate in the cover-up, they are told that if they disclose their injuries to the doctor, they will be taken back to police headquarters for further "interrogation" and when a victim dares to reveal that he or she has been tortured, intimidation of the doctor can still ensure that evidence is suppressed. Amnesty International reported that usually the cover-up succeeds but occasionally detainees are taken to prison in such poor condition that the prison authorities order a medical examination and the issuing of an accurate report in order to prevent themselves being held responsible for the injuries, however, doctors who resist police intimidation put themselves at risk. Amnesty International stated that medical evidence is falsified or suppressed to cover up the causes of deaths in custody and extrajudicial executions and legal representatives of families are sometimes denied access to autopsies and in many cases autopsy reports seem to contradict evidence that is plain to the family when it retrieves the body for burial. Amnesty International reported even when there is medical evidence that detainees have suffered human rights violations, and doctors are prepared to face personal and professional risks in recording it, the judicial authorities frequently make no effort to investigate the allegations, let alone to find and prosecute the torturers.

F. Israel

11.58 In 1996 the State of Israel Ministry of Justice explained¹ that Israel's interrogation policies and practices are governed by Israeli law which strictly forbids all forms of torture or maltreatment. It was explained that the Israeli Penal Code (1977) prohibits the use of force or violence against a person for the purpose of extorting from him a confession to an offense or information relating to an offense and that Israel signed and ratified the U.N. Convention Against Torture and Cruel, Inhuman or Humiliating Treatment. It was said that the State of Israel maintains that the basic human rights of all persons under its jurisdiction must never be violated, regardless of the crimes that the individual may have committed. It was however noted that Israel recognizes its responsibility to protect the lives of both Jews and Arabs from harm at the hands of Palestinian terrorist organizations active throughout the world and to prevent terrorism effectively while ensuring that the basic human rights of even the most dangerous of criminals are protected, the Israeli authorities have adopted strict rules for the handling of interrogations. It is stated that these guidelines are designed to enable investigators to obtain crucial information on terrorist activities or organizations from suspects who, for obvious reasons, would not volunteer information on their activities, while ensuring that the suspects are not maltreated.

11.59 The Israeli Ministry of Justice noted that the basic guidelines on interrogation were set by the Landau Commission of Inquiry² and that in order to compile its recommendations, the Landau commission examined international human rights law standards, existing Israeli legislation prohibiting torture and maltreatment, and guidelines of other democracies confronted with the threat of terrorism. It is stated that the Landau Commission envisioned its task as defining "with as much precision as possible, the boundaries of what is permitted to the interrogator and mainly what is prohibited to him" and that the Commission determined that in dealing with dangerous terrorists who represent a grave threat to the State of Israel and its citizens, the use of a moderate degree of pressure, including physical pressure, in order to obtain crucial information, is unavoidable under certain circumstances. It is explained that such circumstances include situations in which

¹ <http://web.idirect.com/~cic/israelDemocracy/tamarGaulanArticle.html>

² The Commission, headed by former Supreme Court President, Justice Moshe Landau, was appointed following a decision of the Israeli government in 1987 to examine the General Security Service's (GSS) methods of interrogation of terrorist suspects.

information which an interrogator can obtain from the suspect can prevent imminent murder, or where the suspect possesses vital information on a terrorist organization which could not be uncovered by any other source (e.g., locations of arms or explosive caches or planned acts of terrorism).

11.60 The Israeli Ministry Of Justice stated that the Landau Commission recognized the danger posed to the democratic values of the State of Israel should its agents abuse their power by using unnecessary or unduly harsh forms of pressure, and as a result, the Commission recommended that psychological forms of pressure be used predominantly and that only "moderate physical pressure" (not unknown in other democratic countries) be sanctioned in limited cases where the degree of anticipated danger is considerable. The Israeli Ministry of Justice said that it should be noted that the use of such moderate pressure is in accordance with international law, and that for example, when asked to examine certain methods of interrogation used by Northern Ireland police against IRA terrorists, the European Human Rights Court ruled that "[i]ll-treatment must reach a certain severe level in order to be included in the ban [of torture and cruel, inhuman or degrading punishment] contained in Article 3 [of the European Convention of Human Rights]." It is explained that in its ruling, that Court disagreed with the view of the Commission that the above mentioned methods could be construed as torture, though it ruled that their application in combination amounted to inhuman and degrading treatment. It is noted that the question whether each of these measures separately would amount to inhuman and degrading treatment was therefore left open by the Court.

11.61 The Israeli Ministry of Justice remarked that the Landau commission was aware that the issue of moderate pressure during interrogation is both a serious and sensitive one. It is explained that the guidelines regarding interrogation provide for limited forms of pressure under very specific circumstances, to be determined on a case by case basis, that they by no means authorize indiscriminate use of force, and that specific circumstances have been identified and interrogation practices have been strictly defined in a manner that, in the opinion of the Landau commission, "if these boundaries are maintained exactly in letter and in spirit, the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity."

11.62 It is noted by the Israeli Ministry of Justice that to ensure that disproportionate pressure is not used, the Landau commission identified several measures, which have been adopted and are now in force, namely:

- Disproportionate exertion of pressure on the suspect is not permissible: pressure must never reach the level of physical torture or maltreatment of the suspect, or grievous harm to his or her honour which deprives him or her of his or her human dignity;
- The use of less serious measures must be weighed against the degree of anticipated danger, according to the information in the possession of the interrogator;
- The physical and psychological means of pressure permitted for use by an interrogator must be defined and limited in advance, by issuing binding directives;
- There must be strict supervision of the implementation in practice of the directives given to GSS interrogators;
- The interrogators' supervisors must react firmly and without hesitation to every deviation from the permissible, imposing disciplinary punishment, and in serious cases, causing criminal proceedings to be instituted against the offending interrogator.

11.63 The Israeli Ministry of Justice stated that once these measures were set down, the Landau Commission went on, in a second section of its report, to precisely detail the exact forms of pressure permissible to the GSS interrogators. It is explained that this section has been kept secret out of concern that, should the narrow restrictions binding the interrogators be known to the suspects undergoing questioning, the interrogation would be less effective and that Palestinian terrorist organizations commonly instruct their members, and have even printed a manual, on techniques of withstanding GSS questioning without disclosing any information. It is stated that it stands to reason that publishing GSS guidelines would not only enable the organizations to prepare their members better for questioning, but would reassure the suspect as to his ability to undergo interrogation methods without exposing vital information, thus depriving the GSS of the psychological tool of uncertainty.

11.64 The Israeli Ministry of Justice explained that since the interrogation guidelines are secret, the Israeli government recognized the importance of establishing safeguards and a system of review of interrogation practices in order to insure that GSS investigators do not violate the guidelines, and as a result, the GSS Comptroller was instructed to check every claim of torture or maltreatment during interrogation. It is reported that from 1987 until the beginning of 1994, the Comptroller carried out this responsibility, initiating disciplinary or legal action against interrogators in cases

where they have been found to have deviated from the legal guidelines. It is stated that early in 1994, in accordance with the recommendations of the Landau Commission, responsibility for investigation of Claims of maltreatment was transferred to the Division for the Investigation of Police Misconduct in the Ministry of Justice under the direct supervision of the State Attorney.

11.65 The Israeli Ministry of Justice pointed out that the Landau Commission also recommended that there be external supervision of GSS activities and since the Landau Commission issued its recommendations, the State Comptroller's Office has launched an examination of the GSS investigator's unit, and upon the completion of its inquiry, the State Comptroller's findings will be submitted to a special subcommittee of the Knesset (Israeli Parliament) State Comptroller Committee. It is noted that a further review procedure exists whereby the conclusions of the special ministerial committee, as well as the annual reports of the investigators unit are brought to the attention of the Sub-committee for Services of the Knesset Foreign Affairs and Defence Committee.

11.66 The Israeli Ministry of Justice pointed out that in addition, an agreement between the State of Israel and the International Committee of the Red Cross (ICRC) provides for the monitoring of conditions of detention, and delegates from the ICRC are permitted to meet with detainees in private within 14 days of the arrest. It is also pointed out that ICRC doctors may examine detainees who complain of improper treatment and all complaints made by the ICRC regarding treatment of prisoners are fully investigated by the relevant Israeli authorities and the findings are made known to the ICRC.

11.67 The Israeli Ministry of Justice pointed out that as recommended by the Landau Commission, a special ministerial committee headed by the Prime Minister was established in 1988 under the previous government to review periodically the interrogation guidelines themselves. This committee held several sessions but its work was cut short by the national elections which were held in June, 1992. Following the establishment of the new government in July, 1992 a new ministerial sub-committee composed of the Ministers of Justice and Police was appointed in order to review the guidelines. On April 22, 1993, the ministerial sub-committee determined that certain changes should be made in the General Security Service guidelines. On the basis of the sub-committee's recommendations, new guidelines were issued to General Security Service investigators. It is noted that the new guidelines clearly stipulate that the need and justification for the use of limited pressure by

investigators must be established in every case, according to its own special circumstances. The updated guidelines also point out that the use of exceptional methods was intended only for situations where vital information is being concealed and not in order to humiliate, harm or mistreat those under investigation. In addition, in the new guidelines, it is expressly stated that it is prohibited to deny a person under investigation food or drink, to refuse him permission to use a bathroom or to subject him to extreme temperatures. The Ministry noted that in 1991, a petition was submitted to the Supreme Court of Israel sitting as the High Court of Justice by a detainee named Murad Adnan Salkhat and a private group named the Israel Public Committee Against Torture, challenging the legality of the guidelines and demanding that they be made public. The Court dismissed the petition and confirmed the necessity for secrecy.

11.68 The Israeli Ministry of Justice explained that the State of Israel prides itself on having an open society with a democratic legal system which is subject to public scrutiny and which respects human values, and as a result, any allegations of maltreatment are taken seriously and are investigated on a case by case basis. It is stated, however, that it should be noted that individuals arrested, tried or convicted have both personal and political motives for fabricating claims of maltreatment during interrogation. It is pointed out that personal motives include the desire to have a confession ruled inadmissible at trial, to present oneself as a "martyr", or to escape retribution from Palestinian terrorist cells which have often assassinated or tortured individuals who have given information to the Israeli authorities. It is said that political motives include the desire to spread anti-Israel disinformation in the form of unfounded human rights complaints, in order to undermine Israel's human rights image or discredit the General Security Service.

11.69 The Israeli Ministry of Justice noted that it is the unfortunate reality that, during times of political unrest and violence, restrictions must be placed on individuals who threaten the welfare of the State and its citizens and that this note has been aimed at demonstrating that, despite the harsh reality of continuing terrorism faced by the State of Israel, they are doing everything in their power to uphold the rights of all persons under their jurisdiction while ensuring the safety of innocent individuals.

11.70 In contrast to the picture painted above Amnesty International issued a media statement in September 1999 in which it welcomed the conclusions made the previous day by the United Nations Committee against Torture which reiterated its call to Israel to cease immediately the use of torture and ill-treatment during

interrogation.¹ Amnesty International explained that the appeal came as the Committee gave its conclusions on Israel's second periodic report. Amnesty International explained that the Committee found that Israel, on its own admission, used "hooding, shackling in painful positions, sleep-deprivation and shaking" against detainees, and that the Committee reiterated that all these methods constituted torture, banned by Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). Amnesty International pointed out that the Committee also expressed concern about the holding of detainees in administrative detention, without charge or trial, for long periods, particularly where the detainees themselves posed no threat to state security. They explained that this was an apparent reference to the November 1997 decision of the Israeli Supreme Court endorsing the holding of 10 Lebanese detainees as "bargaining chips". Amnesty International also noted that the Committee recommended that Israel review the practice of administrative detention to ensure that it does not amount to cruel, inhuman or degrading treatment or punishment and that the Committee also noted Israel's "apparent failure" to implement any of its previous recommendations made in 1994 and 1997, and reaffirmed their recommendation.

11.71 Amnesty International stated that the Committee asked the Israeli Government to incorporate the convention's provisions into Israeli law. Amnesty International pointed out that it is calling for a review of the draft Law on the General Security Service, then before the Knesset which includes provisions which violate the convention. Amnesty International noted that the Bill grants, for example, GSS employees immunity from criminal liability if they are "acting in good faith and in a reasonable manner". Amnesty International considered that if interrogation rules continue to sanction torture and ill-treatment, as they do now, GSS agents will still be able to use such methods with impunity, in violation of Article 4 of the Convention.

11.72 Amnesty International noted that on 7 September 1999 the Israeli Supreme Court were to hold its second session reviewing the legality of official rules which apparently authorize the General Security Service (GSS) to use interrogation methods such as violent shaking; sleep deprivation for prolonged periods; shackling in painful positions; hooding; and forcing of detainees to listen to loud noise for prolonged periods. Amnesty International urged the Supreme Court to take note of the

¹ Amnesty International - News Release - MDE 15/68/99 6 September 1999 Israel/Occupied Territories "The Israeli Government should implement the High Court decision making torture illegal" see <http://www.amnesty.org/news/1999/51506899.htm>

Committee's recommendations and declare illegal all GSS interrogation methods which violate the Convention's prohibition on torture and cruel, inhuman or degrading treatment or punishment, methods condemned by the Committee as torture.

11.73 In August 1998 Human Rights Watch² called on Israel to:

- Immediately end the practice of torture, amend domestic law to be consistent with the covenant's prohibition of torture, including adopting a definition of torture consistent with international law, and make public the guidelines governing interrogation procedures;
- Immediately end the practice of holding detainees as hostages, both inside Israel and in the territories under its control. Persons held as "bargaining chips" should be immediately released;
- Immediately end the practice of arbitrary or prolonged administrative detention, and revise its laws to ensure that all detainees are guaranteed at minimum the right to prompt and effective judicial review of the lawfulness and conditions of their detention; the right to receive an explanation of one's rights upon arrest in one's own language or soon thereafter and to be informed of the specific, detailed, and personalized reasons for the deprivation of liberty; the right of immediate access to family, legal counsel, and a medical officer; and the right to be released and seek compensation if the detention is arbitrary or unlawful

11.74 The High Court of Justice banned the method of interrogating prisoners by the General Security Service (GSS/ Shin Bet), declaring them tantamount to torture.³ It was reported that the ruling, issued by a special nine-justice panel of the High Court would bring an end to methods of interrogation used by GSS agents whom have been granted leeway to utilize certain generally unacceptable methods in cases dealing with national security. It was noted that in the landmark ruling, the High Court explained that the "shaking" of a prisoner, sleep deprivation, and handcuffing a prisoner in frog-like positions was indeed torture and declared illegal. It was pointed out that the ruling has been hailed a victory by human rights organizations that have been critical of the interrogation methods permitted to date and that the ruling overrules the previous 1987 decision permitting moderate force by GSS interrogators.

² <http://www.hrw.org/hrw/press98/aug/isrl0820.htm>

³ "High Court declares GSS interrogation methods illegal" *Israel Wire* 9/06 see <http://www.israelwire.com/New/990906/99090626.html>

11.75 It was also noted that Deputy Minister of Defense Ephraim Sneh was among the many forces of criticism against the ruling and that former senior military and security establishment officials stated the decision would effectively tie the hands of the GSS at a time when Islamic terror is on the rise, one official stating that the responsibility for protecting the nation should now be taken away from the GSS and given to the justices of the High Court.

11.76 It was further reported that Deputy Attorney General Yehudit Karp recommended that no law be legislated that would permit coercive methods to be used by the General Security Service (GSS/ Shin Bet) in its interrogations.⁴ It was noted that in a special report that was to be submitted to Prime Minister Ehud Barak, Karp estimated that if such a law is passed by the Knesset, it will be disqualified by the High Court, which barred the use of "physical measures" in GSS interrogations. It was pointed out that in the report, Karp stated that her recommendation is grounded in ethical, moral and legal considerations; international opinion of Israel, which would be diminished by such a law; and the fear that sanctioned use of force could be exploited or abused. It was also reported that meanwhile, the GSS demanded that Attorney General Elyakim Rubinstein immediately issue a set of guidelines determining which interrogation methods are still permitted, and that while the GSS insisted that its rights be protected by legislation, several other means of regulating its activity are presently being considered. It was noted that one of these is to provide the GSS with discretion when there is a "ticking time-bomb" and that the Attorney General would examine the case afterwards to determine if irregular or unreasonable action was taken.

11.77 Further reports indicated that State Attorney General Elyakim Rubinstein has not changed his view and remains opposed to the recent landmark decision by the High Court of Justice, barring moderate force by agents of the General Security Service (GSS/ Shin Bet) in their interrogation of suspects⁵ and that the opinion of the attorney general is contrary to that of Justice Minister Yossi Beilin who hailed the decision a victory for democracy. It was reported that Rubinstein said that the judiciary must find a way to assist the GSS in fulfilling its responsibility to stop terrorists from blowing up buses and that he explained that the decision limits their

⁴ "Deputy attorney general opposes interrogation law" *Israel Wire* 9/15 see <http://www.israelwire.com/New/990915/99091530.html>

⁵ "AG Rubinstein supports legislation to bypass High Court's GSS ruling" *Israel Wire* 9/9 <http://www.israelwire.com/New/990909/99090928.html>

ability to do so and in a case dealing with what security agents call a "ticking bomb," the appropriate legislation must be available to permit investigators to use measures not permitted under the 'regular' law. It was pointed out that Rubinstein added that until such time that the necessary legislation can be invoked into law, temporary measures must be taken to protect GSS agents from criminal charges in the event an interrogator crosses the line during an interrogation in extenuating circumstances. It was stated that according to the daily *Yediot Ahronot*, the attorney general told GSS directors that if they wanted legislation to outline interrogations, they would have to apply pressure on Prime Minister Ehud Barak.

11.78 It was also reported that Beilin on the other hand agrees that a GSS law is a necessity, but added he hoped that law would not contain legislation dealing with interrogations. The minister added he did not see a need to circumvent the High Court ruling and acknowledged the importance of the GSS' role in providing security for our country. It was pointed out that State Attorney General Elyakim Rubinstein has indicated he would begin to formulate legislation to define what methods may be employed by interrogators to provide a framework within the law for their continued operations⁶ and that Justice Minister Yossi Beilin, who hailed the decision, opposes the attorney general's plans calling the decision a much needed and overdo step in Israel's modern-day democratic society. It was reported that some legislators stated the justices were not in touch with reality and the decision, at a time when terrorism was on the rise, was not a responsible one. It was reported that National Union MK Hanan Porat called for closing down the GSS and placing the burden of protecting the nation from terror in the laps of the High Court justices and that MK Rechavam Ze'evi of the National Union stated the protecting human life was the ultimate value and the court has tied the hands of the agency responsible for doing so. It was pointed out that following the handing down of the landmark decision, the director of the GSS, Ami Ayalon, issued the new order forbidding any of the previously approved methods of interrogation which included sleep deprivation, placing a black bag over a suspect's head, various positioning of a suspect's body for extended periods of time and playing loud music for extended periods of time.

⁶ "AG planning legislation to circumvent High Court Decision" *Israel Wire* 9/7 see <http://www.israelwire.com/New/990907/99090734.html>

G. ITALY

11.79 In May 1999 Amnesty International investigated and reported on the question of Italy's introducing measures and undertaking systematic reviews to prevent torture and ill-treatment.¹

Amnesty International pointed out that Articles 2, 11 and 16 of the UN Convention against Torture require each state party to take effective legislative, administrative, judicial or other measures to prevent torture and ill-treatment and to keep under systematic review interrogation rules and practices and other arrangements for overseeing the custody and treatment of detainees, in order to prevent acts of torture and other cruel, inhuman or degrading treatment.

Amnesty International noted its 1995 report that in January 1995, in the context of a press conference and report relating to illegal acts committed by Bologna Police, including ill-treatment of detainees, the then Minister of Interior indicated that amongst the Ministry's recommendations aimed at preventing the recurrence of such problems in the State Police was a proposal to create a professional code of ethics (*codice deontologico*) for the police but that Amnesty International has received no information on the progress of this proposal.

11.80 Amnesty International also noted that the CPT, in its report on its second periodic visit to Italy, published in 1997, commented that judges of surveillance (magistrates responsible for the treatment of inmates of prisons within their jurisdiction) were not all carrying out their inspection functions as laid down by law and that, although most visited the prisons under their jurisdiction, visits to the actual quarters in which prisoners were detained were "rare" and in some cases "non-existent". Amnesty International indicated that Italy has ratified the principal international instruments prohibiting torture and cruel, inhuman or degrading treatment or punishment and has submitted periodic reports to the relevant UN bodies and sent official representatives to respond to the questions raised by these bodies. Amnesty International further noted that the Italian government has also allowed publication of the reports of the CPT on its periodic visits of 1992 (published in January 1995) and of 1995 (published in December 1997), although it did not appear to have authorized any report on a third visit made by the CPT to San Vittore Prison, Milan, in 1996. Amnesty International pointed out that these reports, published together with the responses supplied by the government to the questions and

¹ Amnesty International - Report - EUR 30/02/99 May 1999: Italy : a Briefing for the UN Committee Against Torture see <http://www.amnesty.org/ailib/aipub/1999/EUR/43000299.htm>

recommendations put forward by the CPT, shed light on Italy's implementation of some of these recommendations.

11.81 Amnesty International stated that the CPT said that the information collected during its periodic visit had confirmed that it was the period immediately following deprivation of liberty which was the period during which the risk of intimidation and ill-treatment was greatest and that it explained that, in the matter of fundamental guarantees against ill-treatment, it attaches particular importance to three rights which should be available to the detainee from the start of the custody period:

- A. the right of access to a lawyer;
- B. the right to inform a relative or third party of the arrest;
- C. the right to be examined by a doctor of one's own choice.

11.82 Amnesty International explained that under the Code of Penal Procedure, detainees in the custody of law enforcement officers have the right to communicate (*conferire*) with their lawyer from the beginning of their detention (Articles 104.2 and 386), detaining officers must also inform detainees that they may name a lawyer of their own choice or be assigned a duty lawyer *de officio* and these officers also have a duty to inform the relevant lawyer of the detention (Article 386 Code of Penal Procedure). Amnesty International pointed out that in its report on its second periodic visit to Italy, the CPT, however, stated that, on the evidence of the information collected during its visit, "it is clear ... that in practice the presence of a lawyer in a police or carabinieri establishment remains a rare thing".

11.83 Amnesty International pointed out that the CPT invited the Italian authorities to examine the ways and means necessary to allow everyone deprived of liberty by law enforcement officers to be in a position to exercise effectively their right of access to a lawyer from the beginning of the detention period, and in view of information from the authorities indicating that, with regard to detainees in the custody of carabinieri, detainees were able to speak to their lawyer in private - but only if the infrastructure of the post allowed this possibility - the CPT asked the authorities to take the appropriate measure to guarantee that detainees could speak to their lawyers in private, in all circumstances. Amnesty International explained that under Article 104.3 of the Code of Penal Procedure, on the request of a Public Prosecutor, a Judge of Preliminary Examination (*Giudice degli indagini preliminari*) may authorize delaying a detainee's right of access to a lawyer (whether the detainee's private lawyer or one appointed *de officio*) for up to a maximum of five days after arrest, during the preliminary investigation, if there are "specific and exceptional reasons for caution"

(specifiche ed eccezionali ragioni di cautela) and such delays appear to occur most usually in the context of defendants accused of serious offences relating to organized crime and public corruption. Amnesty International remarked that it has not received allegations of physical assault relating to detainees to whom this article of the Code of Penal Procedure has been applied but there have been claims that some prisoners have been subjected to heavy psychological pressure during this period.

11.84 Amnesty International noted that under the provisions of Article 566.2 of the Code of Penal Procedure, detention in establishments of the law enforcement agencies may not exceed 48 hours, after which the detainee must be released or remanded in custody to prison or another form of detention, and therefore, detainees whose access to a lawyer is delayed for up to five days will be held in prison for the bulk of this period.

11.85 Amnesty International further explained that under Article 387 of the Code of Penal Procedure, law enforcement officers must, with the detainee's consent, inform their relatives of the detention without delay and most detainees interviewed by the CPT during its second periodic visit had been told of this possibility. Amnesty International pointed out that the Italian authorities, however, indicated that such notification of detention may be delayed in certain cases, when there are "circumstances linked to the development of the inquiry" and that the CPT recommended that any possibility of exceptionally delaying notification of the arrest should be clearly defined and circumscribed by law.

11.86 Amnesty International pointed out that the Code of Penal Procedure contains no specific provisions covering detainees' access to medical assistance while in the custody of law enforcement officers but the Italian authorities have stated that the provisions of the Constitution (including Article 32, guaranteeing protection of health and a right to free medical treatment in case of indigence) and Article 277 of the Code of Penal Procedure (which guarantees the "rights" of any detainee) provide sufficient guarantee of access to medical assistance. Amnesty International pointed out that the CPT reiterated the recommendation made in its report on its first visit to Italy in 1992 that detainees in the custody of law enforcement officers should be allowed the right to be examined, on their request, by a doctor of their own choice, in addition to any examination carried out by a doctor called in by the law enforcement agencies.

11.87 Amnesty International also pointed out that the CPT stated that the information collected during its 1995 visit suggested that most people it met had been informed of

the possibility of informing a third party of their arrest and at least some had been informed of the possibility of access to a lawyer that the CPT delegation was, however, unable to verify if people in the detention of law enforcement officers were systematically informed of their rights although the Italian authorities informed the CPT that “every detainee is informed of his/her rights at the moment of admission to prison”. Amnesty International stated that the CPT found, however, that this was not always the case and stated that in any case the provision of such a document at that stage was too late, reiterating the recommendation made in its first report - that a document describing their rights be distributed to all detainees arrested by law enforcement agencies at the beginning of the detention period to be available in several languages and, in addition, detainees should certify that they have been informed of their rights in a language they understand.

11.88 Amnesty International said that in its report on its first periodic visit in 1992 the CPT had called the attention of the Italian authorities to information which its delegation had received from various sources, according to which “informal interrogations” of people in detention, carried out by police and *carabinieri*, without a lawyer and/or the prosecutor being present, was “a common practice” and that it was notably on such occasions that pressure had been exerted and/or ill-treatment inflicted. Amnesty International pointed out that the CPT recommended that the Italian authorities draw up a code of conduct for interrogations, to supplement the relevant provisions of the Code of Penal Procedure and it reiterated this recommendation in its second report.

11.89 Amnesty International also remarked that in its report on its first periodic visit in 1992 the CPT stated that it considered regular visits to places of detention by relevant judicial authorities could have a significant effect in preventing ill-treatment and in its second report - on its 1995 visit - the CPT recalled that recommendation, commenting that it had received no response on this point from the Italian authorities and that during its second visit it had not gathered any indication that such checks by judicial authorities had actually taken place.

11.90 Amnesty International drew attention to Articles 12, 13 and 16 of the UN Convention against Torture which require that each state party shall ensure that there is a prompt and impartial investigation, whenever there is reasonable ground to believe that an act of torture or other cruel, inhuman or degrading treatment has been committed and that Article 12 makes it clear that this duty is not dependent on a formal complaint by a detainee. Amnesty International stated that it recognizes that,

like anyone else, police officers are entitled to protection of their reputation and believes that prompt, thorough and impartial investigations, with the methods and findings made public, serve to protect the reputations of law enforcement officers who may be the subject of unfounded accusations of ill-treatment, as well as to safeguard the interests of genuine victims of ill-treatment. Amnesty International however remarked that in recent years it has become increasingly concerned that a number of criminal proceedings concerning alleged ill-treatment by law enforcement and prison officers have been subjected to frequent and lengthy delays and in some instances a lack of resources in the criminal justice system may be a factor in the delay. Amnesty International pointed out that in July 1998 the UN Human Rights Committee said that although it noted that the Italian government had drawn attention to “steps taken to speed up both criminal and civil trials,” it was concerned that “so far, no results have become apparent” and recommended that “further measures be taken to increase the efficiency and promptness of the entire system of justice”.

11.91 Amnesty International also noted that the crime of torture as such does not exist in Italian law and this has been commented on in detail by the Italian government, the UN Committee against Torture and the UN Human Rights Committee. Amnesty International noted that in December 1998 a group of 69 Senators put forward a draft law (*Disegno di legge 3691*) proposing the introduction of a crime of torture - based on the definition of torture contained in Article 1 of the UN Convention against Torture - into the Italian Penal Code and that the Constitution of the Italian Republic stipulates in Article 13(4) that “physical or moral violence against persons placed under any form of detention shall be punished”. Amnesty International further referred to Article 27(3) which states that “... punishments of convicted persons shall not consist of inhumane treatment ...”, that an Italian Constitutional Court decision of June 1993 (Decision No 349) ruled that no form of detention “will imply treatment contrary to the sense of humanity” and that criminal proceedings for crimes ranging from coercion and assault to murder, which are committed against prisoners or detainees by state officials, may be brought under the Penal Code and Code of Penal Procedure. Amnesty International further found that penitentiary legislation and regulations also contain provisions protecting prisoners from inhumane treatment.

11.92 Amnesty International also noted that Italy's third periodic report to the UN Committee against Torture indicates that the general orientation of the Italian government is in favour of inserting the crime of torture in the Italian penal system but that it, however, goes on to state that “nevertheless, given the ample safeguards

already provided by the Italian penal order ... a change in this sense does not seem necessary". Amnesty International also pointed out that during previous consideration of Italy's compliance with the UN Convention against Torture, the Italian government has stated that Italian law does not provide any general system of state compensation for victims of torture, although the Penal Code provides for compensation for material and non-material damage by the person found guilty of the offence. Amnesty International further found that Article 3 of the draft law 3691 put forward by a group of Senators in December 1998 proposed the institution of a fund for victims of torture attached to the office of the President of the Council of Ministers, in order to ensure compensation for acts of torture.

11.93 Early in 2002 it was announced that Italy plans to begin expelling illegal immigrants from the Muslim nations of North Africa and elsewhere in response to the events of September 11, scrapping a long-standing policy of sheltering almost anyone who reaches its shores.² It was reported that an immigration reform law calls for the expulsion of immigrants who entered Italy illegally and don't have regular work contracts. It was said that the government is determined to fight rising crime, which according to recent polls most Italians blame on illegal immigrants. It was said that officials say they have become especially wary of who shows up on their coasts in light of the September 11 terrorist attacks on the United States and the subsequent arrests of suspected terrorists who immigrated from Northern Africa, and that some of these immigrants have been accused of providing false documents for al Qaeda members operating in Europe. It was noted that proponents of the law say Italy's fisheries and farming sectors employ large numbers of illegal immigrants at cheap wages, taking away jobs from Italians, although only 7 percent of the public agrees with this notion.³ It was noted that the proposed law has provoked much opposition from both the left and the public, and that more than 150,000 people protested in Rome against the proposal, calling it racist and uncivilized. Meanwhile, immigrants who have lived illegally in Italy for years have begun flocking to immigration offices, desperate to avoid expulsion.⁴

² By Kristine Crane "Italy drafts new law to oust illegal immigrants" *Washington Times* 18 February 2002 <http://www.washtimes.com/world/20020218-17924212.htm>

³ According to a recent study commissioned by the Region of Lombardy, which has the highest concentration of immigrants, and eighty percent of those surveyed believe immigrants are taking up only the labor-intensive jobs that Italians will no longer do, while most employers agree with the argument, over a half of those surveyed in a study by the Milan Observatory in the same region said Italian immigration law is too "permissive" and a third said immigration has an overall toll on society.

⁴ It is explained that those caught entering Italy illegally are brought daily to the Regina Pacis assistance center for immigrants and trafficked women on the Adriatic coast, and that asylum seekers stay there until other arrangements are made; others are either immediately

H. JORDAN

11.94 Amnesty International noted that following the 11 September 2001 attacks in the United States, Jordan, like many other states, made changes to its legislation in order to take steps against the perpetrators of such acts.⁵ **Amnesty International said that the new laws on "terrorism" and the limitations to the freedom of expression, promulgated after the 11 September attacks without passing through the Jordanian parliament, were part of an already worrying trend in Jordan. They noted that already in August 2001 laws had been promulgated limiting rights of assembly and the right of access to legal counsel to political opponents, and that Amnesty International is concerned that provisions in the August and the post-11 September laws criminalize peaceful activities unrelated to politically motivated violence.**

11.95 Amnesty International pointed out that in addition to its concerns over the new laws limiting rights, their report also raises Amnesty International's concern at Jordan's continuing use of prolonged incommunicado detention. They noted that during the two months following the 11 September attacks, the Jordanian authorities arrested and held in incommunicado detention a number of people who had been involved in demonstrations, including demonstrations opposing the bombing of Afghanistan, and that dozens of others, most of them suspected of links with Islamist groups, were also arrested and held in incommunicado detention.

11.96 Amnesty International noted that Jordan is a State Party to international human rights treaties, such as the *International Covenant on Civil and Political Rights* (ICCPR), which it ratified in 1976, and that in 1991 Jordan acceded to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Amnesty International said it is concerned that the new laws and Jordan's continued use of incommunicado detention, where torture or other ill-treatment have been known to occur, breach these international standards. Amnesty International explained that on 7 May 1999 the *Arab Convention for the Suppression of Terrorism* entered into force after seven member states of the Arab League ratified the Convention. Amnesty International stated that it has serious concerns with it, in particular with its extremely broad definition of "terrorism" and its

repatriated or detained for a month and then given an expulsion slip good for 15 days, which often becomes a ticket to go underground.

⁵ "Security measures violate human rights"
<http://web.amnesty.org/ai.nsf/Index/MDE160012002?OpenDocument&of=COUNTRIES/JORDAN>

failure to prohibit arbitrary detention or prohibit torture or even to insist that detainees are brought promptly before a judge. Amnesty International pointed out that it has called for the amendment of the Convention to ensure that it is consistent with international human rights and humanitarian law. Amnesty International considered that it is important that the need to act against those who might perpetrate "terrorist" attacks should not be used to give legitimacy to practices which are a serious breach of international human rights standards.

11.97 Amnesty International noted that two weeks after attacks on the US, the Jordanian authorities introduced changes to the Penal Code expanding the definition of "terrorism", introducing numerous loosely-defined offences, restricting freedom of expression and the press, and expanding the scope of offences punishable by the death penalty and life imprisonment. They explained that the new Law entitled *Law Amending the Penal Code (Provisional Law No. 54, 2001)* which was hastily promulgated through a provisional royal decree in the absence of Parliament, became effective on 2 October 2001, immediately after approval by King 'Abdallah bin Hussein of Jordan.

11.98 Amnesty International explained that "terrorism" was originally defined in Article 147 of the *Penal Code* as "any acts which aim to create a state of fear and are committed by means of explosive devices, inflammable, poisonous and incendiary material, using epidemics or germs, which can cause a public danger". Amnesty International pointed out that this definition was replaced by a new and broader one under the *Law Amending the Penal Code (Article 147-1)* so that "terrorism" becomes the "use or the threat to use violence" as an individual or collective act with the purposes of undermining public order or endangering social peace and security in a way that may cause fear and terror and endanger the safety and lives of people. They remarked that this Law also expands the scope of "terrorism" to include acts which cause damage to the environment, public facilities, public and private property, and endangering national resources, obstructing the application of the Constitution and laws, and damage to, seizure, or occupation of diplomatic missions. Amnesty International was of the view that the text is vague and its loose wording leaves it open to different interpretations.

11.99 Amnesty International pointed out that this very much wider definition parallels in many respects the definition of "terrorism" in Article 2 of the *Arab Convention for the Suppression of Terrorism* which also describes "terrorism" as "any act or threat of violence". Amnesty International said it is concerned that, by the use of the

word "threat", people who are not accused of committing violent acts could be accused of "terrorism" for instance because of their alleged affiliation to opposition groups which use violence, and, in addition, that the phrase "acts which cause damage to the environment" is extremely vague and could be read as encompassing minor damage caused by peaceful demonstrations, while the "seizure or occupation of diplomatic missions", in the absence of any clear definition of what degree constitutes "terrorism", might be used against people who demonstrate in front of an embassy. This, they noted, would pose a threat to freedom of association and expression.

11.100 Amnesty International also pointed out that under the new Law, Article 147- 2 defines, as acts of "terrorism", banking transactions, particularly depositing money in any bank or any financial institution or transferring money "when it is clear that the money is of a suspicious nature and is connected with any terrorist activity", and that anyone who commits such an offence can be sentenced to up to 15 years' imprisonment with hard labour under Article 147-2c; the bank official who knowingly carries out such a transaction can be punished with imprisonment and the monies frozen and confiscated. Amnesty International remarked that it was concerned that the support of peaceful activities could be deemed to fall under the new definition of "terrorism" thus becoming criminalized.

11.101 Amnesty International explained further that the Law also expands "terrorist" offences that are punishable with life imprisonment and the death penalty, and while Article 148 of the amended Penal Code allowed for the death penalty for acts of "terrorism" leading to the loss of life only, Article 148-4c also provides the death penalty for any acts of "terrorism" involving the use of "explosive, poisonous, incendiary material or using epidemics or germs or chemicals or radioactive material or similar substances" whether or not such acts cause death. Amnesty International pointed out that among the new offences punishable with life imprisonment are disabling or hacking computer systems and networks (Article 148-3b). Amnesty International also noted that major changes have also been made to Article 149 including the introduction of new political offences against the state. The new Article 149-1 states, among other things, that,

"Anyone engaged in any activity in order to destroy the political system of the kingdom or encouraging resistance and anyone engaged in any individual or collective action with intent to change the economic or social nature of the state or basic conditions of the society shall be punished with hard labour for a fixed period of time."

11.102 Amnesty International explained that taking hostages with the intent of, among other things, blackmailing an official or private body is punishable by life imprisonment with hard labour, if such acts result in the injury of any person, and with the death penalty if such acts lead to the death of any person. They noted that the new Law abrogated Article 149-3 of the Penal Code effectively removing the right of the judge to consider extenuating factors when passing sentences related to political offences against the state.

11.103 Amnesty International noted that under Law 54, Article 150 of the Penal Code was expanded with further restrictions on freedom of expression. They remarked that a number of new vaguely defined offences were introduced, including: harming national unity; harming the prestige, integrity and reputation of the state; inciting disturbances, sit-downs and unauthorized public meetings; causing harm to the dignity, reputation or personal freedom of individuals; destabilizing society through the promotion of deviance and immorality; and dissemination of false information and rumours, and such offences are punishable by imprisonment of not less than three months and not more than six months, or a fine of not more than 5,000 Jordanian dinars; or both punishments. Amnesty International pointed out that they can also lead to the closure of newspaper offices deemed to have published offending materials.

11.104 Amnesty International noted that in a further serious attack on the right to freedom of expression, offences committed under Law 54, including the amended Article 150 of the *Penal Code*, fall under the jurisdiction of the State Security Court. Amnesty International pointed out that it has frequently voiced its concern that the State Security Court, which almost invariably uses military judges and a military prosecutor, does not provide the same guarantees of independence and impartiality provided by the ordinary courts. They stated that their organization is even more concerned that, under Law 54, the State Security Court will now have an even wider jurisdiction over many who may be prisoners of conscience, brought to trial for the expression of non-violent conscientiously-held opinions.⁶ Amnesty International

⁶ Amnesty International noted the case Case of Fahd al-Rimawi whom they say is the first known victim of the amendment to Article 150, and who is the editor-in-chief of the weekly political newspaper *al-Majd*, who was detained solely for exercising his right to freedom of expression. Amnesty International stated that it considers Fahd al-Rimawi to have been a prisoner of conscience. They noted that he was questioned for four hours at the General Intelligence Department (GID), then detained for three days at Jweideh Prison from 13 to 16 January 2002, and charged under Article 150 of the Penal Code with "writing and publishing false information and rumours that may harm the prestige and reputation of the state and slander the integrity and reputation of its members. Amnesty International pointed out that Fahd al-Rimawi was released on bail of 5000 Jordanian dinars (\$7,100) pending his referral to the State Security Court.

remarked that the Human Rights Committee, commenting on Jordan's implementation of the ICCPR in 1994, expressed concern that "the State Security Court continues to exercise special jurisdiction" and recommended that consideration be given to its abolition.

11.105 Amnesty International also noted restrictions on freedom of assembly before 11 September 2001 pointing out that in August 2001, King 'Abdallah bin Hussein decreed a law on public meetings which banned the organization or holding of any rally or public meeting without the prior written approval of the administrative governor (Article 3-A) and gave the governor the authority to terminate or disperse the meeting or rally by force if the meeting or rally contravenes the objectives for which it is held (Article 7). Amnesty International explained that anyone infringing the provision of the *Public Assemblies' Law* is liable to punishment of between one and six months' imprisonment; or a fine of not less than 500 Jordanian dinars and not more than 3000 dinars; or both punishments. Amnesty International stated that additional regulations issued by the Minister of Interior shortly after the promulgation of the *Public Assemblies' Law* prohibits "the use of slogans, expressions, chants, sketches, or photos that harm the sovereignty of state, national unity, security and public order" and, according to these regulations the organizers of such meetings or rallies are not permitted to publicise them before obtaining the approval of the governor for them.

11.106 Amnesty International said that it is concerned about the lack of precision and the breadth of the new laws, that it creates uncertainty about which sorts of conduct are prohibited, may criminalize peaceful activities and infringe unduly upon rights to freedom of expression and assembly. Amnesty International also noted that dozens of people were arrested following 11 September, many in connection with demonstrations protesting the killings of Palestinians during the current *intifada* and against the bombing of Afghanistan and, in some cases, in relation to connections with Islamist groups. Amnesty international also pointed out that during September and October 2001 arrests were made in connection with three demonstrations held in Amman and Zarqa, those arrested were held in incommunicado detention, which was prolonged in some cases, and dozens may have been prisoners of conscience held for their political beliefs without having used or advocated violence. Amnesty International explained that the Human Rights Committee, commenting on Jordan's implementation of the ICCPR in 1994 recommended that "the detention premises controlled by the General Intelligence Department be placed under close supervision of the judicial authorities' and that 'measures of administrative detention (detention without charge or trial) and incommunicado detention be restricted to very limited and exceptional cases."

11.107 Amnesty International stated that political detainees are visited by the International Committee of the Red Cross (ICRC) in the GID detention centre but have irregular access (usually only after the first 15 days) to their families and no access to a lawyer, and until recently, allegations of torture were made by only a small minority of those who are arrested by the GID. Amnesty International said that it is concerned that incommunicado detention creates the circumstances where torture and other ill-treatment may be practised and also serves to conceal the evidence of torture. Amnesty International pointed out that the UN Special Rapporteur on torture has called for a total ban on incommunicado detention, stating that, torture is most frequently practised during incommunicado detention, that incommunicado detention should be made illegal, persons held incommunicado should be released without delay, and that legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention.

11.108 Amnesty International urged the authorities of the Government of the Hashemite Kingdom of Jordan to implement the following steps without delay, saying that these measures would bring Jordanian law and practice closer to the letter and spirit of the international human rights treaties to which Jordan is a State Party:

- 1) Incommunicado detention should be ended and all detainees should be ensured immediate access to family, lawyers and independent doctors.
- 2) Detainees should be brought before an independent judicial authority independent of the security forces promptly after arrest; if no recognizably criminal charges are brought against them they should be released.
- 3) All prisoners of conscience should be immediately released.
- 4) All allegations of torture should be promptly, effectively, independently, impartially and thoroughly investigated by an independent body which will make public its findings.
- 5) If evidence is found that any member of the security services and other law enforcement officials have ordered or used torture or ill-treatment against detainees, the authorities should bring perpetrators to justice in accordance with internationally recognized principles of fair trial. All victims of torture or other cruel, inhuman and degrading treatment should be compensated.
- 6) Legislation should be brought in line with Article 19 of the ICCPR guaranteeing the right to hold opinions and express them without interference; and Article 21 of the ICCPR guaranteeing the right to freedom of assembly.
- 7) The Jordanian authorities should establish a moratorium on executions pending total abolition of the death penalty.

- 8) The government should press for the *Arab Convention for the Suppression of Terrorism* to amend its definition of "terrorism" to ensure the right to freedom of expression and for the Convention to include clear provisions that guarantee rights for those in detention according to international standards, including access to the outside world.
- 9) The government should press for provisions of the *Arab Convention for the Suppression of Terrorism* to be amended so that they are in line with international standards. The government should reiterate its firm commitment to human rights in its legislation, policies and action, including those that relate to combatting acts that are being classified as "acts of terrorism". All use of provisions of the *Arab Convention for the Suppression of Terrorism* should be made public.

CHAPTER 12

France

(a) Introduction

12.1 At the end of 2001 France noted in its report to the Security Council of the United Nations that it has been the victim of international terrorism in its own territory and abroad and, for many years, has shown its determination to combat terrorism in all its forms regardless of the identity of the terrorists.¹ **France explained that in the 1980s, in response to the terrorist threat, France established a coordinated system of legislation and operational mechanisms and sought to enhance international cooperation. It was said that that determination was reaffirmed following the terrorist attacks of 11 September 2001 in the United States of America; preventive measures within France and international cooperation were strengthened pursuant to the provisions of Security Council resolution 1373 (2001). It was pointed out that the country's fight against international terrorism is guided by certain basic principles: firstly, unequivocal condemnation of terrorism in all its forms, regardless of the identity and motives of those involved; and secondly, the need to take into account the grave human, political and social problems upon which terrorism feeds. France said it believes that the implacable struggle against terrorism must take place in a context of respect for human rights and fundamental freedoms, and in all but a few exceptional cases, judicial and security measures remain the best response to terrorism. They stated that the French Government is opposed to simplistic assimilations of terrorism to organized crime, although it recognizes that there are increasingly strong links between the two phenomena, particularly financial links.**

12.2 The report noted that France has specific anti-terrorist legislation which has been progressively built up, and whose cornerstone is the Act of 9 September 1986, providing for the prosecution of all terrorist acts. It is explained that such acts have been defined as independent offences, subject to heavy penalties, and terrorist acts are generally defined by combining the existence of an offence under ordinary criminal law which appears on a restrictive list with "an individual or collective undertaking, the aim of which is to cause a serious disturbance to public order by means of intimidation or terror". Certain offences, however, such as acts of environmental terrorism, membership of terrorist groups and the financing of terrorism now have autonomous legal definitions. The Report said that terrorist

¹ Report submitted by France to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001.

offences come under a special form of legal proceedings characterized in particular by the centralized nature of investigation, prosecution and trial under a sole jurisdiction made up of specialized judges whose competence extends to the entire country. French legislation contains provisions which allow for compensation to the victims of terrorist acts. In November 2001, new provisions were enacted to facilitate the fight against terrorism.

12.3 The Report noted that France does not have a government department with sole responsibility for combating terrorism, but the fight against terrorism involves the mobilization of all departments able to contribute to the prevention and suppression of terrorist acts. It is stated that a number of entities have been set up to provide the necessary coordination between different levels of the State hierarchy, including the Anti-Terrorist Coordination Unit (UCLAT), and France also has two operational police units designed to deal with serious threats to public safety, the “Groupe d’intervention de la gendarmerie nationale” (GIGN) and “Recherche, assistance, intervention et dissuasion” (RAID). These units have been fully mobilized since the terrorist attacks of 11 September 2001, when the national contingency plan “Vigipirate renforcé”, which involves heightened levels of security measures, was immediately activated.

12.4 The report pointed out that appropriate measures at the national level to strengthen operational cooperation, monitor the movements of terrorist individuals or groups and block the financing of movements or activities which may be used for terrorist purposes are clearly necessary in combating terrorism. France said it supports closer cooperation within the various multilateral bodies, particularly the United Nations, with its European Union partners and with certain other partners, and that it also considers that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 has played a vital part in elaborating the two most recent international anti-terrorist agreements. France attached particular importance to the entry into force of the *International Convention for the Suppression of the Financing of Terrorism*, which provided a comprehensive and effective response in the areas of prevention and suppression. The Report also noted that France supports the rapid adoption of the draft comprehensive convention on international terrorism and the draft international convention for the suppression of acts of nuclear terrorism.

(b) Measures taken to prevent and suppress the financing of terrorist acts

12.5 France said that since the early 1990s, it has established a specific mechanism for combating money-laundering; it has recently been adapted for the purpose of strengthening measures against the financing of terrorism. The Report stated that the suppression of the financing of terrorism is mostly based on preventing the use of the French financial system for that purpose, and various measures have been implemented, particularly for the application of international standards to combat money-laundering, to ensure that the French financial system fully complies with the obligation of vigilance (identification of clients and economic beneficiaries, mechanisms for declaring suspicions).² **The authorities responsible for the supervision and regulation of the French financial system ensure that the institutions under their control fully respect these obligations. The Report pointed out that Article 3 of the Act of 12 July 1990 on the participation of financial bodies in combating money-laundering provides that such financial bodies shall declare to the French financial intelligence unit (TRACFIN) any suspect transactions which may be linked to drug trafficking or the activities of criminal organizations. TRACFIN transmits to the judicial authorities, where applicable, any positive results from their administrative investigations.**

12.6 The concept of organized crime is applied to terrorist organizations, and activities to combat the financing of terrorism are carried out mainly by the Central Directorate of the Judicial Police (DCPJ). In autumn 2001 a unit to combat the financing of terrorism was created within the Directorate, to provide liaison with other financial authorities involved in preventing the financing of terrorism. The Report stated that this mobilization has led to significant results, and since 1993, terrorist networks operating in a number of areas have been identified and shut down. The Report noted that analysis of international financial flows and remittances has revealed the involvement of individuals who are considered to have instigated, through the supply of resources, the series of terrorist attacks which took place in France in 1995. Improved awareness among the specialized departments concerned has also made it possible to detect activities such as extortion or kidnapping for purposes of ransom, which certain organizations use in order to finance their activities. Legal proceedings are currently under way against organizations involved in money-laundering and the financing of known terrorist organizations.

12.7 France stated that it supports the development of new rules within the context of the European Union to combat the financing of terrorism, and noted that the Union has on

² The Report said these monitoring measures are described in articles L-561-1, L-562-1 to L-562-10 and L-563-1 to 563-6 of the Monetary and Financial Code.

several occasions reaffirmed that banking and fiscal secrecy rules were not binding in legal investigations, particularly those concerning money-laundering offences; this obviously extends to the financing of terrorism. France remarked that in order to strengthen its activities to prevent the financing of terrorist acts, France took an active part in drafting the eight special recommendations of the Financial Action Task Force on Money-Laundering (FATF) on combating the financing of terrorism and has undertaken to implement them by June 2002. France also said it believes that the scope of the declaration of suspicion, as recently defined by FATF, should be extended.

12.8 France noted that since 1986, French anti-terrorist legislation has provided for the prosecution of those involved in the financing of terrorism under the more severe offence of complicity in an act of terrorism. Indeed, the provision of funds is proof of complicity in the instigation of the offence or of aiding and abetting the offence by providing the means for it, and in order to strengthen and rationalize this provision, the Act of 15 November 2001 introduced new offences, specifically including the financing of terrorism. The Reported explained that this legislation has:

- Established a special definition of the offence of financing terrorist activity;
- Brought insider trading and money-laundering within the list of acts of terrorism;
- Imposed an additional penalty involving the confiscation of the assets of terrorist offenders and a provision providing for interim protective measures against the offender's assets.

12.9 The offence of financing terrorist activities (art. 41-2-2 of the Penal Code), the definition of which refers back to the International Convention for the Suppression of the Financing of Terrorism, signed by France on 10 January 2000, is subject to 10 years' imprisonment and a fine of FF 1.5 million. In comparison with the application of existing rules on complicity, the creation of an autonomous offence has the advantage of making it possible for the offence to be prosecuted as a separate case and be processed more quickly, and to combine the competence of financial magistrates and other judges specializing in combating terrorism. Insider trading relating to terrorist activity (article 465-1 of the Monetary and Financial Code) is subject to seven years' imprisonment and a fine of 1.5 million euros. This provision penalizes transactions in funds or securities motivated by speculation based on privileged information on future terrorist attacks. Money-laundering in connection with terrorist activity (article 421-1-6 of the Penal Code) is punishable by 10 years'

imprisonment and a fine of FF 5 million. The fine may be increased to up to 50 per cent of the assets or funds being laundered. This additional definition of terrorist acts is intended to give legal recognition to the fact that an act of money-laundering may be committed in connection with terrorist activities. The offence can then be included in the prosecution case relating to a terrorist act, or the investigation can be conducted under a separate prosecution case to be processed in a coordinated manner.

12.10 An additional penalty of confiscation of the total assets of the terrorist offender has been introduced. The proceeds of the penalty may be paid into a compensation fund for terrorist acts (articles 422-6 and 422-7 of the Penal Code). In practice, the creation of a provision enabling the seizure of assets is an essential precondition for the execution of forfeiture decisions pronounced by the competent court (article 706-24-2 of the Code of Criminal Procedure). Lastly, the legislative body decided to encourage the sharing of competence by expressly providing for the joint appointment of magistrates specializing in terrorist matters and those specializing in financial issues (article 706-17 of the Code of Criminal Procedure).

(c) **What legislation and procedures exist for freezing accounts and assets at banks and financial institutions?**

12.11 France reported that accounts and financial assets may be frozen through administrative or judicial measures. France said that it can freeze the accounts of natural or legal persons at the national level by making use of the decree issued on the basis of the report of the minister responsible for economic affairs in accordance with article L-151-2 of the Monetary and Financial Code. Transfers abroad of the financial assets of persons or entities identified as being related to terrorism are prohibited. France noted that that provision has been strengthened since the adoption on 10 December 2001 of a European Common Position on a common foreign and security policy and on justice and home affairs, as well as a Community Regulation which would allow for the freezing of the financial assets and economic resources (art. 2. (a)) of all persons or entities identified as being related to terrorism or as belonging to a terrorist organization. In addition, article 2 (b) of the Regulation prohibits all European Union nationals or residents from making funds or economic resources available to persons or entities linked to the financing of terrorism.

12.12 With regard to the combating of terrorist financing of the al-Qa'idah movement and the Taliban, this provision is covered, insofar as the freezing of financial assets is concerned, by the implementation at the European level of the Common Position adopted on 26

February 2001 and Community Regulations. To date, France has frozen about 4.42 million euros' worth of funds belonging to Taliban members.

12.13 France explained its procedure for freezing assets as follows: Financial institutions are to notify the Treasury Department of all measures they have taken to freeze assets. If financial institutions are having trouble determining whether a person or entity is subject to the freezing of assets, these institutions are required to refer the case promptly to the Treasury Department, indicating the precise name of the account holder, together with any particulars that would facilitate identification. Following a speedy investigation, the Treasury Department will confirm in writing, if necessary, if the account should be frozen. While awaiting confirmation, the institutions are asked to exercise enhanced surveillance and to delay execution of unusual financial transactions. The basic information (given and family names, amount of funds) relating to accounts frozen pursuant to Community regulations must be transmitted to the European Commission for its information. France explained that in order to strengthen coordination of the French economic and financial agencies in charge of implementing the measures on freezing assets, an ad hoc coordinating group ("Finater") was created in September 2001 by the Ministry of Economic Affairs, Finance and Industry with the task of ensuring that such measures are consistent and coordinated. Lastly, the supervisory bodies and, in particular, the Banking Commission have undertaken an in-depth inquiry into the implementation by credit institutions of asset-freezing decisions.

12.14 France explained its judicial measures as follows: To participate knowingly in the financing of a criminal activity constitutes aiding and abetting. The same holds true with even greater force in the case of the financing of an act of terrorism. A natural or legal person who intentionally provides financial support to a terrorist group or organization thus incurs criminal liability as an accomplice and is subject to seizure and confiscation of the assets in question in the course of criminal proceedings. The introduction of specific provisions on terrorist financing has supplemented, reinforced and rationalized the grounds for prosecution. The Act of 15 November 2001 introduced a provision allowing for the seizure of assets. In practice, such a measure is a necessary preliminary to the execution of a confiscation decision pronounced by the trial court (art. 706-24-2 of the Code of Criminal Procedure). Thus, in the event an information is presented for an offence covered by article 706-16 of the Code of Criminal Procedure, in order to guarantee payment of the fines incurred and execution of confiscation as provided for in article 422-6 of the Penal Code, the judge responsible for release or detention may, at the request of the Public Prosecutor's Office, order provisional measures to conserve the assets of the person under investigation, with expenses advanced by the Treasury and in the manner provided for by the Code of Civil Procedure. A verdict against the defendant has the effect of validating the provisional

seizure and gives rise to a posting of bond. A decision of discontinuance, dismissal or acquittal automatically lifts the measures ordered, the expense being borne by the Treasury. The same applies in the case of a limitation of prosecution. For the purposes of the article, the judge responsible for release and detention of the Paris Court of Major Jurisdiction is competent for the entire national territory.

12.15 The legal instruments which the European Union decided to adopt on 10 December 2001 (the Common Position and Community Regulation) prohibit nationals or residents of European Union member States from making funds or economic resources available to persons or entities linked to the financing of terrorism (art. 2 (a) of the Regulation). Since article 2 of the Regulation of 6 March 2001 provides for the freezing of funds without exception, a financial institution cannot allow any transaction on the account (neither withdrawal nor deposit). Good practice in the matter of freezing financial assets is to freeze accounts in order to dry up the sources of financing of the identified persons, rather than closing bank accounts or cancelling insurance contracts. Article 2 also provides that no funds shall be made available, directly or indirectly, to persons or entities subject to the freezing of assets. At the national level, this requirement is helpfully reinforced by the provisions of article L-152-1 of the Monetary and Financial Code, which provides that all natural persons who transfer funds, securities or financial instruments worth 7,600 euros or more into or out of the country without the intermediary of a credit institution or service organization must file a declaration with the customs administration. Failure to comply is punishable by confiscation of the object in question or, if seizure is impossible, of an equivalent sum and a fine equal to no less than one fourth and no more than the total sum involved in the offence or attempted offence.

12.16 By allowing for control over physical transfers of capital, this obligation to declare, instituted on 1 January 1990, is an important tool for the French customs service in combating money-laundering, tax fraud, illegal drug trafficking and terrorist financing.

(d) What penal provisions exist in France to prohibit recruitment to terrorist groups and the supply of weapons to terrorists, and what other measures help prevent such activities

12.17 France reported that it refrains from providing any form of support for terrorism, and that it has also taken steps to prevent its nationals and residents from doing so. French law considers as a terrorist offence not only a terrorist attack, which is the ultimate manifestation of terrorism, but many other offences committed “in relation to an individual or collective undertaking that has the aim of seriously disrupting public order through intimidation or

terror” (article 421-1 of the Penal Code). They noted that the law thus makes it possible to take vigorous action through a specific procedure against all illicit acts committed in preparation for such an attack. France noted that similar provisions have been agreed on in the context of the European Union. The Council Framework Decision of 6 December 2001 on combating terrorism makes participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way a punishable offence and seeks to harmonize the applicable penalties (eight years’ imprisonment).

12.18 Recruitment of members of terrorist groups is covered by French law under the offence of criminal conspiracy of a terrorist nature, which consists of participation in a group formed or an arrangement set up for the purpose of preparation involving one or more material elements of acts of terrorism. The offence is punishable by 10 years’ imprisonment and a fine of FF 1,500,000. As a matter of regular practice, the judicial authorities institute proceedings when serious and corroborating evidence supports the presumption that a criminal conspiracy has been formed for the purpose of committing acts of terrorism. French law also prohibits these offences under 1936 legislation outlawing combat groups and disbanded movements. Since 1996 such offences are subject to more severe penalties if they are related to a terrorist undertaking. The penalties applied range from five to 10 years’ imprisonment and associated fines, depending on whether the act entails participating in, maintaining or reconstituting a disbanded movement or combat group. France remarked that this consistently developed penal policy makes it easier to detect, at the earliest possible moment, conspiratorial activities that are likely to constitute a serious threat to public order and are carried out by individuals who would be harder to question at a later stage because they belong to international organizations with support networks based abroad.

12.19 In addition, the Act of 29 July 1881 prohibiting both incitement to racial hatred, discrimination and violence and advocacy of terrorism lays the groundwork for punishing not only the dissemination of propaganda for the purpose of recruitment, but also any natural or legal persons who seek to convert others to terrorism. All such acts can be prosecuted in the same way regardless of whether the terrorist activity is meant to be carried out on French territory or abroad, and hence they are subject to judicial proceedings.

(e) Prohibiting the provision of arms to terrorists

12.20 France stated that French legislation carries severe penalties for offences against the regulations on the sale and circulation of weapons. The penalties for the following offences

are more severe if the offences are committed in connection with a terrorist undertaking and range from 5 to 7 years:

- (a) Producing, selling, importing or exporting explosives (Act of 3 July 1970);
- Illegally acquiring, possessing, transporting or carrying explosives or explosive devices (Act of 3 July 1970);
- Possessing, carrying and transporting weapons and ammunition of the first (military weapons) and fourth categories (Decree-Law of 18 April 1939);
- The offences of developing, producing, possessing, stockpiling, buying and selling biological or toxin-based weapons (Act of 9 June 1972);
- Certain offences covered by the Act of 17 June 1998 concerning the implementation of the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction;
- Receiving the proceeds of one of the offences set forth above.

12.21 France noted that it has other preventive measures as well. France has in place a strict and time-tested system of controls on sensitive exports, one aim of which is to prevent such exports from being traded and diverted to terrorist groups. In the case of war material, including explosives, the national control system based on the Decree-Law of 18 April 1939 provides for a general ban, hence any such exports constitute an exception to the rule. The Ministry of Defence annually reports to Parliament. France pointed out that it plans to supplement its legislation in the near future with provisions to control the brokerage of weapons deals. The new law will set up a system for licensing all operations that might result in the transfer, through intermediaries in France, of material from one foreign country to another. The bill also provides that brokerage licences, as well as import and export licences, may be suspended or withdrawn in application of an international agreement, a decision by the European Union or the United Nations Security Council or in the event that the fundamental interests of the nation are at stake. This bill would bring national legislation into line with the international guidelines set by the United Nations and the European Union that aim at cutting off terrorist organizations' sources of supply and preventing shipments of arms to Governments that violate human rights or to regions that are unstable or in conflict. In the case of dual-use items, and communication systems in particular, France was implementing European legislation (Regulation (EC) No. 1334/2000) that subjects certain goods to export controls. In addition, France has a national "monitoring" system for exports of goods containing encryption technology, making it easier to trace such goods.

12.22 France is party to various international agreements and a member of a number of

international bodies. In the framework of the European Union, it applies the code of conduct on arms exports, which calls for information exchange and consultation mechanisms on export rejections, in addition to the application of export criteria. France is also party to the Wassenaar Arrangement, a forum made up of 33 countries that manufacture and export weapons and dual-use goods; it also takes an active part in the exchanges of views and information the Arrangement provides for. France actively supports initiatives to promote and strengthen consideration of the problems of combating terrorism in the multilateral bodies responsible for control of sensitive exports.

(f) What other steps are being taken to prevent the commission of terrorist acts, and in particular, what early warning mechanisms exist to allow exchange of information with other States

12.23 France noted that in order to effectively combat terrorism, France endeavours to work as closely and as extensively as possible with other States in this area, especially in the event of an imminent terrorist threat. Moreover, apart from its standing counter-terrorist mechanism, France has taken specific steps to prevent the commission of terrorist acts. On early warning mechanisms for the exchange of information with other States, all the French counter-terrorist services maintain permanent relations with their counterparts in other countries. Such cooperation involves, inter alia, the exchange of information on terrorist acts planned or committed in France or abroad, on the individuals involved in such acts, on their methods of operation and technical resources used for perpetrating attacks and on terrorist groups — their strategies and goals, their recruitment, organization and support networks (equipment, weapons, financing, training) and their membership.

12.24 France has begun such exchanges in a multilateral (international or European) or bilateral framework. Regarding international cooperation France remarked that it is the host country of the International Criminal Police Organization (Interpol), which has a very effective and universal (179 member countries) communications infrastructure. It remains, among other things, a critical tool for official information on persons on global wanted lists and for communicating judicial assistance. France is also a member of the Berne Club, which was established in 1971 as a multilateral forum for cooperation between the heads of security and intelligence services in a number of European countries. France also participates in several multilateral forums such as the G-8, the Mediterranean Forum, the Conference of Ministers of the Interior of the Western Mediterranean and the Euro-Mediterranean Process, which facilitate the exchange of information among police services. Contact points were exchanged within the latter three forums. The European Union Task Force of Chiefs of

Police, on which France is represented by the Directors-General of the gendarmerie and the national police, is responsible for enhancing the exchange of operational information. The European Police Organization (Europol) has been expanded to include terrorism, and a Task Force has been set up to support member States in their efforts to prevent and combat terrorism by providing assistance to the police and intelligence services. The Task Force focuses on cooperation between police and intelligence services, improving the exchange of information and on cooperation with the United States of America. France has appointed a counter-terrorism expert to the Task Force. France actively participates in the working group on terrorism, which aims at initiating and developing cooperation and prepares a biannual report assessing threats of terrorism and identifying terrorist groups which pose a threat within European Union countries. It also proposes recommendations and measures on various critical aspects of the war on terrorism and regularly organizes thematic seminars.

12.25 France is also a member of the Police Working Group on Terrorism (PWGT), an informal working group where the heads of police counter-terrorist departments meet to discuss current cases under investigation in order to review concrete steps designed to enhance technical and operational cooperation with respect to the war on terrorism in Europe. The PWGT has its own coded communications network. France also participates in the work of the liaison office, a communication network which provides confidential or operational information on individual States. Within the European Union, the establishment of the European Judicial Network and Eurojust is also contributing to enhanced judicial cooperation and the coordination of prosecution between member States.

12.26 On the issue of bilateral cooperation France noted that the various French counter-terrorist agencies continuously exchange confidential bilateral information with many countries. Intergovernmental agreements on police cooperation have been signed with 42 countries, and 13 others are under negotiation. They all provide for the exchange of intelligence on terrorism. France also has a network of attachés in the area of domestic security posted to its embassies abroad who are responsible for the traditional aspects of police cooperation. In Europe, bilateral operational cooperation is facilitated through the assignment of liaison officers who are experts in counter-terrorism to counterpart agencies. France has assigned such officers to Belgium, Germany, Italy, Spain and the United Kingdom, which have also assigned counterparts to France.

12.27 The Directorate of Territorial Security plays the lead role in combating terrorism directed against France; its specialist investigators exchange intelligence with their foreign counterparts. The Central Intelligence Directorate deals with domestic terrorism. Special emphasis is placed on bilateral cooperation through the promotion of the exchange of liaison

magistrates, who get the opportunity to meet their counterparts from neighbouring countries to discuss difficult cases or cases under investigation in their respective countries. For many years, such magistrates have been helping to facilitate international mutual judicial assistance, especially the processing of requests. Additionally, the French customs service initiated contacts and entered into agreements to establish European and global customs cooperation networks to facilitate and promote the exchange of information and operational contacts underpinned by a network of 15 customs attachés in French embassies abroad and various multilateral or bilateral legal instruments on mutual administrative assistance.

12.28 Thus, in addition to being party to European Union and World Customs Organization agreements, France has to date signed 33 bilateral agreements on mutual administrative assistance for the prevention, investigation and punishment of customs fraud and is continuing negotiations with several States.

(g) Specific measures to prevent the commission of terrorist acts

12.29 France pointed out that under the governmental decisions proposed and implemented by the Ministry of Defence, the counter-terrorism machinery mobilizes civilian and military resources. The Interministerial Liaison Committee Against Terrorism (CILAT) coordinates interministerial efforts. Since 1984, the goal of the Anti-Terrorist Coordination Unit (UCLAT) established within the Ministry of the Interior has been to coordinate the activities of all the agencies involved in the war on terrorism. France said that the “Vigipirate renforcé” contingency plan was put into place on 11 September 2001. It aims at promoting enhanced awareness among all public services and private partners, enhancing security along highways, train stations, ports and airports as well as securing sensitive points and networks throughout the country. In addition to the police (police and gendarmerie) and customs services, the armed forces contribute about 1,000 men to this plan. The contingency plan involved additional security measures at nuclear facilities, including controlling staff access to the most sensitive areas, further restriction of access to such facilities, surveillance and overflight of the facilities.

12.30 France also noted measures taken in the field of mass transit security, saying that air transport security measures have been considerably enhanced from 11 September 2001 and reviewed several times since then. They cover all international flights irrespective of the nationality of the carriers and passengers. The measures basically involve enhanced procedures for the screening of passengers and their hand luggage, specifically a more thorough manual search, speeding up the introduction of the checked-in luggage inspection procedures, enhanced control of personnel access to restricted airport areas and introducing

screening of such personnel at the hubs of major airports, enhanced aircraft access control and improved procedures for the inspection of freight and catering supplies. The French customs service conducts special security inspections of all passenger, tourist vehicle, lorry and railway freight traffic going through the Channel Tunnel to the United Kingdom. The frequency of inspections, instituted by an interministerial security committee and endorsed by a bi-national Franco-British committee, has been considerably increased since 11 September 2001.

12.31 France noted also specific measures to combat bioterrorism: As a complement to the "Vigipirate" plan, France has adopted more specific plans of action. The Biotox plan on biological risk adopted by the Government in October 2001 is the fruit of interministerial efforts begun in 1999. The plan, which involves close cooperation between civilian and military agencies, provides for specific measures to be taken in the following areas: prevention, surveillance and early warning, and emergency action. With particular respect to prevention, new arrangements have been put in place since 22 September 2001 with a view to enhancing security at facilities for the production, storage and transport of hazardous biological materials. These arrangements include the following:

- Order concerning the inclusion of several agents of infectious diseases and pathogenic micro-organisms on the list of poisonous substances;
- Order concerning the handling, import, export, possession, transfer, whether free or for a consideration, acquisition and transport of agents of certain infectious diseases, pathogenic micro-organisms and toxins. Eleven pathogens subject to particular conditions are listed thereunder.

12.32 Moreover, by Decree No. 2001-910 of 5 October 2001, anthrax was included on the list of reportable diseases. The procedures for the notification of human anthrax are laid down under an order of 5 October 2001.

(h) What legislation or procedures exist for denying safe haven to terrorists, such as laws for excluding or expelling persons

12.33 France said it fully abides by its international obligations as a State party to the Geneva Convention relating to the Status of Refugees and grants refugee status to persons who meet the requirements of the Convention and to any persons who are persecuted for their activities to promote freedom, if they are "freedom fighters" as defined by the French Constitution. The processing of requests for asylum and the granting of initial and continued

residency are carefully scrutinized where an applicant is suspected of involvement in terrorist activities.

12.34 France set out the procedure for admission to refugee status, saying that requests for asylum are handled by the French Office for the Protection of Refugees and Stateless Persons (OFPRA), which processes applications and rules independently on the merits thereof. Where OFPRA denies an application, the applicant may within a month appeal to the Refugee Appeals Board, a specialized court with full jurisdiction, whose decisions are binding. Those decisions are subject to appeal to the highest court. In considering requests for asylum, the enduring concern of OFPRA has been to protect not only refugees but the status of refugees itself against any abuse. It is in that spirit that it applies the exclusionary clauses provided for by the Geneva Convention (article 1 F (a), (b) and (c)). In the light of French doctrine and case law, such clauses are indeed being applied. Anyone invoking such clauses would, however, have to put forward sufficiently compelling personal data, failing which their case will be rejected on appeal. This interpretation of the provisions of the Geneva Convention in practice excludes any person with respect to whom there are reasons for considering that he has, directly or indirectly, helped to decide, prepare or carry out acts likely to be considered as serious non-political crimes (article 1 F (b)) — irrespective of the offence as charged under the French Penal Code — or as acts contrary to the purposes and principles of the United Nations (article 1 F (c)), where such acts were committed in the country of nationality or in a third country.

(i) Granting of residency to and expulsion of asylum seekers

12.35 France said that except for legal prohibitions against admission, which fall within the jurisdiction of criminal courts, the Ministry of the Interior has jurisdiction over the granting of residency and expulsion measures. An application for asylum filed with a prefecture is subjected to thorough investigations to determine whether the applicant has previously applied for a residence permit, whether an administrative or judicial order has been issued for his expulsion or whether he is wanted in connection with criminal investigations or he is on the wanted list of specialized law enforcement agencies. In the light of the information collected, it may be decided not to grant the request for asylum on the grounds that the applicant represents a threat to public order. OFPRA will therefore have to take a prompt decision. Where there is clear evidence that an asylum seeker has been convicted of terrorism, the prefect may either issue an order for him to be escorted to the border, or, if he has been convicted of a crime, an order may be issued for his deportation. In implementation of the principle of non-refoulement of asylum seekers, where an expulsion order has been issued, it may not be executed before OFPRA rules on the case. The applicant may be put under house arrest pending a ruling by OFPRA. Where OFPRA

denies the application for refugee status, the expulsion order must be enforced, since an appeal before the Refugee Appeals Board does not operate to suspend proceedings. Then the problem of the country to which the person will be expelled arises, since under the European Convention on Human Rights, an alien may not be expelled to a country where he might be exposed to inhuman or degrading treatment.

12.36 France explained that where the asylum seeker has been granted permission to stay and it becomes known subsequent to the issuance of the temporary residence permit that he or she is a known terrorist, such temporary permit may be withdrawn or not renewed. However, the asylum seeker has the right to remain on French soil until such time as OFPRA rules on his or her status. Once a person has been granted refugee status, he or she is issued with a residence permit valid for 10 years, unless he engages in activities that jeopardize public order. In such case, the residence permit of a refugee whose presence poses a threat to public order may be withdrawn by the competent prefecture. The residence permit is automatically renewable; in other words, while it can be denied the first time, once granted, it may not be withdrawn at the time of renewal, even if the refugee represents a threat to public order, in which case the only possibility is a deportation order. The refugee status granted by OFPRA may be withdrawn from any person who may have concealed information that might have made him ineligible under the Geneva Convention (including misrepresentation concerning terrorist activities prior to being granted refugee status, which are grounds for its withdrawal). However, as far as the refugee status is concerned, while a refugee who commits an offence (including involvement in terrorist acts) on the territory of the host country may be subject to a criminal penalty and may, where necessary, be subject to expulsion under articles 32 and 33 of the Geneva Convention, under current case law such an offence does not constitute grounds for withdrawing his refugee status. In such case, the refugee retains his status and residence permit but may be expelled.

12.37 Where terrorist activities charged to a refugee constitute a threat to public order, a deportation procedure may be initiated. Similarly, where the expulsion of the refugee is required by an extreme emergency or by compelling reasons of national security or public order, an order may be issued. However, such an expulsion order may be executed only subject to the principle of prohibition of return to a country where the refugee would be exposed to persecution referred to in article 33, paragraph 1, of the Geneva Convention. Where the refugee cannot be returned to his country of origin or to a third country, a compulsory residence order may be issued under the condition of close supervision.

12.38 France noted on territorial asylum and the concept of terrorism that under French

law, a foreigner may be granted asylum if he proves that his life or freedom is at risk in his country or that he may be subjected there to treatment prohibited by article 3 of the European Convention on Human Rights (article 13 of the Act of 25 July 1952 on the right of asylum as amended by the Act of 11 May 1998). Under article 13 of the Act of 1952 on the right of asylum, the French authorities may deny a request for territorial asylum where such request is not compatible with the interests of France. Since the maintenance of public order is a requirement under the Constitution, it may be used as grounds for denying territorial asylum to any person convicted of terrorism. Article 9 of the Decree of 23 June 1998 on territorial asylum provides, in the event of a threat to public order, for an emergency procedure which may result in the applicant being denied temporary residence. Where there is evidence that the applicant has been convicted of terrorism, an expulsion order may be issued either during the processing of the request for asylum or upon notification of the denial of territorial asylum, subject to the provisions of article 3 of the European Convention on Human Rights.

(j) What legislation or procedures exist to prevent terrorists acting from French territory against other States or citizens?

12.39 France said that it takes specific measures to prevent the use of its territory as a “home base” by terrorist movements, and these measures have been strengthened recently. France noted that Act 96-647 of 22 July 1996 introduced an additional anti-terrorist measure namely the offence of criminal conspiracy of a terrorist nature. Article 421-2 of the Penal Code was modified as follows: “The following shall also constitute a terrorist act: participation in a group or an understanding established for the purpose of preparing, by means of one or more material actions, one of the aforementioned terrorist acts.” This provision is vital in order to prevent the use of French territory to commit acts against third States or their nationals. The offence of criminal conspiracy for the purpose of planning terrorist acts is applicable to persons not only within French territory but also outside the country. This offence is also applicable when the terrorist organization is targeting the territory of a foreign State, not only French territory (article 706-16 of the Code of Criminal Procedure).

12.40 France said that new measures were also adopted. A law on every day security measures was adopted by the French Parliament on 15 November 2001. It contains new provisions for the purpose of:

- (a) Combating more effectively those offences which may be connected with terrorist activities:
 - Police and gendarmerie forces will be authorized to inspect vehicles in the context of offences particularly damaging to

public safety, such as those relating to terrorism or the trafficking of arms, explosives or drugs;

- Unoccupied premises may be searched at night with a warrant from a magistrate in the context of offences relating to terrorism or the trafficking of arms, explosives or drugs.

(b) Intensifying the fight against terrorism in general terms:

- Video recordings may be made during interviews and videoconferencing technology may be used for witness confrontations for offences related to terrorism or drug trafficking, in order to ensure rapid transmission of information to the investigating magistrate and avoid unnecessary transfers;
- Personal files contained in police data-processing systems may be consulted by officials in the context of specific situations which will be listed in a decree;
- Internet connection data and other technical data are to be retained long enough to permit identification and prosecution of offenders.

12.41 The network of liaison officers set up by France and several other countries, particularly in Europe, facilitates exchanges among departments. Also, a number of specialized police units have been set up; one such has recently been established in Bayonne, near the frontier with Spain.

12.42 France noted in its report the monitoring of legally incorporated and de facto entities. It explained that the provisions of the Act of 1 July 1901 on freedom of association enable the French authorities to deal with the illicit activities of organizations which break the law or disturb public order and whose purpose is to support terrorist organizations, sometimes in the guise of cultural, religious, charitable or humanitarian activities. The Act of 1 July 1901 enables the authorities to shut down organizations based on illicit causes or objectives contrary to the law or accepted standards of behaviour. The abolition of the organization is pronounced by judicial decision. In making its decision, the judicial authority takes into account not only the purpose as set forth in the organization's statute but also the goal it actually pursues. The Act does not require that illegal acts must actually have been committed. The Act of 10 January 1936 provides for the abolition, by a Council of Ministers decree, of combat groups and private militias established as associations, whether declared or not, which call for armed demonstrations in the streets or advocate discrimination or racial hatred or violence. In 1996 this provision was extended to groups which, within or from French territory, conspire to bring about acts of terrorism in France or abroad.

12.43 France pointed out that it has set up a system to prevent the use for terrorist purposes of telecommunications and information networks. Under the Act of 10 July 1991, on the confidentiality of correspondence transmitted via telecommunications technology, interceptions by the security forces are authorized for the purpose of preventing terrorism. Such interceptions are carried out under the supervision of the National Commission for the Monitoring of Security Interceptions. An automated system to monitor technological development has been set up at a national centre against high-technology crime. Following 11 September 2001, other departments, such as the customs and gendarmerie, have been focusing the activities of their technological monitoring units on terrorism.

(k) **What steps have been taken to establish terrorist acts as serious criminal offences and to ensure that the punishment reflects the seriousness of such terrorist acts**

12.44 France noted that it has adopted specific and comprehensive anti-terrorist legislation, the cornerstone being the Act of 9 September 1986, and which has evolved in order to deal with the threat of terrorism. France said that the French Penal Code (arts. 421-1 et seq.) defines acts of terrorism as independent offences, that is, a separate category of offences subject to more severe penalties than are violations of ordinary criminal law. This legislation defines terrorism as an individual or collective undertaking, the aim of which is to cause serious damage to public order by means of intimidation or terror. Terrorist activity is defined in criminal law, however, by combining two criteria:

- Firstly, the existence of an offence or serious crime under ordinary criminal law, as defined in the Penal Code. This concerns only certain offences and serious crimes included in a list established under the Penal Code. The list was added to in 1994 (new Penal Code) and lastly in 1996, and currently includes the following:
 - Deliberate attacks upon the life or physical integrity of the person; abductions and sequestration; hijacking of aircraft, ships or any other means of transport;
 - Theft, extortion, destruction, damage or deterioration, and certain computer-related crimes;
 - Offences in relation to combat groups and disbanded movements;
 - The manufacture or possession of deadly or explosive devices or machines (definition extended to biological or toxin-based weapons);

- Receiving the products of the aforementioned offences.
- Insider trading and money-laundering were recently added to this list by the Act of 15 November 2001.
- Secondly, the connection between these offences or serious crimes and an individual or collective undertaking whose aim is to cause a serious disturbance to public order by means of intimidation or terror. The following are specifically criminalized:
 - Since 1994, acts of environmental terrorism (introduction into the atmosphere, upon or under the ground or into any waters, including those of the territorial sea, of a substance that is likely to endanger the health of persons or animals or the natural environment);
 - Since 1996, criminal conspiracy of a terrorist nature (participation in a group or an understanding established for the purpose of preparing, by means of one or more material actions, one of the aforementioned acts of terrorism);

12.45 These offences thus defined are considered acts of terrorism and criminalized as separate offences under the new Penal Code, with particularly heavy penalties. They come under a special procedural regime with the following characteristics:

- Investigation, prosecution and judgement centralized under the Tribunal de grande instance of Paris (Central Anti-Terrorist Department of the Prosecution Service of Paris with specialized investigating magistrates);
- Extension to four days of the maximum duration of police custody;
- Authority to carry out searches at night under a special authority;
- Postponement of the right to see a lawyer for seventy-two hours during police custody;
- Trial of terrorist crimes before a special criminal court composed of professional magistrates (Act of 16 December 1992);
- Availability of a special mechanism for “reformed” terrorists (remission of sentences for terrorists who change their minds and help to prevent a terrorist act, and halving of sentences for terrorists who enable the authorities to put an end to illegal activities or who help the authorities in such a way that the offence in question is prevented from causing loss of life);
- Extension of the statute of limitation on prison sentences (from 20 to 30 years for serious crimes and from 15 to 20 years for other offences) and on bringing actions (from 10 to 30 years for serious crimes and from 3 to 20 years for other offences).

12.46 The Penal Code provides for the punishment for a given offence to be increased to the maximum sentence when the offence constitutes an act of terrorism. Under criminal law, the maximum is raised to life imprisonment where the sentence initially applicable was 30 years' imprisonment, 30 years when the initial penalty was 20 years, and 20 years where it was 15 years. Where the maximum was initially 10 years' imprisonment, it becomes a sentence for a serious crime and is increased to 15 years' imprisonment. The same mechanism applies at the magistrate's court level (*correctionnelle*), where the sentence is increased to the upper limit: from seven years' imprisonment to 10 years or from five to seven years; where the initially applicable penalty was between one and three years, it is doubled.

12.47 Rules of ordinary criminal law concerning aggravating circumstances are also applicable. Under the rules relating to the criminal responsibility of accomplices or of those who attempt to commit serious terrorist offences, life sentences are often imposed on those prosecuted for their participation in terrorist acts such as assassination, murder, serious terrorist attacks or abduction.¹

12.48 As for magistrates' courts, many cases relating to the terrorist activities of various organizations have been heard in recent years, and the courts have imposed sentences up to the maximum of 10 years' imprisonment; in some cases, where the person convicted was a foreigner, the Court added an additional penalty of permanent or temporary banishment from French territory.

(I) What procedures and mechanisms are in place to assist other States

12.49 France said that in addition to the exchanges of information on terrorism described above, France provides legal assistance to other States and has entered into bilateral and multilateral agreements for that purpose.

12.50 France noted in regard to conditions for granting legal assistance that it may grant legal assistance in criminal investigations concerning terrorism in two different types of

¹ The report notes that French courts are frequently called upon to hear such cases, and they impose severe sentences. One example of the prosecution of a serious crime was the sentencing by the specialized Court of Assize of Paris, on 24 December 1997, of Illitch Ramírez Sánchez, alias Carlos, to life imprisonment following a gunfight in Paris on 27 June 1975 during which three people, including two police officers, were killed and a third police officer was wounded. Another person who attempted to bomb the Paris-Lyon TGV (high-speed train) in 1995 was sentenced on appeal to 30 years' imprisonment on 26 October 2001. The court of first instance had sentenced his accomplice to 20 years.

situations: France is a party to a great number of multilateral instruments relating to particular types of criminal activity, and containing more or less detailed provisions in the area of legal assistance. France is also party to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, which constitutes the main basis of its relations concerning mutual assistance in criminal matters. As for bilateral instruments, as of 1 January 2001, France was a party to about 50 existing agreements in the area of mutual assistance in criminal matters. France is also developing an active policy of negotiating new bilateral agreements to strengthen, simplify and improve the legal framework for mutual assistance in criminal matters. France pointed out that generally speaking, these agreements do not restrict legal assistance to certain named offences. Also, where an existing multilateral or bilateral convention is applicable, the conditions for the granting of assistance and any possible reasons for withholding it are determined by the instrument itself.

12.51 France remarked that where no convention exists, France may nonetheless grant mutual assistance in criminal matters on a reciprocal basis, pursuant to the provisions of articles 30 et seq. of the Act of 10 March 1927. Again, the possibility of mutual legal assistance being granted is not restricted to specifically named offences. France noted in regard to conditions for the exercise of mutual assistance in criminal matters that in principle, France does not make compliance with a request for assistance subject to the rule of dual criminality. This condition does, however, apply under certain bilateral conventions, particularly regarding requests for assistance relating to coercive measures. Dual criminality is presumed to exist if the offence in respect of which the assistance is requested is covered under a multilateral instrument to which the requesting State and France are both parties (including the International Convention for the Suppression of the Financing of Terrorism). In France, banking confidentiality may not be invoked against judicial authority, and it cannot therefore be used to justify denying mutual assistance. Furthermore, such assistance may also be granted when the liable party is a legal person. Certain instruments may enable France to grant legal assistance for non-criminal proceedings of an administrative nature, provided that an appeal will be possible, particularly before a criminal court, against the decisions handed down by the administrative authorities if the applicable convention so provides.

12.53 It is explained that on 23 June 1999, in order to strengthen judicial cooperation, a law was enacted in France to improve the efficiency of criminal proceedings. A section relating to international judicial assistance was thereby added to the Code of Criminal Procedure. The new text includes a provision (article 694) covering problems of compatibility between French law and the law of the requesting State. For example, it permits action on requests

for assistance from foreign authorities in a manner which is as close as possible to that provided for in the legislation of the requesting State.

12.54 France noted that these provisions are also intended to streamline the processing of requests for judicial assistance, with particular attention to cooperation among States parties to the Schengen Convention of 19 June 1990 (articles 695 and 696 of the Code of Criminal Procedure). France also considers that the efficiency of such cooperation would be improved by strengthening its national structures and mechanisms specifically devoted to cooperation, which may be used in the context of international judicial cooperation for the suppression of terrorism. Particular efforts have been made on bilateral cooperation by developing exchanges of liaison magistrates but also by giving magistrates opportunities to meet their counterparts in neighbouring countries to discuss cases in which difficulties have arisen or those being investigated in both countries. For several years, these liaison magistrates have been working to expedite procedures for international mutual legal assistance, particularly by facilitating the transmission of requests.

12.55 At the European Union level, the establishment of the European Judicial Network and of Eurojust have also helped to enhance judicial cooperation and the coordination of legal proceedings among member States. Lastly, training courses taught by the *École Nationale de la Magistrature* enable the provisions of France's anti-terrorist legislation to be disseminated in

France and abroad. In France, specialized investigating magistrates send and receive requests for assistance in the suppression of terrorism, the execution of which has led to the thwarting of a number of attempted terrorist attacks in France and abroad and made it possible to follow up to complement these counter-terrorist operations with investigations that have led to the identification and fullest possible punishment of all those who participated in the attacks.

(m) **How do border controls in France prevent the movement of terrorists, how do their procedures for issuance of identity papers and travel documents support this, and what measures exist to prevent their forgery, etc?**

12.56 France pointed out that it has taken action in this field primarily in a European framework, in particular that of the Schengen Agreements, which eliminated internal cross-border controls and strengthened controls on the external borders of the countries of the Schengen area. France noted on border control, training and information and control of external borders of the Schengen area, that the French agencies responsible for controlling the movement of foreigners into and out of France (border police (DCPAF), gendarmerie

(DGGN) and customs) ensure that persons crossing the border meet common standards for admission into the territory; these agencies conduct checks with reference to the following:

- The Schengen Information System (SIS), including notification of measures of expulsion, bans on leaving the territory and denial of entry into the territory;
- Threats to the public order;
- Threats to national security.

12.57 France noted that checks are also carried out during customs clearance of goods and control of passengers, carriers and merchandise by the Customs Administration, through inspection at points of entry and mobile controls throughout the territory, including the buffer zones. These controls enable the authorities to conduct targeted searches of sensitive materials and transport vehicles that may be used to organize trafficking and smuggling of persons or products.

12.58 France noted that the abolition of the control of persons at internal borders under the Schengen Agreements has led to the adoption of a number of compensatory measures aimed at ensuring an optimum level of security in the common area. Specific controls for verifying obligations relating to the possession, carrying and presentation of identity papers and visas, where applicable, may be carried out by the police, gendarmerie and customs in an area within 20 km of the land borders with States parties to the Schengen Convention and in areas accessible to the public at ports, railway stations or coach stations open to international traffic. These three agencies also participate, under cross-border cooperation agreements with neighbouring member States, in the gradual introduction of Police and Customs Cooperation Centres (CCPD), whose purpose is to strengthen bilateral operational cooperation, in particular with regard to security and combating illegal immigration and trafficking. These centres also help implement the rights of cross-border surveillance and hot pursuit established by the Schengen Agreements. France explained on training and information that it is focusing on enhancing the skills of its border control agents. Thus, a national personnel network was set up in 2000 to improve the exchange of operational information and the training of agents, and to step up the dissemination of early warnings and information notes in real time. Software to help detect forged documents was set up in 1993-1994 and is gradually being extended to all the agencies concerned. France is actively cooperating with its European partners on a reciprocal basis in the exchange of data, in the form of dissemination of early warnings and participation in various international seminars and meetings. Priority is currently being given to the upstream battle against drug rings, in cooperation with the Office of International Technical Police Cooperation (SCTIP), with training offered in the source countries and a reciprocal arrangement with consular

officials in countries where SCTIP is not represented.

12.59 France pointed out that various systematic controls are used for the issuance of identity documents and visas by the authority of the place of residence, for which applicants are required to appear in person. One of the purposes of these controls is to verify the civil status and identity of applicants, their possible registration in the register of wanted persons and, where appropriate, the prior issuance of the requested documents. France noted that on 17 November 2000, the Council of the European Union adopted a resolution on ensuring the security of passports and other travel documents. The new French passport and the secure national identity card meet these new standards. These documents will be issued by French diplomatic and consular missions abroad starting in 2002 for the secure national identity card, and in 2003 for the passport. Lastly, France is an active participant in the effort to combat forgery, in particular with its partners in the Group of Eight (G-8) and the Mediterranean Forum.

(n) **Have steps been taken to intensify and accelerate the exchange of operational information?**

12.60 France said that besides the internal procedures of the various agencies, the Anti-Terrorist Coordination Unit (UCLAT) is responsible for ensuring the cross-cutting exchange of information and analysis by coordinating the various actors in the fight against terrorism, thus giving it an inter-ministerial dimension. For their part, the armed services engage in frequent exchanges of information and awareness training which, under the auspices of the Ministry of Defence, have been formalized since 11 September.

12.61 France explained on the issue of the exchange of information on arms trafficking, explosives or sensitive materials and the use of information technologies that besides the steps referred to above, it is helping to build, at the European level, a network of contact points designed to improve the ability to track firearms used in connection with offences and ensuring greater efficiency in the exchange of information between the police forces of the States members of the Union. Moreover, France is making a significant contribution to external operations, in particular in the former Yugoslavia, both to the forces under the command of the

North Atlantic Treaty Organization (NATO) and to United Nations peacekeeping missions. Thus, its presence in conflict zones which generate arms trafficking enables it to gather and use information on drug rings and criminal groups. France is now exchanging information on the protection of arms depots as well.

12.62 France pointed out on the exchange of information on weapons of mass destruction, that in addition to the steps outlined above, it participates every year in an exchange of information under the Biological Weapons Convention, which requires States parties to communicate to the United Nations Secretariat, on a voluntary basis, any information concerning their activities in the biological weapons field. Moreover, France has complied with its reporting obligations under the Chemical Weapons Convention. States parties are required by the Convention to declare their entire stock of chemical weapons, their production facilities in operation, their past activities in that area, and all industrial sites that produce, in quantities exceeding the limits set by the Convention, substances that may be used for the production of chemical weapons.

12.63 France said on the issue of whether steps have been taken to exchange information and cooperate in the area of weapons of mass destruction, that there is judicial cooperation and on administrative cooperation in the area of finance, that the French financial intelligence unit (TRACFIN) has placed its techniques and experience in combating money-laundering at the service of efforts to stop the financing of terrorism, in view of the links between the financial bases of organized transnational crime and those of international terrorist networks. France explained that TRACFIN is authorized to exchange information with its counterparts in other countries, provided that they meet the following three conditions: they must have a similar remit, namely, that of combating money-laundering; they must respect the principle of reciprocity; and they must abide by the same professional confidentiality requirements (article L.564-2 of the Monetary and Financial Code). In addition, since 1996, TRACFIN has been authorized to use its right of discovery in relation to any financial institution concerned in order to provide information, in the above-mentioned conditions, to agencies of other States carrying out the same functions (article L.563-4 of the Monetary and Financial Code). These provisions form the basis for day-to-day operational cooperation between TRACFIN and other financial intelligence units. Moreover, TRACFIN has signed 21 administrative agreements on bilateral cooperation with various foreign partners to formalize their reciprocal commitment to the fullest possible cooperation. Negotiations on seven more agreements are currently under way. TRACFIN is thus strengthening its cooperation initiatives, particularly within the Egmont Group, an informal structure that includes the 58 existing financial intelligence units.

12.64 France considers that in the current international context, the exchange of financial information among financial intelligence units should be further intensified. A secure computerized communication system is being planned within the European Union with a view, inter alia, to coordinating the response of these agencies in the framework of the campaign targeting assets linked to terrorism.

12.65 France noted on multilateral cooperation to prevent the use of weapons of mass destruction by terrorists that the two instruments in force, the Biological Weapons Convention and the Chemical Weapons Convention, do not expressly refer to terrorism, but they nonetheless provide the legal basis for action to help combat terrorism. Their aim, which is to prevent the diversion and illegal use of such weapons, encompasses the prevention of terrorist acts. France remarked that it has signed the Biological Weapons Convention on 10 April 1972 and ratified it on 27 September 1984. It noted that it has, however, as early as 1972, adopted a national implementing act covering all the obligations laid down in the Convention (Act No. 72-467 of 9 June 1972). The law extends the scope of the Convention's prohibitions to any action aimed at inducing or assisting in any way a State, enterprise, organization or group of any kind, or an individual, to develop, produce, possess, stockpile, acquire or transfer such weapons for hostile purposes. Each year, the States parties voluntarily provide the United Nations Secretariat with information on their activities in the field of biology. France participates every year in this exchange of information.

12.66 France pointed out that the Chemical Weapons Convention was signed in Paris on 15 January 1993 and entered into force on 29 April 1997. The conditions in which the Convention is implemented in France are established by Act No. 98-467 of 17 June 1998, which provides for administrative and criminal penalties for the violation of, or the failure to meet, the obligations laid down in the Convention. Decree No. 98-36 of 16 January 1998 establishes the institutional framework for the Convention's implementation and divides responsibilities among the various ministries concerned. France has met its reporting obligations under the provisions of the Convention. States parties to the Convention are required to declare their entire stock of chemical weapons, chemical weapons production facilities in operation and past activities in that area, as well as all industrial sites that produce, in quantities exceeding the limits set by the Convention, substances which could be used for the production of chemical weapons. France has submitted initial declarations in this regard, which are updated regularly.

12.67 France explained on nuclear non-proliferation that it fully supports the work being done in various international forums on issues relating to nuclear non-proliferation and the control of exports of sensitive nuclear materials. France pointed out that these efforts help, in particular, to prevent the misuse of such materials by terrorist groups. It said that within the International Atomic Energy Agency (IAEA), France participates actively in the preparation of policy papers and recommendations on measures to be taken for the physical protection of nuclear material. It is a party to the Convention on the Physical Protection of

Nuclear Material, which establishes physical protection standards for different categories of material. France also supports the Agency's missions to provide assistance to member States that request it (particularly in the Commonwealth of Independent States (CIS) countries and in Central and Eastern Europe) for the establishment and maintenance of national accounting and control systems for nuclear materials. It also contributes to the IAEA database on trafficking in nuclear materials.

12.68 Within the Nuclear Suppliers Group (NSG), France conforms strictly to the Group's directives on the control of exports of nuclear materials and equipment and of dual-use goods. In the framework of "threat reduction" programmes among nuclear Powers or within the Group of Eight, France also plays an active role. It participates in efforts to solve the problem of the vast quantities of fissile materials resulting from disarmament treaties between the United States and the Russian Federation, which are at high risk of misuse. Particularly with respect to weapons-grade plutonium, France initiated the French-German-Russian programme AIDA, carried out since 1992 to convert such material into mixed oxide (MOX) fuel for use in civilian reactors. It also participates very actively in the global project to eliminate excess Russian weapons-grade plutonium, negotiated within the Group of Eight, and looks forward to the project's speedy completion. France noted on the draft convention on the prevention and suppression of acts of nuclear terrorism that from the outset, France, together with its Group of Eight and European Union partners, has supported the draft convention on the suppression of acts of nuclear terrorism, proposed by the Russian Federation. Such a convention would provide an appropriate response to a threat which is more topical than ever before, and would complement existing legal instruments in this area.

12.69 France explained on the issue of multilateral cooperation in the field of air safety that it is involved in the work of international organizations dealing with air safety. Air transport safety measures were strengthened substantially after 11 September 2001, and have been updated several times since then. The International Civil Aviation Organization (ICAO) Assembly, at its thirty-third session, adopted a resolution setting ambitious targets for improving global aviation safety. A new Annex will enter into force in 2002. The participants in the high-level ministerial meeting which were to be convened in February 2002 in Montreal would determine arrangements for implementing and financing the ICAO Universal Safety Oversight Audit Programme, and Document No. 30 of the European Civil Aviation Conference (ECAC), which contains safety provisions, was strengthened in the light of the events of 11 September 2001. ECAC set up working groups to strengthen, both immediately and in the longer term, the safety measures implemented on the ground; to consider developments in terms of procedures and aircraft design with a view to improving

flight safety measures; and to identify the quality control measures that should be put in place by States. In addition, the Ministers of Transport of the European Union agreed, at their extraordinary meeting of 14 September 2001, that the strengthened security measures should be effectively and uniformly implemented. To that end, European regulations, on which the Council reached a common position under the co-decision procedure, will require member States to comply with the chief measures agreed upon at the pan-European level in the framework of ECAC. These regulations provide for the introduction of a Community control mechanism.

12.70 France said on bilateral cooperation against terrorism that apart from the areas of cooperation already mentioned earlier in its report, France has concluded intergovernmental agreements on police cooperation with certain countries. France noted that the preamble to the text of these agreements clearly reflects the importance attached to efforts to combat terrorism: Convinced of the importance of cooperation in the fight against crime and particularly against terrorism ..., Wishing to intensify their joint efforts to combat terrorism ...". Article 2 of the text provides that "In their efforts to combat terrorism, the parties shall:

- Exchange information on terrorist acts which have been planned or committed, on persons participating in such acts and on the modus operandi and technical methods used to perpetrate such acts;
- Exchange information on terrorist groups and on members of such groups that may operate, are operating or have operated in the territory of one of the parties against the interests of the other party".

12.71 France reported that to date, it has concluded such intergovernmental agreements on police cooperation with 42 countries; 13 more agreements are currently being negotiated. Special efforts are being made to enhance bilateral cooperation by stepping up the exchange of liaison magistrates, but also by giving magistrates the opportunity to meet with their counterparts from bordering countries on cases which raise difficulties or which are being investigated in both countries. For a number of years, liaison magistrates have helped to increase the flow of international judicial assistance by facilitating, in particular, the transmission of claims. Likewise, the French customs service has established contacts and agreements to start customs cooperation networks at the European and global levels to facilitate and increase information exchanges and operational contacts. These arrangements are based on a network of 15 customs attachés within France's embassies abroad and on the existence of various multilateral or bilateral legal instruments on mutual administrative assistance.

12.72 France pointed out that it is thus not only a party to the conventions adopted by the

European Union and the World Customs Organization (WCO), but also has concluded, to date, 33 bilateral conventions on administrative assistance for the prevention, detection and punishment of customs fraud, and is still conducting negotiations with a number of States.

(o) **What are the French government's intentions regarding signing and/or ratifying the conventions and protocols?**

12.73 France explained that it is already party to 10 of the 12 conventions and protocols referred to and has taken the requisite national measures. It said that on 29 November 2001 it completed the process of ratification of the *International Convention for the Suppression of the Financing of Terrorism* and would file the related instrument of ratification within the next few days. It further remarked that in November 2001 it also began the procedure for accession to the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, of 14 December 1973. France also observed that it fully implements the conventions, protocols and resolutions referred to. Following the terrorist attacks of 11 September 2001, it undertook actions entailing the involvement of air, land and naval military capabilities.

(p) **Legislative and/or administrative procedures which prevent claims of political motivation being recognized as grounds for refusing requests for the extradition of alleged terrorists?**

12.74 France explained that it makes certain that invoking political motivations is not in itself considered as justifying the rejection of requests for the extradition of presumed terrorists. France is also party to a number of anti-terrorist conventions which prohibit invoking the political character of an offence in order to reject a request for extradition. The report stated that France is party to the European Convention on Extradition of 13 December 1957 as well as numerous bilateral conventions (49 as of 1 January 2001). Nevertheless, France's extradition relations are not subject to the existence of a conventional juridical base, inasmuch as its domestic law, and specifically the Act of 10 March 1927, permits extradition, in the absence of any convention, on the basis of reciprocity.

12.75 France remarked that under French law, extraditable offences are generally determined by the penalty to be incurred, not according to the nature of the offence. However, certain bilateral conventions allow extradition solely for certain specified offences. Extradition is always subject to the condition of dual criminality. This condition is fulfilled, for example, whenever the request for extradition is submitted by a State for an offence defined

by an instrument to which both that State and France are parties. Under French law, extradition may be refused whenever the crime or offence for which it is requested is of a political nature. However, court practice shows that the notion of “political offence”, which is not defined by any legal text, is in fact interpreted in a highly restrictive manner. Even the 1927 law had manifested the intention to limit its scope to “odious, barbarous acts and acts of vandalism prohibited under the laws of war”, committed during an insurrection or a civil war (cf. art. 5, para. 2). France noted that numerous court decisions giving favourable opinions on requests for extradition have long stressed the gravity of the non-political acts committed by the person concerned on political or ideological grounds or pretexts. Furthermore, in making their assessment, the courts have traditionally given particular weight to the fact that the acts were committed in a State respectful of fundamental rights and freedoms. Precedent have thus shown that extradition may be granted even if the deeds have been committed for political reasons, provided that the following conditions are met:

- Regarding the nature of the act committed: the offence must be particularly grave;
- Regarding the requesting State: the offence must have been committed in a State respectful of fundamental rights and freedoms.¹

12.76 In addition, France said that it staunchly supports the work undertaken within the European Union with a view to facilitating judicial cooperation in criminal matters, including extradition, notably through the application of the principle of mutual recognition of judicial decisions. Thus, the implementation of the framework decision on the European arrest warrant, which will replace extradition procedures between member States, will simplify and considerably speed up the process of handing over wanted persons. This instrument calls, among other things, for the abolition of the requirement of dual criminality for certain offences, including terrorism. Finally, judicial cooperation will be strengthened by the entry into force of the European Union conventions of 10 March 1995, on the simplified extradition procedure, and of 27 September 1996, on extradition, which should be ratified by France in the near

¹ France pointed out that these precedents can be illustrated by a number of specific decisions (cf., for example, Council of State, Galdeano, 26 September 1984: “The fact that the crimes, which do not constitute political offences by virtue of their nature, may have been committed within the framework of a struggle for the independence of the Basque Country does not, in view of their gravity, suffice in order for them to be regarded as having a political character”. Court of Appeal of Douai, Grasso, 29 November 1983: “The fact that those acts, which are not political as far as their object is concerned, may have been intended to destroy the democratic order and overthrow the economic and social order does not, in view of their gravity, suffice in order for them to be regarded as having a political character, especially in view of the fact that they were committed in a State respectful of fundamental rights and freedoms”).

future. In another area, French nationality law provides for limits on the naturalization of foreigners who satisfy the legal requirements. While in many cases the Civil Code allows a foreigner or a stateless person to acquire French nationality, its article 21-27, paragraph 1, establishing rules relating to certain ways of acquisition of French nationality, states that no person who has been convicted of a crime or offence constituting an act of terrorism or who has been sentenced to more than six months' imprisonment not coupled with a suspended sentence shall, irrespective of the offence concerned, be able to acquire French nationality.

12.77 France explained that Article 21-27 of the Civil Code constitutes an absolute obstacle to the acquisition of French nationality that does not violate the *Convention for the Protection of Human Rights and Fundamental Freedoms*. Naturalization is a prerogative of the public power, whose function it is to determine, under the conditions provided by law, the rules governing the acquisition of French nationality. These provisions are in conformity with article 7 of the European Convention on Nationality, adopted by the Committee of Ministers on 14 May 1997 and drafted in turn in a spirit of respect for and in consideration of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 8 of the 1961 Convention on the Reduction of Statelessness.

CHAPTER 13

OPTIONS ON REFORM

A. INTRODUCTION

13.1 It was noted in Chapter 1 that the Minister of Safety and Security requested the Commission to conduct an investigation into security legislation. The Commission said in the discussion paper that it is indebted to the Police Service who conducted the initial research and drafted a Bill on which this report and the proposed Bill are based. The reader will therefore find references in this report to “the original Bill”, “the original clause” or the “original proposal” meaning the Bill as submitted by the Police Service to the Commission and its project committee. (The words which are struck out in the Bill (contained in Annexure “B”) are those amendments which the project committee and working committee considered should be made. The Bill was published in this format to reflect the original and the amended wording.) The original Bill was distributed by the SA Police Services to some Government Departments for their comments before it was submitted to the project committee (that version, however, did not contain clause 16 on detention for purposes of interrogation and special offences which was added by the SAPS after a spate of bombings in the last quarter of 1999).

13.2 The discussion paper explained that the existing offence of terrorism which is contained in section 54(1) of the Internal Security Act, 1982, relates only to terrorism in respect of the South African Government or population, although the threat of terrorism worldwide is often directed at foreign officials, guests, embassies and the interests of foreign states. It was therefore considered that the existing offence of terrorism under South African law was inadequate.

13.3 It was explained in the discussion paper that it can be argued that any act of terrorism can in any event be prosecuted in terms of the existing law as such an act would constitute an offence, whether under statute or common law but that the worldwide trend is to create specific legislation based on international instruments relating to terrorism. Two reasons for this were noted, namely firstly to broaden the normal jurisdiction of the courts to deal with all forms of terrorism, especially those committed outside the normal jurisdiction of courts, and secondly to prescribe the most severe sentences.

13.4 It was stated that it is imperative that South Africa sign, ratify or accede to the respective instruments relating to terrorism as soon as possible. It was said that for this purpose two options are available: one is for the Departments involved to amend present

legislation pertaining to nuclear energy, civil aviation, etc. on the basis of the relevant international instruments, and the other is to draft an omnibus Act addressing the issue of terrorism on a broader basis.

13.5 It was explained in the discussion paper that the second option was provisionally preferred, and a draft Anti-Terrorism Bill to that effect was included in the discussion paper for general information and comment (see Annexure B). The State Law Advisers: International Law have noted in preliminary consultations that complex issues are raised by this investigation. They noted that this is exacerbated by the fact that so many line function Departments are involved, and that the investigation is a timely reminder that if South Africa is to fulfil its international obligations to combat terrorism as well as address the ever-increasing terrorism threat within our borders all Departments must do their bit. They noted that the Bill was drafted in order to address all relevant terrorism issues in one piece of legislation. They stated that in principle they supported this approach as it can expedite the pressing issue of the ratification of the outstanding conventions, a consideration which must be taken very seriously. They raised, however, the concern whether this is operationally feasible and legally comprehensive, pointing out that this is something which must be determined by all the line function Departments. Comment was therefore in particular invited from all line function Departments on this aspect.

13.6 The draft Bill as drafted originally by the South African Police Service dealt with the following aspects:

- Definitions (clause 1);
- offences relating to terrorist acts (clause 2);
- the providing of material support in respect of terrorist acts (clause 3);
- membership of terrorist organisations (clause 4);
- sabotage (clause 5);
- hijacking of aircraft (clause 6);
- endangering the Safety of Maritime Navigation (clause 7);
- terrorist bombings (clause 8);
- taking of hostages (clause 9);
- sentences in case of murder or kidnapping of internationally protected persons (clause 10);
- protection of internationally protected persons (clause 11);
- protection of property occupied by foreign governments (clause 12);
- offences relating to fixed platforms (clause 13);
- nuclear terrorism (clause 14);
- jurisdiction of the Courts of the Republic in respect of offences under the Bill (clause 15);
- custody of persons suspected of committing terrorist acts (clause 16);
- identification of special offences by Directors of Public Prosecutions (clause 17);

- powers of court in respect of offences under the Act (clause 18);
- pleas at trial of offences under this Act (clause 19);
- bail in respect of offences under this Act (clause 20);
- duty to report information on terrorist acts (clause 21);
- powers to stop and search vehicles and persons (clause 22);
- authority of the Director of Public Prosecutions (clause 23);
- amendment and repeal of laws (clause 24); and
- interpreting the Bill (clause 25).

13.7 Amnesty International recently stated that on 29 November 2001, in an unprecedented move, the heads of three leading inter-governmental human rights bodies¹ **jointly cautioned governments that measures to eradicate terrorism must not lead to excessive curbs on human rights and fundamental freedoms. AI noted that in a joint statement, these three said that while they recognize that the threat of terrorism requires specific measures, they call on all governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent, and in pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms. Amnesty international pointed out that following the attacks in the United States of America on 11 September 2001, many states have taken steps to protect their populations from similar criminal acts, and these measures include new security legislation and new law enforcement measures.**² Amnesty International pointed out that it has monitored the use of security legislation and security measures in all regions of the world for 40 years. Amnesty International said it recognizes the duty of states under international human rights law to protect their populations from violent criminal acts, however, such measures should be implemented within a framework of protection for all human rights. They remarked that the challenge to states, therefore, is not to promote security at the expense of human rights, but rather to ensure that all people enjoy respect for the full range of rights, and that the protection of human rights has been falsely described as being in opposition to effective action against "terrorism". Amnesty International noted that some people have argued that the threat of "terrorism" can justify limiting or suspending human rights, and that even the prohibition of torture, one of the most basic human rights principles and a rule of international law which binds every state and every individual, has been called into question. Amnesty International consider

¹ Mary Robinson, the United Nations High Commissioner for Human Rights, Walter Schwimmer, Secretary-General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the Organization for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights.

² "Rights at risk: Amnesty International's concerns regarding security legislation and law enforcement measures" press release, 29 November 2001.

that states can work together to address the threats that were brought into sharp focus by the events of 11 September 2001, but only by upholding agreed and shared basic standards of human rights in their law enforcement and judicial procedures. They stated that concerns in Europe regarding the extradition of suspects to the USA, because of the possibility that the death penalty would be imposed, showed that failure to abide by international standards can inhibit international cooperation in law enforcement, that many of the measures currently being introduced are ostensibly to deal with emergency situations, and that some explicitly or implicitly involve derogating from (limiting or suspending) human rights guarantees. Amnesty International also note that on 10 December, a number of UN Independent Experts publicized their concerns as follows:

We express our deep concern over the adoption or contemplation of anti-terrorist and national security legislation and other measures that may infringe upon the enjoyment for all of human rights and fundamental freedoms. We deplore human rights violations and measures that have particularly targeted groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media. Concerned authorities have already been requested to take appropriate actions to guarantee the respect for human rights and fundamental freedoms in a number of individual cases drawn to the attention of relevant independent experts. We shall continue to monitor the situation closely.

B. THE NEED FOR AN ANTI-TERRORISM BILL

(a) Comment on discussion paper 92

13.8 It was noted above that the publication for general information and comment of the discussion paper on terrorism led to a heated debate in the newspapers locally as well as in the foreign press.¹ **Martin Schönteich remarks that the South African anti-terrorism policy — unlike the populist pronouncements of some of its policy makers — has taken the approach that terrorism should be combated without sacrificing citizens' civil liberties and the rule of law.² He notes that the value of this approach — and the dangers of ignoring it in favour of a Draconian one — is spelt out by Paul Wilkinson:³**

¹ See Chapter 1 par 1.5.

² Of the Institute for Security Studies *Fear in the City, Urban Terrorism* Published in Monograph No 63 2001 Chapter 4 see <http://www.iss.org.za/Pubs/Monographs/No63/Chap4.html>.

³ Director: Centre for the Study of Terrorism and Political Violence University of St Andrews, United Kingdom. See also "Current and Future trends in Domestic and International Terrorism: Implications for Democratic Government and the International Community" in

The primary objective of a counter-terrorist strategy must be the protection and maintenance of liberal democracy and the rule of law . . . To believe that it is worth snuffing out all individual rights and sacrificing liberal values for the sake of 'order' is to fall into the error of the terrorists themselves, the folly of believing that the end justifies the means.

It must be a cardinal value of liberal democracies in dealing with problems of civil violence and terrorism, however serious these may be, never to be tempted into using the methods of tyrants and totalitarians. . . . It is a dangerous illusion to believe one can 'protect' liberal democracy by suspending liberal rights and forms of government. Contemporary history abounds in examples of 'emergency' or 'military' rule carrying countries from democracy to dictatorship with irrevocable ease."

13.9 Martin Schönreich says that numerous pieces of legislation designed to combat terrorism, uphold internal security, and strengthen the hands of the security forces against terror groups, are on the South African statute books:

Many of the laws are not being used fully by the security forces because of operational weaknesses in the criminal justice system and the state's intelligence agencies. Policy makers need to direct their efforts at these weaknesses, before advocating Draconian measures — as contained in some of the clauses of the draft Anti-Terrorism Bill — which could have the effect of curtailing the rights and liberties entrenched in the country's constitution.

Tough and sweeping legislation is likely to fail in its aims if it is not properly implemented and used by the personnel of the criminal justice system. Terrorism can be effectively combated. What is needed is a well-run and adequately resourced criminal justice system staffed by trained and motivated personnel.

Recent developments promise to improve the state's ability to apprehend and convict those guilty of urban terrorism. At the beginning of 2001, legislation was promulgated which formally established the Directorate of Special Operations (DSO). Comprised of multi-disciplinary teams of investigators, prosecutors and intelligence operatives, the DSO's structure, and prosecution-driven and intelligence-led approach, places the organisation in a strong position to effectively combat those guilty of acts of urban terror. An increase in budgeted expenditure of 41% between 2001/02 and 2002/03 to over R200 million per year should provide the DSO with the necessary resources to fulfil its mandate.

There is a need to streamline the many disparate pieces of legislation designed to combat terrorism and to bring them in line with South Africa's international obligations. It would, however, be a mistake to introduce legislation that seeks to combat terrorism by diluting the rights of all South Africans. The country's history is full of examples of tough temporary legislative measures becoming permanent fixtures on the statute books.

13.10 Some respondents such as the Department of Environmental Affairs and Tourism responded that they have no comment to make on the discussion paper. The Magistrate's Office Pretoria North also comments that the discussion paper is comprehensive and no further comment is regarded necessary. The Department of

Labour notes that it has no inputs to the paper.

13.11 Numbers of respondents pointed out that since there are more than 20 statutes presently on the statute book, there is no need to enact the proposed Bill.⁴ Others also stated that the threat of international terrorism is not an issue in this country and it is therefore not necessary to have legislation dealing with this aspect in South Africa.⁵

13.12 Professor Michael Cowling of the University of Natal argues that the enactment of detention without trial provisions could amount to a violation of South Africa's obligation under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which South Africa is a party.⁶ The convention obliges each state party to keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subject to any form of arrest or detention in order to prevent any cases of torture. He points out that this means that the government is under a duty not only to actively prevent torture by punishing those who perform acts of torture but also to prevent it indirectly by eliminating conditions in which torture is likely to take place.

13.13 Esther Steyn remarks that for purposes of the arguments advanced it will be accepted that a consolidated security Act would be useful, provided that it conforms to constitutional norms.⁷ She says that she therefore accepted that on a substantive level the crime of terrorism should be re-defined to include transnational acts and that on a procedural level the jurisdiction of the courts should be broadened in order for them to be able to impose more severe sentence that befit the crime. She argues that this is what was reasonably anticipated by the legislation in the light of the Commission's reasons for the proposed Bill yet the provisions of the Bill reveal that what the project committee did was to create a procedural lobster pot. She argues

⁴ Such as Dr Imtiaz Sooliman on behalf of the Gift of the Givers Foundation

⁵ The remark by Prof Mike Hugh of the University of Pretoria's Institute for Strategic Studies in its ISSUP Bulletin 6/2000 is worth noting where he says: *The fact that two South African citizens (since released) were among those taken hostage by the Abu Sayyaf Group, an Islamic separatist group operating in the Southern Philippines, has also shown that South Africa is currently neither immune from domestic terror, nor from international terror.*

⁶ "The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" *South African Journal of Criminal Justice* 13 (3) 2000 344 - 359 at p 350.

⁷ "The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?" 2001 SACJ Vol 14 179 - 194 at at 179 -180 and 194.

that the definition of terrorism is defined in such broad terms that almost any serious violent offence will fall within its ambit and a system is created by virtue of clause 16 , whereby persons will be put in the lobster pot with ease but will find it much harder to get out of the pot or be able to avoid such detention in the first place. She says that the Bill is in fact unique in its severity, and on a procedural level it not only provides for a broadened substantive crime and an increase in the punitive measures of the courts, it also allows the state to use drastic pre-trial detention procedures. She considers that even if its is accepted that a consolidation of different offences was needed, she submits that the Bill as presently drafted , is excessive in its scope and will short fall of constitutional norms. She explains that the adoption of the South African Constitution laid a secure foundation for all the people of South Africa to transcend the divisions and strife of the past, which had generated transgressions of human rights and humanitarian principles and left a legacy of guilt and revenge. She considers that in contrast, the enactment of this Bill in its current form would be a regressive step that would undeniably lead to a forfeiture of hard won rights. She expresses the view that rights, such as the right to life, to liberty and freedom of worship and assembly, as well as other fundamental rights should not be compromised, because they do not depend on the outcome of elections. She notes that liberty, most importantly should not be something that derives from the grace of law enforcement officers, but from the Constitution as a right.

13.14 Mr JEH Wild⁸ notes that having researched organised crime for approximately 20 years, both as an academic and as a practising advocate, he would like to offer the suggestion that the existing legislation and systems, properly applied and functioning, are satisfactory and more than adequate to deal with organised crime and public violence. He considers that what is required to address the present crisis is a correct analysis of the available intelligence and data concerning the nature and extent of the phenomena which the intended legislation seeks to address and which has apparently become such great concern to the present government. He suggests that upon a correct analysis of the available data it will be possible, with all the available resources including the existing legislation and suitable personnel, to bring the present situation to an end. He considers that the present problem is occasioned by a failure to analyse the available data correctly and act upon it efficiently. He remarks that it may be that there is an unwillingness to act, given the maintenance of past structures and personnel whose loyalty and commitment to democracy are extremely doubtful. He notes that it would not only be ironic but tragic if the present government were seduced by certain advisers and structures into resurrecting

⁸ Who is an advocate from Durban.

legislation of apartheid when there is no real necessity to do so in the context of those very past elements and their allies who can be clearly identified as responsible for the existing state of affairs.

13.15 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal note that the discussion paper has been perused and that their office is in agreement that a consolidation of Security Legislation to bring it in line with international trends is necessary to effectively curb terrorism and bring about certainty in the prosecution of related offences.

13.16 Amnesty International (AI) points out in its comment on the discussion paper that the Bill is quite wide ranging in its scope and intentions and that they take no position on the matter of rendering into positive law South Africa's obligations under international conventions relating to terrorism. They explain that they confine their comments largely to a number of proposed clauses which will likely have substantial impact on the human rights of South Africa's citizens, in particular the section in the Bill which would allow detention without charge or trial of suspects or witnesses for the purpose of interrogation. They say they are aware that public debate has already occurred on the proposed legislation, including in the media and at a recent seminar hosted by the South African Human Rights Commission on 6 November 2000 in Cape Town.⁹ Amnesty International remark that they understand from comments made in the national parliament, from reports in the media¹⁰, as well as from AI's own

⁹ South African Human Rights Commission seminar, "Human Rights, Crime and Urban Terror", 6 November 2000.

¹⁰ "Zealots, criminals or amateurs - who are Cape Town's bombers? Government insists Muslims are to blame" by Chris McGreal in Cape Town *Guardian* Saturday October 21, 2000 "What is happening in Cape Town depends on who you believe. Some say a bomb blast this week - the 21st in two years - was the work of highly trained religious terrorists bent on turning South Africa's "mother city" into Algeria as a means of overthrowing the government. Others portray it as a lame attempt by a bunch of deluded incompetents capable of rigging no more than the most rudimentary explosion, exaggerated by the authorities to justify sweeping anti-terrorism legislation. . . . The police and government are confident that the bombs are the work of a once popular Muslim vigilante group turned terrorist outfit, People Against Gangsterism and Drugs (Pagad). Last week, more charges were added to those already faced by Pagad's leader, Abdus-Salaam Ebrahim, for murder and terrorism. More than 50 other Pagad members are either being tried or awaiting trial on similar charges. "I want to state clearly that we know a lot about the people involved in urban terror," South Africa's safety and security minister, Steve Tshwete, told parliament. "We know who the leaders are, we know who provides resources, and we know who carries out the acts of urban terror. I am absolutely convinced it is Pagad." The Western Cape's security minister, Hennie Bester, went further. He said the bombers were trying to overthrow the government. "They want to overthrow the state," he said. "There is some evidence they tried to produce larger fertiliser bombs. The intent for something much bigger is there but they haven't been able to execute it. My sense is we have the more technically proficient in prison." Last month, President Thabo Mbeki and Mr Tshwete warned that Pagad could turn Cape Town into Algeria. The comparison was clearly so ludicrous and so offensive

discussions in Pretoria on 20 October 2000 with officials from the Ministry of Justice and the Office of the National Director of Public Prosecutions (NDPP), that the domestic impetus for this legislation has arisen primarily out of longstanding

to the city's Muslim community that it was quickly dropped. But the portrayal of Pagad as an organisation with secret bomb-making cells is being used to justify sweeping anti-terrorism legislation that some say is as draconian as laws from the PW Botha years. Among the provisions of the draft legislation is a clause that categorises any threat to the functioning of the state as terrorism, a term so broad as to potentially include strikes. The police will be able to carry out random street searches, and hold anyone with "knowledge" of "urban terrorism" for up to 14 days without charge. But the definition of urban terrorism is so unclear that any reporter who spoke to Pagad could be accused of it.

"Technically civil service strikes could be interpreted as terrorist activity under the bill," said Irvin Kinnes at the University of Cape Town's centre for conflict resolution. "According to the draft legislation the police can also stop and search for any articles that may be used in a terrorist act. It means a police officer can detain anybody that his information says has knowledge of terrorist activity. We are questioning this because we've had such a long road to democracy in this country. It's the easiest way for the police to silence opposition."

Even Mr Bester had doubts about the new legislation. "I have serious reservations about it. I frankly believe you only go to that when you can't achieve what you want with good intelligence, good effective policing and a fairly good criminal justice system. And we don't have that at the moment," he said. In any case, Mr Bester admitted that the police were using apartheid-era security laws still on the statute books to lock up suspects. "We have taken the key people off the streets. We used minor charges to get 30 or 40 people at the core, to keep them in prison. The latest bombs are much more amateurish. We've been pretty effective," he said.

There are few who doubt that Pagad was responsible for an earlier spate of about 150 small pipe-bomb attacks that killed drug dealers and gangsters operating in the Cape Flats townships. But is it behind the explosions that have plagued the city of Cape Town over the past two years? The doubters question why a Muslim fundamentalist group supposedly bent on overthrowing the state would bomb pizzerias and nightclubs. As a terrorist force it has not been particularly effective - three deaths from 21 bombs have not had a big impact on a city that views murder and robbery pretty much as part of life. And while the government has secured dozens of convictions against Pagad members, not one is related to the blasts. Above all, if Pagad is attempting to bolster support for its cause through the bombings, it could not have pursued a worse strategy. The vigilantes once commanded overwhelming support within the Muslim community, and on the Cape Flats as a whole. Two years ago, opinion polls gave Pagad the backing of more than two-thirds of the area's population. But the support, which had the government scrambling to respond, collapsed as a result of the bombs. And if the organisation is pursuing a cause, where are its demands and claims of responsibility? To the sceptics, some of the bombings and their targets point to organised crime, probably extortion rackets. Doubters have latched on to the testimony of a police informer, Deon Mostert, who alleges that senior police officers with links to organised crime are involved in the bombings. Others note that South Africa's private security industry is making considerable amounts of money from the fears stoked by the bombings. The doubts extend to the business community, which is offering a 2m rand reward (££180,000) for the capture of the bombers.

"By making your opponent more important than he really is you justify your own incapacity," said the businessman behind the scheme, Michael Rubin. "I'm not accusing Tshwete and Mbeki of that but talk to the local security guys and they'll tell you they are dealing with a highly organised, technically advanced group. It's not true. "The security industry, and that includes the police, are not people that give me a great deal of confidence. They are getting nowhere." The most significant impact has been on Pagad itself. The most senior leader still free, Cassiem Parker, last week told what may well prove to be the organisation's final public rally that it is prepared to go underground if necessary. "We don't know if we are going to meet again in this format to feel the togetherness we feel today. They can split us, but meet we will. We have a common cause, whether they like it or not," he said. Then he led the audience in chants of "one gangster, one bullet". "

government concern over the pattern of violence in the Greater Cape Town area. They note that in particular the government appears concerned that there continues to be difficulty in achieving convictions in the courts of those responsible for the string of bomb explosions in the past two or more years, notwithstanding the number of joint police and military security operations in the area and the increased involvement of the NDPP's office in directing the investigations. AI considers that members of the public must clearly also be extremely concerned as well, in view of the deaths and injuries which have resulted from these bomb blasts.

13.17 AI notes that the Minister of Safety and Security, Steve Tswete, is reported to have stated in the national parliament during 2000 his belief that those responsible for this "urban terror" are members of PAGAD (People against Gangsterism and Drugs), or militant elements among this anti-crime vigilante organization. Alleged statements by some PAGAD members and the organization's affiliations with the local Muslim community appear to have led to the view amongst some national and provincial authorities that the "acts of urban terror" are ideologically motivated and anti-state. AI points out that the authorities have also publicly linked the organization to the targeted killings of officials involved in investigating or hearing cases against their members, as well as to the intimidation of potential prosecution witnesses. AI notes that civil society organizations, statutory bodies with oversight functions, journalists and others have, however, expressed concern that there may be a multiplicity of actors involved in this violence, including organized crime or even renegade members of the security and intelligence services, and that primarily what underlies the investigation failures is corruption, inefficiencies, limitations in resources or other shortcomings in law enforcement agencies. AI remarks that as the South African Human Rights Commissioner, Jody Kollapen, noted at the Cape Town seminar, if the problem is a lack of capacity, this needs to be dealt with head-on, to ensure that the actual perpetrators are more likely to be arrested and brought to justice, rather than by passing new laws, particularly where they involve serious inroads into fundamental human rights.¹¹

13.18 Amnesty International states that while it does not condone under any circumstances deliberate and arbitrary killings or threats of violence by armed opposition groups, or killings or threats of violence acquiesced in by elements of the state, the organization is concerned that certain provisions in the proposed Bill

¹¹ Chris McGreal, "Zealots, criminals or amateurs - who are Cape Town's bombers", The Guardian (UK), 21 October 2000; Howard Barrell, "Clean up the cops first", Mail & Guardian, September 29 to October 5, 2000; Marianne Merten, "Back to detention without trial ?", Ted Leggett, "Tshwete is barking up the wrong tree", idem, 15-21 September 2000.

violate international and regional human rights treaties to which South Africa is a party and may lead to human rights violations.

13.19 Mr Saber Ahmed Jazbhay asks in his comment whether we are about to witness a reversion to the apartheid era with its plethora of security legislation whose sole purpose was to neutralize opposition on the part of the majority to the policies of the then de facto as well as de jure National Party government? He points out that South Africans who have struggled to put an end to that era were, no doubt, extremely relieved when the constitutional era was ushered in on 29 April 1994 with the final Constitution forming the bedrock of the vision that underpins the society that is desirable and achievable.¹² He states that a justiciable Bill of Rights entrenched therein constitutes a shield as well as a sword to defend them against the very sort of human rights violations which characterized the apartheid era. He considers that in this context the Anti-Terrorism Bill raises concerns on the part of those South Africans, many of whom asking as to given the fact that there are at least 22 laws already in existence which deal with, inter alia, terrorism and related matters that, whether there is a need for an omnibus terrorism legislation in the could of the ATB.¹³ He believes that the Bill will do more harm than good, in its present form and should be put in cold storage. He considers that it is manifestly an anti-Islamically orientated measure¹⁴ and the fact that the drafters had originally intended to exclude lawyers as well as to hold a detained person incommunicado for longer than the period of 14

¹² Dr Imtiaz Sooliman who commented on behalf of the Gift of the Givers Foundation says that the Bill appears to be in conflict with the Constitution which in the words of the late Chief Justice Ismail Mahomed *is the soul of the nation*.

¹³ Mr Faadil Khan is of the view that since there are more than 20 statutes presently on the statute book, they should rather be used than creating a new terrorism law. Mr Vahed Mahomed also comments that he believes that it is the government's duty to protect its citizens, that the current laws are sufficient to combat urban terrorism, that the Bill infringes the rights of its citizens and a *copy and paste* version of laws of other jurisdictions is an insult to our Constitution. Mr RS Gass also comments that South Africa should surely not be subjected to the previous draconian repressive laws against which so many people have fought for so many years and that legislation should not be introduced which suppresses lawful dissent.

¹⁴ Mr Nishaat A Siddiqi points out that some politicians are convinced that Pagad are to blame for the bombings. He considers if Pagad were truly intent on overthrowing the government they would focus on more significant targets instead of wasting their time on obscure restaurants. His views are that attacking a government target these days is not so difficult a task as one vagrant recently demonstrated when entering the presidential home successfully. He notes that up to now Pagad has denied all connection with the bombings, a strange decision if they were the perpetrators. He considers that it would make sense to accept responsibility so as to raise the profile of their organisation rather than to condemn the bombings outright, and that any number of groups or organisations out to discredit Muslims would be hard pressed to find a better tactic than the one making headlines. He considers Also that forensic experts would by now have been able to determine who is behind these heinous crimes.

days without the safeguards now built in, shows the hidden agenda behind the drafters, the SA Police Services no less, in submitting the Bill to the Commission. He notes that notwithstanding its ostensible purpose, namely to combat terrorism in the international as well as domestic front, in its current draft form it is a crude piece of legislation reminiscent of the dreaded *Internal Security Act* and Terrorism Bills of apartheid era,¹⁵ and the fact that certain of its provisions are borrowed from these, and other pieces of odious laws, require more than mere lip service against violations of human rights. He says that when legislation confers the power to detain without trial, it authorizes invasion of the individual's most fundamental liberty — the liberty of personal freedom. He considers that there are no compelling reasons to derogate from the constitutional guarantees which the Bill in subtle ways attempts to do. Mr Jazbhay remarks that the cumulative effect of this draft law is the annihilation of the right to personal liberty and given our history, he submits that we can do without it. He points out that though welcome, the safeguards surrounding the renewal or extension of periods of detention are of little assistance taken conjunctively with the 'no bail' provision in section 16 of the Bill.

13.20 Mr Jazbhay comments further that section 39(2) of the Constitution provides a guide to statutory interpretation under our nascent constitutional order in stating:

¹⁵

Mr Essa Zaheer remarks that as a lay citizen of South Africa he considers that the passing of the Bill would be taking a step backwards into the apartheid era, it seems to attack what all South Africans have recently been given, namely the gift of democracy, in essence, it violates the civil and human rights and to accept this would be an atrocity. Dr SAS Haffejee responds in a similar way stating that the proposed legislation seems to be a gross violation of individual rights, that the return to detention without trial is reminiscent of the bad old days of apartheid, to simply belong to any organisation cannot make one automatically guilty of an offence that may be committed by others and that this reminds one of the banning of the ANC and the PAC in the dark days of apartheid. He suggests that the SAPS use all other legal means to bring the perpetrators to justice. Mr Ismail M Moolla responds similarly that if we look at past history during the BJ Voster regime, we are all fully aware what the freedom fighters had experienced with the invasion of individual's most fundamental liberty namely the right to personal freedom. He states also that with the Bill we are going back to those wretched days by once more becoming a police state, the Bill will take us back to the days of apartheid and it will simply mean that those who have sacrificed their lives for the freedom of all South Africans will eventually be made a mockery. He considers that by introducing the Bill disorder and chaos will be created to the extent of the juntas we had seen before the new democratic order was established. He suggests that it would be more effective if the Ministers concerned were to call a conference consisting of various organisations who feel affected and most aggrieved by the Bill. He considers that the government has the necessary legislation to deal with any problems, therefore there is no need for the Bill. Mr A Dangor is also of the view that the Bill demonstrates opposition of Muslims. These sentiments are also expressed by Mr Nishaat A Siddiqi who says that it would be a tragedy especially to the memories of so many ordinary South Africans who have endured repressive laws under apartheid to find similar laws camouflaged in new and impressive terminology reintroduced. He poses the question where are the civil liberties promised to every South African in the Constitution, and whether in a democracy one can hold a suspect for 14 days in detention without trial. He considers it is the tools of an oppressive regime out to silence any opposition. He considers that we do not need new legislation to curtail freedoms but bold legislation and action to eliminate the terrorists who roam our streets daily.

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. He points out that this means that all statutes must be interpreted through a prism of the Bill of Rights, and that all law-making authority must be exercised in accordance with the Constitution. He notes that the Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. He explains that the points expressed must be seen against the backdrop of our history and the fact that constitutional protection of human rights is new in this country and that we need to be mindful of the sort of violations that were perpetrated with impunity by the legislature and the executive. Mr Jazbay considers that such emphasis is necessary particularly in this period when South African society is still grappling with the process of purging itself “of those laws and practices from our past which do not fit with the values which underpin the Constitution- if only to remind both authority and citizen that the rules of the game have changed”. He remarks that as such, the process of interpreting the Constitution must recognise the context in which we find ourselves presently, from whence we emerged and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. He notes that the purport and objects of the Constitution finds expression in clause 1 which lays out the fundamental values which the Constitution is designed to achieve and that the Constitution requires us to read and interpret legislation, where possible, in ways which give effect to its fundamental values. He says that consistently with this, when the constitutionality of legislation is in issue, one is under a duty to examine the object and purport of the ATB and to read its provisions, as far as is possible, in conformity with the Constitution.

13.21 Mr Jazbhay states that to reiterate, it should be kept in mind that apart from the 22 existing laws, the South African common law, has the capacity to combat terrorism especially in cases where it is difficult to prove specific intent which these laws require, and with the immense powers afforded to the Investigating Directorate: Investigation of Organised Crime and Public Safety, together with the resources at its disposal anti-terrorism can be implemented. He says that interestingly, although the *Criminal Code* of Canada does not provide for a specific offence of terrorism, certain of its provisions are particularly relevant to the type of offences committed by terrorists, and there is an important lesson we can derive from this, especially when we debate a need for an omnibus terrorism Bill. He suggests that it can be argued, therefore, that any act of terrorism can be prosecuted in terms of existing law,

notwithstanding the worldwide trend to create specific legislation based on international instruments relating to terrorism. He points out that a cursory examination of the ATB shows, for instance that it has borrowed extensively from the provisions of other jurisdictions.¹⁶

13.22 Mr Jazbhay states that his comment is by no means his final word on the ATB, a piece of legislation which will do more harm than good, in its present form and should be put in cold storage. He considers that it throws out wide-ranging tentacles which constitute a crushing blow to the constitutionally entrenched values fought for and entrenched in the Bill of Rights, and the fact that certain of its provisions are borrowed from these, and other pieces of odious laws, require from us more than mere lip service against violations of human rights.¹⁷

¹⁶ Mr Jazbhay points to section 22 of the United Kingdom's *Prevention of Terrorism (Temporary Provisions) Act*, 1989; the Northern Ireland (Emergency Provisions) Act, 1986 (regarding bail applications); the USA's *Antiterrorist and Effective Death Penalty Act of 1996* (clause 3 of the ATB); Germany's *Kontaktsperregesetz*, 1977, in regulating contact between detainees and their lawyers; France's *Anti-Terrorist Law* of 9/09/1986 regarding the definition of terrorism and the power of the police to handle and investigate terrorist crimes; and the Russian Federation whose Criminal Code defines "terrorism" as 'causing the explosion or committing arson or other acts entailing risk or loss of human life, substantial damage to property or other consequences dangerous to society, if these acts are committed for purposes of disrupting public safety, terrorizing the population . . .';

¹⁷ The respondents H, I, M, G, R, N, L, S, F and E Vanker, S, N, F, G and K Nichols, I, Z, E and W Majiet and R Seepye comment that they lodge their opposition against the Bill as they consider that the reason for the Bill was not to curb urban terrorism and with about 23 statutes already available to the SA Police Service to curb urban terrorism why do we need an international terrorism Bill thrown on us by foreign powers to tell us how to run our country. They say they are against any form of terrorism by any person or organisation and believe that the law must take its course but that if the police services were seen to be more effective then the laws we presently have are adequate. The Athlone/Crawford Ratepayers & Residents Association also note their opposition against the Bill saying that the Bill will further impoverish and oppress its citizens and that one should think of future generations, we have come to far to go back to what the apartheid government did to its citizens. Mr Abdul Ragmaan Moos, Mr Riaz Mahomed, Dr Faizel Sarwar and Mr Mahomed Sarwar also hold the view that there are enough statutes available, that the existing laws should be amended to conform to international instruments and that the proposed legislation is not required. Messrs Mufti AS Desai and MIH Khan also note that it is ironical that the government they voted into power now legitimises the very same policies which it fought to obliterate as oppressive and inhuman when it was not in power. They consider that the Bill is a violation of the fundamental rights of citizens as are embodied in the Constitution and imposes unacceptable restrictions on the rights of a person to subscribe to and practice upon the basic teachings of a religion which does not have among its tenets the perpetration of indiscriminate acts of violence. He says that the initiation of such legislation is undoubtedly insidious and shrouded with suspicion in the context of the public statements of one of our ministers that they have the names of the perpetrators of the bombings but *need concrete evidence fit for judicial scrutiny*. He notes that without intending to present any mitigating factors towards the cause of any organisation, it is highly questionable that these *known perpetrators* are left unchallenged because of a *lack of concrete evidence* while an entire religious sector is construed as terrorists purely on a whim and unsubstantiated suspicion, again without *concrete evidence*. He considers that this is anomalous and has a very treacherously familiar tone to it one of the infamous *third force* of the apartheid era.

13.23 Mr Jazbhay states that during the apartheid era, those opposition political parties¹⁸ in parliament did very little apart from paying lip service opposing the labyrinthine set of laws which unleashed five decades of misery and human right violations in South Africa and that scared off by *swart gevaar* type of tactics they became eunuchs muted into submission. He comments that someone once said that the worse type of oppression is when good men do nothing and that those inclined to rush headlong into supporting any type of anti-terrorist type legislation need to ask themselves whether historical precedents have anything to teach them. Mr Jazbhay considers that during the cold war era, the apartheid government willingly became a pawn of the US led alliance against communism with active support being given by the US and the United Kingdom to prop up the apartheid regime. He remarks that the powers that were benignly looked on as Parliament passed a plethora of anti-human right laws which were repressive and violent in their implementation. He remarks that it seems as if we have turned full circle and we are being dictated to again by the powers that be which are dominating the United Nations now that the spectre of communism as epitomised by the then Soviet Union is no longer a factor in the quest for a new world order. He notes that it is in this context that the *Anti-Terrorism Bill* is located. He comments that when legislation confers the power to detain without trial, it authorizes invasion of the individual's most fundamental liberty- the liberty of personal freedom, and that there are no compelling reasons to derogate from the constitutional guarantees which the Bill in subtle ways attempts to do. He notes that if there is a serious terrorism problem, the Constitution provides for the declaration of regional states of emergency and this , in addition to the powers under the *National Prosecuting Authority Act*, ought to be employed by the government in its fight against crime and the threat to security in South Africa. 13.24The Criminal Law and Procedure and Legal Aid committee of the Law Society of the Cape of Good Hope notes that at the request of the Law Society it met to discuss and comment on discussion paper 92, and that the committee also considered a comment prepared by Mr SA Jazbhay. The Committee remarks that it supports the views expressed in Mr Jazbhay's memorandum. The Committee says that it offers an additional comment, namely that during the apartheid era the legislator provided for anti-terrorism legislation which came under constant attack and which was later repealed. The Committee states that it feels that new legislation on anti-terrorism will probably go the same way. The Committee notes that it is of the view that visible policing and effective prosecution in terms of the law whether common or statute is sufficient to combat terrorism.

18

Helen Suzman is an exception to this. She is catalogued as the lone voice of conscience that pricked the side of the pachydermic type Nationalist Party government.

13.25 The Commission received petitions totalling hundreds of pages from people opposing the proposed Bill. One such comment was received from members of the Orient Old Boys Club who said that they wish to record in the strongest terms their categoric opposition to the draconian measures proposed in the Bill. They note that the Bill is decidedly oppressive in nature, iniquitous and completely out of synchronisation with the democratic liberal tradition, and that it makes a mockery of the constitutional milieu that South Africa is arguably basking in and smacks of the oppressive, paranoid and dictatorial recent past. Another comment received was from an organisation named Muslims Against Global Oppression (MAGO). They explain that they are a movement that has an Islamic commitment to enjoin what is good and forbid what is evil and that they will expose any form of oppression and exploitation. MAGO states that the indecent haste on the part of the government to steam-roller through Parliament the proposed Bill ostensibly to curb urban terror is a painful reminder of the draconian security laws of the apartheid era which culminated in the worst form of state sponsored oppression and violence against its own citizens. They note that they have not forgotten the thousands of people that were incarcerated unjustly, the deaths in detention and those who went missing without trace. MAGO remarks that the preamble of the Bill contains eleven clauses dealing with the need to introduce the Bill and that significantly, no fewer than ten of these deal with international terrorism and only one addresses local terrorism. They consider that this Bill makes nonsense of the state's efforts to convince the nation at large that the proposed legislation is necessary to combat local urban terrorism. They point out that it is clear that the proposed legislation forms part of the global agenda of the new world order policed by the greatest terrorist State, the United State of America. MAGO notes a number of areas of concern regarding the Bill such as —

- that any person merely suspected of being involved with terrorism may be detained for interrogation for up to 14 days;
- detainees are not entitled to apply for bail;
- detainees will be traumatised which is tantamount to torture both physically and mentally;
- the subject matter of the Bill is so generally defined that its very vagueness could lead to abuse of power in the interpretation and application of the legislation;
- the legitimate grievances of the oppressed masses against corruption, crime and economic exploitation will be stifled;
- the power of police officers to authorise the stopping and searching of vehicles and persons will encourage the further abuse of an already established power given to the police;
- members and supporters of an organisation deemed to be a *terrorist organisation* would be criminalised by mere association with

such an organisation, lawful activities such as fundraising, logistical and material support of such an organisation would be a crime and Muslim would be restricted in choosing which organisations should receive their charities;

- the Bill does not make provision for political detainees.

13.26 MAGO considers that the irony of the State's determined effort to bulldoze the Bill through Parliament is that it merely serves to highlight the inefficiency and ineptitude of the Police Service to deal with the serious crimes which are rampant in the whole of South Africa. MAGO states that it questions the justification of reverting to past draconian laws to deal with urban terror as there are already 22 laws on the statute book dealing with crime and which they consider more than adequate to deal with any crises situation. MAGO note that they demand the scrapping of the Bill; condemn in the strongest terms the irresponsible conduct of Ministers Tswete and Maduna in blaming Pagad for the recent spate of bombings in the Western Cape without due process of law having taken place; hold the State accountable and responsible should any innocent party suffer adversely as a result of the implementation of the Bill; and view the introduction of the Bill as an attempt on the part of the State to thwart any organisation that poses a viable threat to the security of the new world order.

13.27 The United Ulema Council of South Africa (UUCSA)¹ note that their submission will not deal extensively with the unconstitutionality of the proposed Terrorism Bill, as there will be without doubt many submissions from various credible organisations that will do justice to the extent of the unconstitutionality of the Bill. They explain that the focal point of their submission is to investigate, given the history of the Antiterrorism Bill from its international evolution, whether such a Bill is necessary and if so what precisely will the Bill achieve if it is passed as law.

13.28 UUCSA notes that the nub of their submission is this: one man's terrorist is another's man's freedom fighter, and although the present Government is democratically elected, that

¹ The UUCSA explains that it is the largest representative organisation of the Muslim community in South Africa and that it consists of leaders of each of the various categories of Muslim communities within South Africa. They say that UUWA's mission statement is to unify, co-ordinate and represent all Muslims of South Africa on a National and International basis, and amongst others its objectives are to protect, preserve and promote Islamic law and to procure religious freedom. The composition of UWSA is an umbrella body comprising of all theological formations in South Africa. Its founding members are the Muslim Judicial Council; Jamiatul Ulama - Transvaal; Jamiatul Ulama - Kwazulu Natal; Sunni Ulama Council; and Sunni Jamiatul Ulama. In its constituency, UWSA has approximately 455 Mosques and 408 educational institutes in South Africa. UUCSA through its affiliates control the overwhelming majority of religious institutes and Mosques in South Africa. It is representative of and enjoys the confidence of the greater Muslim populace of the country.

process of being democratically elected did not come about easily. They point out that the streets of Sharpeville flowed with the blood of youth whom to this day tribute is paid to, the blood of martyrs being the blood of South Africa's freedom fighters — yet these very freedom fighters were labelled, classified and declared enemies and terrorists of the South African State. They point out that the African National Congress was declared a terrorist organisation, just as the Pan African Congress and host of other organisations. They state that the consequence of this was that if a person was found to be a member of such an organisation of what they will refer to as freedom fighters, and if such a person was convicted of the "offence" in terms of the Internal Security Act (a piece of legislation which is comparable to the present *Anti-Terrorism Bill*), such a person would be imprisoned. They refer to *S v Xosha & Others*² **where the accused were imprisoned for two years for being members of the ANC in terms of sections 31(a)(i) of Act 44 of 1950, which forbade a person inter alia to become a member of an unlawful organisation. They note that the South African law reports are exhaustively compiled of the various incidences of freedom fighters being arrested and detained for several years, and that one example which comes immediately to mind is the regrettable and unfortunate imprisonment of our ex President Dr Nelson Mandela for a period of 27 years. They consider that Walter Sisulu, Chris Hani, Ahmed Kathrara and the rest of the so-called "terrorists" should not be forgotten.**

13.29 UUCSA remark that on 24 January 1995, the President of the US by executive order placed a prohibition on transactions with "terrorists" who threatened to disrupt the Middle East Peace Process.³ They note that this order declares certain organisations to be terrorists, just as the previous South African Government declared the ANC and PAC as terrorist organisations. They ask whether South Africa is prepared to align itself with such a view and is South Africa willing to align itself with the harsh, violent and brutal slaying by an Israeli sniper who cold-bloodedly kills

² 1965 (1) SA 267 (C).

³ The following organisations were listed in the USA (at the time the respondent commented) as designated by the then Secretary of State Madeleine Albright on October 8, 1999: (see <http://usinfo.state.gov/topical/pol/terror/fto1999.htm>) Abu Nidal Organization (ANO); Abu Sayyaf Group (ASG); Armed Islamic Group (GIA); Aum Shinrikyo; Basque Fatherland and Liberty (ETA); Gama'a al-Islamiyya (Islamic Group, IG); HAMAS (Islamic Resistance Movement); Harakat ul-Mujahidin (HUM); Hizballah (Party of God); Japanese Red Army (JRA); al-Jihad; Kach; Kahane Chai; Kurdistan Workers' Party (PKK); Liberation Tigers of Tamil Elam (LTTE); Mujahedin-e Khalq Organization (MEK, MKO, NCR, and many others); National Liberation Army (ELN); Palestine Islamic Jihad-Shaqaqi Faction (PIJ); Palestine Liberation Front-Abu Abbas Faction (PLF); Popular Front for the Liberation of Palestine (PFLP); Popular Front for the Liberation of Palestine-General Command (PFLP-GC); al-Qa'ida; Revolutionary Armed Forces of Colombia (FARC); Revolutionary Organization 17 November (17 November); Revolutionary People's Liberation Army/Front (DHKP/C); Revolutionary People's Struggle (ELA); Shining Path (Sendero Luminoso, SL); Tupac Amaru Revolutionary Movement (MRTA).

a 12 year old Palestinian boy in his father's arms whilst both father son are unarmed and at a prayer congregation in a Mosque in Jerusalem? They point out that the entire world cried out aloud at the incident which occurred on Friday the 1st of September 2000 in Palestine. The Middle Eastern Peace Process is a debate about land, and the right to self-determination much the same way as our own history teaches us. UUCSA explain that many of these liberation movements are declared terrorist organisations because they seek to protect and preserve their right to self determination in a land which they say they have a claim to. UUCSA asks to what extent does South Africa align itself to the United Nations list of terrorist organisations?⁴ They remark that it is clear that 80% of the organisations listed therein are Muslim organisations, and that there is global paranoia about Muslim fundamentalism in the West, particularly in America. UUCSA says that an article which appeared in the *Impact International Magazine* in February 1999 issue clearly illustrates the extent of such paranoia⁵ as well as an article which appears in the *Impact International Magazine* in August 2000 entitled "Fighting Terrorism on Hearsay - Secret Evidence Threatens Everyone's Rights". They note that 20 Muslims remain in jails on the basis of a 1996 Antiterrorism Bill authorising the use of secret evidence in deportation proceedings, and neither defendants nor their lawyers have the right to see such evidence. They ask what kind of justice is this and note that it appears to bring back haunting memories of the former *Internal Security Act*.

13.30 They also note that in an article written by a New York journalist Judith Miller it is reported that the parents of an Israeli American teenager killed in a 1996 "terrorist attack" in Jerusalem filed a \$600 million lawsuit in Chicago against several Islamic charities, non-profit groups and individuals contending that they raised money in the United States of American for Hamas, the militant Palestinian group, and the allegation by Miller is that these organisations 'ostensibly have religious and charitable purposes,' but finance terrorism. They say that American lawyers Nathan Lewin and Thomas B Carr, two of the lawyers for the plaintiff in the \$600 million lawsuit said that they hoped to prove "that anyone sending money to a group like Hamas could be legally accountable for all its activities, and that that's what we believe Congress intended in enacting the Antiterrorism Act of 1990 and 1992", Carr said. They ask isn't that what the present *Anti-Terrorism Bill* will achieve, whether or not it is the intended objective, in particular isn't that what Section 1 and in particular the definition of funds and clause 3 are designed to achieve.

13.31 UUCSA says it wants to clarify one point and that is that they strenuously

⁴ They enclosed a copy of the Terrorist Organisation Profiles of the United Nations.

⁵ They enclosed a copy of the article entitled Profiling Islam as Terrorism.

oppose violence against civilians, and indiscriminate bombings where women and children are murdered. They say they do believe, however, that if adequate policing of a highly specialised team of officials is put into place, this would lead to arrests and convictions of the perpetrators in these crimes. They consider that the existing provisions of the bail laws and particularly the Criminal Procedure Act contain sufficient safeguards in order to protect the State to further its investigations and not release the accused if their release would be a continued threat to the State.

13.32 UUCSA remarks that in the past history of South Africa many people were killed in bomb blasts on both sides of the fence, in what would be defined as terrorist activities in terms of the Bill, yet the ultimate objective and aim of the Truth and Reconciliation Commission was to grant political amnesty to the perpetrators of crimes that fit the glove of the present Anti-Terrorism Bill. The UUCSA considers that this was done only because the Government recognises that certain crimes which committed in the course of a political objective stand on a different footing to common law crimes such as murder, robbery etc and the only question is on which side of the fence does the Government want to align itself? They point out that an effect of clauses 1 and 3 of the *Anti-Terrorism Bill* will be to haunt our future with a case known as *S v Arenstein*⁶ where Arenstein was sentenced to 4 years' imprisonment for, *inter alia*, financially assisting the South African Communist Party in 1967 and that our law reports are plagued with such decisions. They note that the incident of the 12 year old Palestinian boy who was shot to death in cold blood by the Israeli sniper is an incident that will no doubt elicit a response from one or other liberation movement in Palestine. They ask whether the organisation that fights for that cause is truly a terrorist organisation in South African eyes, despite the American list of "terrorist organisation profiles" which declares virtually every Palestinian liberation movement a terrorist organisation. The UUCSA says that they do not intend to deal at any length with the unconstitutionality of the *Anti-Terrorism Bill* although there are some glaring unconstitutional provisions which violate the South African Bill of Rights. They note that a fundamental feature of the Constitution is the right to silence and the protection against self incrimination. UUCSA considers that the Bill, in addition, offends the provisions of section 12(1)(a) to (e) and sections 35(1)(a) to (c) of Act 108 of the Constitution.

13.33 UUCSA states that in the final analysis, if a *Terrorism Act* is to be passed, caution should be used in very carefully defining precisely what terrorism is and what the standpoint of South African authorities is on terrorism, and whether, in fact, the

⁶ 1967 (3) SA 371 AD.

South African authorities will adopt the American position regarding the Palestinian issue for instance. They suggest that the emphasis should be to target individuals and not organisations. They pose the question how is one to distinguish between a situation where a person provides funding to an organisation which is viewed as being a terrorist organisation although its intention is the provision of legitimate charitable assistance and which may be the fundamental object of the organisation concerned. UUCSA suggests that the past should not be repeated, and as the Bill presently stands this will be its ultimate effect. They consider that there are no guarantees that police officials or persons in Government opposed to Islam may use the provisions in the manner used by the apartheid Government in order to undermine the struggle. UUCSA says it is therefore and for all the aforementioned reasons opposed to the Bill in its present form.

13.34 The Media Review Network (the Network) explains that there are more than 1 million Muslims living in South Africa and that in the past, and on an on-going basis, the mainstream media has defined who Muslims are and what they represent for the general South African public.⁷ The Network states that their views and opinions, policy positions and strategic interests have always either been ignored or deliberately distorted. The Network points out that, through a loose informal grouping of individuals, it considered it imperative in the rapidly changing socio-political landscape of the new South Africa, to ensure that the dynamism of Islam not to be lost in the maze of perverse innuendos and that the need to have Muslim opinions and insights heard on a daily basis as a matter of routine, rather than as an

⁷ The Media Review Network explains its aims and objectives as follows:

- To monitor, analyse, dissect and evaluate distortions fabrications and double standards in the mass media;
- to research the impact on Islam caused by such misrepresentations and publish its findings on an on-going basis;
- to arouse curiosity, inquiry, research and interest in Islam;
- to counter the onslaught on Islam, it's norms and values;
- to identify and nullify certain stereotypes e.g.: "terrorists", "fundamentalists", "radicals", "fanatics", etc;
- to express alternate perspectives and policy positions on local and international issues;
- to be proactive in respect to projecting and promoting Islam;
- to establish rapport with journalists, editors and key opinion-formers;
- to source appropriately qualified and articulate spokes-persons to represent Muslims on radio and TV; and to widen the network of informed Muslims to address the print media;
- to hold seminars and workshops on information gathering and dissemination;
- to promote the training of committed Muslims in the specialised fields of communication/journalism;
- to establish an effective network of co-operation with Muslims engaged in the publication of Islamic magazines, periodicals, newspapers and with those engaged in community Islamic radio stations.

exception. The Network notes that its aspiration is to dispel the myths and stereotypes about Islam and Muslims and to foster bridges of understanding and that Muslim perspectives on issues impacting on South Africans is a prerequisite to a better understanding and appreciation of Islam. The Network explains that they believe that freedom of speech is a fundamental human right but it is also a responsibility which must be discharged with a sense of justice and a commitment to the truth.

13.35 The Network notes as a prelude to its comment that the Bill intending to deal with terrorism that has its motivation in dealing with internal incidents of terrorism, although the motivation for the Bill is largely based on international precedents, requires a deeper analysis, of the general ideas implicit in its interpretation. The Network comments that the Rule of Law stands for the view that decisions should be made by the application of known principles of all laws and that, in general, such decisions must be predictable, and as such all citizens must know what the law is. The Network notes that South Africa has just traversed a period where some of its legislation and in particular the security legislation could be regarded as the worst examples of statutory violation of the rights and liberties of the overwhelming majority of its subjects and inroads were made in an arbitrary fashion at the whim and fancy of certain individuals whose intentions are now being articulated, by these individuals who attacked the integrity, dignity and liberties of individuals that chose to oppose the Draconian measures that were in place at the time. The Network remarks that the cruelty that has been portrayed is cruelty reminiscent of the Middle Ages and the arbitrary and uncontrolled powers applicable at the time over-stepped every norm of the legal idea. The Network comments that in any civilized society, arbitrary powers, sanctioned injustices and brutal application of the law, by the upholders of law and order cannot be countenanced even in the guise of security actions or under the pretext of total onslaught.

13.36 The Network notes that South Africa is a constitutional state, and has a Constitution which articulates the idea that government should obtain its powers from a written constitution and that its powers should be limited to those set out by the constitution and that in South Africa we now have such a Constitution. The Network points out that the dichotomy of any government in a constitutional state is identified as follows: *the government that is established must have sufficient power to govern, but that power has to be structured and controlled in such a way as to prevent it being used oppressively.* The Network states that a constitution limits the power of the government in the following ways:

- It imposes structural and procedural limitations on power;
- Through the operation of the bill of rights, substantive limitations are imposed.
- A government may not use its power in such a way as to violate any of a list of individual rights. Inherent in this is the right of individuals in terms of our constitution to: Just administrative action; access to courts; the rights of arrested, detained and accused persons.

13.37 The Network notes the comment by the Commission *"the substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur arbitrarily, there must, in other words be a rational connection between the deprivation and some objectively determinable purpose. If such a rational connection does not exist ... the protection of freedom ... is now being denied."* The Media Review Network considers that the procedure envisaged in affording police officers discretion to stop and search any vehicle or person as those envisaged in clause 21, clearly flies in the face of the noble intentions articulated herein; that the police officials simply have too much power at their disposal; and that the administration of justice according to law means administration according to standards, more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receiving like treatment. The Media Review Network comments that the law enforcement agencies have been inherited and retained from the apartheid era, and as such they are not capable in dealing with issues such as the ones on hand and there are no systems of checks and balances in place.

13.38 The Media Review Network remarks that no matter how noble the intention of the drafters of the proposed anti-terrorism legislation, the effect of such legislation will damage and or destroy the essential elements and basic features of our Constitution. The Network states that the power afforded to individuals in the proposed legislation, includes the power to violate the constitutional principles and suggests that those charged with upholding the Constitution should not be seeking authority directly or indirectly to circumvent the Constitution. The Network remarks that at present, there are sufficient remedies in the common law crimes that can deal with the criminal activity that has to be prohibited; the constitutional values enshrined in our Constitution underlie the unique system of government in South Africa; and the anticipated legislation can perhaps be interpreted in such a manner where diversity, religious and ethnic tolerance now becomes questionable, on the part of the

government. The Network states that it can also be argued that the anti-terrorism laws may well be used to detain and silence political opponents, as well as purportedly subversive actions whose activities may have nothing to do with terrorism. The Network suggests that the solution does not lie in the implementation of Draconian legislation, but in proper policing, prosecution and the punishment of crimes already recognised in terms of our common law.

13.39 The Media Review Network points out that the United States government has implemented a law that is structured in a similar fashion to the Anti-Terrorism Bill. The Network notes that the implications of such legislation and the arbitrary fashion in the imposition of its provisions, profiles Islam as a terrorist religion and adherents of the Islamic faith as fundamentalists/terrorists and that the United States government has gone ahead with implementing a law, which targets Muslim passengers at airports. The Network says that the overwhelming majority of people that have been singled out for security checks by the new profiling system and have been subjected to crude and humiliating searches at the United States airports have been Muslims or people of Arab origin and Muslim women in *hijab* and Muslim men with beards. The Network states that the recent comments made by the Minister of Safety and Security and other high profile politicians are reminiscent of the comments that were made in the United States by prominent politicians prior to the implementation of the anti-terrorist legislation. The Network points out that Islamic organisations have invariably come under severe criticism for lawful civil action and condemned as unlawful without proper investigation or proof in most of the instances, and, unfortunately, this pattern seems to be repeating itself in South Africa. The Network considers that the proposed legislation will in all probability be utilised to silence opponents of the government no matter how vociferous and justified the opposition may be. The Network notes that the implications of the legislation in the United States have included the following:

- Fundraising has now been criminalized, for groups that have been deemed to be terrorists.
- Banks are forced to freeze funds of these organizations.
- Lawyers are not generally available to defend persons being prosecuted under the terrorist legislation.
- The fairness of trials under this legislation is now questionable.
- The wording of the legislation is so wide that it allows for selective enforcement.

13.40 The Media Review Network considers that the above will easily find its way into their lives if the law is to be passed, the impact that such actions will have for the different communities presently being accused by the Minister for Safety and Security will be profound and communities that are vociferous in calling the government to

perform its duties will be targeted. The Network says that the present document has the full backing of the United States and that it is not inconceivable that those persons who will be tasked with the responsibility of implementing the law will receive their education and training in the USA. The Network notes that until very recently, civil rights activists and human rights proponents were subjected to similar forms of repression and the present leaders and representatives in Parliament were assaulted, falsely accused of crimes, subjected to slander campaigns, and were brutally treated; demonstrations were suppressed by tear gas, rubber bullets, live ammunition and police dogs in order to terrorise people who had demanded equality. The Network notes that it was the sacrifices of our present leaders who stood against unjust laws that brought about changes and many of the leaders presently in Parliament are no strangers to difficulties themselves having spent time in prison as a result of the repressive legislation. The Network considers that surely those who have tasted the bitter end of such repressive legislation can never allow history to repeat itself no matter what the price may be.

13.41 The Media Review Network comments that it is the "omnibus" approach addressing the entire spectrum of terrorism from the hijacking of an aircraft or nuclear terrorism to mere domestic political offences that leads to such drastic statutory provisions. The Network says that these provisions are unjustifiable in any democratic country when applied to relatively minor political offences and yet become palatable and justifiable when seen against the backdrop of nuclear terrorism or the possession of radioactive devices. The Network comments that under the guise of deterring international terrorism, mere ordinary political protests and activities are clamped down yet again in a repressive and undemocratic manner by the use of draconian measures, which prior to 1994, were universally condemned for their repressiveness. The Network states that while the state may justify the introduction of drastic measures to deter international terrorism, in harmony with the Organisation of African Unity and the United Nations, on the ground that South Africa is now part of the international community, this in no way justifies the use of such repressive methods to deter political protests in a democratic country. The Network comments that the two objects of combatting international terrorism and deterring domestic political unrest and terrorism cannot justifiably be grouped together and suggests that they must be divorced and present legislation be relied on, coupled with more effective enforcement to deter domestic political offences. The Network considers that present legislation is adequate to counter domestic 'terrorist' activities- such as the *Internal Security Act 74* of 1982, and in particular Section 54(1), and a whole host of similar legislation, is beyond argument. The Network says that

comparisons drawn with jurisdictions such as Northern Ireland or Israel are not only unhelpful but positively misleading and suggests that the *omnibus* approach thus be rejected.

13.42 The Network comments that while the security of the state may under certain circumstances, be an overriding interest, the measures adopted in the Draft Bill effectively erode the basic liberties of the individual. The Network remarks that every citizen has the right not to be deprived of his freedom arbitrarily, and he has, according to Sachs J in *De Lange V Smuts NO 1998 3 SA 785 (CC)* a right to bodily and psychological integrity. The Network says that it is shocking that under the guise of countering "terrorist" activities, gross invasions of individual rights are now being justified, that even the right of silence is now under threat and that these drastic powers cannot be justified on the ground that they are reasonable and necessary in the interests of the community or the state.

13.43 The Media Review Network comments that the South African Constitution represents a decisive break from the past but the Draft *Anti-Terrorism Bill* destroys that achievement, and that experience shows that power can, and inevitably, will be abused. The Network remarks that the Constitution lays the foundation for a democratic and an open society, that every citizen enjoys the equal protection of the law and that human dignity, equality, and the advancement of human rights together with non-racialism and non-sexism are the values enshrined in the Constitution (they note Judge Chaskalson's *Delmery the Third Braam Fischer Lecture*). The Network considers that these limitations on these rights, contained in the *Anti-Terrorism Bill* are manifestly neither reasonable nor justifiable as they go further than is required for the protection of the interests of the state. The Network comments that the Draft Bill fails to achieve a proper balance between the protection of the fundamental rights of the individual against the general interests of the community and the state and says it strongly urges that it be rejected, and that the implementation and application of the *Anti-terrorist Bill* be abandoned.

13.44 The Sunni Ulama Council of the Cape (the Council) comments that Muslims in South Africa, more so in the Western Cape, are gravely perturbed by the climate of fear and suspicion against Muslims and Islam in particular that has been generated by remarks, which are of extreme concern to Muslims, made by Ministers Steve Tshwete and Penuell Maduna, linking the spate of bombings in the Western cape, a senseless and heinous act, to *Muslim fundamentalism*. The Council states that the meaning of the word *fundamentalism* according to the dictionary is *a person who upholds a strict or literal interpretation of traditional religious beliefs*. The Council considers that by the aforesaid definition, the

honourable Ministers have painted every Muslim who upholds the principles of Islam as being *fundamentalists*, which the Council remarks is indeed a very grave error. The Council notes that what concerns them is that with the rhetoric of the Ministers and their unfounded claims not a single person has been arrested for these senseless acts and that the current wave of violence is used to justify the imposition of the ATB. The Council remarks that the negative implications of the Bill for civil society as a whole and Muslims in particular, based on the experience of communities in other parts of the world, where similar draconian legislation exists, has lead to intense consultation within the Muslim community. The Sunni Ulama Council states it calls on the government to retract the Bill for the following reasons:

- In its Preamble, whilst reaffirming its condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, it makes specific reference to, inter alia, *considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them*. Given official utterances by the likes of the Minister Tshwete *et al* against certain organisations like Pagad and Qibla, a reasonable man will reach the inescapable conclusion that it has an Anti Islamic connotation. Islam has been equated with *terrorism*, falsely we must add, not only by the so-called superpowers but also by the world's media, given the hype associated with Hollywood inspired movies. Furthermore, the official response by the said Ministers attributing the criminal acts on unknown persons, in the absence of hard evidence, which lead to the senseless loss of live and maiming of people in some of the bombings in the Western Cape to *Islamic Fundamentalists* is a typical case in point. It is therefore arguable that the ATB targets and discriminates against Muslims and that accordingly it or parts of it could be challenged to be unconstitutional and invalid.
- The definition of the words *terrorist acts* is too wide and is bound to become unstuck should it become subject to constitutional challenge. It must be understood that with the proliferation of organised crime in this country, sophisticated crime syndicates could use the anti-Islamic hysteria publically expressed to whip up support against terrorism to implicate all bona fide organisations who are fighting organised crime and drug syndicates, especially in the Western Cape region. It will be recalled that a Mr Deon Mostert revealed the existence of third force activity in the Western Cape region whose intention was and we submit still is, to destabilise the Western Cape region and pin the blame on somebody else as our Ministers have tended to do without backing it up with proof.
- It will violate the constitutional right to be presumed innocent if people may be charged with membership of any organisation deemed to have links with groups designated as *terrorists*.
- Legislation is so vaguely and broadly defined that in practice it could infringe on the basic constitutional rights to freedom of expression and association.
- It would criminalise fundraising for lawful activities associated with *unpopular* causes.
- The ATB seeks to entrench the principle of guilt by association.
- The legislation should subtly redefine terrorism by simply establishing a nexus between material support and so-called *terrorist activities*.
- Certain clauses in the ATB are reminiscent of the apartheid era which the majority of people in this country including the Muslims, fought so vehemently against, and who were extremely relieved when the new constitutional era was ushered in on the 29/4/1994 with the final Constitution forming the bedrock of the vision that underpins the society that is desirable and achievable.
- It would be a crime for Muslims to support relief, charitable or religious activities or groups labelled as *terrorists* by people who are themselves guilty of perpetrating acts of terrorism. It would constrain the choices of Muslims in determining or deciding a worthy cause for their charities.
- It may bar personalities associated with a so-called *terrorist organisation* from

attending or addressing public gatherings. This would effectively control who cannot or cannot speak in our mosques and it will also inhibit what could be said from our pulpits.

- The integrity of Islamic institutions of higher learning may also be compromised since they are viewed as the seedbed for Muslim *Fundamentalism*.
- It will unilaterally brand organisations, states or countries that seek to be free and independent of Western and Imperialistic control, especially if such a stance is postulated upon an Islamic overview.

13.45 The Sunni Ulama Council reiterates that Islamic teachings and practices are strongly opposed to any indiscriminate acts of violence and that the South African Constitution has adequately covered the very sort of human rights violations which characterised the apartheid era. The Council states that a justiciable Bill of rights entrenched in the Constitution acts as a shield and a sword to defend South Africa's people against any human rights violations and that the acts of violence orchestrated in the Western Cape compels the Muslim community to question the motives of these faceless perpetrators. The Council poses the question whether somebody is deliberately manipulating this piece of legislation directed more at Muslims who happen to be classified as the overwhelming majority of so-called *terrorists* and *fundamentalist* organisations by the very people who sow fear and terror in all corners of the world. The Sunni Ulama Council considers that the cumulative effect of the Bill is the annihilation of the right to personal liberty and given South Africa's history the Council submits it is something that the country can do without.

13.46 Ms JA Schneeberger of the office of the Chief State Law Adviser (International law) of the Department of Foreign Affairs notes that the Department of Foreign Affairs, and particularly the office to which she is attached, has a specific and ongoing interest in the elaboration of an *Anti-Terrorism Act*. She explains that their interest arises from the fact that the international community has been particularly active in elaborating measures to combat international terrorism and has elaborated 12 international conventions on this. She remarks that as has already been pointed out in the Discussion Paper, South Africa is only party to 5 of these Conventions and needs, on a priority basis, to ratify the other 7. She says that many Member States, and in particular the G8 have an active lobby group requesting States to report on the implementation of these Conventions and it is imperative that South Africa indicates progress on its own initiatives to implement these conventions. She notes that the South African Law Commission's Project, and the future *Anti-Terrorism Act* are crucial components of this. In addition, she notes, they also believe that it is imperative for South Africa's security interests that it be part of the international legal framework to combat terrorism. She explains that to date the major stumbling block in ratifying the terrorism conventions is the fact that they are all based on a "prosecute or extradite" framework with extensive jurisdiction provisions which do not fit neatly into the existing legislative basis. They believe that the proposed *Anti-Terrorism Bill* can be the ideal vehicle to enhance the

legislative basis in order to enable South Africa to ratify these Conventions. Their comments on the *Bill* are therefore made from the point of departure as to whether or not the provisions comply with South Africa's international obligations, thereby enabling South Africa to ratify these Conventions.

13.47 Ms Schneeberger remarks that the debate in the UN Ad Hoc Committee on a Comprehensive Convention on Terrorism¹ **is interesting because it is also reflected in the approach that has been taken in the SALC's project.** She explains that the decision to elaborate a comprehensive convention is a historic one as a logical corollary for such a convention will be some sort of definition for terrorism. She notes that the need for such a definition was raised in the SALC Discussion Paper. However this is likely to be a very difficult task. She considers that the cliché "one man's terrorist is another man's freedom fighter" is only a cliché because it is true, and the political interests and dynamics were clearly reflected in the debate in the Sixth Committee on this item. Ms Schneeberger remarks that the main issue at stake therefore is the scope of a Comprehensive Convention, that some States argue that, as the name implies, the Convention should be truly comprehensive in nature but that they differ on how this should be done. She notes that some argue that the definition of the crime should focus not on the type of crime (murder, kidnapping etc) but rather on the motive for the crime (violence with the intention to compel the State to do or abstain from doing something), and that the definition of the crime should be broad enough to encompass State terrorism. Others argue that the Convention should merely fill in the gaps left by existing Conventions and should therefore focus on crime specific issues (such as murder, extensive destruction of property etc) without focusing on the intention. She states that the States preferring the more restrictive, crime specific approach, were also concerned that a comprehensive approach would either lead to confusing conflicts between the crime specific conventions on terrorism and the comprehensive convention, or that the comprehensive convention would make the crime-specific conventions redundant.

13.48 Ms Schneeberger explains that in the Commission's proposed Bill there is thus a comprehensive definition for a terrorist act, which focuses on the intention of the perpetrator and could theoretically cover all the other acts such as hijacking, hostage

¹ Which was first discussed by the United Nations, and in particular the Sixth (Legal) Committee and its Ad Hoc Committee on Measures to Eliminate International Terrorism, in the ongoing project on Measures to Eliminate International Terrorism: Ad Hoc Committee from 25 September – 6 October 2000. She notes that the core issues for the elaboration of a comprehensive convention were identified and discussed, and that due to the sensitivity and complexity of the matter however, progress is slow and further sessions were to be held in 2001 to continue this process (the first during February 2001).

taking, terrorist bombings etc provided that the requisite intention is present and, the *Anti-Terrorism Bill* also includes specific acts, which focuses on the nature of the act rather than a specific intention. She comments that in view of the fact that the title of the Bill is the “*Anti-Terrorism Bill*” what this implies is that even if there is no “terrorist intention” (i.e. to compel a government to do or abstain from doing any act) specific acts are identified as being of such a serious nature that they will still fall within the realm of terrorism. A person hijacking an aeroplane to the Bahamas with no terrorist intention but merely with the intention to enjoy a free holiday could therefore be classified as a terrorist for having committed a crime under the *Anti-Terrorism Bill*. Similarly a mugging of an internationally protected person with only criminal intent would also be included in the *Anti-Terrorism Bill*.

13.49 Ms Schneeberger remarks that they have no strong views on the viability of this approach from a domestic law point of view, it is not within the field of their expertise. She suggests, however, that in view of the fact that the Bill can cover common (although serious) crimes as well, the drafters may wish to consider using a more neutral title such as the “Security Act”. She remarks that from an international law point of view they do favour the current approach in the Bill — that this is the approach that has been utilised by the international community, and while it is perhaps legally not very neat, it is workable. She notes that the approach currently followed in the Bill will enable South Africa to ratify the existing crime specific terrorism conventions. She states that it also clearly incorporates the crimes from these conventions and is therefore a clear indication of South Africa’s willingness to co-operate with the international community on the basis of the comprehensive legal framework which has been elaborated at an international level.

13.50 The Human Rights Committee of South Africa (the HRC) remarks that there is no question about the importance of combating terrorism towards its elimination.²

² The Human Rights Committee of South Africa explains that it is an independent national non-governmental organisation (NGO) established from a number of banned human rights organisations in September 1988. “We believe in protecting and promoting fundamental rights and in sustaining and developing democracy. We seek to contribute to a South Africa where its entire people effectively enjoy the benefits enshrined in the Constitution and the Bill of Rights.

The HRC owes its history to a number of South African NGOs that had fought for the fundamental rights for all South Africans for many years. Its formation was in response to the banning in February 1988 of a number of anti-Apartheid organisations, in particular the Detainees’ Parents Support Committee (DPSC) that was established in 1981. Amongst other activities, the DPSC had undertaken to monitor and publicise human rights violations in South Africa. The HRC aimed to fill the information vacuum resulting from its banning.

Our objective is to bring the Constitution to our people. The HRC has adopted an integrated and holistic approach whereby its monitoring, research, reporting, public awareness and advocacy work aims to:

The HRC states that terrorism constitutes a serious violation of fundamental rights, in particular rights to physical safety, life, freedom and security, and impedes socio-economic development through destabilisation of states. The HRC notes that South Africa, a nation that seeks to move from a deeply divided society characterised by strife, conflict, untold suffering and injustice to a future founded on the recognition of human rights, democracy and peaceful co-existence and opportunities for all by way of the Constitution, cannot afford to ignore the growing incidence of terrorism. The Human Rights Committee points out that it is especially concerned about the continuing urban violence and bombings in the Western Cape and the effect it has on building a human rights culture.

13.51 The Human Rights Committee notes that there are advantages in approaching terrorism from an international perspective, since international conventions and United Nations resolutions focus on *international* terrorism.³ The HRC also point out

-
- ensure that people's rights are respected, promoted and protected;
 - ensure that legislation and government policies conform to the Constitution;
 - assist people within state institutions to respect, promote, protect and fulfil constitutionally entrenched rights;
 - empower people to know their rights and assert them; and,
 - monitor trends in the SADC region that could impact on South Africa.

At the outset the stated objectives of the HRC were to monitor and disseminate information about the observance or violation of fundamental rights by the Apartheid government. Special emphasis was placed on repression, defined by the HRC as actions perpetrated by the proponents and supporters of Apartheid for the purpose of maintaining and defending the system of Apartheid. The HRC concentrated its efforts on monitoring and exposing such violations with the express purpose of bringing them to the attention of a wide audience, in particular to those in a position to influence the demise of Apartheid.

Subsequent to South Africa's first non-racial democratic elections in April 1994 and the acceptance of the Government of National Unity, the HRC continues to see its role as a watchdog body concerned with the protection of civil society from the abuse of government power. The HRC moves to identify gaps in human rights reporting and to provide a regular comprehensive national human rights barometer. The HRC has broadened its activities to include lobbying for effective human rights legislation."

³

The HRC points out —

- Article three of the *International Convention for the Suppression of the Financing of Terrorism*: "[t]his Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under ... this Convention to exercise jurisdiction..."
- *The Convention of the Organisation of African Unity on the Prevention and Combating of Terrorism* which does not provide a clear nationality exception, but its focus is nevertheless international.
- *Resolution 1269 (1999)* adopted by the Security Council (19 October 1999) which emphasises the "necessity to intensify the fight against terrorism at the national level and to strengthen ... effective international cooperation in this field." The *Resolution* is a condemnation of *international* terrorism and a call for international cooperation to address international terrorism on a domestic level.

that these conventions and resolutions focus on the fair treatment of the alleged perpetrator: Under Article 17 of the *International Convention for the Suppression of the Financing of Terrorism* any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention must be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law. Under Article 7(3) any person regarding whom measures are being taken shall be entitled to communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides; be visited by a representative of that State; be informed of that person's rights under subparagraphs (a) and (b). Under article 7(3) any person against whom the national measures to ensure that person's presence for the purpose of prosecution are being taken shall be entitled to communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides; be visited by a representative of that State; be assisted by a lawyer of his or her choice; and be informed of his or her rights.

13.52 The Institute for Democracy in South Africa (IDASA) explains that while it is understood that the drafting of the *Anti-Terrorism Bill* is still in its preliminary stages, certain aspects of the Draft Bill threaten to erode the attempts which have been made post-1994 to entrench a human rights culture in South Africa. IDASA says that when tackling crime and especially terrorism, the state has immense power, and the manner in which it utilises such power is an issue of public interest. IDASA notes that it thus makes its submission to draw attention to the aspects of the Draft Bill which are problematic in light of the Constitutional framework of our nascent democracy. They are of the opinion that an infringement of any of these principles undermines democracy and minimises the accountability of government. The four aspects of the Draft Bill that they would submit are problematic and which will be the focus of the submission are — clause 16 dealing with "the custody of persons suspected of committing terrorist acts"; the definition of "terrorist act"; the definition of "terrorist organisation", and linked to the problems surrounding s16, the constitutional right of the arrested person to remain silent and the duty to take cognisance of such right (which is not dealt with in the Draft Bill).

13.53 IDASA comments that there has been much debate on whether South Africa ought to follow the examples of other jurisdictions and create specific legislation to deal with the

threat of terrorism. IDASA notes that those who argue against the omnibus Act are of the view that a new Act would be socially wasteful and there are several (22 in all) pieces of legislation in terms of which a person may be charged, should he be accused of a terrorist act. IDASA points out that the argument continues, that resources should instead be expended on effective *implementation* of the existing legislation and that legislation *per se* will not be a solution to the problem of terrorism.⁴

13.54 IDASA explains that alternatively, the Commission has taken the view that specific legislation on terrorism is essential for the following reasons:

- The existing offence of terrorism contained in s 54 (1) of the *Internal Security Act* of 1982 only relates to terrorism in respect of the South African Government or population. Given the threat of international terrorism specifically when directed at foreign officials and the interests of foreign states, it is clear that the offence of terrorism as it exists in South African law is inadequate.
- The international trend is to enact specific legislation dealing with terrorism and to thereby ensure that the most severe sentences are meted out.
- South Africa also needs to ratify the respective international instruments relating to terrorism as soon as possible.

13.55 IDASA points out that its position is that effective implementation will always be the test for the efficacy of any legislation, that the anti-terrorism legislation is no different and whether there were to be an omnibus Act or several pieces of legislation, they will be of little or no value, if not implemented properly. IDASA remarks that it may well be that the omnibus Act will give the State renewed impetus to deal with terrorism, the Act being an important starting point. IDASA states that it may also be easier to enact the specific legislation as opposed to amending the 22 pieces of legislation which impact on terrorism, that the Act, whatever form it takes, needs to deal with the threat of terrorism locally and internationally and needs to do so within the framework of the Constitution. IDASA notes that laws must also be implemented against the backdrop of thorough police investigation for which there can be no replacement, and that a large part of the efficacy of the Draft Bill indeed rests on the assumption that police are trained not only in their jobs but also in the ability to carry out of their duties in a constitutional democracy. IDASA considers that this

⁴ IDASA notes that its concerns are, at this stage limited to the above aspects of the Draft Bill. IDASA welcomes the manner in which this Draft Bill has been introduced for public comment. They say the SA Law Commission is to be commended for placing all the information surrounding the formulation of the Draft Bill (including the preliminary draft efforts) at the disposal of the public. The process has been open and transparent. They say they look forward to the final draft Bill which is to be presented to the Minister of Safety and Security and trust that it will indicate that consideration has been given to the concerns raised by them.

assumption is a dangerous one and one which could potentially limit the efficacy of the legislation. IDASA notes that while this potential problem will be raised further on in the submission, it is beyond the scope of its submission to test all the ways in which untrained police, in conjunction with limited resources can decrease the efficacy of this or any of the 22 pieces of legislation.

13.56 The Legal Resources Centre (LRC) in Cape Town comments that the question of whether the legislation was desirable in the South African context seemed rhetoric at first. It made sense that only a terrorist would be opposed to this legislation. The LRC says that the *Anti-Terrorism Bill* sets out to do two very important things to combat terrorism, namely, to give effect to relevant international principles, and to ensure the security of the republic and the safety of the public against threats and acts of terrorism. The LRC notes that it has been argued further that there is a need for a single legislation, as this seems to be an international trend to have a legislation creating specific offences of terrorism rather than relying on common law. The LRC remarks that in a Constitutional democracy it is possible to legislate without adding our Bill of Rights to the list of casualties of the incidents of urban terror in Cape Town. The LRC points out that values and the freedoms enshrined in the Constitution are there to guide us even when legislating in times of perceived crisis, and as a sector of civil society they look at this legislation and weigh up the competing interests in an attempt to balance fundamental freedoms. The LRC says that the draft Bill and discussion document presents a number of problems, and that their response is aimed at addressing some of those problems. The legislation comes at a time when the whole of South Africa and Cape Town in particular tries to make sense of the recent spate of urban terror. A call for the limitation of fundamental rights for the purpose of fighting terrorism continues to perpetuate the perceived links between the Constitution and crime. The LRC asks what the purpose of this self-defeating legislation could be? The LRC points out that a unifying legislation aimed at combating terrorism is hailed as global trend, and that the domestic situation has been described as disparate because our anti-terrorism legislation is spread across 22 different laws. The LRC considers that the provisions of the draft legislation make the existing position ideal, that we have not been presented with any compelling reasons why retaining the offences in the legislation that deals with those matters is undesirable or inadequate. The LRC suggests that instead there be a draft provision that (mis)labels a number of offences by providing for them in the *Anti-terrorism Bill*. The LRC notes that in the attempts to unify scattered pieces of legislation one needs to guard against the mislabeling that might be created in the process. The LRC suggests that common assault on a diplomat over any brawl could be mislabeled as a

terrorist act because it is part of an anti-terrorism legislation, and that the offender could be prosecuted in terms of this legislation. The LRC states that clause 16 is a good example of this bad idea, where it states: “Whenever it appears to the Judge of the high court on the ground of information submitted under oath by a Director of Public Prosecutions that there is a reason to believe that any person possesses or is withholding from a law enforcement officer *any information regarding any offence under this Act*”. The LRC considers that this means that a witness to an assault on a diplomat could be detained for 14 days because s/he has information regarding an offence under the Act.

13.57 The LRC says that if the motivation for a single piece of legislation is anything to go by they still need to be convinced why our common law or statutes such as *Civil Aviation Offences Act*, in which some of the provisions dealing with hijacking of an aircraft have been taken from, are inadequate. The LRC suggests that they need to be made to understand why it is important to provide for common law offences in anti-terrorism legislation. The LRC says that there is no doubt that we need to incorporate the provisions of most or all of the international instruments that South Africa has ratified, at a domestic level, noting that some domestic legislation have been able to incorporate main provisions of international conventions. The LRC remarks that the *Civil Aviation Offences Act* incorporates the Tokyo Convention, 1963, Convention on offences and certain other acts committed on Board Aircraft, the Hague Convention, 1970, for the suppression of unlawful seizure of aircrafts, the Montreal Convention, 1971, for the suppression of unlawful against the safety of civil aviation. The LRC states that it has been argued that the existing legislation curtails our ability to act against someone who may be guilty of a terrorist act against a foreign target. The LRC considers that if the intention of the legislature is to provide for international terrorism it falls short in that respect, the international conventions have been provided for in the relevant legislation, and there is no single clause in the draft bill that introduces new measures aimed at combating international terrorism. The LRC points out that we are consoled by the interpretation clause that provides for the definition of a terrorist act to be in accordance with the principles of international law, and in particular international humanitarian law.

13.58 The LRC suggests that South Africa is a country struggling to come to terms with information uncovered during the TRC hearings regarding the acts of police brutality, some of which took place in detention, that there is a need to restore public confidence in our police services and giving them more power is a hardly a first step towards achieving that. The LRC states that there is no denying of the devastating

effects of the recent spate of bombings. The LRC points out that South Africa cannot renegotiate its fundamental freedoms in a state of fear. The LRC notes that the project committee noted that to the extent that bombs are ticking they are certainly ticking more in Northern Ireland and Israel than they are in South Africa, maybe those countries do need those drastic measures. The LRC suggests that what is very difficult to foresee is what is the next freedom that we might have to renegotiate and that in the process we may lose the right to retain our global claim of being owners and custodians of one of the world's most progressive Constitutions.

13.59 The LRC says that the need for institutions like the ICD continues to exist, police brutality can be monitored but police incompetence is hard to monitor, and the consequences of both are the same. The LRC considers that at this instance South Africans are asked to hand over our freedoms to compensate for lack of financial and trained human resources, that it is a heavy price and its people need to be convinced why this legislation is the only viable alternative to what they have got. The LRC remarks that South Africans need to be convinced why the drastic measures as provided for in clause 16 are justified and to be willing to discover why conventional policing methods are inadequate, and whether this is in the public interest.

13.60 The South African Human Rights Commission (SAHRC) comments that it approaches the fulfilment of its mandate from a "rights based perspective" in order to achieve the progressive realisation of human rights within South Africa. The SAHRC says that in the context of legislation monitoring, this approach entails a critical analysis of proposed measures, such as the draft *Anti-Terrorism Bill* ("the Bill"), in order to advise government and civil society on the likely impact that a proposed new law, amendment or the implementation of an existing statute will have on the realisation of human rights in South Africa. The SAHRC notes that in the performance of its functions, it is primarily guided by the Bill of Rights, as contained in the Constitution, existing rights as developed through our common law and other statutes and international human rights instruments. The SAHRC remarks that present levels of crime and violence in South Africa profoundly concern the SAHRC and that our nascent democracy has for the past few years been grappling with the challenge of combating and overcoming the scourge of serious crime. The SAHRC states that crime in whatever form prevents decent and law-abiding citizens from enjoying and exercising the rights guaranteed in the Constitution, and that recent events in Cape Town compellingly illustrate how crime threatens our democracy and the values of freedom and human dignity that underpin it. The SAHRC points out that it is simply impossible for human rights to flourish under conditions that resemble a

siege and it is wholly unacceptable that nameless and faceless criminals can hold a nation to ransom.

13.61 The SAHRC comments that society demands, and legitimately so, that those responsible for these deeds of terror be arrested and prosecuted. The SAHRC notes that it is necessary that the resources of the State and in particular the law enforcement agencies be fully harnessed to deal with this challenge. In this regard the intelligence and investigative capacities need to be seen to be responding in an effective, expeditious and decisive fashion. The SAHRC points out that in a media release on 18 September 2000, it commented that an important debate has commenced on the desirability or otherwise of introducing anti-terrorism legislation, and even the declaration of a state of emergency in appropriate circumstances. The SAHRC states that at the media release, the SAHRC emphasised that state action, and in particular that of the law enforcement agencies, takes place within the parameters of the Constitution and the law and that the debate on the proposed anti terror legislation happens in a rational and dispassionate environment.

13.62 The SAHRC notes that while the primary responsibility for dealing with crime rests with the state, it is their view that all decent and law abiding South Africans have a duty to assist where possible in this process, they could assist the police in their investigations, make relevant information available and join in a collective effort to overcome what no doubt is a real and formidable threat to our society. The SAHRC points out that we cannot, however, condone citizens or communities taking the law into their own hands. The SAHRC says that we take strength from the fact that the majority of South Africans are indeed committed to a society free of crime and terror. It is this resolve that has seen South Africa overcome the demon of apartheid and oppression and it is this resolve that will see us overcome the demons of crime and urban terror. The SAHRC points out that their comments at this stage are directed at broad issues of principle around the introduction of the Bill rather than a detailed analysis of its provisions, although their work will not stop there. The SAHRC explains that they have embarked on various initiatives around the introduction of the Bill in order to bring pertinent issues to the fore and to facilitate discussion of these by the broader South African public.

13.63 The SAHRC explains that it convened a seminar on the issues of crime, urban terror and human rights which took place in Cape Town on 6 November 2000. The SAHRC notes that the seminar brought together members of Government, the Judiciary, civil society and community organisations to discuss the Bill and other

critical issues relating to crime, urban terror and the realisation of human rights in South Africa, and amongst others, the following topics were discussed at the seminar:

- The recognition, promotion and realisation of the rights of the victims of crime;
- The impact recent event in Cape Town has had on the community;
- The ability of the Constitution to effectively deal with crime as it prevails in South Africa as well as more serious challenges to the authority of the State;
- The government's motivation for anti-terrorism legislation evaluated from a rights based perspective;
- The challenges facing the judiciary in adjudicating on cases involving crime and urban terror within the framework of the Constitution and the Bill of Rights; and
- The challenges crime and urban terror present for human rights activists.

13.64 Secondly, the SAHRC points out, it was developing a research paper entitled *Crime and Human Rights* which considers existing legal provisions relating to the investigation, prosecution and adjudication of criminal cases, and it evaluates the ability of the criminal justice system to effectively implement these measures. The SAHRC points out that based on their findings, they pose the question whether South Africa needs more laws to deal with present levels of crime and the spate of bombings in and around Cape Town or whether the problems can be dealt with by the effective implementation of existing laws. The SAHRC says that it will closely monitor the further passage of the Bill and will comment on its provisions in detail at a later stage should the need arise. The SAHRC notes that a last preliminary point must be made, having taken note of the reasons for anti-terrorism legislation put forward in the discussion paper. The SAHRC notes that these are two-fold; firstly according to the Commission there is an international trend to create specific legislation based on international instruments relating to terrorism, and while this may be so, they are not convinced that South Africa should follow this world-wide trend without further compelling reasons, and secondly, however, the Commission points out that to enable South Africa to give effect to its obligations in terms of international it is necessary to draft an omnibus Act addressing the issue of terrorism on a broader basis. The SAHRC notes that they support the recommendation of the Commission in this regard as it will provide clarity, certainty and facilitate access to the law, and in this regard they join the Commission in calling on the government to ratify or accede

to the respective international instruments relating to terrorism as soon as possible.⁵

13.65 Professor Abdulkader I Tayob who is a professor of religious studies, comments that he supports the government's attempt to eradicate the scourge of terror and crime on the streets of South Africa. He notes that he hopes that his comments will assist in the formulation of adequate strategies in this regard. Professor Tayob states that he wishes to raise some concerns about the proposed Bill to curb acts of terror in South Africa, and to align South African legislation in line with international trends. He believes that South Africa's approach in developing new legislation, rather than taking the alternative route of revising existing legislation, is flawed and dangerous for a number of reasons set out below. At the outset, he indicates that he is not an expert in international law or anti-crime legislation, however, as a specialist in the study of modern trends in Islam, he believes that this type of legislation has direct implication for the development of certain trends within the religious community. Moreover, he says, it contributes to the false perception of the international arena since the fall of communism and the end of the cold war.

13.66 Professor Tayob points out that the proposed Bill assumes that international terror is carried out in the name of social, political, religious and other causes, and that such goals are held by key organisations that purportedly support or carry out such acts. He notes the hesitancy with which organisations are dealt with, and also note that there is no intention to ban or proscribe organisations as such, although the proposed Bill works from the assumption that terror is driven by organised activity led by clearly identified ideological goals. In his opinion, the proposed Bill does not address the difficult question of how such organisations will be identified. He says such a situation leaves the question of terror organisations to popular perceptions, and the vagaries of media allegations, and in the absence of clear guidelines as to how such organisations will be identified, the proposed Bill unwittingly grants some legal recognition to wild allegations and speculation. He suggests that this is not

⁵

The SAHRC points out that it has not commented on each provision of the Bill, although they share many of the concerns raised by the South African Law Commission and explains that their failure to comment on all clauses should not be construed as indicating their support for specific clauses. They note that they shall continue to monitor the progress of the Bill and may submit further comments at a later stage, if necessary. The SAHRC notes that their seminar on Crime and Human Rights will provide a further useful opportunity to engage with the issues at hand and will facilitate discussion of the critical issues the Bill raises. They state that they shall keep the Commission advised of developments in this regard. They also congratulate the South African Law Commission on the work it has done to date, stating that the depth of research and analysis that accompanies the report is commendable and has established a solid foundation for further debate of the issues at hand. The SAHRC says it shares many of the concerns of the Law Commission and invite the Commission to call on their services should the Commission require their further assistance.

acceptable, as the issue of terrorist organisations is fraught with emotions, which often have serious social consequences. Professor Tayob points out that in Kenya and the United States, for example, Islamic religious and welfare organisations were tainted with the brush of supporting terror, and that Kenya, in fact, passed a law against a number of such organisations, demanding that they re-register.

13.67 Professor Tayob notes that the Bill proposes to bring South African legislation in line with international attempts to combat terror acts, and that this is commendable, although there are no safeguards whereby South African security organisations will not, wittingly or unwittingly, be used by governments to use anti-terror legislation to oppose legitimate opposition (or in some cases where legitimate opposition is severely curtailed). He explains that many countries in the Middle East including Algeria, Tunisia, Egypt, Israel and Turkey use the bogey of Islamic fundamentalism to suppress dissent. He notes that the proposed Bill sets up South Africa as a potential partner in the suppression of legitimate opposition, but there are no safeguard clauses where such co-operation may be checked against defensible criteria. He says that the Bill seems to be making the same mistake as was made during the Cold War, when legitimate opposition to dictatorial regimes was suppressed in the name of fighting communism, and that there is no consideration of this danger in the proposed Bill and documents on this matter.

13.68 Professor Tayob points out that the discussion paper provides a good survey of the range of terror acts in South Africa, and points out that more than 50% of such acts have taken place in the Western Cape. He states that given this information, however, it seems unclear why such acts are considered to be part of an international network from one or few organisations. He considers that the cause of such acts of terror must first be laid at internal problems, and the proposed legislation seems too hasty to lay the blame at international connections. Professor Tayob is of the view that the cure, in brief, may not suit the problem. He notes that there is a general tendency again to see Islamic political activity as foreign-inspired, and that this tendency is not too different from thinking in the days of apartheid that laid the blame for insurrection against the Apartheid State at the door of Russia, and the problems in South Africa, as they are in Algeria, Egypt, Israel and Turkey, closer to home.

13.69 Professor Tayob points out that according to the proposed Bill, acts of omission may also be construed to be supportive of terror organisations or acts, and any person who fails to report on acts of terror may be guilty. He notes that the Bill makes no provision for the lack of safety against individuals who are thus implicated,

and also opens the door for rogue law enforcement officers to "terrorise" individuals who may be suspected of withholding information. He is of the view that the right to silence for reasons of personal safety, not to speak of self-incrimination, has been thrown out of the window. Professor Tayob states that even though the legislation does not overtly state this, the issue of "Islamic" terror must be addressed. He points out that it is undeniably that certain groups, in the name of religion, use violence to espouse and achieve their goals. He says he would go one step further, and does not think it is sufficient to state that they misuse religion to achieve their political goals. He considers that one would rather have to admit that their approach reflects a reading of religious teachings of war and defence based on their perception of their own social and political conditions. Professor Tayob explains that this particular approach means that their reading and interpretation of religious views and obligations has potentially greater appeal than if it had mainly been a matter of misusing religion as such. He notes that if one agrees with this, then the promulgation of a law against certain organisations may be construed as a law against a particular religious reading. Professor Tayob explains that supporters of Islamic political ideology include a whole range of tendencies, including those who are both prone to use violence and those who reject violence in principle. He remarks that the Bill in its wide sweep and scope may correctly, however, be construed as a law against Islamic political ideology in its entirety. He considers that this is a matter, he believes, that must be left to the religious tendencies in the Muslim community, and that any Bill that encroaches upon this activity interferes in it, and lends support to those who choose violence. Professor Tayob believes that the Bill must drop certain aspects, particularly as it pertains to an international network of terror, to avoid the pitfall of being regarded as an anti-Islamic Bill, moreover, it cannot be accepted that all acts of omission be criminalised.

13.70 Professor Tayob remarks that there is at best dubious evidence that the resurgence of religious militancy, Muslim or otherwise, is inter-connected globally. He notes that claims about the network of international Islamic terror are supported by sectors within a number of countries (US, Israel, France and sadly South Africa) with their own dubious agendas, and given more time he would be able to document the manner in which the supposed threat of the Islamic terror in South Africa has been fanned and promulgated. He believes that the legislation endorses this perception of an international *network* of Islamic terror, without having the *evidence* to name such an organisation. He remarks that on the contrary, the tendencies to interpret Islam politically are driven by a more diffuse process, through the global movement of ideas and people. He points out that any organised network, if there is

such a thing and it has not yet been proved, thrives on this global flow, but does not drive it. Professor Tayob considers that the proposed Bill stands the risk of criminalising any flow of people and ideas that may appear to be supporting or condoning acts of terror. The comment by Mr F Jeewa echos those made by Prof Tayob in stating that he is shocked and appalled by the Bill which is a very serious infringement of human rights; is vaguely defined; and would do nothing but make life difficult for honest God-fearing citizens who want this country to learn from the mistakes from the past and progress favourably into the bright future painted for us by people such as Mahatma Ghandi and Nelson Mandela.

13.71 The sentiments expressed by these respondents are also shared by respondents such as Mr Ismail Soosiwala, Mr Asad Soosiwala, Mr Arsad Soosiwala, Mrs Sabira Soosiwala, Mrs Rehana Dinat, Mrs Razia Essack, Mr A Dinat, Mr R Essack, Ms N Essack, Ms Z Amod, Mr M Amod, Mr H Amod, Ms A Dinat and Mr W Essack.⁶ Ms Mushahida Adhikari comments that the proposed *Anti-Terrorism Bill* seems very clearly to be aimed almost exclusively at controlling the activities of PAGAD as witnessed by the Minister of Safety and Security and the DPP's comments in the media recently and that PAGAD has been identified as a mainly Muslim or Muslim driven organisation. She notes that her concern is that the enactment of a bill aimed so clearly at a particular identifiable segment of the population could be used as a tool in the hands of persons who would see certain political and or ideological opponents neutralised, and additionally, that the blame for the urban terror campaign in the Western Cape has been placed almost solely at the door of PAGAD and ordinary Muslims who may not even be involved or sympathetic to the aims of

⁶ Who comment that as law abiding and tax paying citizens it disturbs them that the Minister of Safety and Security can pin blame on a group of people without concrete evidence nor without following the proper legal channels. They remark that this is following the lead of many so-called democracies who firstly points the blame at certain religious groups or people without even getting the evidence and going to court. They note that their father and friend was recently murdered in a car highjacking and was shot in broad daylight in front of hundreds of people including school children. They note that the law abiding citizens are being held hostage by the criminals in the country. They consider that the proposed legislation should be an anti crime law and not target innocent Muslims who are fighting for the just causes of their brethren in Palestine, Iraq, Sudan, Chechniya, Afhanistan, Mindanao etc. They note that the law if passed will alienate a large and powerful people who are mostly law abiding people and that it is the Muslim community who fought in the struggle globally as well as in South Africa. They agree that the people or organisations who carry out the senseless acts of bombings, murders etc should be severely punished as Islam does not condone these acts. They however consider that the government knows who is behind these acts and should not target the Muslims or blame Islam. They say that in the light of the Bill being a violation of human rights and freedom of belief and religion, they record their objection to the Bill and plead that the government release its citizens from the clutches of crime and reinstate the death penalty but not to impose the bill which is a form of terrorism itself.

PAGAD are already being victimised by business persons and the security forces. She remarks that to her such incidents indicate a growing anti-Muslim sentiment and she fears that the *Anti-Terrorism Bill* will further add to this. She notes that as any resident of the Western Cape will be able to tell this not something to be taken lightly, as the Muslims form a fairly large proportion of the population in the region. She considers that a sustained campaign of victimisation could in fact have the effect of driving more moderate Muslims closer to the fringe elements in PAGAD, as well as violating the freedom of association clauses in the Constitution.⁷ She points out that the parts of the proposed Bill which most concern her are the "bad company" clauses which seem to indicate that one could be branded a terrorist merely by being acquainted with identified terrorists. She states that if one then applies this to the PAGAD situation one could conceivably end up with a situation where a sizeable portion of the Muslim and Coloured communities in the Western Cape would be

7

Mr Khalick Limalia also notes that it is sad that Ministers Tshwete and Maduna single out Pagad as the group that is involved in the bombings and that he fails to understand that after the 20th bomb has exploded in the Western Cape no one has been arrested but that these ministers can go publicly and state that Pagad is involved. He suggests that if Pagad is involved, the law should take its course but the SAPS must first investigate the matter. He considers that it has a detrimental effect on the innocent Muslims in South Africa as they all will be looked at as if they were terrorists. His views are also held by Mr N Motala who comments that apart from being an unconstitutional limitation of the prescribed 48 hour detention period and the right to freedom from detention the bill is reviewed under circumstances which are entirely conducive to religious intolerance. He explains that the wave of terror which has swept the Western Cape is an undeniable fact but the unjustified and unsubstantiated comments of the Ministers of Justice and Safety and Security about the involvement of Pagad in the spate of bombings goes beyond merely irresponsibility. He notes that it encourages blatant religious intolerance as Pagad is portrayed as an *Islamic Fundamentalist* organisation upholding the *fanatic* ideals of all Muslims, and that creating misconceptions before such an influential piece of legislation is to be considered can only be detrimental to the measured processes which ordinarily accompany such Bills. He notes that constant reiteration of terms such as *Muslim extremists* and *Islamic fundamentalists* creates negative connotations not only of a group such as Pagad but indeed of the whole Muslim community of South Africa. He suggests that the Bill directed mainly at Pagad will serve not only to quell terrorist acts but will open up avenues for general discrimination against Muslims countrywide with every Islamically clad person being deemed a terrorist. He considers that the timing of the last bombings which occurred in a predominantly Muslim area provides great impetus for the fast-tracking of the proposed legislation which renders the usual consideration processes ineffectual. He urges that the Commission create greater awareness of the constitutional dangers which surround the passing of such legislation as the greater public is kept in the dark over much what is happening in terms of religious intolerance and this must be brought to light. Mr Tshepo Matsimela's comments also echo the sentiments expressed by these respondents. He also questions the fact that Pagad is singled out as the prime suspects. He notes that in such serious issues there are usually more than one suspect on the SAPS list and asks where are the other possibilities. He notes that usually terrorists make it known that they are involved in certain acts/crimes and therefore expect certain demands of theirs to be met. He points out that Pagad are denying any links to the terror and asks what do they have to gain from such terror acts and whether they would risk being caught by continuing to detonate bombs in the Cape. He also points out that whoever is responsible for the bombings are doing it so professionally that no one seems to be able to catch them and poses the question whether Pagad has reached such a level of skill even when 35 of their key members have been arrested.

criminalised. She explains that these communities is so closely knit that one could have PAGAD members, gangsters and ordinary citizens all in one family group. She notes that this is a very frightening scenario and that it also seems to be a very convenient way to deal with the Urban Terror and Gang problem in the Western Cape without having to use the normal law enforcement channels.

13.72 Ms Adhikari states that another area of great concern is the proposed re-introduction of detention without trial and denial of access to legal representation. She notes that besides the obvious historical connotations, she finds it hard to see how such provisions could be in accordance with South Africa's hard won Constitutional rights nor does she feel that such provisions could possibly fall within the bounds of the limitations clause. She considers that this again seems to be a convenient way for the security forces to deal with a problem which the traditional methods of law enforcement have proven incapable of handling. She says that this, however, also seems to be a way of diverting attention from the possible reasons for law enforcement's failure to deal with these issues. She comments that to add further weight to the fears she has expressed, she would like to draw the Commission's attention to the statements made in the press recently by the DPP, when he was asked what evidence he had to back up his claims that PAGAD are behind the urban terror campaign and he replied that normal observation was his proof. She adds that when MP Patricia De Lille pointed out that there could be a certain amount of complicity between the gangs, PAGAD and the police, Ms De Lille was loudly denounced and her allegations dismissed without any attempt at an explanation as why law enforcement found this such a preposterous idea. In conclusion she would urge the Commission when making its recommendations to look very carefully at the human rights context within which this Bill will operate and to make sure that this Bill does not become a tool in the hands of certain forces to neutralise their opposition, as was the case under the apartheid era's terrorism laws.

13.73 Another respondent joining the ranks of the last-mentioned respondents is Rashid Mohammed. He comments that as he understands it, the Bill is intended to curb the recent terrorist attacks in the Western Cape and he supports this one hundred percent as anyone be it a black or white person, Muslim or Christian who has the audacity to take innocent lives, must be punished and sentenced accordingly. He points out, however, that he has a problem with the underlying statements of the Bill which subtly seem to be concealed in the background. He poses the question if the law is to curb terrorism locally why must there also be clauses preventing humanitarian aid and any other form of support to liberation groups overseas who are

deemed by America as supposed *terrorist groups*. He criticises the fact that the word *terrorist* is not defined in the Bill and that the definition of *terrorist act* as being too wide. He poses on the issue of criminalising support to so-called terrorist organisations the question (raised by other respondents as well) that why should being a good Samaritan to innocent widows and orphans overseas make someone a terrorist. Mr Mohammed considers that the Bill is a very subtle and intelligent approach to sideline and victimise a certain group or people in the country by detention without trial, secret evidence, search of person, organisations and personal property. He notes that the country has just emerged from an era with laws such as the proposed Bill and asks whether our progress has been forward or backwards, and whether this is the South Africa millions have been martyred for.⁸ He notes that South Africa has inter alia the right to freedom of association. Mr Mohammed notes also that there are the 23 laws presently on the statute book and asks whether it is a question of the police not being effective in carrying out their duties or whether it is perhaps a lack of resources preventing them to perform their duties effectively and efficiently. He considers that the proposed Bill infringes the rights of South Africans, and if this appalling and uncalled for Bill were passed it will deny their rights of freedom of association and expression.

13.74 Mr Hashim Bobat also notes that the Bill is said to deal with urban terrorism whereas it deals in fact with international terrorism.⁹ He notes that he is concerned

⁸ A respondent who commented under the name Muhammad notes similarly that he believes the Bill takes the country backwards instead of forwards, the reason being detention for no reason other than interrogation, without the opportunity to post bail creating a draconian law which is against any concept of democracy, and it also prevents freedom of choice when funding organisations that could be blacklisted removing the constitutional right of association. Another respondent who likewise responds is Mr Iqbal Sheik who says that the Bill will take South Africa back to the apartheid era and that it would be more reasonable to implement the death penalty than the proposed Bill. He considers that there are sufficient laws in South Africa and that we do not need the proposed Bill. The Pretoria Muslim Congregation also notes that their submission is a reminder to the present government that the demise of apartheid has not necessarily led to a demise of injustice and oppression as is evidenced in the Bill and that as Muslims, they are duty-bound to oppose it. They note that should the constitutional rights be limited in the way the Bill does, it would auger a return to the draconian laws of the apartheid state which the Muslims and others have tirelessly fought against.

⁹ A comment containing the same content as was received from Mr Bobat was received from Mrs B Motala and Mss Z Motala and S Motala. Mr Rhiaz and Mr Riedwaan Hassiem point out in separate submissions that all Muslims are targeted by the Bill and that they will be unable to support the people in Bosnia, Chechnya, Palestine, Kashmir, Afghanistan etc who are fighting for their freedom, to raise funds for them for medicine, clothing, food and basic humanitarian rights, or to hold protest marches and rallies whereby they can openly speak out against their oppression. They suggest that the State and Pagad should unite by creating synergy with a greater output, as Pagad and the State are fighting the same cause (the eradication of criminal elements and creating peace in South Africa), the state should implement measures forcing the Police to do their job and the third force should be eliminated. They consider that we do not need American, French or Russian laws but that all

that the Bill uses an all-embracing concept of *terrorism* and that no provision is made for any freedom strugglers, liberation movements or the concept of a just war. He considers that this will effectively cut off any support for the liberation movements all around the world and also humanitarian aid for those who are victims of oppression. He poses the question of how the former liberation movements in this country will be viewed under this Bill.¹⁰ He notes with alarm that the Bill is modelled on the 1996 *Anti-terrorism Act* of the USA and that it is common that the USA has been pressurising all countries all over the world to pass similar legislation that will effectively cut off all moral, material, and financial support for any group abroad that is deemed terrorists by them. Mr Thamsana Mnqadi comments that the Bill is against the Constitution, that South Africans have struggled for these human rights and that he simply does not have parents as a result of the struggle. He considers that the Bill is another form of apartheid in disguise as the Bill is directed against a certain minority of people and that it is barbaric and cruel.

13.75 Ms Mary de Haas of the *Natal Monitor* notes that the Bill deals with matters pertaining to South Africa's need to fulfill international obligations to combat terrorism — as well as address what is described as an “ever-increasing threat within our borders”. She suggests that until there is far greater debate and clarity about this supposedly ever-increasingly threat within South Africa, that only what is necessary to fulfill international obligations be dealt with by way of legislation. Ms De Haas

who oppose terrorism should join forces in South Africa to achieve the same objective.

¹⁰ Mr Jon Smith raises the question whether South Africa is taking a dive back to the times of Hendrik French Verwoerd as the spirit of the proposed Bill is an embodiment of his spirit. He considers that South Africa has presently 23 laws to combat terrorism and asks why is there a need to bring into existence another one. He comments that he considers the solution is that the police is not equipped to carry out their duty and are using the Bill as a scapegoat to target Pagad. Mr Smith believes that no one actually knows who the perpetrators behind the bombings are. He notes that the uncalled for outbursts by persons such as Minister Tshwete highlights the fickleness of the public and how generalisations and cheap propaganda play a role in the lives of masses. He also points out the fact that the media use the word Muslim fundamentalism irresponsibly. He notes that at the start of the series of bomb blasts the minister called for a Bill to combat urban terrorism in the Western Cape but now it has spread to international-based so-called *terrorist groups*. Mr Smith considers that we cannot solve the problems in South Africa but wish to concern ourselves with international terrorism, and that it does not add up. He is of the view that it is startling that the word terrorist is not defined in the Bill and considers that a terrorist is someone who pledges any form of support (be it financially, medically, verbally, etc) to a group deemed as a terrorist organisation by the government. He poses the question whether it would constitute an offence of terrorist if someone were to collect funds for the widows and orphans in Chechnya, Kosovo or any of the other war stricken countries. He further poses the question how could it constitute a terrorist act if someone scratches the car belonging to a diplomat. Mr Smith considers that South Africa should not turn to a country such as Algeria for inspiration as they are governed by militant rulers. He suggests that South Africa is going to commit a grave injustice and erode the constitutional rights of its citizens, particularly the Muslim citizens who feel they are the prime target of the Bill were the Bill passed.

considers that the crux of her problem is that there is no proper analysis of the nature of terrorism in South Africa, and no attention to the context in which it is taking place. She states that bombings in the Western Cape, for example should be seen in the context of what is happening in South Africa in general and, especially what amounts to terrorism of a different manifestation in KwaZulu-Natal, where wanton killings of, amongst others, elderly people and children, it could be argued, fall into this category. She considers that should such an analysis be done, it would be shown that the greatest threat to internal stability of this country comes from the security arm of the State, especially the police, to whom this proposed legislation wants to give increased powers. She points out that the discussion paper refers to the wearing of hoods/masks in public places¹¹ and that in recent illegal raids on homes of rural residents by members of the SANDF in the Creighton area, soldiers were accompanied by people wearing balaclavas. She also notes that the *Intimidation Act* of 1982 and the *Arms and Ammunition Act* of 1969 are constantly transgressed with impunity in KZN.

13.76 Ms Mary De Haas is of the view that an holistic analysis of terrorism would give proper attention to the failure of existing organs of state to address it. She considers that such an analysis should include attention to the structure of policing and intelligence agencies, and include an audit of the backgrounds of those tasked with combatting violence, including that which is defined as terrorism. Ms De Haas is of the view that it would show that, structurally, the South African police, for example, remains largely the same as it was under *apartheid*, with most key positions being occupied by members of the former security police and their homeland police allies. She points, however, out that it should be noted that she is not saying that there are no good, professional members of all races as there are, but that she is talking about the structure of the SAPS. She suggests that there should be a moratorium on any further legislation concerning violence and terrorism in South Africa until there has been far greater debate, and especially, analysis of the existing *status quo*. She states that there is in particular a need to examine why the police and the well-resourced Scorpions cannot deal with the situation. She is of the view that what is totally overlooked is that South Africa has not changed structurally, in terms of the composition of its bureaucracies — and there is reason to believe that certain members of those bureaucracies may be resentful of the change in government and, putting it mildly, unenthusiastic about making democracy work. She remarks that the only beneficiaries of the violence — whether in the Western Cape or KZN — are those

¹¹ In terms of the Northern Ireland (Emergency Provisions) Act of 1996 the wearing of hoods or masks in public places constituted an offence.

who wish to undermine nonracial democracy.

13.68 Mr Zehir Omar comments that clause 20 of the Bill manifest Parliament's mindfulness of the recent amendments to our *Criminal Procedure Act* of 1977 relating to Schedule 6 offences and that the consequences of *terrorist acts* invariably fall within the category of offences listed in Schedule 6. He says the South African Constitutional Court's acknowledgment of the sudden increase in crime in our country was a persuasive factor confirming the constitutionality of denying rights enshrined in section 35 of the Constitution to persons arrested for having contravened any one of the offences identified in Schedule 6. Mr Omar remarks that we already have tools in place to address "terrorist activities" identified by the "International community". He considers that the success of Bill of Rights in the UK, Canada and USA was a significant factor yielding our surrender to the Bill of Rights enacted in the South African Constitution. He is of the view that the enactment of the proposed Bill will obstruct the germination of the nascent seeds of democracy still growing in our country, and that the obstruction may serve as a precedent to any future government to enact legislation that will completely obfuscate the provisions of section 35 of the Constitution. Mr Omar notes that we must remain mindful of the destruction of post-colonial democracies in Africa. Mr Omar points out that there are factors peculiar to our democracy:

- The ANC has close to seventy five percent support of the citizenry, opposition parties aligned do not surpass the support by the populace for the ANC and a *majoritarian* dictatorship is therefore a prominent reality absent from other democracies. (He says Madiba's reconciliation of Black and White and Zulu and Non-Zulu also remains tenuous.)
- South Africa's third world economy prevents it from giving practical effect to Parliament's obligations contained in, inter alia, sections 26, 27 and 29 of the Constitution, ie government's obligation to provide housing, health care and education.
- South Africa does not have the financial resources possessed by other democracies to ensure that the sweeping powers of arrest, detention and interrogation referred to in the Bill are not abused.

(b) Evaluation

13.79 It is instructive that numerous respondents argue that existing legislation should be used or amended in stead of adopting a comprehensive piece of legislation. It was noted above that on 28 September 2001 the Security Council of the United Nations adopted the wide-ranging, comprehensive resolution 1373 with steps and strategies to combat

international terrorism, that by this resolution the Council also established a Committee to monitor the resolution's implementation and called on all States to report on actions they had taken to that end no later than 90 days from that day. The Council decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. The Security Council also adopted Resolution 1390 the aim of which is to ascertain which measures have been taken by UN member States and it also makes provision for a sanctions committee.¹ **It is therefore clear that**

- ¹ Acting under Chapter VII of the Charter of the United Nations,
 . . . 2. *Decides* that all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to resolution 1267 (1999) hereinafter referred to as "the Committee";
- Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory;
 - Prevent the entry into or the transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry into or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case by case basis only that entry or transit is justified;
- (c) Prevent the direct or indirect supply, sale and transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities;
3. *Decides* that the measures referred to in paragraphs 1 and 2 above will be reviewed in 12 months and that at the end of this period the Council will either allow these measures to continue or decide to improve them, in keeping with the principles and purposes of this resolution;
4. *Recalls* the obligation placed upon all Member States to implement in full resolution 1373 (2001), including with regard to any member of the Taliban and the Al-Qaida organization, and any individuals, groups, undertakings and entities associated with the Taliban and the Al-Qaida organization, who have participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts or in supporting terrorist acts;
5. *Requests* the Committee to undertake the following tasks and to report on its work to the Council with its observations and recommendations; . . .
6. *Requests* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement the measures referred to in paragraph 2 above;
7. *Urges* all States, relevant United Nations bodies, and, as appropriate, other organizations and interested parties to cooperate fully with the Committee and with the Monitoring Group referred to in paragraph 9 below;
8. *Urges* all States to take immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their territory, to prevent and punish violations of the measures referred to in paragraph 2

there are definite measures to be taken by South Africa to comply with its international obligations, and that the UN will be taking steps to coerce States into compliance should they choose not to comply. The Commission also considers that the events of 11 September 2001 put terrorist activities in completely a different light than it was hitherto regarded. Effective legislation for combatting terrorism is one of the available tools governments can use in fighting terrorism. There are shortcomings in South African legislation and they should be remedied. There are respondents who argue that the police are abusing their powers, that they will continue this process under the terms of the proposed legislation and that the proposed legislation should not be proceed. It was pointed out above that the Law Commission of India took into account that their police have contravened the law in the past and the Law Commission considered that this is no reason why they should desist in proposing legislative amendments. The Commission agrees with the point of view that we must bring our South African legislation for combating terrorism in line with the international conventions dealing with terrorism, that our law should provide for extra-territorial jurisdiction in line with the international conventions, that the present terrorism offence is too narrow and that financing of terrorism must be addressed. The Commission therefore considers that there is a need for legislation dealing with terrorism by way of a so-called omnibus Act and that an *Anti-Terrorism Bill* must be drafted. The Commission has noted the perceptions that the Bill targets Islam and wishes to make it clear that this is not the intention. Legislation should be adopted which contains the necessary safeguards and which complies with the South African Constitution. The Commission wishes to emphasise that detention for interrogation cannot be supported, it being in conflict with the fair trial rights and the right to security of the person. The Commission is of the view that legislation should be adopted which contains the necessary safeguards and which complies with the South African Constitution.²

of this resolution, and to inform the Committee of the adoption of such measures, and *invites* States to report the results of all related investigations or enforcement actions to the Committee unless to do so would compromise the investigation or enforcement actions; ...

² The remarks by Prof Paul Wilkinson (Head, School of History and International Relations, University of St. Andrew's, Scotland) are noteworthy where he gave the answer in 1995 to the question what are the prospects of European states achieving radical improvements in their measures to combat terrorism up to 2010 and beyond: ("Terrorism: Motivations and Causes" in *Commentary No. 53* A Canadian Security Intelligence Service Publication January 1995)

In view of the fact that attacks by terrorist groups have become increasingly lethal over recent years, it is wise to plan for a continuing trend towards massive car and truck bombings in crowded city areas, and "spectacular" terrorist attacks, for example on civil aviation, airport facilities or military or diplomatic facilities, designed to capture maximum attention from the mass media, to cause maximum shock and outrage and to effect some terrorist demands.

Conclusion

Faced with this scenario of future terrorism, what are the prospects of European states achieving radical improvements in their measures to combat terrorism up to 2010 and beyond? The true litmus test will be the Western states' consistency and courage in maintaining a firm and effective policy against terrorism in all its forms. They must abhor the idea that terrorism can be tolerated as long as it is only affecting someone else's democratic rights and rule of law. They must adopt the clear principle that one democracy's terrorist is another democracy's terrorist. The general principles which have the best track record in reducing terrorism are as follows:

- no surrender to the terrorists, and an absolute determination to defeat terrorism within the framework of the rule of law and the democratic process;
- no deals and no concessions, even in the face of the most severe intimidation and blackmail;
- an intensified effort to bring terrorists to justice by prosecution and conviction before courts of law;
- tough measures to penalize the state sponsors who give terrorist movements safe haven, explosives, cash and moral and diplomatic support;
- a determination never to allow terrorist intimidation to block or derail international diplomatic efforts to resolve major political conflicts in strife-torn regions, such as the Middle East. In many such areas terrorism has become a major threat to peace and stability, and its suppression therefore is in the common interests of international society.

To conclude on an optimistic note, one major aspect of advanced technology gives the democratic governments a potentially winning card in their battle against terrorist organizations. Whereas developments in terrorist weaponry and the vulnerability of modern complex societies help the terrorists, the development of sophisticated fine-

(c) Recommendation

13.80 The Commission recommends that there is a need for an *Anti-Terrorism Bill* to remedy the deficiencies which presently exist in South African law.

C. PREAMBLE TO THE BILL

(a) Evaluation and proposal contained in discussion paper 92

13.81 The project committee noted that the SAPS drafters of the original Bill informed it that the real motivation for the Bill is to deal with internal incidents of terrorism although the motivation for the Bill is largely based on international precedents.

grained computers and terrorism databases provide superb assets for the intelligence war against terrorism. If these developments are matched by greatly enhanced international intelligence sharing and counter-terrorism collaboration, they can lay the foundations of long-term success over terrorist organizations.

13.82 The project committee took into account the observations recently made by the International Policy Institute for Counter-terrorism. The Institute notes that on 19 October 1999 the United Nations Security Council unanimously adopted resolution No 1269 , condemning “all acts, methods and practices of terrorism as criminal and unjustified, regardless of their motivation.”¹ **The Institute points out that this resolution is an important step towards achieving real and effective international cooperation against terrorism, that it is a step in the right direction, yet only a first step and that it must be followed by a bid for an acceptable international definition of terrorism. The Institute states that there are a great number of resolutions calling upon the international community to deepen and unify their efforts against international terrorism, that all of this is, however, unfortunately no more than lip service and that without reaching an acceptable international definition of the term “terrorism” one can sign any declaration or agreement against terrorism without having to fulfil ones obligations as per the agreement. The Institute points out that for every country participatory to the agreement will define the phenomenon of terrorism differently from every other country and that this lack of an internationally accepted definition of terrorism reflects the hypocrisy in international politics as a whole and in the case of counter terrorism as a case in point.**

13.83 The International Policy Institute for Counter-terrorism points out that when a violent act is aimed against a particular country, that country will define the act as terrorism and the perpetrators terrorists but when the same act is aimed against another country, then the countries not affected may refer to the perpetrators as guerillas, freedom fighters, an underground movement or some other terms — terms with a more positive connotation than the word “terrorist.” The Institute explains that this situation is reflected in the well-known saying, “one men’s terrorist is another man’s freedom fighter” and that this saying reflects a misunderstanding and a misuse of the term “terrorism”. The Institute considers that it implies that the definition of terrorism² is a matter of point of view and does not lend itself to objective judgment

¹ Security Council Resolution 1269: *What it Leaves Out* 20 October, 1999 see <http://www.ict.org.il/>

² Boaz Ganor writes as follows in “Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?” (See <http://www.ict.org.il/>)
“In their book *Political Terrorism*, Schmidt and Youngman cited 109 different definitions of terrorism, which they obtained in a survey of leading academics in the field. From these definitions, the authors isolated the following recurring elements, in order of their statistical appearance in the definitions: Violence, force (appeared in 83.5% of the definitions); political (65%); fear, emphasis on terror (51%); threats (47%); psychological effects and anticipated reactions (41.5%); discrepancy between the targets and the victims (37.5%); intentional, planned, systematic, organized action (32%); methods of combat, strategy, tactics (30.5%). Respondents were also asked the following question: ‘What issues in the definition of terrorism remain unresolved?’ Some of the answers follow:

but that this cliché is founded on the will of the perpetrators of violence to make a case that the same act will have a different interpretation depending on one's attitudes to the end goal of the perpetrators and that it is just another way of saying, "The end justifies the means". The Institute suggests that the question still stands on what is terrorism and that the Security Council resolution is one step in the right direction. The Institute considers that this is unfortunately not enough and that the Council must now reach an understanding on what constitutes a terrorist act. The Institute explains that it is clear that sometimes a non-state organization - a community, an ethnic group or a religious sect - may have just grievances against a regime and when a nation suffers from foreign occupation, or a society is controlled by a ruthless dictatorship, or a regime commits crimes against humanity, one can argue that the afflicted community has every right to use violence against the state or regime. The Institute notes that almost every nation has at some time in its past used violence against what it saw as an evil regime but that the question is - even in case of a just cause whether every use of violence is justified or are there certain types of violence that should always be forbidden?

-
- (c) The boundary between terrorism and other forms of political violence
 - (d) Whether government terrorism and resistance terrorism are part of the same phenomenon
 - (e) Separating 'terrorism' from simple criminal acts, from open war between 'consenting' groups, and from acts that clearly arise out of mental illness
 - (f) Is terrorism a sub-category of coercion? Violence? Power? Influence?
 - (g) Can terrorism be legitimate? What gains justify its use?
 - (h) The relationship between guerilla warfare and terrorism
 - (i) The relationship between crime and terrorism

We face an essential need to reach a definition of terrorism that will enjoy wide international agreement, thus enabling international operations against terrorist organizations: A definition of this type must rely on the same principles already agreed upon regarding conventional wars (between states), and extrapolate from them regarding non-conventional wars (between an organization and a state).

The definition of terrorism will be the basis and the operational tool for expanding the international community's ability to combat terrorism. It will enable legislation and specific punishments against those perpetrating, involved in, or supporting terrorism, and will allow the formulation of a codex of laws and international conventions against terrorism, terrorist organizations, states sponsoring terrorism, and economic firms trading with them. At the same time, the definition of terrorism will hamper the attempts of terrorist organizations to obtain public legitimacy, and will erode support among those segments of the population willing to assist them (as opposed to guerrilla activities). Finally, the operative use of the definition of terrorism could motivate terrorist organizations, due to moral or utilitarian considerations, to shift from terrorist activities to alternative courses (such as guerrilla warfare) in order to attain their aims, thus reducing the scope of international terrorism.

The struggle to define terrorism is sometimes as hard as the struggle against terrorism itself. The present view, claiming it is unnecessary and well-nigh impossible to agree on an objective definition of terrorism, has long established itself as the 'politically correct' one. It is the aim of this paper, however, to demonstrate that an objective, internationally accepted definition of terrorism is a feasible goal, and that an effective struggle against terrorism requires such a definition. The sooner the nations of the world come to this realization, the better."

13.84 The International Policy Institute for Counter-terrorism considers that the next step that the Security Council must take is to declare unequivocally that even in case of a just cause - a cause in which the use of violence may be considered justified, one type of violence is never justified and that this is *the intentional use of violence against civilians*, or in other words, "terrorism", defined as "the deliberate use of violence against civilians in order to achieve political aims." The Institute suggests that this type of violence is always unacceptable even when used in the most righteous of causes. The International Policy Institute for Counter-terrorism argues that only when all states agree on what type of acts constitute terrorism, can resolutions such as this one of October 1999 have any real effect on the international arena and that such a consensus is not impossible. The Institute points out that precedent already exists in the parallel definition of the term "war crime", defined as the intentional targeting of civilians by military personnel. The Institute considers that it is this international agreement on the definition of the act that alone makes possible international extradition, prosecution and punishment of individuals who perpetrate such acts. The Institute remarks that the significance of the Security Council resolution lies in its insistence that when dealing with terrorism there is no taking into account the motivations of the perpetrators and that in the case of terrorism the end does not justify the means.

13.85 The International Policy Institute for Counter-terrorism considers that one cannot justify atrocities by saying "I am not a terrorist because I am a freedom fighter". The Institute notes that the answer in that case would be: "maybe you are a freedom fighter but if you are using violence against civilians then you are most certainly a terrorist as well". The Institute states that one of the great ironies in this Security Council action is that the draft of resolution 1269 was proposed by none other than Russia - the very country that once (in its communist phase) defended nearly every major terrorist organization in the world. The Institute further notes that Russian support for a number of such organizations was in fact based on the justification that their just cause excused any and all acts but when these experts in the use of the phrase "freedom fighters; not terrorists" came under attack by such groups themselves, they quickly saw the need to draw a clear line between terrorism and other types of violence. The Institute considers that those states that have seen their daily life disrupted by brutal attacks on civilians can see most clearly that the use of terrorism cannot be legitimized by any cause - no matter how just.

13.86 Boaz Ganor recently remarked that the terror attacks in the US on September

11th, and the subsequent efforts by the United States to build a broad-based anti-terrorism coalition, have thrown into sharp relief the question of *what constitutes terrorism*.³ He notes that most researchers tend to believe that an objective and internationally accepted definition of terrorism can never be agreed upon; after all, they say, “one man’s terrorist is another man’s freedom fighter,” and that the question of who is a terrorist, according to this school of thought, depends entirely on the subjective outlook of the definer; and in any case, such a definition is unnecessary for the international fight against terrorism. He points out that in their view, it is sufficient to say that what looks like a terrorist, sounds like a terrorist, and behaves like a terrorist is a terrorist. He explains that this position contributes nothing to the understanding of an already difficult issue, nor does the attempt to divide terrorism into categories such as “bad and worse terrorism,” “internal terrorism and international terrorism,” or “tolerable terrorism and intolerable terrorism.” He says all these categories reflect the subjective outlook of whoever is doing the categorizing – and purely subjective categories will not help us to determine who are the real terrorists.

13.87 Boaz Ganor remarks that at the same time, there are others who say that a definition of terrorism is necessary, but that such a definition must serve their own political ends. He notes that States that sponsor terrorism are trying to persuade the international community to define terrorism in such a way that the particular terror groups they sponsor would be outside the definition – and thus to absolve them from all responsibility for supporting terrorism. He states that countries such as Syria, Libya, and Iran have lobbied for such a definition, according to which “freedom fighters” would be given carte blanche permission to carry out any kind of attacks they wanted, because a just goal can be pursued by all available means. He considers that both these schools of thought are wrong; and both attitudes will make it impossible to fight terrorism effectively. He remarks that an objective definition of terrorism is not only possible; it is also indispensable to any serious attempt to combat terrorism. Lacking such a definition, no coordinated fight against international terrorism can ever really get anywhere.

13.88 Boaz Ganor points out that a correct and objective definition of terrorism can be based upon accepted international laws and principles regarding what behaviours are permitted in conventional wars between nations. He explains that these laws are

³ “Terrorism: No Prohibition Without Definition” 7 October 2001 <http://www.ict.org.il/articles/articledet.cfm?articleid=393> (It did not form part of the discussion paper but is included here for convenience sake.)

set out in the Geneva and Hague Conventions, which in turn are based upon the basic principle that the deliberate harming of soldiers during wartime is a necessary evil, and thus permissible, whereas the deliberate targeting of civilians is absolutely forbidden. He says these Conventions thus differentiate between soldiers who attack a military adversary, and war criminals who deliberately attack civilians. Boaz Ganor remarks that this normative principle relating to a state of war between two countries can be extended without difficulty to a conflict between a non-governmental organization and a state, and that this extended version would thus differentiate between guerilla warfare and terrorism. Exactly in parallel with the distinction between military and civilian targets in war, he says, the extended version would designate as “guerilla warfare” the deliberate use of violence against military and security personnel in order to attain political, ideological and religious goals. Terrorism, on the other hand, would be defined as “the deliberate use of violence against civilians in order to attain political, ideological and religious aims.”

13.89 Boaz Ganor points out that what is important in these definitions is the differentiation between the goals and the means used to achieve these goals. The aims of terrorism and guerilla warfare may well be identical; but they are distinguished from each other by the means used – or more precisely, by the targets of their operations. The guerilla fighter’s targets are military ones, while the terrorist deliberately targets civilians. He explains that by this definition, a terrorist organization can no longer claim to be “freedom fighters” because they are fighting for national liberation or some other worthy goal, and even if its declared ultimate goals are legitimate, an organization that deliberately targets civilians is a terrorist organization. He considers that there is no merit or exoneration in fighting for the freedom of one population if in doing so you destroy the rights of another population. He suggests that if all the world’s civilian populations are not to become pawns in one struggle or another, terrorism – the deliberate targeting of civilians – must be absolutely forbidden, regardless of the legitimacy or justice of its goals. He considers that the ends do not justify the means, and by carrying out terrorist attacks, the perpetrators make themselves the enemies of all mankind.

13.90 Boaz Ganor remarks that only on the basis of an international agreement on the definition of terrorism will it be possible to demand that all nations withhold all support from terrorist organizations, and only on this basis can countries be required to act against terrorists, even when they agree with and support the terrorists’ goals. He considers that the worldwide acceptance of the above definition of terrorism – and the adoption of international legislation against terrorism and support for terrorism

based upon this definition – could bring about a change in the cost-benefit calculations of terrorist organizations and their sponsors. He explains that at present, terrorist organizations may carry out either terrorist or guerilla attacks according to their preferences and local conditions only, with no external reason to choose one type of attack over the other. After all, as far as the rest of the world is concerned, the two types of attack are morally equivalent; punishment is identical in both cases. However, should these organizations and their sponsors be made aware that the use of terror will bring them more harm than good, they may opt to focus on guerilla warfare rather than on terrorism. He asks whether this definition of terrorism does legitimize guerilla warfare, and answers that it does and says that the definition does make a moral distinction between terrorism and guerilla warfare. Countries forced to deal with ongoing attacks on their military personnel will obviously perceive these attacks as acts of war, which must be thwarted. He considers that these countries cannot expect to enlist the world in a struggle against “legitimate” guerilla warfare, but they could justifiably demand that the international community assist them were they fighting against terrorism.

13.91 Boaz Ganor notes that yet another question to be answered is, can countries as well as organizations be held responsible for carrying out terrorist acts? He points out that in effect, this question has already been answered in the form of existing international legislation. He says that the term “terrorism” is superfluous when describing the actions of sovereign states – not because states are on a higher moral level, but because, according to the international conventions, any deliberate attack upon civilians in wartime by regular military forces is already defined as a war crime. He notes that should such an attack be carried out during peacetime, the act is defined by convention as a “crime against humanity,” and, in both cases, such acts are already covered by international law, and provisions exist for dealing with the perpetrators. He remarks that it is when these actions are carried out by politically-motivated individuals or groups that the lack of legislation is felt, and, ironically, under current international law, organizations are not specifically prohibited from perpetrating actions that are considered illegal and abhorrent when carried out by sovereign states.

13.92 Boaz Ganor says that there have been previous attempts to address these issues; that the US State Department, for example, has put forward a definition according to which terrorism is the deliberate use of violence against *non-combatants*, whether civilian or not. He notes that this definition of terrorism will, however, not work in practice, as it designates attacks on non-combatant military

personnel as terrorism. He explains that despite the natural tendency of those who have been harmed by terrorism to adopt this broad definition, terror organizations and their supporters can justly claim that they cannot be expected to attack only military personnel who are armed and ready for battle, and if they were held to such a standard, they would lose the element of surprise and be quickly defeated. He points out that by narrowing the definition of terrorism to include only deliberate attacks on civilians, we leave room for a “fair fight” between guerillas and state armies. Thus we set a clear moral standard that can be accepted not only by Western countries, but also by the Third World and even by some of the terrorist organizations themselves. When such a moral distinction is internationally applied, terrorist organizations will have yet another reason to renounce terrorism in favour of guerilla actions.

13.93 Boaz Ganor considers that the definition of terrorism he proposes can serve as a guide for including or excluding various countries in the international anti-terror coalition, as well as for identifying those organizations and countries to be targeted by the coalition, but its main significance is in the drafting and enforcement of international legislation aimed at forcing states to act against terror organizations operating on their territory. He suggests that without an objective and authoritative definition, accepted by all nations, the fight against terrorism will always suffer from “cultural relativism.” He points out that without a change in the priorities of all the enlightened countries, and their determination to fight against terrorism apart from any other political or economic interest, it will not be possible to wage an effective war against terrorism. He remarks that without such a unified stand by all nations, the September 11th 2001 attacks in the United States will be insignificant compared to the attacks yet to come. He considers that the free world must understand that “cultural relativism” applied to terrorism – whatever the terrorists’ goals – will lead only to more terrorism.

13.94 The project committee noted when finalising the discussion paper that under the preamble of the Bill criminal acts intended or calculated to provoke a state of terror in the general public, any group of persons or particular persons for political purposes are under any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them. The project committee noted that the Convention of the Organisation for African Unity on the Prevention and Combating of Terrorism specifically excludes in Article 3(1) struggles waged by people in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by

foreign forces from being considered terrorist acts. However, the committee also took into account that in terms of Article 3(2) of the OAU Convention, political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act, and that nothing in Article 22(1) shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples' Rights.

13.95 The project committee also considered clause 25 of the Bill (the interpretation clause)⁴. The committee considered whether the proposed article in the preamble, its definition of terrorist act and the interpretation clause might conflict with the OAU Convention. The committee asked what are the drafters of the Bill saying, namely that whatever happened in South Africa before 1994, the line is now taken that if an Ethiopian comes to South Africa and if it is alleged that he has taken steps to overthrow a vicious and oppressive system in his own country, in terms of the proposed Bill it would under no circumstances be justified? The committee asked itself what message it would be sending and whether it would be accepting the OAU reservations. The project committee noted that in the preamble it is stated that criminal acts for political purposes are under any circumstances unjustifiable. The accused may allege that he or she did something for political purposes. The Bill, however, says that it is unjustifiable and contains a definition setting out which acts qualify as terrorist acts. The committee noted that one might have a situation where a certain organisation is carrying out bombing attacks but have never admitted that they have done so although it might be known that they have certain political objectives. The committee posed the question whether the Bill doesn't make it more difficult for the state to prove the political objective of such an organisation.

13.96 The committee raised the question whether the phrase "for the purpose of political, ideological and religious reasons" should be added to the definition of terrorist act. The committee considered that the Bill might have purposefully been drafted as saying that a terrorist act performed for the purpose of doing or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles. The committee therefore decided against including the phrase "for the purpose of political, ideological and religious reasons" in the definition. The committee considered a suggestion that an appropriate qualifier be added to the preamble to make the general recognition clear that in cases of legitimate struggles by people fighting for self-determination, such acts may not even

⁴ The definition of "terrorist act" shall be interpreted against the principles of international law, in particular the international humanitarian law, in order not to derogate from those principles.

be appropriately categorised as terrorist acts, subject to the normal requirements under international humanitarian law. The committee noted that the OAU Convention on Terrorism says that terrorism cannot be justified under any circumstances. The committee considered why the Bill oughtn't provide likewise in the preamble and that it should talk about "terrorism" instead of "criminal acts".

13.97 The project committee decided that the preamble should provide that "whereas terrorist acts are under any circumstances unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them" instead of providing that "criminal acts intended or calculated to provoke a state of terror in the general public, any group of persons or particular persons for political purposes are under any circumstances unjustifiable ...".

(b) Comment on discussion paper 92

13.98 Ms Schneeberger remarks with regard to the third preambular paragraph that the last part of this paragraph "including those which jeopardise the friendly relations among States and peoples and threaten the integrity and security of States" has a highly charged political context in the United Nations. She explains that it is intended to be an oblique reference to State terrorism and is usually targeted at the United States and Israel, and in the international context it is part of a carefully balanced compromise. She suggests that as domestic legislation will deal with acts of individuals and groups only (not States) and in view of the controversy of this phrase, they would advise that it be deleted.

12.99 Ms Schneeberger further notes with regard to the ninth preambular paragraph that it refers to the prevention of financing of terrorism although there is nothing specific in the Bill on the financing of terrorism. She suggested that a separate section should be included for the financing of terrorist acts with appropriate amendments to Article 2 of the Terrorist Financing Convention.

13.100 Mr Saber Ahmed Jazbhay notes that in its Preamble, whilst it reaffirms its unequivocal condemnation of 'all acts, methods and practices of terrorism as criminal and unjustifiable', the Bill makes specific reference to, inter alia, 'considerations of a political, philosophical, ideological, racial, ethnic, *religious* or other nature that may be invoked to justify them'. He says that given official utterances by the likes of Minister Tshwete *et al* against Pagad and Qibla, a reasonable man will reach the inescapable conclusion that it has an anti-Islamic bent. He remarks that one has to read this with the real motivation of the drafters as conveyed to the project committee of the Commission. Mr Jazbhay notes that

Islam has been equated with terrorism in the world's media, given the hype associated with Emerson's *Jihad in America* as well as Hollywood inspired movies such as *The Siege* and Betty Mahmoody's *Not without my Daughter*. He considers that the official response attributing the criminal acts on unknown persons, in the absence of hard evidence, which lead to the loss of lives in the Planet Hollywood restaurant in the Western Cape to Pagad, is a typical case in point. He comments that it is arguable therefore that the ATB potentially targets and discriminates against Muslims and that, accordingly it, or parts of it fall to be declared unconstitutional and invalid.⁵ **Mr Jazbhay states that the project committee has incidentally, considered that the ATB 'might have purposefully been drafted as saying that a terrorist act performed for the purpose of doing or abstaining from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles.**

13.101 The SAPS: Legal Component: Detective Service and Crime Intelligence suggests that the reference in the preamble to "urban terrorism" should perhaps only be to terrorism, and not to "urban" terrorism where it provides : "AND WHEREAS terrorism presents a serious threat to the security of the Republic and the safety of the public". The Defence Secretariat⁶ notes that the Preamble sets out the reason for the introduction of the Bill, and that it is important to note that the increase in crime especially in the type of criminal conduct which copies the pattern of criminality related to terrorist activities is on the increase in South Africa. The Secretariat states that this is particularly true in respect of the bombings which have in recent times plagued the Western Cape in particular and that it serves only to add to the growing feeling of insecurity experienced by South African society. They state that the Preamble is structured to prepare us in respect of the contents of clause 16 as certain fundamental rights of persons suspected of having committed terrorist acts are

⁵ Another respondent who commented under the name Mohamed noted that SA has enough laws to deal with terrorism, that the Bill is biased as it is more against his religion Islam than terrorism and that consideration should be given to the fact that South Africa is a young democracy and that we do not need a biased government proclaiming unjust laws. He also states that everyone wants the terrorists to be caught, that the government knows who these people are, the culprits should be arrested and the law abiding citizens should be left alone.

⁶ Directorate Legal Support Services.

infringed, although the purpose of the Bill is to effectively fight against terrorism which undermines the maintenance of law, order and stability in South Africa. The Secretariat also notes that the Bill is necessary as the South African legal system is not equipped to deal with terrorism effectively especially in accordance with international law.

(b) Evaluation

13.102 Ms Schneeberger's explanation of the compromise wording of the 3rd preambular paragraph is persuasive concerning the last part of this paragraph "including those which jeopardise the friendly relations among States and peoples and threaten the integrity and security of States" having a highly charged political context in the United Nations. It is accepted that it is intended to be an oblique reference to State terrorism, usually targeted at the United States and Israel, and in the international context it is part of a carefully balanced compromise. The Commission considers that it should be deleted as suggested. The Commission is also of the view that the SAPS's suggestion is persuasive and that the reference in the 8th preambular paragraph should be to "terrorism" and not to "urban terrorism".

(b) Recommendation

13.103 The Commission recommends that the words "including those which jeopardise the friendly relations among States and peoples and threaten the integrity and security of States" in the last part of the third preambular paragraph be deleted and that the reference in the 8th preambular paragraph should be to "terrorism" and not to "urban terrorism".

D. DEFINITIONS

(a) Arms

_____(i) Comment on discussion paper 92

13.104 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal consider that the definition in clause 1 of "arms" is not sufficient. They note that the definition of 'arms' in section 1 of the *Arms and Ammunition Act* (Act 75 of 1969) specifically excludes machine guns and machine rifles although it is well known that these types of weapons are more frequently used by terrorists than other weapons. They therefore

suggest that the following should be added to the definition after 'any arm', namely "and also 'machine guns' and 'machine rifles'".

(ii) Evaluation and recommendation

13.105 It was noted in the Discussion Paper in the footnote to the definition of “arm” provisionally proposed in the Bill that the *Firearm Control Bill* should be taken into account for purposes of the definition of *arm*. The *Firearm Control Act* 60 of 2000 was passed and it contains a definition of *firearm*.¹ **The Commission therefore considers that the definition to be included in the Bill should be “firearm” and that the suggestion that there should be a reference to machine guns and machine rifles is persuasive. The Commission recommends that the definition should provide as follows: ‘firearm’ means any device as defined in section 1 of the *Firearm Control Act*, 2000(Act No 60**

¹ The *Firearm Control Act* defines it as follows: 'firearm' means any —

- (a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);
- (b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
- (c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
- (d) device manufactured to discharge a bullet or any other projectile of .22 calibre or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or
- (e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d), but does not include any device contemplated in section 5;

of 2000) and includes a machine gun or machine rifle² as defined in the *Arms and Ammunition Act, 1969* (Act No 75 of 1969).

(b) **Combatting terrorism**

13.106 In considering this definition the project committee explained in the discussion paper that it was of the view that the words “terrorist activities” should be replaced by “terrorist acts” in this definition and wherever else the words “terrorist activities” are used in the Bill. The project committee stands by this decision. The Commission agrees with this recommendation.

(c) **Place of public use**

13.107 The project committee noted in the discussion paper the definition of “place of public use” as set out in the *International Convention for the Suppression of Terrorist Bombings* and questioned the way it was drafted. The project committee was of the view that it is unnecessary to include in the definition the reference to “whether continuously, periodically or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place which is so accessible or open to the public, as well as any dwelling or place of residence.” The committee considered that a definition setting out that “‘place of public use’ means those parts of any building, land, street, waterway or other location that are at any time accessible or open to members of the public” would be sufficient.

13.108 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal consider that in order to include places to which the general public normally does not have access such as clubs, the words “or any group of members of the public” should be included in the definition of “place of public use”. The project committee considered that the drafters of the *Convention for the Suppression of Terrorist Bombings* in all probability contemplated the same issue when they included the qualification “whether continuously,

² The *Arms and Ammunition Act, 1969* (Act No 75 of 1969) provides that ‘machine gun’ or ‘machine rifle’ includes any firearm capable of delivering a continuous fire for so long as pressure is applied to the trigger thereof, whether or not that firearm was originally designed to function in that manner.

periodically or occasionally” to the definition of *place of public use*. The project committee therefore reconsidered its preliminary proposal and recommended that these latter words should remain part of the definition. The Commission agrees with this recommendation.

(d) Financing

13.109 The project committee noted in the discussion paper the inclusion in the original Bill of a definition stating that “financing” means the transfer or reception of funds. The committee was of the view that the meaning of the word “financing” is apparent and that there is no need for the definition.

13.110 Ms Schneeberger points out, however, that the *International Convention for the Suppression of Financing of Terrorism* was adopted in late 1999. She explains that although the financing of terrorist acts can be prosecuted as an ancillary crime (accomplices, aiding and abetting etc) the international community felt that it was of such a serious nature, and so integral to the successful commission of a terrorist act, that it merited a separate legal regime. She suggests that similar arguments may well apply here, in which case a separate section should be included for the financing of terrorist acts, and with appropriate amendments to Article 2 of the *Terrorist Financing Convention*, such a provision would read:

“Any person commits an offence if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act which constitutes an offence within the scope of, and as defined in this Act.”

13.111 The project committee and the Commission agree with Ms Schneeberger on the insertion of separate clauses dealing with the financing of terrorism but remain of the point of view that there is no need for a definition of *financing*.

(e) Internationally protected persons

13.112 Ms Schneeberger notes in her comment on the discussion paper that section 4(c) of the *Diplomatic Immunities and Privileges Act* of 1989 makes provision for an *ad hoc* granting of immunities and privileges to certain persons which is used quite frequently in practice. She suggests therefore that a reference to section 4(c) should be included in the definition of internationally protected person. She also drew the Commission’s attention to the fact that the Act was being amended, that the general principle for categories of internationally protected persons will remain the same, but that the changes to the Act may affect the cross-referencing in the Bill. This Act was replaced by the *Diplomatic Immunities and Privileges Act* 37 of 2001. The immunities and privileges of internationally protected

persons are now set out in sections 2 to 7 of this Act.¹ **(The Act commenced on 28**

¹ **3 Immunities and privileges of diplomatic missions and consular posts, and of members of such missions and posts**

(1) The Vienna Convention on Diplomatic Relations, 1961, applies to all diplomatic missions and members of such missions in the Republic.

(2) The Vienna Convention on Consular Relations, 1963, applies to all consular posts and members of such posts in the Republic.

4 Immunities and privileges of heads of state, special envoys and certain representatives

(1) A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as-

1.1 heads of state enjoy in accordance with the rules of customary international law;

1.2 are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or

1.3 may be conferred on such head of state by virtue of section 7 (2).

(2) A special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as-

1. a special envoy or representative enjoys in accordance with the rules of customary international law;

2. are provided for in any agreement entered into with a state, government or organisation whereby immunities and privileges are conferred upon such special envoy or representative; or

3. may be conferred on him or her by virtue of section 7 (2).

(3) The Minister must by notice in the Gazette recognise a special envoy or representative for the purposes of subsection (2).

5 Immunities and privileges of United Nations, specialised agencies and other international organisations

(1) The Convention on the Privileges and Immunities of the United Nations, 1946, applies to the United Nations and its officials in the Republic.

(2) The Convention on the Privileges and Immunities of the Specialised Agencies, 1947, applies to any specialised agency and its officials in the Republic.

(3) Any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7 (2).

(4) Any organisation contemplated in this section is vested with the legal capacity of a body corporate in the Republic to the extent consistent with the instrument creating it.

6 Immunities and privileges pertaining to international conferences or meetings convened in Republic

(1) The officials and experts of the United Nations, of any specialised agency and of any organisation, and representatives of any state, participating in an international conference or meeting convened in the Republic enjoy for the duration of the conference or meeting such privileges and immunities as-

1.1 are specifically provided for in the Convention on the Privileges and Immunities of the United Nations, 1946, or the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, as the case may be, in respect of the participation in conferences and meetings;

1.2 are specifically provided for in any agreement entered into for this purpose; or

(c) may be conferred on any of them by virtue of section 7 (2).

(2) The Minister must by notice in the Gazette recognise a specific conference or meeting for the purposes of subsection (1).

7 Conferment of immunities and privileges

February 2002.) It is recommended that the references in the Bill be amended to reflect the provisions of the *Diplomatic Immunities and Privileges Act of 2001*.² The definition should provide that “internationally protected person” means any person who enjoys immunities and privileges in terms of sections 2 to 6 of the *Diplomatic Immunities and Privileges Act, 2001 (Act No.37 of 2001)*, or on whom such immunities and privileges have been conferred in terms of section 7 of the said Act.

(f) **“Law enforcement officer”**

13.113 The project committee noted in the discussion paper that clause 16 sought to provide that a judge may issue a warrant for the detention for interrogation of a person at the request of a Director of Public Prosecutions if such Director submits information to the judge

(1) Any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the Gazette.

(2) The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette.

² Note the provisions of the Vienna Conventions of 1961 and 1963 to which the *Diplomatic Immunities and Privileges Act, 2001* refer:

Article 37 of the Vienna Convention on Diplomatic Relations, 1961

1 The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

2 Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.

3 Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.

Article 43 of the Vienna Convention on Consular Relations, 1963:

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

Article 53 Beginning and end of consular privileges and immunities

1 Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.

2 Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this Article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.

that there is reason to believe that that person possesses or is withholding from a police officer information regarding any offence under the Bill. The Bill only made provision for police officers approaching Directors of Public Prosecution and the committee considered the question whether it is not too limited in referring to police officers only. The committee considered that provision should be made for customs and immigration officials in this clause as well. The committee therefore proposed that a definition be included in the Bill setting out that “law enforcement officer” include members of the police service and immigration and custom officials.

13.114 The Defence Secretariat suggests that the definition should include members of the SANDF whenever they are deployed with the police force as it is imperative that Defence Force members should be given the same powers as police officers in order to effectively carry out their duties. The same suggestion is made by the Special Forces Brigade³ and by the Chief: Military Legal Services. **The latter comments that as the SANDF is currently employed in cooperation with the SAPS in execution of the National Crime Prevention Strategy, it is recommended that the same powers also be given to the SANDF when they act in cooperation with the SAPS. The Chief: Military Legal Services says that this will strengthen the arm of the law enforcement agency in the RSA, and as the SANDF can legally be requested to assist the SAPS, then they must be given the necessary powers to act according to their mandate.**

13.115 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal suggest that in the definition of *law enforcement officer*, members of forces like the Durban Police should be included.

13.116 Ms Esther Steyn⁴ comments that it is disconcerting that the project committee proposed that the ambit of the legislation should be broadened to encompass the use thereof by all law enforcement officers and not only police officers. She considers that to grant such special powers to all law enforcement officers, including immigration and custom officials, in instances where the liberty of

³ The Special Forces Brigade explains that they must be given the same powers as the SAPS when the SANDF are deployed in support of the SAPS for counter terror acts and specifically in those cases where the SANDF act on behalf of the SAPS where offences relating to maritime navigation or fixed platforms are concerned. They further indicate that through agreements and procedures probably (and not necessarily by the proposed legislation) between the various departments involved, the coordination of the execution of terror related operations and the collection, dissemination and processing of intelligence relating to combating terrorism need to be addressed.

⁴ “The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?” 2001 SACJ Vol 14 179 - 194 at 192.

individuals is at stake is not only extraordinary but also irresponsible. It is therefore considered that the proposed power to bring an application for bringing a witness before a judge for an investigative hearing in order to obtain information on terrorism should be given to police officers only. The definition of law enforcement officer should therefore be deleted. The project committee and the Commission consider that the suggestion on the inclusion of members of the SANDF whenever they are deployed in the Republic on police functions is persuasive and recommend this inclusion. The suggestion on the inclusion of forces like the Durban Police is, however, unclear.

(f) **State or government facility**

13.117 The Chief: Military Legal Services notes that it is unclear whether this definition is understood to include SANDF or SAPS structures or buildings.¹ They also pose the question whether the words *members of government* include the SANDF or SAPS, and consider that greater clarity on this matter is needed. This remark caused the project committee to reconsider the preliminarily proposed definition which is also contained in the *Terrorist Bombing Convention*. It seems to the project committee that the relevant question is whether the intention ought not be that the definition should refer to facilities of *the State* instead of *a State* in view of the fact that the protection of property of foreign governments is addressed in a separate clause. On the other hand the intention could be to protect not only the State facilities of the Republic but of other States in South Africa as well. The project committee is of the view that the more inclusive approach would be more appropriate. If this amendment is effected it would clarify the doubt expressed by the respondent referred to above. The Commission agrees with this reasoning. The project committee and the Commission therefore recommend that the definition should provide as follows:

“State or government facility”, includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State, *the Republic* or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

¹ The preliminary proposed definition said: “State or government facility”, includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

(h) “Terrorist act”

(i) Evaluation and proposal contained in discussion paper 92

13.118 The project committee noted in the discussion paper that the definition of “terrorist act” seems to be taken from the OAU Convention and the committee considered whether it should retain the suggested definition or amend it in accordance with the wording of the English *Terrorism Bill*. The committee suggested that the phrase “put fear in” seems to be adopted from the OAU Convention and that it should be replaced with the words “instill fear”. The committee noted that included in the Bill is a definition of “terrorist acts” and a definition of “terrorist activities”. The question arose whether this is necessary. The committee was also concerned whether, if once “terrorist acts” have been defined, it does not follow from the criminal law that aiding and abetting and complicity would then also be covered by that which seems to be sought to be covered under the definition of “terrorist activities”.²

13.119 The committee considered whether acts which are not to be regarded as terrorist acts should be set out in the definition of “terrorist act” as was done in article 3 of the OAU Convention. These acts would be exclusions from or a proviso to the definition of terrorist act and would include armed acts pursuant to a struggle for self-liberation or self-determination according to the principles of international law. The committee noted that under clause 25 the definition of “terrorist acts” has to be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles, one of which is the OAU Convention on Terrorism. The committee felt that this was enough to exclude all acts that have the blessing of international law.

13.120 The committee decided that in the definition of “terrorist act” the words “does or” be inserted in the first line after “which” (“terrorist act means any act which is a violation of the criminal laws of the Republic and which does or may endanger the life, physical integrity or freedom of ...”). The committee considered that there is no need for the inclusion of the words “or cause serious injury or death to” because if

² Note the definition of terrorism in the US Code Title 18 - Crimes and Criminal Procedure Part I - Crimes Chapter 113B - Terrorism
As used in this chapter - (1) the term "international terrorism" means activities that - (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended - (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum; (2) the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act; (3) the term "person" means any individual or entity capable of holding a legal or beneficial interest in property; and (4) the term "act of war" means any act occurring in the course of - (A) declared war; (B) armed conflict, whether or not war has been declared, between two or more nations; or (C) armed conflict between military forces of any origin.

one endangers anyone's life or physical integrity then one has already injured or killed someone and that the word "does" covers that in any event now. The committee further resolved that the words "any number or group of" be deleted in the third line and that the words "or persons" be inserted. The committee also considered that the words "public or private" ought to be deleted in the third line as everything would be the property of someone. It noted that it raises the question of *res nullius* but that it is still not covered by "private or public" as it would fit into a third category not already being covered. The committee also decided that the words "natural resources, environmental or cultural heritage" should be deleted. The committee suggested that the words "instill fear, force" be deleted, to provide similar than the British definition of "terrorist act". The committee also decided that the words "any government or persons, the general public or section thereof" be substituted for the words "any government or persons, body, institution, office bearer, the general public or segment thereof". The committee considered whether it needs to include any other type of intervening or lesser organisation or body and whether it can leave the clause at just "government or persons, the general public or section thereof". The committee considered that it should retain the words "government" for obvious reasons but that "persons, the general public or section thereof" should cover any organisation or group of persons. The committee also posed the question whether the words "to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles" are needed and decided that they are superfluous. The committee was of the view that it is almost inevitable if one is intimidating or coercing someone that one is trying or forcing someone to do or not to do something.

13.121 The committee also considered subparagraph (ii) of the definition of terrorist acts in the discussion paper.³ It was thought to be a derivative of the sabotage provision and that someone might say he or she didn't want to scare anybody but just wanted to disrupt the water supply or the railways. The committee noted that it has to be read subject to the preceding part under paragraph (a) - it has to be a criminal act causing damage or which may cause damage or which has the potential to cause damage. The committee did not have any problem with subparagraph (ii) and suggested that it be left in the definition.

13.122 The committee also considered a suggestion on subparagraph (iii) that

³ Terrorist act means- (a) any act which does or may endanger the life, ... or causes or may cause damage to property and is calculated or intended to-... (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency;

the Bill refers to a terrorist act creating a general insurrection in a state and whether this would include a state of general unrest or acts intended to raise or heighten hostility among various groups, but which need not be intended to create a general insurrection against a state.⁴ The committee stated that it has no difficulty saying “create unrest or insurrection in *any* state” instead of a state. The committee also decided to delete paragraph (b) of terrorist act considering that there is a need for the retention of the definition of “terrorist activity”. The committee considered that there is no merit in having the definitions of “terrorist acts” and “terrorist activities”. The committee was of the view that “terrorist activities” looks from the details of it, all the sorts of things that an accomplice, a conspirator and what not, can be guilty of. The committee considered that there is no reason why section 18 of the Riotous Assembly Act - which still remains in force, and that deals, inter alia, with conspiracy, incitement and attempt - does not cover these issues. The committee noted that section 18 uses somewhat different language - it does not use the word organising - but considered that nothing turns on that. The committee therefore considered that subparagraph (b) of “terrorist act” as well as the definition of “terrorist activities” should be deleted.

(ii) Comment on discussion paper 92

13.123 Ms Schneeberger remarks in her comment on the discussion paper that they agree with the general approach to have a broad definition of terrorist act, and this is consistent with the approach adopted in some international instruments, most notably the OAU Convention on Terrorism. She considers that the amendments made by the Commission to the original draft would still encompass the obligations included in the international instruments. She remarks that they would however like to draw the Commission’s attention to the recent debates in the UN Ad Hoc Committee where a proposal was made to have major economic loss included as a separate element for a crime. She explains that an argument was made that it is quite possible to have an effective act which does not cause physical damage but which is still performed with the requisite intention and is serious enough to merit classification as a terrorist act, noting that cyber attacks on a stock exchange or banking system were some of the examples given. She states that the South African delegation found some of these arguments to be quite compelling and suggests that the Commission may wish to include it as one of the elements for a “terrorist act”.

13.124 Amnesty International comments that the proposed Bill will allow the authorities to use extraordinary measures against individuals suspected of crimes

⁴ By Prof Medard Rwelamira at the time of the Department of Justice’s Policy Unit.

involving extreme acts of violence against people and directed to particular ends. AI remarks that it is vital in this regard that the definition of a “terrorist act” is formulated very narrowly. AI notes that the current definition is too widely drawn and could encompass legitimate activities, as for instance trade union strikes which can at times result in damage to property or the disruption of the delivery of essential services or can be intended to induce the government, employers or members of the public to agree to something. AI says that the implications of the wide definition of a “terrorist act” can be seen in section 12 of the Bill, which refers to the protection of property of internationally protected persons, and under the provision, “any person who wilfully, with intent to intimidate, coerce, threaten or harass, enters or introduces any part of himself or herself or any object within that portion of the any building or premises...; or refuses to depart...” commits an offence and is liable on conviction to a fine and/or term of imprisonment of up to five years. AI remarks that arguably such activities could encompass non-violent demonstrators attempting to deliver a petition to an embassy.

13.125 Amnesty International states that if the definition remains vaguely or too widely worded, then the danger exists that the provisions of the law will be open to abuse or used for repressive purposes. AI explains that the need to narrow the definition is also underscored by the stringent sanctions, such as lengthy terms of imprisonment, laid down in clauses 2 to 14 for contraventions of the proposed Bill.

13.126 Prof Mike Hough⁵ points out that although the Commission refers to “criminal” explosions, therefore including potential non-politically motivated incidents, the Commission also notes that “one should keep in mind numerous violent crimes, which could, in view of the number of perpetrators, type of weapons used and their *modus operandi* be classified as terrorist acts”. He states that the issue of when an incident, even if it involves an explosion, can be deemed to be an act of terror, is a difficult one. Motives are one set of criteria, terrorism proper normally being associated with a political motive, and contrasted to pure “criminal” terror. He explains that the *Convention on the Suppression of Terrorist Bombings*, basically defines an act of terror where a person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent — to cause death or serious bodily injury; or cause extensive destruction of such a place, facility or system, where such de-

⁵ Of the University of Pretoria’s Institute for Strategic Studies in the article “Urban Terror 2000: Some Implications for South Africa” *ISSUP Bulletin* 6/2000.

struction results in or is likely to result in major economic loss. He also points out that the Convention however stipulates that none of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. He remarks that a request for extradition or for mutual legal assistance based on such an offence may accordingly not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives, and the underlying reasoning is obviously to prevent extradition being refused on political grounds. He notes that this, however, does not mean that some political criterion is not to be used. He explains that to some extent, this is to be found in the intentions or objectives associated with a particular incident, linked to the type of target and the type of weapon used. He states that the Convention uses a particular combination of these criteria to determine an offence for purposes of the Convention, and notes that what is significant, is that it primarily refers to explosives or other lethal devices, state or government facilities, public places, public transport systems or infrastructure facilities. From this, he suggests that one could deduce some political objective, and interestingly though, threats to use such methods are not specifically included, only the act itself. He notes the proposed definition contained in the Bill on terrorist act. He considers that it is an open question whether the wording "any government or persons" is not too wide, as the term "persons" could be interpreted as implying that anybody coercing another person can be found guilty under the proposed legislation, whether there is a political objective or not, and whether or not it has implications for state security. He points out that the definition of a terrorist act contained in the original version (prior to amendments by the project committee) was similar to that contained in the OAU Convention on the Prevention and Combating of Terrorism.

13.127 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal consider that the wording "to do or to abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles" is superfluous and should be deleted from the draft. They however explain that the verbs, "intimidate, coerce and induce" are transitional verbs and have to refer to other acts (verbs). They note that whilst it is appreciated that this subclause is necessary to include terrorist acts in the RSA but aimed at foreign governments or organizations, they suggest that the original wording of the draft should be retained. They also consider that the inclusion of "general public" and "any person or persons" in the definition renders the definition to have too broad an application and that the well known intimidation during labour unrest, for instance,

will squarely fall within the ambit of this definition. They point out that it also includes intimidation for private reasons which is clearly against the spirit and purpose of the Bill and that there is, moreover, no definition of intimidation. They pose the question in view of the fact that section 1 of the *Intimidation Act* is repealed by this Bill, what would be the meaning of "intimidation".

13.128 Advocates Fick and Luyt remark that whilst the offence of sabotage has been deleted from the draft for reasons agreed with, there is no more detailed description of specific services addressed by the Bill. They consider that in sub-section (a)(ii) the interpretation of the term "essential" which describes "services" can cause problems, as certain services are interpreted by some as essential while others interpret them as luxurious, and therefore the services to be protected should be clearly defined. They thus suggest that the term "essential" be deleted and the services as defined by the deleted clause 5 (sabotage) be incorporated in the definition of terrorist acts. They further pose the question whether sub-clause (a) (iii) of this definition substitutes the common law offence of public violence.

13.129 The Media Review Network comments that the view that terrorist acts are unjustifiable accords with common sense but that the definition of a "terrorist act" and "terrorist organisation" contained in clause 1 of the Bill is patently and manifestly wider than is necessary.

13.130 Mr Saber Ahmed Jazbhay notes that the definition of 'terrorist act' is too wide and is vulnerable to constitutional attack. He comments that the Commission's preliminary recommendation is that it should read ' any act which does or may endanger the life, physical integrity or freedom of any person or persons . . . ' He considers that it is so widely framed that it covers acts of random violence which have the maximum effect on the country's psyche for instance. Mr Jazbhay points out that with the proliferation of organized crime in this country, sophisticated crime syndicates could use the hysteria and the hype generated by anti-Pagad sentiments publically expressed to whip up support against terrorism to implicate those bona-fide organizations, including Pagad, who are fighting organized drug syndicates as well as crime especially in the Western Cape region. He says the Deon Mostert expose has shown the dark side of this potential whilst we wait for the truth to unveil itself regarding this affair.⁶ He says that a good example to use would be the taxi

⁶ Mr Jazbhay remarks that it will be recalled that Mr Mostert revealed the existence of third force activity in the region whose intention was, and he submits still is, to de-stabilize the Western Cape region and to pin the blame on Pagad.

related violence in the Western Cape which has led to the deaths of many people, including drivers of the Golden Arrow bus company, the perpetrators are unknown, and their acts come within the definition of terrorism or terrorist acts despite the fact that they are being committed by persons with a criminally intentional point to dissuade the bus company to drop its fares. He notes that such acts are already punishable at law but bringing them within the ambit of terrorism is sheer extravagance. Mr Jazbhay states that if the much deprived inhabitants of the Wallacedene squatter community,⁷ in the Kraaifontein area of the Western Cape, decide to invade vacant lands belonging to the municipality as well as private persons and they resort to acts of violence as they resist attempts to evict them, their acts will fall within the definition of terrorism even though a limited degree of violence is used. He points out that this is a chilling thought, especially if the scheme of the ATB is considered which empowers the DPP to detain people for interrogation who might have or who are suspected of possessing information of the commission of terrorist offences. He asks whether this is what the ATB seeks to do, namely to stifle protest which might become violent.

13.131 Dr Imtiaz Sooliman who commented on behalf of the Gift of the Givers Foundation says that from a practical point of view, the definition of terrorism is not properly defined and would put it at odds with the constitutional guarantees of freedom of association in relation to an individual's membership of an organisation if the provisions of clause 2(2) were to be implemented.

13.132 IDASA notes that "terrorist act" is defined as any act which does or may endanger the life, physical integrity or freedom of any person or persons or causes . . . damage to property . . . and is calculated or intended to intimidate, coerce or induce any government to . . . disrupt any public service, the delivery of any essential service to the public or to create a public emergency or create unrest or general insurrection in any state . . . " Linked to this is the definition of "terrorist

⁷

Who Mr Jazbhay notes are tired of waiting for the courts to come to their rescue regarding the provision of adequate housing in terms of their constitutional rights guaranteed to them which the authorities in the region are slow to deliver or make real. See *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) where the Constitutional court held that the State was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. The interconnectedness of the rights and the Constitution as a whole had to be taken into account in interpreting the socio-economic rights and, in particular, in determining whether the State had met its obligations in terms of them and it was not only the State who was responsible for the provision of houses but that other agents within society had to be enabled by legislative and other measures to provide housing. Section 26 of the Constitution placed, at the very least, a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.

organisation" which means an organisation which has carried out, is carrying out or plans to carry out terrorist acts. IDASA says that as is evident the definitions are intrinsically linked to each other, and they are of the view that the definition of "terrorist act" is too wide and its ambit ought to be limited. They remark as other respondents do too, that the draft definition, as a result of its wide ambit could become a tool to prevent legitimate opposition to government, and that any strike, any blockade by taxi drivers or legitimate forms of protest could be construed as a "terrorist act" should it disrupt "any public or essential service." IDASA suggests that this may pose a threat to democracy.

13.133 IDASA submits that the definition of "terrorism" in the United Kingdom *Terrorist Act*, 2000, namely, "the use or threat of action that is designed to influence a government or to intimidate the public for the purpose of advancing a political, religious or ideological cause", is preferable since it clearly indicates the type of action that the legislature seeks to proscribe, and acts fall under this definition if they involve "serious violence" against persons or property, or create a serious risk to public health or safety. IDASA also notes that the use of threat or action that involves the use of firearms or explosives is to be considered as terrorism in terms of the definition. IDASA points out that in terms of the draft South African definition, no mention is made of "advancing a political, religious or ideological cause". They are of the view that it would perhaps be preferable to incorporate such a reference so that the context of any action may be considered when deciding whether an offence is a "terrorist act" or not. They note that this will enable the police to effectively monitor terrorist organisations and their activities. They also remark that they are satisfied that the draft legislation does not, as in the United Kingdom specifically name those organisations that are to be branded as "terrorist organisations". IDASA says that they believe that it is preferable to utilise definitions to ascertain whether the actions of individuals or groups are prohibited or not.

13.134 The South African Human Rights Commission comments that the definition of a terrorist act is overly wide and may potentially bring under the umbrella of the Act activities as diverse as traffic blockades of the kind seen recently in Gauteng, legitimate public demonstrations that may overrun the bounds of legality, labour strikes that may involve violence or some form of intimidation, etc. The SAHRC says that while it may be argued that the intention would not be to apply the definition under such relatively non threatening circumstances, the fact of the matter is that once it becomes law, it becomes part of the arsenal of the law enforcement agencies and nothing can prevent its use in the wider sense described. The SAHRC

states that they must point out that they do not seek to pass judgement on the government nor are the scenarios they sketch an indication of how they predict government will act and respond, however, what they are mindful of is the potential consequences of the definition, and as governments come and go, any law that is promulgated becomes a tool for the use of any current or future government. The SAHRC says that they cannot assume that South Africa will always have a government that is committed to the rule of law and the protection of human rights. The SAHRC notes that given that membership of a terrorist organisation is also a criminal offence⁸, the very wide definition of a terrorist act renders the potential list of terrorist organisations virtually endless. The SAHRC states that this not only gives undue and unnecessary powers to the State, but also has the potential of making serious inroads into the right of association, which is protected by the Bill of Rights⁹. The SAHRC considers that it is possible that a bona fide organisation that represents no more than an irritation to the State can be brought within the ambit of the Act with all the consequences that then go with it, and the Bill can very easily become a tool to stifle legitimate dissent and opposition.

10.135 The Ministry of Community Safety of the Western Cape comments similarly that the definition would seem to be too wide as it would include for example certain kinds of lawful industrial action in the public sector, that there is no doubt that militant strike action which often occurs, *may cause damage to property and is calculated . . . to disrupt public service*. The Ministry considers that certainly the intention cannot be to declare this type of strike action a *terrorist act*. Martin Schönsteich notes that the Bill's definition of a 'terrorist act' has been criticised for being too broad.¹⁰ He says that the definition includes lawbreakers who would clearly not be terrorists in the normal meaning of the word, that for example, the definition includes "any act which may cause damage to property and is intended to disrupt any public service". He points out that minibus taxi owners who blockade a street used by municipal bus services, and where some parked vehicles are subsequently damaged, or a group of youths who destroy a Post Office letterbox would be guilty of committing a terrorist act as defined by the Bill. He notes that in its submission on the Bill, Amnesty International raises the concern that the broad definition could encompass legitimate activities, such as trade union strikes that result in damage to property or the disruption of the delivery of essential services, and that AI argues that if the definition remains vaguely or too widely worded, then the danger exists that the

⁸ See Clause 4.

⁹ Section 18 of the Bill of Rights.

¹⁰ "Fear in the City, Urban Terrorism" Published in Monograph No 63 ISS 2001.

provision of the law will be open to abuse or used for repressive purposes.

13.136 The Defence Secretariat says that the word *terrorist* is used consistently in the Bill although it is not defined. They consider that the definition of *terrorist act* encompasses the gist of what *terrorism* should entail but suggest that in view of the use of the word in the media, other forms of reporting and the day to day perceptions of the man in the street that it be isolated and defined. The Secretariat states that the definition *terrorist act* limits the activity to an act and that the definition is lacking in that it does not take into account the threat of a terrorist act and suggests that the threat of a terrorist act should be included in the definition. The Chief: Military Legal Services also points out that the definition covers an act committed, that noting is said about a verbal threat or threats to persons and suggests that the words *or threat of an act* be inserted after the word *act* in line 1. They suggest further that the words *is likely to* be substituted for the word *may* in line 1 and 3. They point out that the words *physical integrity* is not defined and that it is uncertain how they will be interpreted. They suggest that the definition of *psychological integrity* as set out in section 12 of the Constitution be considered.¹¹ They remark that no definition is provided of the words *unrest* or *general insurrection* and consider that it contributes to the ambiguity of the definition. They further note that a terrorist act can be committed in any state, that no definition is given of the word *state* (which does not necessarily include the RSA as South Africa is referred to as a *government* and suggest that the words *in the RSA and/or any other State* be substituted for the words *any State*. They also propose that it be explained in the Bill that the singular includes the plural and vice versa. The Chief: Military Legal Services remark that it is unclear what is understood by the word *persons* in the phrase *and is calculated or intended to — (i) intimidate, coerce or induce any government or persons* and poses the question whether this implies *persons* from a Government and or does this include natural or juristic persons.

(iii) Evaluation

13.137 The project committee noted the concern that the definition of terrorist act is too wide. The committee considers that the reasons proffered for excluding lawful and peaceful dissent and labour demonstrations from the ambit of the

¹¹ 12(2) Everyone has the right to bodily and psychological integrity, which includes the right-
 (a) to make decisions concerning reproduction;
 (b) to security in and control over their body; and
 (f) not to be subjected to medical or scientific experiments without their informed consent.

definition are persuasive. The committee considered the definitions contained in the Australian *Criminal Code*,¹² the UK *Terrorism Act of 2000*,¹³ the Canadian *Anti-*

¹² In this Division - "act of terrorism" means the use or threatened use of violence -

- (f) to procure or attempt to procure -
 - (1) the alteration of; (ii) the cessation of; or (iii) the doing of, any matter or thing established by a law of, or within the competence or power of, a legally constituted government or other political body (whether or not legally constituted) in the Territory, the Commonwealth or any other place;

- (f) for the purpose of putting the public or a section of the public in fear; or
- (g) for the purpose of preventing or dissuading the public or a section of the public from carrying out, either generally or at a particular place, an activity it is entitled to carry out;

54. Any person who commits an act of terrorism is guilty of a crime and is liable to imprisonment for life.

55. (1) Any person who obtains for himself or another or supplies anything with the intention that it be used, or knowing that it is intended to be used, for or in connection with the preparation or commission of an act of terrorism is guilty of a crime and is liable to imprisonment for 10 years.

(2) Any court by or before which a person is found guilty of a crime defined by this section may order the forfeiture to the Crown of any property that, at the time of the crime -

- (a) he had in his possession or under his control; and (b) he intended should be used for or in connection with the preparation or commission of an act of terrorism.

¹³ 1(1) In this Act "terrorism" means the use or threat of action where-

- (f) the action falls within subsection (2),
- (g) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
- (h) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it-

- (a) involves serious violence against a person,
- (b) involves serious damage to property,
- (c) endangers a person's life, other than that of the person committing the action,
- (d) creates a serious risk to the health or safety of the public or a section of the public, or
- (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section-

- (f) "action" includes action outside the United Kingdom,
- (g) (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
- (h) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
- (i) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

Terrorism Act of 2001¹⁴ and the Australian Security Legislation Amendment

¹⁴

“Terrorist activity” means

(a) an act or omission committed or threatened in or outside Canada that, if committed in Canada, is one of the following offences:

- (f) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,
 - (g) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971,
 - (h) the offences referred to in subsection 7(3) that implement the *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 December 14, 1973,
 - (i) the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979,
 - (j) the offences referred to in subsection 7(3.4) or (3.6) that implement the *Convention on the Physical Protection of Nuclear Material*, done at Vienna and New York on March 3, 1980,
 - (k) the offences referred to in subsection 7(2) that implement the *Protocol for 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 February 24, 1988,
 - (l) the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988,
 - (m) the offences referred to in subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,
 - (n) the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and
 - (o) the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of Terrorist Financing*, adopted by the General Assembly of the United Nations on December 9, 1999, or
- (b) an act or omission, in or outside Canada,
- (i) that is committed
 - (a) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (b) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside Canada, and
 - (ii) that intentionally
 - (f) causes death or serious bodily harm to a person by the use of violence,
 - (g) endangers a person's life,
 - (h) causes a serious risk to the health or safety of the public or any segment of the public,
 - (i) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(Terrorism) Bill of 2002.¹⁵ The Committee also noted the remarks made by Alex Obote-Odora¹⁶ where he noted as follows on the failure of the UN to produce an internationally endorsed definition of terrorism:¹⁷

-
- (j) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in any of clauses (A) to (C),
- and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or 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.

¹⁵ *Terrorist act* is defined in the Security Legislation Amendment (Terrorism) Bill 2002 to mean a specified action or threat of action that is made with the intention of advancing a political, religious or ideological cause. The types of actions covered by the definition of "terrorist act" are set out in proposed subsection 100.1(2) and include actions involving serious harm to persons, serious damage to property and interference with essential electronic systems. Electronic systems include information systems; telecommunications systems; financial systems; and systems used for essential government services, essential public utilities and transport providers. The new offence in proposed section 103.1 will apply to the financing of actions which fall within this definition. Lawful advocacy, protest and dissent, and industrial action are expressly excluded from the ambit of the definition.

¹⁶ Alex Obote-Odora "Defining International Terrorism" <http://www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61.html>

¹⁷ It was reported that on 2 October 2001 when the General Assembly entered the second day of its weeklong debate on measures to combat international terrorism, several speakers called attention to the need to define the scourge in order to effectively combat it. "Yemen's Ambassador, Abdalla Saleh Al-Ashtal, joined numerous others who have expressed support for the recently adopted Security Council resolution on fighting terrorism, but pointed out that its implementation would be affected by the fact that there was no agreed definition of terrorism. Echoing this view, the Ambassador of Malaysia, Hasmy Agam, stressed that without a clear definition, it would be difficult to enforce international agreements to combat the menace. "Acts of pure terrorism, involving attacks against innocent civilian populations - which cannot be justified under any circumstances - should be differentiated from the legitimate struggles of peoples under colonial or alien domination and foreign occupation for self-determination and national liberation," he said. Speaking on behalf of the Arab Group, Libyan Ambassador Abuzed Omar Dorda said States that harboured terrorists of Arab nationalities should surrender them to their countries so that these elements may be brought to justice. The Arab Group also advocated convening an international conference to arrive at a definition of terrorism, he said, adding that the Group would oppose any attempt to classify resistance to occupation as a terrorist act. "Such an attempt will turn concepts topsy-turvy, and only hatred can be engendered from this kind of oppression." Supporting the call for an anti-terrorism conference, Iran's Vice-Minister for Foreign Affairs, Javad Zarif, said the forum should elaborate objective criteria that would allow the

The failure of the international community, acting through the United Nations, to define terrorism is political, not legal or technical. The political reasons are many and diverse. From among the members of the United Nations, there are States that are frustrated because they are disempowered. There are also states that consider themselves victims of economic and social wrongs, imposed on them by the developed countries. However, the central point is not whether the allegations made by developing countries against the developed ones are true or false, right or wrong. What is relevant is that these allegations form the political basis for terrorist actions and subsequently serve to justify it. Significantly, these States refuse to accept a legal order that, according to their perception, perpetrates such real or perceived inequalities. Consequently these states tend to refuse to embrace factual definition of terrorism that do not include the root causes of their backwardness and disempowerment. They are therefore disinclined to sign, let alone ratify, a definition which would restrict their freedom of action and might result in condemning militants who are the object of public admiration in their respective states. Examples of these political situations are many: In World War II, resistance fighters were seen and treated as terrorists by Nazi Germany, while considered heroes by the Allies. Today, many Islamic militants who are considered terrorists by many developed and developing countries, are treated as heroes by the disempowered in the Middle East, Asia, Africa, and other places where they operate.

Failure to separate legitimate struggles, using lawful means to effect political, economic and social changes, tend to result in unilateral responses by victim states. Partly because international terrorism is not defined, and partly because there are no legal ways to respond to violent terrorist attacks, victim states often find themselves in breach of international law itself under the pretence of self-defence, by resorting to methods sometimes similar to the ones it denounces.

One way of addressing the problem of international terrorism is constructive engagement through dialogue between victims states and terrorists. The two groups should attempt to see the other's point of view. For example, the fact that a terrorist act is inexcusable should not preclude a political assessment of the situation. Exploring the political depth of a given terrorist manifestation does not in the least suggest the approval of what remains, legally, a criminal act.

On the other hand, recognizing the political dimension of terrorism can influence the handling of the problem, and thus lead closer to defining terrorism. It is important to understand and address a terrorist's message notwithstanding that one does not agree with it. This exercise is relevant solely for the purpose of acknowledging the political dimension of the terrorist act. This alternative approach accounts for a better appreciation of the act, and does not necessarily favours the terrorist. By acknowledging terrorist messages and acts, terrorism can be condemned by a greater number of States, or by the international community through the United Nations.

There is, however, a caveat. Political dialogue may only be possible when terrorist organisations, and their messages, are identifiable, endorsed by a foreign State or

international community to identify and combat terrorism. "Legitimacy as well as sustainability of the global struggle against terrorism rests on applying a single set of standards to all," he said.

Pledging his country's full support for the fight against terrorism, Ambassador Shamshad Ahmad of Pakistan emphasized the need to tackle the root causes of that peril, noting that stability and mutual prosperity were critical to that effort. "It will continue to haunt us if the roots of terrorism, which lie in the inequality of societies, in the exploitation of downtrodden, in the denial of fundamental rights and in the sense of injustice, are not addressed," he said.

The Ambassador of the Sudan, Elfatih Mohamed Ahmed Erwa, stressed that his country would never be a haven for terrorist groups and would fully cooperate in any effort to eliminate terrorism. The Sudan would support international laws and General Assembly resolutions aimed at combating terrorism and apprehending the perpetrators.

Guatemalan Ambassador Gert Rosenthal pointed out that the battle against terrorism would require fighting crime, drug trafficking and money laundering "given the actual or potential links between these scourges, which are becoming increasingly international in nature."

somehow linked to another State. For example, "terrorist" organisations such as the PLO and IRA were able to negotiate durable political settlements once the victim states were prepared to listen to their clear and unambiguous political messages. In these cases, unfortunately the Oslo Agreement and the Good Friday Agreement did not include definition of international terrorism in the overall peace agreements.

On the other hand, this alternative approach does not necessarily apply to terrorist activity aimed at challenging the economic order or religious belief, conducted by isolated individuals or small groups over which States have no practical means of control outside repression. Red Brigades, Baader Meinhof and assortment of extreme religious groups tend to loosely fit this category.

It is also relevant for one to be mindful of the reasons why victim States often refuse to deal directly with those whom they consider criminals. Victim States that refuse to deal directly with "terrorists" should be encouraged to use other procedures such as inquiries, mediation or conciliation. Of course the particular method used will depend in the end on the type of underlying political conflict. Whatever form is adopted by the parties, a definition of international terrorism should be placed high on the agenda, only then may those who engage in terrorist acts help in the formulation of a definition of their trade - terrorism.

Debates in the Sixth Committee, General Assembly and the Security Council demonstrate that all members of the United Nations, including states that are suspected of sponsoring terrorism, condemn terrorism, and terrorist attacks in all their manifestations, at least in public. No single state came out openly in support of terrorism. Similarly, the ICJ condemned all forms of terrorism and terrorist attacks. It is therefore reasonable to conclude that the international community, either individually, or through the United Nations, condemns international terrorism and terrorist acts.

However, member states are divided on the methods of combating terrorism, including providing a definitive definition of terrorism. The problem of definition as observed above, is not legal, but political. Consequently, questions relating to definition of terrorism is best solved when addressed by political and legal committees of the United Nations. This is because causes of terrorism are usually political. Thus, a purely legal approach may not necessarily address the political dimension of international terrorism. Moreover, causes of terrorism can not, and should not, be separated from its consequences. Linking the two factors necessarily involve states and organisations that have, or may have, connection with terrorists. It is only through constructive engagement - bringing all the major players at the conference table - that a working definition of international terrorism, with the possibility of creating rules that provide for effective enforcement of international law, may be achieved.

13.138 The committee considers that it should amend its proposed definition along the lines of the Canadian legislation including elements of the UK and Australian legislation.¹⁸ The committee considers the argument adopted in the UK not

¹⁸ **terrorist act** means action or threat of action where:

- (f) the action falls within subsection (2); and
- (g) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; but does not include:
 - (1) lawful advocacy, protest or dissent; or
 - (d) industrial action.
- (f) Action falls within this subsection if it:
 - (h) involves serious harm to a person; or
 - (i) involves serious damage to property; or
 - (j) endangers a person's life, other than the life of the person taking the action; or

persuasive that if the act concerned involves serious violence against a person, serious damage to property, endangers a person's life, other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system, and the action involves the use of firearms or explosives then it constitutes terrorism whether or not the use or threat is designed to influence the government or to intimidate the public or a section of the public. The committee however considers it should follow the Australian provision regarding interference with essential electronic systems. This legislation defines electronic systems as including information systems; telecommunications systems; financial systems; and systems used for essential government services, essential public utilities and transport providers. The Commission agrees with the project committee's views on the definition of "terrorist act".

-
- (k) creates a serious risk to the health or safety of the public or a section of the public; or
 - (l) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (1) an information system; or
 - (2) a telecommunications system; or
 - (3) a financial system; or
 - (4) a system used for the delivery of essential government services; or
 - (5) a system used for, or by, an essential public utility; or
 - (6) a system used for, or by, a transport system.

(iv) **Recommendation**

13.139 The project committee and Commission recommend that the definition of *terrorist act* should read as follows:

terrorist act means an act, in or outside the Republic,

- (c) that is committed —
 - (i) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (ii) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside the Republic, and
 - (b) that intentionally —
 - (i) causes death or serious bodily harm to a person by the use of violence;
 - (ii) endangers a person's life;
 - (iii) causes a serious risk to the health or safety of the public or any segment of the public;
 - (iv) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of subparagraphs (i) to (iii); or
 - (v) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, including, but not limited to an information system; or a telecommunications system; or a financial system; or a system used for the delivery of essential government services; or a system used for, or by, an essential public utility; or a system used for, or by, a transport system, other than as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in any of subparagraphs (i) to (iii),
- but, for greater certainty, does not include conventional military action in accordance with customary international law or conventional international law.

(i) **“Terrorist organisation”**

- (i) Evaluation and preliminary proposal contained in discussion paper 92

13.140 The project committee noted the originally proposed definition which provided that “terrorist organisation” means (a) an organisation created with the intention to carry out or plans carrying out terrorist acts or activities or an organisation that approves of the possibility of using terrorism in its activities ; or (b) any organisation, of which at least one of its divisions is involved in terrorist acts or activities and at least one governing body is aware of such involvement. The committee raised the

question whether the definition ought not perhaps be simplified. The committee noted that the words “or activities or an organisation that approves the possibility of using terrorism” deal with indirect or constructive intention and the question arose whether it would be sufficient if the clause were to say “terrorist organisation means an organisation having the intention directly or indirectly to carry out terrorist acts”. The committee wondered whether this was an attempt to cater for the provisional IRA type of organisation and considered that an organisation might start off as a struggle organisation without embracing violence and gradually it does or the members foresee that it might embrace violence and reconcile themselves with that. The committee also considered that the clause would be too limiting if it were to say “created with the intention to carry out terrorist acts” as the organisation might say the organisation was not created with the intention to carry out terrorist acts. The committee considered that the clause should cover the various possibilities, ie of an organisation presently carrying out terrorist acts, one which has done so in the past or will in future do so. The committee therefore decided that the clause should read as follows: “‘Terrorist organisation’ means an organisation which has carried out, is carrying out or plans carrying out terrorist acts”.

13.141 The project committee noted the formulation contained in the proposed subclause (b) that “any organisation, of which at least one of its division is involved in terrorist acts or activities and at least one governing body is aware of such involvement” and was of the view that it is not clear. The committee noted that this subclause was taken from legislation of the Russian Federation and was of the view that it should be deleted.

(ii) Comment on discussion paper 92

13.142 The Media Review Network comments that the view that terrorist acts are unjustifiable accords with common sense but the definition of a “terrorist act” and “terrorist organisation” contained in clause 1 of the Draft Bill is patently and manifestly wider than is necessary.

(iii) Evaluation and recommendation

13.143 It is expected of South Africa in terms of resolutions 1373 and 1390 to have the necessary measures in place to combat the financing of terrorism and to freeze and forfeit funds, to prevent supplies to terrorists and to prevent their entry into member States. It was noted above that in Canada it was decided to make provision for listed entities whereas their proposed legislation talked of a *terrorist group*. Terrorist group was defined as — an entity that has as one of its purposes or activities facilitating or carrying out any

terrorist activity, or a listed entity, and includes an association of such entities. The Canadian Government backed a cosmetic change in the list of terrorist organizations to be compiled by the government, and instead of terrorist groups, such organizations would now be known as "listed entities." The change was suggested by a Senate committee that worried innocent groups would be stigmatized by the name terrorist, even if they were wrongly included on the list and were later deleted.

13.144 The project committee is of the view that it should reconsider its decision not to proscribe organisations or entities. One way of giving effect to resolution 1373 where funding of organisations, entities or persons is suspected of being used for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or that it is to be for the benefit of a terrorist group, would be to list the group, entity or person. The committee therefore has to decide whether the Bill should still provide for *terrorist organisations* or *listed organisations* or *entities*. Giving effect to the Convention for the Suppression of the Financing of Terrorism seems to necessitate the listing or proscription of individuals and organisations. It is also apparent to the project committee that the one does not exclude the other necessarily and that the Bill could provide for the listing and proscription of persons and entities (as the Australian proposed legislation does). The Australian Suppression of the Financing of Terrorism Bill 2002 provides that proscribed person or entity means: (a) a person or entity listed by the Minister under section 15; or (b) a person or entity proscribed by regulation under section 18.¹ It was noted above that the Canadian legislation provides for an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or a listed entity, and includes an association of such entities. The project committee and Commission are of the view that it should still provide for *terrorist organisations* in the Bill and make provision for the power of the Minister² to proscribe organisations. The project committee and Commission recommend the following definition:

"Terrorist organisation" means an organisation that has as one of its purposes or activities facilitating or carrying out any terrorist act, which has carried out, or plans carrying out a terrorist act.

(h) Use of weapons of mass destruction

¹ See below the discussion of membership offences.

² A definition of "Minister" is also therefore included in the Bill which provides that "Minister" means the Minister to whom the administration of this Act has been assigned in terms of section 63. Section 63 provides that the President may by proclamation in the Gazette assign the administration of this Act to any Minister, and may determine that any power or duty conferred or imposed by this Act on such Minister, shall be exercised or carried out by that Minister after consultation with one or more other Ministers. (Section 91(2) of the Constitution of 1996 provides that the President appoints Ministers and assigns their powers and functions.)

13.145 It was suggested to the Commission that consideration be given to include an offence in the Bill aimed at weapons of mass destruction as well. The Commission has noted that in the UK although the heading to part 6 of their *Anti-terrorism, Crime and Security Act* 2001 talks of weapons of mass destruction³ it is not defined there, neither is it defined in their *Chemical Weapons Act* of 1996. It is, however, defined as follows in Title 18 of the US Code on Crime and Criminal Procedure:

the term "weapon of mass destruction" means -

³ Part 6 of the *Anti-terrorism, Crime and Security Act* strengthens current legislation controlling chemical, nuclear and biological weapons (WMD). It makes it an offence to aid or abet the overseas use or development of chemical, nuclear, biological. It introduces offences equivalent to those in the Chemical Weapons Act 1996 in relation to biological and nuclear weapons. This brings legislation on biological and nuclear weapons into line with existing legislation on chemical weapons. These provisions will cover nuclear and radiological weapons, chemical weapons and biological agents and toxins. There is also a new provision for customs and excise to prosecute.

- (A) any destructive device as defined in section 921¹ of this title;
- (B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors;
- (C) any weapon involving a disease organism; or
- (D) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.

13.146 The project committee and Commission agree with the suggestion to include a reference to weapons of mass destruction and proposes that the definition on weapons of mass destruction contained in the *Non-proliferation of Weapons of Mass Destruction Act 87 of 1993* be applied namely:

'weapon of mass destruction' means any weapon designed to kill, harm or infect people, animals or plants through the effects of a nuclear explosion or the toxic properties of a chemical warfare agent or the infectious or toxic properties of a biological warfare agent, and includes a delivery system exclusively designed, adapted or intended to deliver such weapons.

E. CLAUSE 2: TERRORIST OFFENCES

(a) Evaluation and preliminary proposal contained in discussion paper 92

13.147 The project committee considered that the words "if such act falls, in terms of

¹ The term "destructive device" means -
 (A) any explosive, incendiary, or poison gas -

- (i) bomb,
- (ii) grenade,
- (iii) rocket having a propellant charge of more than four ounces,
- (iv) missile having an explosive or incendiary charge of more than one-quarter ounce,
- (v) mine, or
- (vi) device similar to any of the devices described in the preceding clauses;

- (A) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

- (B) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

this Act within the jurisdiction of the courts of the Republic”² in clause 2 is superfluous and was of the view that they should be deleted. The committee proposed that clause 2 should provide as follows: “Subject to this Act, any person who commits a terrorist act or any other contravention of this Act, commits an offence and shall be liable on conviction to imprisonment for life”.

(b) Comment on the discussion paper

13.148 Ms Schneeberger comments that although the section is preceded by the qualifier “subject to the provisions of this act” they still found it confusing that a life sentence was imposed on all offences, while specific offences under clauses 7, 10, 12 and 13 all made provision for lesser sentences. She remarks that in their opinion it would be clearer if the different offences could be dealt with under each separate section, with the addition of a new section for penalties for a terrorist act.

13.149 The Chief: Military Legal Services suggests that the words *shall be guilty of an offence* be inserted after the words *of this Act* and that the words *commits an offence* be deleted. They also suggest that the words *knowingly commits* be inserted after the words *terrorist act, or*. They consider that the wording of the clause is ambiguous in that a person can commit a terrorist act in the Republic or elsewhere and that the person can be imprisoned for life on conviction. They consider that where the wording *or elsewhere* is used in the Bill it infringes on the international law in that the country where the offence is committed will always have jurisdiction over the offender. They state they are uncertain how it is visualised how RSA courts will have jurisdiction over the offender other than by extradition treaties or agreements. They note that this clause cannot be enforced in any other country without infringing on its sovereignty. The Chief: Military Legal Services also says that it is unclear from the wording whether the drafters had in mind that terrorist acts are only carried out by groups of persons and cannot be carried out by individuals. They suggest that from the wording of clause 2 of the Bill it seems as though any person can carry out acts of terrorism, although no definition can be found for a terrorist. They state that from a practical point of view a person is normally charged for committing a specific offence, for example the offence of assault. The Chief: Military Legal Services point out that no specific offence is mentioned in the definition. They therefore suggest that the offence of terrorism should be included in the Bill and should be defined in section 1 of the Bill. They consider that it will make the prosecution for the offence of terrorism easier.

² The original clause provided as follows: “Any person who, in the Republic or elsewhere, commits a terrorist act, if such act falls, in terms of this Act, within the jurisdiction of the courts of the Republic, commits an offence and is liable on conviction to imprisonment for life”.

13.150 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal comment that clause 2 prescribes life imprisonment for terrorist acts or any other contravention of the Act, and that for many other offences introduced by the Bill, however, other sentences are specifically prescribed. They remark also that this creates an anomaly which would most definitely cause problems in the prosecution of the offences, and suggest that this can be rectified by either deleting the words "or any other contravention of the Act" and prescribe the sentence for each introduced offence separately in the description of the offence (which is in anyway the case in most of the offences already) or to add the words "unless otherwise prescribed". They suggest that if the last suggestion is to be followed, the separate prescribed sentences of life imprisonment throughout the Bill should be deleted and only the sentences other than life imprisonment be retained. They however consider that to ensure easier reading of the Bill and certainty, it is suggested that the first suggestion be followed. Advocates Fick and Luyt further note that the provision that an act committed "elsewhere" also causes concern and pose the question whether our courts will have jurisdiction for instance if an act that fits the definition is committed in Northern Ireland. They point out that as the jurisdiction of our courts is provided for in clause 15, they recommend that the words "in the Republic or elsewhere" are superfluous and should be deleted.

(c) Evaluation

13.151 The project committee agrees with Ms Schneeberger and Messrs Fick and Luyt that clause 2 imposes a life sentence on all offences, while specific offences under clauses 7, 10, 12 and 13 make provision for lesser sentences. The committee considers the reasoning persuasive on the deletion of the words "or any other contravention of the Act" and to prescribe the sentence for each introduced offence separately in the description of the offence. The committee also agrees with the argument that since the jurisdiction of our courts is provided for in clause 15, the words "in the Republic or elsewhere" are superfluous and should be deleted. The committee also agrees that the words *shall be guilty of an offence* should be substituted for the words *commits an offence*. The Commission agrees with the project committee.

(d) Recommendation

13.152 The project committee and Commission recommend the following provision:

Any person who commits a terrorist act shall be guilty of an offence and shall be liable on

conviction to imprisonment for life.

F. CLAUSE 3: PARTICIPATION IN AND FACILITATION OF TERRORIST ACTS AND HARBOURING AND CONCEALING

(a) Evaluation and preliminary proposal contained in discussion paper 92

13.153 The Bill contained in the discussion paper contained clause 3 which dealt with material support, harbouring and concealing terrorist acts. The project committee noted that the wording of clause 3 was taken from the American section 2339A Title 18 (Crimes and Criminal Procedure) which provides as follows:

“(a) Whoever, within the United States, provides material support or resources or conceals or distinguishes the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or carrying out, a violation of section 32, 37, 81, 175, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332c, or 2340A of this title or section 46502 of title 49,¹ or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Definition. In this section, the term ‘material support or resources’ means currency or other financial securities, financial services, lodging, training, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”

13.154 The committee noted that the definition in the proposed Bill related to “material support or resources” and that the only differences between the proposed definition and the American provision are the use of the words “funds or financing” where the American provision uses the phrase “currency or other financial securities”; the insertion at the end of the definition of the words “funds or financing”; and the deletion in the proposed definition of the phrase “except medicine or religious materials” which is contained in the American provision.

¹ See the discussion of the American legislation in Chapter 6 above in regard to the sections referred to in this section.

13.155 The committee noted that the heading to the clause says “providing material support in respect of terrorist acts” but that clause 3(1)(i) provides for “an offence under the provisions of this Act” and that it includes other offences such as hijacking and so forth. The committee therefore suggested that the heading should not be confined only to “terrorist acts” but should say “any offences under the Act”. The committee initially suggested that the word “partakes” used in the original clause should be substituted by the word “participates” but was then concerned whether there is any point in saying in clause 3(1)(c) “participates in terrorist acts” (or activities) since aiding or promoting terrorist acts would already be covered by the definition of terrorist acts in any event. The committee therefore decided that clause 3(1)(c) should be deleted. The project committee also noted that clause 3(2) is intended to cover the case of someone assisting an offender to escape arrest. The committee considered whether it should be criminal to harbour or conceal an offender and noted that one will have to show knowledge and objective facts for a reasonable suspicion under clause 3(2)(a). The committee also considered whether it should be criminal to have no *mens rea* other than the failure to appreciate what another reasonable person might otherwise have appreciated. The committee was of the view that the phrase in the original draft “has reason to suspect” should be deleted and be replaced with the word “knows”.¹

¹ Section 7 of the South African Protection of Information Act, 84 of 1982 and section 81 of the Australian Commonwealth Crimes Act of 1914 is noteworthy. They provide as follows:
7 Any person who-

- (a) knowingly harbours or conceals any person whom he knows or has reason to believe to be a person who is about to commit or who has committed an offence under this Act, or knowingly permits any such persons to meet or assemble in any premises in his occupation or under this control;
 - (b) having harboured or concealed any such person, or permitted such persons to meet or assemble in any premises in his occupation or under his control, wilfully omits or refuses to disclose to any member of the South African Police Service any information it is in his power to give in relation to any such person; or
 - (c) knowing that any agent or any person who has been or is in communication with an agent, whether in the Republic or elsewhere, is in the Republic, fails forthwith to report to any member of the South African Police Service the presence of or any information it is in his power to give in relation to any such agent or person,
- shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

81(1) Any person who:

- (a) knowingly harbours any person whom he knows or has reasonable ground for supposing to be a spy; or
 - (b) knowingly permits any persons, whom he knows or has reasonable ground for supposing to be spies, to meet or assemble in any premises in his occupation or under his control; or
 - (c) having harboured any person whom he knows or has reasonable ground for supposing to be a spy, or having permitted any persons whom he knows or has reasonable ground for supposing to be spies to meet or assemble in any premises in his occupation or under his control, refuses to disclose to any authorized officer any information which it is in his power to give in relation to that person or those persons;
- shall be guilty of an offence. Penalty: Imprisonment for 7 years.

The committee further suggested that the words “to which the person so harboured or concealed would have been liable on conviction of” be deleted in order to provide as follows, namely “liable on conviction to the penalty for the offence which that person intended to commit or has committed, as the case may be”.

13.156 The committee further decided that clause 3(1)(a) should be amended by the insertion of the words “logistical or organisational” because the person who invites , addresses, manages and all that is surely providing organisational or logistical support. The committee also noted a suggestion that the scope of the term “conceal” in clause 3(1)(b) is not quite clear and whether it would include a situation where witnesses for one reason or another refuse to testify.² It was also suggested that one may need to consider this aspect since the acts envisaged under the Bill are of a nature where intimidation is bound to be significant. The committee presumed that what is meant is someone who knows certain things but then refuses to testify. The committee was of the view that the Criminal Procedure Act could be used in this regard where someone has given a statement but then when called to testify, refuses to do so. The committee however noted that the applicable penalty in the case of someone who refuses to testify is that penalty which the intending offender would be liable to. The committee was of the view that the clause actually aims at someone who provides support or resources or who harbours a terrorist as opposed to someone who simply refuses to testifying at a trial. It didn’t strike the committee as the right place to deal with this issue as the Criminal Procedure Act seems to be the appropriate measure for dealing with it.

(b) Comment on discussion paper 92

13.157 Ms Schneeberger remarks that the clause appears to be dealing with accessories and accomplices to an offence, which is an essential component of the offences. She points out that the international conventions on terrorism traditionally identify four main ancillary offences, i.e. attempts, accomplices, organising and directing, and persons acting with a common purpose. She says that they do note that section 18(1) and (2) of the *Riotous Assemblies Act* will cover attempt, conspiracy, instigation, commands and procurement and that the *Riotous Assemblies Act*, together with section 3 of the Bill would therefore cover attempt, organising and directing and some forms of accomplices as identified in the international conventions. They are, however, not certain whether the current formulation would cover all accomplices and persons acting with a common purpose.

13.158 Ms Schneeberger states that the point has been made by delegates

² By Prof Medard Rwelamira formerly of the Department of Justice’s Policy Unit.

negotiating international conventions that the ancillary crimes are used more frequently than the main offence to prosecute a crime and it is therefore quite possible that South Africa will have more prosecute or extradite requests for an ancillary offence than for the main offence. She points out that it is therefore essential to ensure that all the possible ancillary crimes, in particular all types of accessories and persons acting with a common purpose, are covered in the South African legislation. They would request that the Commission bears this in mind when drafting the *Anti-Terrorism Bill*.³

13.159 Mr Jazbhay comments that this clause is taken from the American s 2339A Title 18 (Crimes and Criminal Procedure) and is straightforward in its meaning. He considers that what is onerous though is that any person who has knowledge that another person intends to commit or has already committed an offence under the Bill commits an offence and is liable to punishment as if he intended to or has committed the offence. He suggests that this provision is too wide and that it ignores the possibility of the role of intimidation or coercion in the equation. Mr Jazbhay considers that a 'whistle-blower' type of protection is desirable in order to blunt the impact of this provision. The Pretoria Muslim Congregation comments that the definitions of "material support" and "funds" are extremely wide and effectively prohibit the accumulation of funds by whatever means by Pagad and curtails the religious duty of Muslims to give charity and support worthy causes ie in this instance to eliminate the social evils of gangsterism and drugs.

13.160 The SAPS: Legal Component: Detective Service and Crime Intelligence comments that this clause may be too broad and could perhaps be qualified by inserting the words "*knowingly*" prior to the word "*participates*". The Chief: Military Legal Services suggests that the plural be used in the clause where the singular is presently used.

13.161 Mr MR Essack submitted a petition to the Commission in which he says that they object to the Bill as the motivation for the Bill is explained to be to deal with urban terrorism, that they believe strong action should be taken against urban terrorism but that the existing laws are adequate and that compelling evidence should be advanced for the reintroduction of detention without trial. They are strongly opposed to the clauses dealing with international terrorism and consider that they are strongly based on the Anti-Terrorism Bill of the United States of America which they say is used to target and neutralise any kind

³ Ms Schneeberger points out that although the references to the ancillary crimes have been deleted in some clauses, on the basis that they are covered by the *Riotous Assemblies Act*, they are included in others. There is a need for consistency in this respect, and they would favour specific mention of the ancillary offences, either in respect of each offence or as a generic clause for all the offences covered by the Act.

of support for liberation movements⁴ especially in the Middle East as even humanitarian aid to individuals and families suffering oppression is outlawed. They remark that they strongly oppose the idea that South Africa should fall in line with US foreign policy objectives.

13.162 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal comment that although "material support" is defined in clause 1, there is no definition of logistical or organisational support. They suggest that the reference to "logistical or organisational support or any resources" be deleted from clause 3 and that the words "notwithstanding the normal meaning" be added to the definition of "material support" in clause 1. Martin Schönteich notes that the Bill seeks to criminalise the actions of those who provide material support in respect of terrorist activities and that, for example, anyone who provides material, logistical or organisational support, knowing or intending that such support will be used in the commission of an offence in terms of the Bill, is deemed to have committed a criminal offence. The same would apply to anyone who participates in the activities of a terrorist organisation. On conviction of such an offence, a penalty of up to 10 years imprisonment, without the option of a fine, is proposed. He also notes that anyone who conceals a person knowing that that person intends to commit or has committed an offence in terms of the Bill, also commits an offence.

(c) Evaluation and recommendation

13.163 The committee noted that the issue of giving support to groups lead to serious concern from various quarters. It was alleged that the State would target also those

⁴ See however <http://www.fas.org/irp/news/2000/01/000121-terror3.htm> "Terrorist groups often try to raise money in countries where they are not active, but where their sympathizers can take advantage of ordinary people's misplaced generosity. Claiming to raise funds for peaceful purposes, front organizations turn the money they get over to the terrorist groups they are secretly working for. The United Nations International Convention for the Suppression of the Financing of Terrorism is intended to make this more difficult. Nations that become a party to the convention are required to make it a crime for anyone to provide or collect funds for terrorism. They must also extradite or prosecute offenders and cooperate in investigating and preventing the financing of terrorist activities. . . . It is a critical advance in counter-terrorism policy. As Secretary of State Madeleine Albright said, "It is wrong to finance terrorist groups. . . . Every nation has a responsibility to arrest or expel terrorists, shut down their finances and deny them safehaven. . . . Our purpose is to weave a web of law. . . that will . . . deny them the mobility and sustenance they need to operate." While all states criminalize acts of terrorism, few have prohibitions on the financing of terrorists. Supporters of terrorist groups ranging from Hizballah in Lebanon to the Tamil Tigers of Sri Lanka to the Armed Islamic Group in Algeria and the Kurdistan Workers Party in Turkey have been adept at raising money, supposedly for humanitarian or educational purposes. The UN convention will improve efforts by governments to prevent financial assets from being used to help terrorists. If necessary, assets can be seized or frozen. Individuals involved in channeling money to terrorists can be arrested. If they are not tried in the country where they are apprehended, they must be extradited to a requesting state to stand trial. Fighting terrorism requires international cooperation. Most of the world's states are aware that they are vulnerable. By promoting a collective effort to confront a common problem, the UN is helping to stop this international scourge".

organisations and individuals who give humanitarian support to certain foreign groupings. It raised great discomfort and was heavily criticised. The fact remains, however, that there is almost universal acceptance since 11 September 2001 that one effective method of preventing and combating terrorism is to ensure that terrorist groups receive no funding or other support. It is noteworthy that international obligations compel South Africa to take note of and consider the question of the ratification of the Convention on the Suppression of Financing of Terrorism.⁵ The latest in a series of interlocking conventions intended to combat terrorism, the International Convention for the Suppression of the Financing of Terrorism was adopted by the United Nations General Assembly on 9 December 1999. Speaking at a press conference following its adoption, Philippe Kirsch, of Canada, who chaired the working group that drafted the legislation, called the Convention a model instrument. He pointed out that it recognizes the fundamental importance of the international problem posed by the financing of terrorism; it establishes the act of financing terrorism as an independent crime; it does not require that an act of terrorism actually be committed; and it contains important provisions on the liability of legal entities, such as organizations or groups — a new concept in the struggle against international terrorism.⁶

⁵ See <http://www.peacezine.org/UNinfo/anti%20terrorism%20convention.htm> and also <http://www.france.diplomatie.fr/actual/dossiers/terroris/fiche1.gb.html> "Why A New Convention on Terrorism?"

"... Effective measures to strengthen security have been taken in many spheres, for example, that of the safety of civil aviation. International cooperation has developed, particularly in the multilateral fora, thus creating a framework for more extensive judicial and police cooperation. Finally, several international conventions have been drawn up to bolster the fight against specific terrorist activities, such as hostage-taking or aircraft hijacking, and more recently terrorist attacks involving explosives. The need has nevertheless been felt for a broader approach to enable us to fight against all terrorist activities by directly attacking their financing. Carrying out an act of terrorism requires considerable resources in order to maintain clandestine networks, train units, mount complex operations, procure weapons and purchase collusion. There is someone behind every terrorist act; behind every terrorist group there are financiers. The fight against terrorist financing, whether from "legal" (commercial or charitable activities for example) or "illegal" sources (racketeering, trafficking, robbery, procuring, etc.) is a priority objective for the services actively engaged in the fight against terrorism. It requires sophisticated means and techniques to thwart the operation of what are intrinsically complex and impenetrable financial networks, often related to those used by the Mafia. It also requires a specific national and international legal framework so that we can obtain vitally-needed cooperation from banks and ensure collaboration between international law enforcement agencies. However, the existing conventions are insufficient. Firstly, because they do not cover all acts committed by terrorists, such as those not involving explosives (for example, murders committed with automatic weapons - the case in Luxor in Egypt in 1997). Secondly, because no specific mechanism for judicial cooperation exists to combat terrorist financing. . . ."

⁶ "The new Convention is intended to have 'teeth'. In today's electronic environment, huge quantities of money can circle the globe in seconds. If a significant number of countries become States parties, the Convention will provide powerful enforcement possibilities to governments who want to put an end to acts of terrorism. Every time terrorist monies pass through the territory of a State party, an international crime has been committed which can be prosecuted.

The international community historically has been unable to agree on a definition of terrorism, as one man's terrorist is often another man's freedom fighter. Because of this difficulty, countries have taken the approach of creating the network of conventions which criminalize

specific acts, such as setting bombs, kidnapping or hijacking airplanes. While this Convention does not specifically define an act of terrorism, it does come significantly closer. According to the text, it is a crime to provide or collect funds with the knowledge or intention that they are to be used in acts of violence targeting civilians with the intention of intimidating a government. This is a much broader category of crime than has previously been outlawed. A person is also guilty of an offence if he participates as an accomplice in such an act, if he organizes or directs other to commit such an act, or if he contributes in any other way to the crime. In addition, the Convention makes it a crime to provide or collect funds with the knowledge or intention that they are to be used to carry out any of the acts described in nine previously adopted anti-terrorism conventions referred to by the Convention.

States parties are required to adopt measures, such as domestic legislation, to ensure that the criminal acts described in the Convention will under no circumstances be considered justifiable because of political, philosophical, ideological, racial, ethnic or religious considerations.

For the first time, the Convention specifically targets the financial sponsors of terrorist activity, rather than simply the actual perpetrators of the specific acts. Previously, the financial backers of such criminal acts could only be charged with aiding or abetting that crime. Under this law, it is not even necessary that an act of terrorism has taken place; according to article 2, the intention or knowledge of the use of the funds collected or provided is sufficient. Proceeds from illicit activities, such as opium production or the small arms trade now often find their way to the hands of terrorists through a transnational “shadow banking” system. Front businesses, such as travel agencies that can change currencies, are easily used to launder dirty money and to transfer funds. In the globalizing world, cooperation between transnational criminals and international terrorists is on the rise. The Convention sets new limits on the banking secrecy traditionally provided by some countries, which has been such a useful tool for transnational criminals and terrorists. States parties will be required to take “all practicable measures”, such as adapting their domestic legislation, to prevent the relevant offences, whether by persons or organizations. Banks and other financial institutions must identify account holders, and must pay special attention to unusual or suspicious transactions and report any they suspect may stem from criminal activity.

The Convention suggests a number of specific measures, such as requiring banks and

13.164 The project committee noted the provisions contained in the Canadian Terrorism legislation of 2001 which provides as follows:

83.18 (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Prosecution

- (2) An offence may be committed under subsection (1) whether or not
- (c) a terrorist group actually facilitates or carries out a terrorist activity;
 - (d) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or
 - (e) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

Meaning of participating or contributing

- (3) Participating in or contributing to an activity of a terrorist group includes —
- (d) providing, receiving or recruiting a person to receive training;
 - (e) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;
 - (f) recruiting a person in order to facilitate or commit
 - (i) a terrorism offence, or
 - (ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence;
 - (g) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and
 - (h) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit
 - (i) a terrorism offence, or

financial institutions to verify the legal existence of a customer by obtaining proof of incorporation, or requiring banks to maintain transaction records for at least five years. The Convention also calls for efforts to identify, detect, and freeze or seize any funds used or allocated for the purpose of committing a terrorist act, and asks that States consider establishing mechanisms to use such funds to compensate victims and/or their families. States parties will be required to provide information to other States regarding the whereabouts and activities of suspects, or regarding the movement of funds. They must provide assistance when requested to obtain evidence in their possession. They should consider measures, such as introducing licensing for money- transmission agencies and monitoring the cross-border movement of cash and bearer negotiable instruments.

All the offences in the Convention are to be deemed 'extraditable offences'. But States may no longer refuse extradition on the grounds that the crime concerned is political in nature. Similarly, extradition may no longer be denied because the offence is of a fiscal nature, as the Convention specifies that none of the crimes it covers are to be considered fiscal offences.

- (ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence.

Factors

(4) In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused—

- (a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group;
- (b) frequently associates with any of the persons who constitute the terrorist group;
- (c) receives any benefit from the terrorist group; or
- (d) repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group.

Facilitating terrorist activity

83.19 (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Facilitation

- (2) For the purposes of this Part, a terrorist activity is facilitated whether or not
- (c) the facilitator knows that a particular terrorist activity is facilitated;
- (d) any particular terrorist activity was foreseen or planned at the time it was facilitated; or
- (e) any terrorist activity was actually carried out.

Commission of offence for terrorist group

83.2 Every one who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life.

Instructing to carry out activity for terrorist group

83.21 (1) Every person who knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity, is guilty of an indictable offence and liable to imprisonment for life.

Prosecution

- (2) An offence may be committed under subsection (1) whether or not —
- (c) the activity that the accused instructs to be carried out is actually carried out;
- (d) the accused instructs a particular person to carry out the activity referred to in paragraph (a);
- (e) the accused knows the identity of the person whom the accused instructs to carry out the activity referred to in paragraph (a);
- (f) the person whom the accused instructs to carry out the activity referred to in paragraph (a) knows that it is to be carried out for the benefit of, at the direction of or in association with a terrorist group;
- (g) a terrorist group actually facilitates or carries out a terrorist activity;
- (h) the activity referred to in paragraph (a) actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or
- (i) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

Instructing to carry out terrorist activity

83.22 (1) Every person who knowingly instructs, directly or indirectly, any person to carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for life.

Prosecution

- (2) An offence may be committed under subsection (1) whether or not —
- (c) the terrorist activity is actually carried out;
- (d) the accused instructs a particular person to carry out the terrorist activity;
- (e) the accused knows the identity of the person whom the accused instructs to carry out the terrorist activity; or
- (f) the person whom the accused instructs to carry out the terrorist activity knows that it is a terrorist activity.

Harbouring or concealing

83.23 Every one who knowingly harbours or conceals any person whom he or she knows to be a person who has carried out or is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity, is guilty of an indictable

offence and liable to imprisonment for a term not exceeding ten years.

13.165 The project committee is of the view that the Canadian provision should be followed rather than the provision proposed in the discussion paper. The committee believes it is more comprehensive and better suited to address the issue of the giving of support to terrorist acts and of harbouring terrorists than the provision proposed in the discussion paper. The committee also considers that provisions dealing with facilitating, collecting, providing or making available, directly or indirectly, property or inviting a person to provide or make available property or financial or other related services, intending that they be used to carry out a terrorist act; using property, directly or indirectly, for the purpose of facilitating or carrying out a terrorist act; and possessing property intending that it be used, directly or indirectly for the purpose of facilitating or carrying out a terrorist act should be included in this provision. The Commission agrees with the project committee. The project committee and Commission therefore recommend the following provision on participation in and facilitation of terrorist acts and harbouring and concealing of terrorists:

- (1) Any person who knowingly participates in, or contributes to, the activities of a terrorist organisation or does anything which will, or is likely to, enhance the ability of any terrorist organisation to facilitate or carry out a terrorist act is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.
- (2) An offence may be committed under subsection (1) whether or not —
 - (a) a terrorist organisation actually facilitates or carries out a terrorist act;
 - (b) the participation or contribution of the accused actually enhances the ability of a terrorist organisation to facilitate or carry out a terrorist act; or
 - (c) the accused knows the specific nature of any terrorist act that may be facilitated or carried out by a terrorist organisation.
- (3) Without limiting the generality of subsection (1), participating in or contributing to the activities of a terrorist organisation includes —
 - (b) providing, receiving or recruiting a person to receive training;
 - (c) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist organisation;
 - (d) collecting, providing or making available, directly or indirectly, property¹ or inviting a person to provide, facilitate or make available property or financial or other related services on behalf of such an organisation;
 - (e) using property, directly or indirectly, on behalf of such an

¹ Paragraphs (c) to (e) was added here to incorporate clauses 31 to 33 which dealt with the property offences in response to the concern that these offences do not differ from these set out under clause 3.

- organisation;
 - (f) possessing property intending that it be used, directly or indirectly on behalf of such an organisation;
 - (g) recruiting a person in order to facilitate or commit —
 - (i) a terrorist act, or
 - (ii) an act or omission outside the Republic that, if committed in the Republic, would be a terrorist act;
 - (g) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist organisation; and
 - (h) making oneself, in response to instructions from any of the persons who constitute a terrorist organisation, available to facilitate or commit —
 - (i) a terrorist act, or
 - (ii) an act or omission outside the Republic that, if committed in the Republic, would be a terrorist act.
- (4) Nothing in subsection (3) makes it an offence to provide or collect funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights.¹
- (5) In determining whether an accused participates in or contributes to any act of a terrorist organisation, the court may consider, among other factors, whether the accused—
- (a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist organisation;
 - (b) frequently associates with any of the persons who constitute the terrorist organisation;
 - (c) receives any benefit from the terrorist organisation; or
 - (d) repeatedly engages in acts at the instruction of any of the persons who constitute the terrorist organisation.
- (6) Any person who knowingly facilitates a terrorist act is guilty of an offence and liable on conviction to imprisonment for a period not exceeding fifteen years.

¹ A subclause recently added to the New Zealand Terrorism (Bombing and Financing) Suppression Bill of 2002 provides as follows:

(g) To avoid doubt, nothing in subsection (1) makes it an offence to provide or collect funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights.

(7) A terrorist act is facilitated whether or not —

- (a) the facilitator knows that a particular terrorist act is facilitated;
- (b) any particular terrorist act was foreseen or planned at the time it was facilitated; or
- (c) any terrorist act was actually carried out.

(8) Any person who commits an offence under any Act or the common law for the benefit of, at the direction of or in association with a terrorist organisation is guilty of an offence and liable on conviction to imprisonment for life.

(9) Any person who knowingly instructs, directly or indirectly, any person to carry out any act for the benefit of, at the direction of or in association with a terrorist organisation, for the purpose of enhancing the ability of any terrorist organisation to facilitate or carry out a terrorist act, is guilty of an offence and liable on conviction to imprisonment for life.

(10) An offence may be committed under subsection (9) whether or not —

- (a) the activity that the accused instructs to be carried out is actually carried out;
- (b) the accused instructs a particular person to carry out the activity referred to in paragraph (a);
- (c) the accused knows the identity of the person whom the accused instructs to carry out the activity referred to in paragraph (a);
- (d) the person whom the accused instructs to carry out the activity referred to in paragraph (a) knows that it is to be carried out for the benefit of, at the direction of or in association with a terrorist organisation;
- (e) a terrorist organisation actually facilitates or carries out a terrorist act;
- (f) the activity referred to in paragraph (a) actually enhances the ability of a terrorist organisation to facilitate or carry out a terrorist activity; or
- (g) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist organisation.

(11) Any person who knowingly instructs, directly or indirectly, any person to carry out a terrorist act is guilty of an offence and liable on conviction to imprisonment for life.

(12) An offence may be committed under subsection (11) whether or not —

- (a) the terrorist act is actually carried out;
- (b) the accused instructs a particular person to carry out the terrorist act;
- (c) the accused knows the identity of the person whom the accused instructs to carry out the terrorist act; or
- (d) the person whom the accused instructs to carry out the terrorist act knows that it is a terrorist act.

- (13) Any person who knowingly harbours or conceals any person whom he or she knows to be a person who has carried out or is likely to carry out a terrorist act, for the purpose of enabling the person to facilitate or carry out any terrorist act, is guilty of an offence and liable on conviction to imprisonment for a period not exceeding fifteen years.

G. CLAUSE 4: MEMBERSHIP OF TERRORIST ORGANISATION AND PROSCRIPTION

(a) Evaluation and preliminary proposal contained in discussion paper 92

13.166 It was provisionally proposed in the discussion paper that clause 4 should provide that any person who becomes or is a member of a terrorist organisation commits an offence, and is liable on conviction to imprisonment for a period not exceeding five years without the option of a fine. The project committee raised the question whether under clause 4 it is necessary to proscribe organisations. The committee considered that it obviously makes the job of a prosecutor and the job of the Minister easier since the latter does not have to ban organisations or having to find out whether the ABC tennis club is the same as the organisation he is really after since most of these organisations would be plainly front organisations. The project committee was of the view that it may be to simplify the work of the prosecution, but one still has to prove that the organisation is involved in terrorist acts, that the accused was a member at the time when the organisation was involved in terrorist acts and that the accused knew this.

13.167 The project committee noted the drafters' motivation for not providing for a mechanism for proscribing or "banning" organisations: in 1996 section 4 of the *Internal Security Act* of 1982 which provided for the banning of organisations was repealed; and the

thinking at the time seems to have been that it would be more expedient to target criminal activities than to proscribe or ban organisations, a activity which led in the past only to a proliferation of new structures being formed and a constant growing list of organisations having to be identified in attempting to deal with them. The drafters were of the view that it would suffice if membership of a terrorist organisation constituted an offence and that no provision should be made for proscribing organisations.

13.168 The committee also noted a suggestion that membership of terrorist organisations is difficult to prove.¹ The committee pointed out that aiding or promoting terrorism is already dealt with in the definition of terrorist acts and that really any form of association with terrorism might be sufficient to cover the problem. The committee considered if the aim was to cover also a passive member, the activities of such a member would not qualify for aiding or complicity or conspiracy. The committee pointed out that the person's knowledge of another person intending to commit or of having committed offences under the Act would be covered under clause 3(2)(a). However, under clause 3 one will have to prove such knowledge whereas under clause 4 one only has to prove membership. The committee considered section 11 of the Prevention of Organised Crime Act to see whether it contains useful criteria in establishing membership of a terrorist organisation. The committee concluded that nothing contained in section 11 really seems to be of assistance. The committee was of the view that if the prosecution wishes to prove anything less than for example complicity then it is up to the prosecutor to find the relevant evidence and by that time complicity will in all probability have been proven. The committee therefore decided to leave it at that.

(b) Comment on discussion paper 92

13.169 Mr Jazbay comments that his concern is that the enactment of a Bill aimed so clearly at a particular identifiable segment of the population could be used as a tool in the hands of persons who would see certain political and or ideological opponents neutralised. Further, blame for the urban terror campaign in the Western Cape has been placed almost solely at the door of PAGAD and ordinary Muslims who may not even be involved or sympathetic to the aims of PAGAD are already being victimised by business persons and the security forces. To him such incidents indicate a growing anti-Muslim sentiment and he fears that the *Anti-Terrorism Bill* will further add to this, and he adds that any resident of the Western Cape will be able to say that this is not something to be taken lightly, as the Muslims form a fairly large proportion of the population and a sustained campaign of victimisation could in fact have the effect of driving more moderate Muslims closer to the

¹ By Prof Medard Rwelamira at the time of the Department of Justice's Policy Unit.

fringe elements in PAGAD, as well as violating the freedom of association clauses in the Constitution.

13.170 Mr Jazbay notes that the parts of the proposed Bill which most concern him are the "bad company" clauses which seem to indicate that one could be branded a terrorist merely by being acquainted with identified terrorists. If one then applies this to the PAGAD situation one could conceivably end up with a situation where a sizeable portion of the Muslim and Coloured communities in the Western Cape would be criminalised as these communities are so closely knit that one could have PAGAD members, gangsters and ordinary citizens all in one family group. He considers that this is a very frightening scenario although it also seems to be a very convenient way to deal with the Urban Terror and Gang problem in the Western Cape without having to use the normal law enforcement channels.

13.171 Amnesty International says that a concern arises from clause 4 which makes it an offence to become a member of a "terrorist organisation" and provides for a term of imprisonment of up to five years upon conviction for this offence. AI notes that paradoxically, the Bill does not provide for a mechanism for proscribing organizations, which would of course have raised concerns about infringements of the right to freedom of association. AI remarks that the creation of this "membership" offence contains the possibility that a member of a particular organization could be prosecuted even if he or she, when joining the organization, was unaware that it was regarded as a terrorist organization. AI considers that the same liability to prosecution may also arise even if he or she did not commit or intend to commit acts of violence, or conspire, aid, abet or in any other way facilitate the commission of terrorist acts. AI comments that besides the further freedom of association concerns that would arise from criminalizing membership in this way, how would a court of law adjudicate such a case, given that there are no guidelines provided in the legislation for determining when an organization can be considered to be a terrorist organization?

13.172 The Media Review Network comments that the *Anti-Terrorism Bill* throws its tentacles in a way that it attempts to crush certain political organizations. The Network says that it also appears that certain individuals holding views that may not be consistent or reconcilable with the government may be victims in terms of this Bill, that the definition of "terrorist act" would ensure for this view and to a great extent, the *audi alterem partem* rule is excluded in the implementation and application of the Bill.

13.173 Mr Saber Ahmed Jazbhay notes that membership of a terrorist organization is an offence for which a person can be imprisoned for a period of five years on conviction. He

points out that the Act is silent as to the criteria that would make it a "terrorist" a term that is too wide, and asks whether the organization, for instance, would be a beneficiary of the *audi alteram partem* rule. He remarks that the Bill is silent on this point. He comments that although the organization is not proscribed, such a drastic step as declaring it a "terrorist" organization is in effect of such an effect and this would put is at odds with the constitutional guarantees of freedom of association as well.

13.174 The Human Rights Committee notes that clause 4 makes it an offence to become or be a member of a "terrorist organisation", which is defined in clause 1 as "an organisation which has carried out, is carrying out or plans carrying out terrorist acts"; that the definition of "terrorist act" is a modified version of the definition found in the *OAU Convention on the Prevention and Combating of Terrorism*, although the definition applies to any person committing such acts in any territory, including South Africa, including past acts. The HRC explains that terrorism according to this drafting includes domestic criminal acts that fall under the definition of "terrorist act". The Human Rights Committee points out that it foresees two problems with this drafting:

- Under international conventions, alleged international terrorists receive the protection of communicating without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides. They have a right to be visited by a representative of that State. These guarantees become impossible to implement in a purely domestic context and there seems to be no parallel protection in terms of the draft Bill.
- Being tried for the crime of being a member of a terrorist organisation could amount to being tried for "an offence in respect of an act or omission that was not an offence under either national or international law at the time it was committed or omitted."¹ The retroactive aspect of the clause is confusing.

13.175 The HRC states further that the clause also has implications in connection with freedom of association and that further attention to the definitions section is needed as these are just some of the problems that might arise. The HRC says that it is also not clear what is meant by an organisation "committing" terrorist acts - presumably it is individuals who are members who commit the acts, and that, in addition, the definition of a "terrorist act" is at least potentially broad enough that it could conceivably include vandalism on a McDonald's restaurant after a protest, which is obviously not a good thing, but arguably does not merit a life sentence in jail either.

13.176 The Legal Resources Centre (LRC) Cape Town comments that clause 4 deals with membership of a terrorist organisation and that the clause threatens to have

¹ See section 35(3)(l) of the Constitution Act of South Africa, Act No. 108 of 1996.

serious implications to the freedom of association. The LRC says that clause 4 retains some of the most recognizable features of its repealed counterpart. The revised version omits the banning of organizations and proscription of organization. It deals with membership of a terrorist organization. It states that a person who becomes a member of a terrorist organization commits an offence. The LRC says this clause presents a number of complex scenarios, and that at a glance, the provisions of clause 3 seems to have dealt with these problem because if anyone provides support, conceals, aids a “terrorist” commits a terrorist act. THE LRC notes that the distinguishing feature between the offence in clauses 3 and 4, as the discussion paper tells, is “knowledge”, and that the offence in clause 4 does not require any knowledge of the activities on the part of the member, membership alone constitutes an offence. The LRC remarks that the project committee felt that the proscription of organization led to a proliferation of new organizations being formed and to constant growing lists attempting to identify and deal with these organizations. The LRC notes that this approach begs the question how can any person be hold liable for anything that he did not know? The LRC considers that the ghost of the apartheid terrorism Act threatens to revisit the statute books, and such a provision makes banning of organizations less evil and has a potential of raising the casualty that again. The LRC considers that the worst-case scenario would be to join an organization because it purports to be something else and latter to have a member of the organisation convicted of a “terrorist act” or uncovered that the organization is involved in acts of terror. The LRC suggests that it is a firmly established and very sound human rights principle that people have to be accountable for their own actions, not for other people, and giving effect to the Constitution should be interpreted as prohibiting conduct not mere association with a perceived terrorist group. The LRC says that with the benefit of hindsight we know how reckless it is to legislate in times of perceived crisis, and the limitation of any guaranteed freedoms need to be sanctioned taking due regard of the limitation clause in the Constitution. The LRC points out that the limitation clause of the Constitution grants the exception to limit a right to the extent that the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality but that the legislation at hand threatens those fundamental freedoms.

13.177 The SAPS: Legal Component: Detective Service and Crime Intelligence notes that both in German and British legislation there are provisions for the proscription of terrorist organisations. The SAPS explains that under previous British legislation (*Prevention of Terrorism Act, and Emergency Provisions Act*, proscription was only applicable to organisations concerned in Irish terrorism, whereas under the new Terrorism Act, 2000² it will be possible in Britain to proscribe organisations concerned in international or domestic terrorism. The SAPS says that under this new Act, any organisation deemed to

² Which received Royal assent on 20 July 2000.

merit proscription will be proscribed throughout the whole of the United Kingdom, and the British Government is also considering which organisations involved in international terrorism might be added to the Schedule of proscribed organisations.³

13.178 The SAPS: Legal Component: Detective Service and Crime Intelligence notes that terrorism in the past was practised by individuals belonging to identifiable organisations with clear command structures and objectives, and targeting tended to be more selective. The SAPS points out that the Institute for Strategic Studies of the University of Pretoria's (ISSUP) Bulletin reflects however that currently, religious and cult groups with more amorphous aims, with loosely based organisation and membership have been increasingly emerging seemingly with tactical independence and that investigators confirm that also in South Africa, the tendency of terrorist groups is to be loosely structured, without formal membership, or membership cards.⁴ They foresee that it would even be difficult to prove that a particular person held membership of a terrorist group, as would be required for a prosecution in terms of the proposed clause on membership. The SAPS explains that it might be possible to determine the executive members, the spokesperson, etc. of an organisation, but mere supporters identified at rallies would not necessarily be linked to the organisation as members. The SAPS notes that in terms of the British *Terrorism Act 2000*, the Secretary of State may proscribe an organisation, if it — commits or participates in acts of terrorism, prepares for terrorism, or promotes or encourages terrorism. The SAPS also points out that the prohibition of organisations (*Vereinen*) in Germany is regulated in terms of the *Gesetz zur Regelung des öffentlichen Vereinsrechts*, that in Indian Law there has been provisions for declaring organisations unlawful since 1967, and in a recent review of terrorism legislation, the Indian Law Commission has found that such measures in respect of terrorist organisations are still necessary. In conclusion, however, the SAPS says that it is still of the opinion that it is not necessary to make provision for the proscription of organisations.

13.179 The Ministry of Community Safety of the Western Cape remarks that the proposed clause is problematic. The Ministry notes that firstly, proof of membership could be extremely difficult and secondly, it will be difficult to proof that an organisation is a *terrorist organisation*. The Ministry poses the question whether formal authorisation by the structures of the organisation of terrorist acts or the intention to commit such actions is required. The Ministry considers if this is not required, it could lead to serious injustice and individuals

³ The SAPS refers to the Explanatory Note to Terrorism Act 2000 ISBN 010561100X, Her Majesty's Stationery Office.

⁴ *Urban Terror 2000: Some Implications for South Africa*, 6/2000 University of Pretoria, Institute for Strategic Studies at 6.

could be prosecuted for deeds that they were completely unaware of.

13.180 The Chief: Military Services suggests that the words "knowing that that organisation is a terrorist organisation" be inserted after the words "member of a terrorist organisation". They consider that the clause is worded too wide and may be unconstitutional if it is allowed that a person can be convicted if he or she becomes a member of a organisation not knowing that the organisation is a terrorist organisation. They state that another problem they foresee in the implementation of the clause is how an individual will know or become aware that a specific organisation is a terrorist organisation. They note that it must be understood that a specific organisation can only become unlawful once declared unlawful by the State.

13.181 Prof Mike Hugh also notes that the Bill makes it an offence to be or to become a member of a terrorist organisation, but that it does not provide for a mechanism for proscribing organisations. He points out that this seems to be based on the reasoning that; "it would be more expedient to target criminal activities than to proscribe or ban organisations since the banning of organisations led in the past only to a proliferation of new organisations being formed and a constant growing list attempting to identify and deal with these organisations".

13.182 Advocates Fick and Luyt note that regarding the definition of a "terrorist organization, in view of what was said regarding the definition of "terrorist acts", a trade union, for instance, would qualify as a "terrorist organisation", and that even the ANC would fall within this description as it is well known that, along the same reasoning, it has carried out terrorist acts. They ask when is it decided that an organization is involved, maybe when certain members are involved, and if so, how many members need to be involved, how many acts need to be performed? They consider that taking into consideration clause 4, the definition of "terrorist organization" is totally inadequate. They pose the question how would any person know that he or she is joining such an organization. They point out that the Minister of Safety and Security's stance on PAGAD, for instance, would render it a terrorist organization, although PAGAD denies that. They ask how would a person know whether he is allowed to join PAGAD or not and consider that it would be virtually impossible to prove a contravention of clause 4 without proper criteria upon which a court can decide whether the involved organization is a terrorist organization. They consider that even with extensive criteria described in the Act it is quite foreseeable that there will be endless problems for the prosecution in proving in the first instance that the involved organization complies with the criteria and secondly that the accused had knowledge of wrongfulness. Advocates Fick and Luyt suggest that a procedure be introduced whereby the Minister can declare certain

organizations to be terrorist organizations, and that strict criteria must be followed in performing this administrative duty which should, inter alia, involve that information regarding compliance with the criteria should be under oath. They propose that such a declaration should be subject to scrutiny by the High Court by means of automatic review and appeal procedures and that these declarations should only come into force after the High Court scrutiny procedures have been completed and published in the Government Gazette, the printed and electronic media.

13.184 Martin Schönteich points out that the Bill proposes that any person who is a member of a "terrorist organisation" commits an offence through such membership and would be liable, on conviction, to imprisonment for up to five years without the option of a fine. He explains that the Bill defines a terrorist organisation broadly as "an organisation which has carried out, is carrying out or plans carrying out terrorist acts". He comments that given the broad definition of what constitutes a terrorist act, such a provision could be used to criminalise the actions of a wide range of people. He remarks that it could apply to all members of a taxi organisation that organise a street blockade, whether such members are actually involved in the blockade or not, and, moreover, to secure a conviction under this provision the state would not have to prove that an accused person knew that he was a member of a terrorist organisation as the state would merely have to prove membership of a terrorist organisation. He points out that the concern has been raised that the creation of such a membership offence could result in the prosecution of a member of a particular organisation even though such a person is unaware that the organisation is regarded as a terrorist organisation.

(c) Evaluation and recommendation

13.185 The provisions of a number of countries was noted. The Australian *Criminal Code* provides as follows on unlawful organisations and membership:

"organization" means an association, society or confederacy;

"unlawful organization" means an organization that uses, threatens to use or advocates the use of unlawful violence in the Territory to achieve its ends;

"violence" means violence of a kind that causes, or is likely to cause, the death of, or grievous harm to, a person.

51. Membership of Unlawful Organization

- (1) Any person who, knowing an organization to be an unlawful organization -
- (a) belongs or professes to belong to it;
 - (b) solicits or invites financial or other support for it or knowingly makes or receives a contribution of money or other property to or for its resources; or
 - (c) arranges or assists in the arrangement or management of or addresses a meeting of 3 or more persons knowing that the meeting is to support or further the activities of that unlawful organization or is to be addressed by a person belonging or professing to belong to that unlawful

organization,

is guilty of a crime and is liable to imprisonment for 2 years.

(2) The court by or before which a person is found guilty of a crime defined by this section may order the forfeiture to the Crown of any money or other property that, at the time of the offence, he had in his possession or under his control for the use or benefit of the unlawful organization.

52. Evidence of Knowledge of Unlawfulness

Proof of the fact that a person has belonged to an unlawful organization for 28 days or was a member of any committee of it is evidence that he knew it to be an unlawful organization.

53. Display of Support for Unlawful Organization

Any person who, knowing an organization to be an unlawful organization, in a public place, or in any other place with the intention that it can be seen by persons in a public place -

- (a) wears an item of dress; or
- (b) wears, carries or displays a sign or article,

in such a way or in such circumstances that it can reasonably be inferred he is a member or supporter of an unlawful organization, is guilty of an offence and is liable to imprisonment for 6 months.

13.186 The Australian *Security Legislation Amendment (Terrorism) Bill* 2002 provides as follows on proscribed organisations:

102.1 Definitions

In this Division:

member of an organisation includes:

- (a) a person who is an informal member of the organisation; and
- (b) a person who has taken steps to become a member of the organisation; and
- (c) in the case of an organisation that is a body corporate--a director or an officer of the body corporate.

proscribed organisation means an organisation in relation to which a declaration under section 102.2 is in force.

the Commonwealth, when used in a geographical sense, includes the Territories.

Subdivision B--Declarations of proscribed organisations

102.2 Attorney-General may make declarations

(1) The Attorney-General may make a declaration in writing that an organisation is a proscribed organisation if the Attorney-General is satisfied on reasonable grounds that one or more of the following paragraphs apply in relation to the organisation:

- (a) if the organisation is a body corporate--the organisation has committed, or is committing, an offence against this Part (whether or not the organisation has been charged with, or convicted of, the offence);
- (b) a member of the organisation has committed, or is committing, an offence against this Part on behalf of the organisation (whether or not the member has been charged with, or convicted of, the offence);
- (c) the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation;
- (d) the organisation has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country.

(2) The Attorney-General must publish a declaration in:

- (a) the *Gazette*; and
- (b) a newspaper circulating in each State, in the Australian Capital Territory and in the Northern Territory.

(3) A declaration comes into force at the time it is published in the *Gazette* and stays in force until:

- (a) it is revoked; or
- (b) the beginning of a day (if any) specified in the declaration as the day the declaration ceases to be in force.

(4) The Attorney-General may delegate powers and functions under this section to a

Minister.

102.3 Revocation of declarations

- (1) The Attorney-General must revoke a declaration made under section 102.2 in relation to an organisation if the Attorney-General is satisfied on reasonable grounds that none of the paragraphs in subsection 102.2(1) apply in relation to the organisation.
- (2) The Attorney-General may revoke a declaration made under section 102.2.
- (3) The Attorney-General must publish a revocation in:
 - (d) the *Gazette*; and
 - (e) a newspaper circulating in each State, in the Australian Capital Territory and in the Northern Territory.
- (6) A revocation comes into force at the time it is published in the *Gazette*.
- (5) The Attorney-General may delegate powers and functions under this section to a Minister.

13.187 The Australian *Security Legislation Amendment (Terrorism) Bill* 2002 provides as follows on offences in regard to proscribed organisations:

102.4 Directing activities etc. of proscribed organisations

- (2) A person commits an offence if the person:
 - (e) directs the activities of a proscribed organisation; or
 - (f) directly or indirectly receives funds from, or makes funds available to, a proscribed organisation; or
 - (g) is a member of a proscribed organisation; or
 - (h) provides training to, or trains with, a proscribed organisation;
- or
- (i) assists a proscribed organisation.

Penalty: Imprisonment for 25 years.

- (2) Strict liability applies to the element of the offence against subsection (1) that the organisation is a proscribed organisation.
- (3) It is a defence to a prosecution of an offence against subsection (1) if the defendant proves that the defendant neither knew, nor was reckless as to whether:
 - (b) the organisation, or a member of the organisation, had committed, or was committing, an offence against this Part; and
 - (c) there was a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation and that decision was in force at the time the person engaged in the conduct constituting the offence; and
 - (d) the organisation had endangered, or was likely to endanger, the security or integrity of the Commonwealth or another country.
- (4) It is a defence to a prosecution of an offence against paragraph (1)(c) if the defendant proves that the defendant took all reasonable steps to cease to be a member of the organisation as soon as practicable after the organisation became a proscribed organisation.
- (5) Section 15.4 (extended geographical jurisdiction--category D) applies to an offence against subsection (1).

5 Application

The Attorney-General may make a declaration under section 102.2 of the *Criminal Code* after the commencement of that section in relation to:

- (a) acts or omissions committed before or after the commencement of that section; or
- (b) decisions of the Security Council of the United Nations made before or after the commencement of that section.

13.188 The UK *Terrorism Act* of 2002 provides as follows:

PROSCRIBED ORGANISATIONS

Procedure Proscription.

- 3.(1) For the purposes of this Act an organisation is proscribed if-

- (a) it is listed in Schedule 2, or
- (b) it operates under the same name as an organisation listed in that Schedule.
- (2) Subsection (1)(b) shall not apply in relation to an organisation listed in Schedule 2 if its entry is the subject of a note in that Schedule.
- (3) The Secretary of State may by order-
 - (b) add an organisation to Schedule 2;
 - (c) remove an organisation from that Schedule;
 - (d) amend that Schedule in some other way.
- (4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.
- (5) For the purposes of subsection (4) an organisation is concerned in terrorism if it-
 - (a) commits or participates in acts of terrorism,
 - (b) prepares for terrorism,
 - (c) promotes or encourages terrorism, or
 - (d) is otherwise concerned in terrorism.

Deproscription: application.

- 4. -** (1) An application may be made to the Secretary of State for the exercise of his power under section 3(3)(b) to remove an organisation from Schedule 2.
- (2) An application may be made by-
 - (b) the organisation, or
 - (c) any person affected by the organisation's proscription.
 - (3) The Secretary of State shall make regulations prescribing the procedure for applications under this section.
 - (4) The regulations shall, in particular-
 - (a) require the Secretary of State to determine an application within a specified period of time, and
 - (b) require an application to state the grounds on which it is made.

Deproscription: appeal.

- 5. -** (1) There shall be a commission, to be known as the Proscribed Organisations Appeal Commission.
- (2) Where an application under section 4 has been refused, the applicant may appeal to the Commission.
 - (3) The Commission shall allow an appeal against a refusal to deproscribe an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.
 - (4) Where the Commission allows an appeal under this section by or in respect of an organisation, it may make an order under this subsection.
 - (5) Where an order is made under subsection (4) the Secretary of State shall as soon as is reasonably practicable-
 - (b) lay before Parliament, in accordance with section 118(3), the draft of an order under section 3(3)(b) removing the organisation from the list in Schedule 2, or
 - (c) make an order removing the organisation from the list in Schedule 2 in pursuance of section 118(4).
 - (6) Schedule 3 (constitution of the Commission and procedure) shall have effect.

Offences Membership.

- 10. -** (1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.
- (2) It is a defence for a person charged with an offence under subsection (1) to prove-
 - (a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and
 - (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.
 - (3) A person guilty of an offence under this section shall be liable-
 - (d) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or
 - (e) on summary conviction, to imprisonment for a term not

exceeding six months, to a fine not exceeding the statutory maximum or to both.

(3) In subsection (2) "proscribed" means proscribed for the purposes of any of the following-

- (b) this Act;
- (c) the Northern Ireland (Emergency Provisions) Act 1996;
- (d) the Northern Ireland (Emergency Provisions) Act 1991;
- (e) the Prevention of Terrorism (Temporary Provisions) Act 1989;
- (f) the Prevention of Terrorism (Temporary Provisions) Act 1984;
- (g) the Northern Ireland (Emergency Provisions) Act 1978;
- (h) the Prevention of Terrorism (Temporary Provisions) Act 1976;
- (i) the Prevention of Terrorism (Temporary Provisions) Act 1974;
- (j) the Northern Ireland (Emergency Provisions) Act 1973.

Support.

11. - (1) A person commits an offence if-

- (a) he invites support for a proscribed organisation, and
- (b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 14).

(2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is-

- (b) to support a proscribed organisation,
- (c) to further the activities of a proscribed organisation, or
- (d) to be addressed by a person who belongs or professes to belong to a proscribed organisation.

(3) A person commits an offence if he addresses a meeting and-

- (a) the purpose of his address is to encourage support for a proscribed organisation or to further its activities, or
- (b) he knows that the meeting is to be addressed by a person who belongs or professes to belong to a proscribed organisation.

(4) In subsections (2) and (3) "meeting" means a meeting of three or more persons, whether or not the public are admitted.

(5) A person guilty of an offence under this section shall be liable-

- (a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or
- (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

13.189 Provision for proscription of terrorist organisations, for revocation of the proscription and review should be made. The issue also arises to whom the administration of the Act should be assigned. It is considered that the Bill should provide that 'Minister' means the Minister to whom the administration of this Act has been assigned by the President by proclamation in the Gazette. The President should also be empowered to determine that any power or duty conferred or imposed by the Act on such Minister, shall be exercised or carried out by that Minister after consultation with one or more other Ministers. (Section 91(2) of the Constitution of 1996 provides that the President appoints Ministers and assigns their powers and functions.) The project committee and Commission also propose the following provisions on terrorist organisations, proscription, revocation of proscription and review:

4(1) Any person commits an offence if he belongs or professes to belong to a proscribed organisation.

4(2) A person guilty of an offence under this section shall be liable-

(a) on conviction to imprisonment for a term not exceeding ten years, to a fine or to both, or

4(3) For purposes of this section —

(a) *member* of an organisation includes:

- (i) a person who is an informal member of the organisation; and
- (ii) a person who has taken steps to become a member of the organisation;

(b) *proscribed organisation* means an organisation in relation to which a declaration by the Minister under section 4(5) is in force.

4(4) The Minister may by notice in the *Gazette* declare an organisation to be a proscribed organisation, if he or she is satisfied on reasonable grounds that one or more of the following paragraphs apply in relation to the organisation:

- (a) the organisation has committed, or is committing, a terrorist act (whether or not the organisation has been charged with, or convicted of, the terrorist act);
- (b) a member of the organisation has committed, or is committing, a terrorist act on behalf of the organisation (whether or not the member has been charged with, or convicted of, the act);
- (c) the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation;
- (d) the organisation has endangered, or is likely to endanger, the security or integrity of the Republic or another country.

4(5) A declaration comes into force at the time it is published in the *Gazette* and stays in force until:

- (a) it is revoked; or
- (b) the beginning of a day (if any) specified in the declaration as the day the declaration ceases to be in force.

4(6) The Minister must by notice in the *Gazette* revoke a declaration made under subsection (4) in relation to an organisation if the Minister is satisfied on reasonable grounds that none of the paragraphs in subsection (4) applies in relation to the organisation.

4(7) A revocation comes into force at the time it is published in the *Gazette*.

4(8) If a proscribed organisation makes an application in writing to the Minister alleging that there are reasonable grounds why its declaration should be revoked, the Minister must without delay decide the application and notify the applicant accordingly.

4(9) The applicant may apply to a High Court for judicial review of the Minister's decision.

4(10) When an application is made under subsection (9), the judge shall, without delay —

- (a) examine, in private, any security or criminal intelligence reports considered in proscribing the organisation and making the Minister's decision and hear any other evidence or information that may be presented by or on behalf of the National Director of Public Prosecutions and may, at the request of the National Director of Public Prosecutions, hear all or part of that evidence or information in the absence of the applicant and any counsel representing the applicant, if the judge is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person;
- (b) provide the applicant with a statement summarizing the information available to the judge so as to enable the applicant to be reasonably informed of the reasons for the Minister's decision, without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person;
- (c) provide the applicant with a reasonable opportunity to be heard; and
- (d) determine whether the Minister's decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, order that the applicant no longer be a listed entity.

4(11) The Minister shall cause to be published, without delay, in the Gazette notice of a final order of a court that the applicant no longer be a proscribed organisation.

4(12) A proscribed organisation may not make another application under subsection (8), except if there has been a material change in its circumstances since the time when the organisation made its last application.

H. SABOTAGE

(a) Evaluation contained in discussion paper 92

13.190 The project committee questioned the separate offence of "sabotage" and raised the question whether the crime of sabotage should not rather be included in the

definition of “terrorist act”, especially in view of the definition of terrorist act setting out that “terrorist act” includes disrupting any public service, the delivery of essential services to the public or to create a public emergency and creating general insurrection in a state. The project committee’s point of view was that it should remove from the Bill those aspects which will possibly cause unnecessary litigation, debate or concern. The committee noted that the under the *Internal Security Act* of 1982 two offences exist presently, namely “terrorism”¹ and “sabotage”². The committee noted the way in which clause 5 is drafted and that it largely corresponds with section 54(3) of the *Internal Security Act*. The project committee was of the view that the required intent for the different acts to constitute sabotage is the same as the intent required to constitute a terrorist act and should also fall under the definition of terrorist act. The committee was therefore of the view that it can do away with clause 5 (sabotage) altogether as it seems to be covered by the definition of “terrorist act”. The project committee noted on the matter of the possible over-breadth of the offence of sabotage, and leaving out unnecessary wording, when considering clause 5(a)(vi), that any person who commits an act with the intent to impede the free movement of traffic on land commits the offence of sabotage and furthermore, that the taxi blockades or farmers

¹ 54(1) Any person who with intent to -(a) overthrow or endanger the State authority in the Republic; (b) achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic; induce the Government of the Republic to do or to abstain from doing any act or to adopt or to abandon a particular standpoint; or ... in the Republic or elsewhere - (i) commits an act of violence or threatens or attempts to do so; (ii) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act; (iii) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (i) or act referred to in paragraph (ii), or to aid in the commission, bringing about or performance thereof; or (iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat, shall be guilty of the offence of terrorism and liable on conviction to the penalties provided for by law for the offence of treason.

² 54(3) Any person who with intent to -(a) endanger the safety, health or interests of the public at any place in the Republic; (b) destroy, pollute or contaminate any water supply in the Republic which is intended for public use; (c) interrupt, impede or endanger at any place in the Republic the manufacture, storage, generation, distribution, rendering or supply of fuel, petroleum products, energy, light, power or water, or of sanitary, medical, health, educational, police, fire-fighting, ambulance, postal or telecommunication services or radio or television transmitting, broadcasting or receiving services or any other public service; (d) endanger, damage, destroy, render useless or unserviceable or put out of action at any place in the Republic any installation for the rendering or supply of any service referred to in paragraph (c), any prohibited place or any public building; (e) cripple, prejudice or interrupt at any place in the Republic any industry or undertaking or industries or undertakings generally or the production, supply or distribution of commodities or foodstuffs; or (f) impede or endanger at any place in the Republic the free movement of any traffic on land, at sea or in the air, in the Republic or elsewhere - (i) commits any act; (ii) attempts to commit such act; (iii) conspires with any other person to commit such act or to bring about the commission thereof or to aid in the commission or the bringing about of the commission thereof; or (iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit such act, shall be guilty of the offence of sabotage and liable on conviction to imprisonment for a period not exceeding twenty years.

blockading roads or highways that we see from time to time, qualify as acts of sabotage. It also considered that such an act would in any event constitute an offence under the *Traffic Act*. The committee further noted that under clause 5(a)(v) any person who commits an act with intent to interrupt any industry or undertaking, in the production, supply or distribution of commodities or who would in other words participate in a strike would be committing sabotage.³

13.191 This clause was considered above and the project committee's view was that it should be deleted. The committee considered that the definition of "terrorist act" provide sufficiently for the offences presently constituting sabotage.

(b) Comment on discussion paper 92

13.192 The SAPS: Legal Component: Detective Service and Crime Intelligence suggests that in view of the observations on "terrorist bombings" as a separate offence, the same arguments in respect of the difference between the forms of intent required respectively in respect of the definition of "terrorist act" and in the offence of "sabotage", they request that the offence of sabotage be retained as a separate offence, in order to cater for

³ The committee also took into account the criticism expressed in the past on the over-breadth of the offence. See Prof Anthony Mathews *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* Kenwyn: Juta 1986 who remarked as follows:
 "A person who organises a school boycott will have committed an act 'which interrupts ... educational services' and will therefore be chargeable for sabotage. An unlawful strike will usually 'interrupt ... the production, supply or distribution of commodities or foodstuffs' and therefore fall under the broad mantle of the offence of sabotage. These two simple examples provide chilling evidence of the potential impact of security crimes on protest politics and industrial action in South Africa."
 In "The newspeak of sabotage" 1988 SACJ 175 - 186 Prof Mathews remarked as follows on p 179: "The range of activities that falls under one or other (or both) of the crimes of subversion and sabotage is truly immense. The activities which constitute the criminal conduct for subversion, and the guilty mind requirement for sabotage, cover most kinds of prejudicial involvement in industry and manufacturing, in the provision of facilities, services and goods, in the free flow of traffic, in the functions of the security forces and in relations between the races. It does not appear to matter, moreover, that the prejudicial involvement is trivial (interrupting the teaching of one small class of pupils) rather than serious or far-reaching (closing down all the schools in a large area). On the face of it all forms of interference are covered with the result that tripping up a waiter in a diningroom and blowing up a goods train are both instances of sabotage because in each case the perpetrator has committed an act which interrupts 'the supply or distribution of commodities or foodstuffs'. Statutes that are overbroad, as this one is, are simultaneously vague because it is virtually impossible for the citizen to determine when the security authorities will strike. ...
 No amount of linguistic straining, moreover, can avoid one absurdity that flows from the conviction of the accused in *S v Nel* for the crime of sabotage. The accused was a miner who had blown up twelve mine offices with dynamite to settle a private grudge against a mine manager. After holding that a person could be convicted of sabotage without proof of an intention to prejudice the interests of the state or the community, the court decided that the accused was guilty of the crime of sabotage even if his objective was one of private vengeance; his actions need not have a political colouring. ..."

the cases where considerable damage is caused to key infrastructure or installations, and it is possible that the act is not committed with the intent to coerce the Government or the population, or was committed for a political or other cause.

(c) Evaluation and recommendation

13.193 The project committee does not consider the SAPS's reasoning persuasive for retaining the offence of sabotage in the Bill. The committee agrees that it will not always be possible to prove that an act was committed with the intent to coerce the Government or the population, or was committed for a political or other cause. The project committee notes that it has expanded the definition of terrorist act drastically by including aspects contained in the Australian proposed legislation, such as where someone seriously interferes with an information system; a telecommunications system; a financial system; a system used for the delivery of essential government services; a system used for, or by, an essential public utility; or a system used for, or by, a transport system. It is considered that the expanded definition of "terrorist act" provides sufficiently for the offences presently constituting sabotage. The committee considers that there is no more necessity for the inclusion of an offence of sabotage. The Commission agrees with this point of view.

I. CLAUSE 5: HIJACKING

(a) Evaluation contained in discussion paper 92

13.194 In *S v Hoare*¹ the court considered the offences under the *Civil Aviation Offences Act*, 1972 and said the following:

“It can, I think, be accepted that, if the accused's conduct can be properly described as a hi-jack in the popular sense, it was a most unusual one. It was not a planned hi-jack specifically embarked upon to escape from an oppressive regime, or to advance some political or sociological theory, or to exact some political or financial advantage by taking hostages. The accused's conduct in getting onto the plane and persuading the captain by methods which will be discussed in this judgment to fly them to Durban was not part of a long term plan but arose as a result of the providential arrival of the Air India plane on a routine flight at a time when the accused were in a perilous situation of their own creation when their plan to take over the Seychelles by force of arms was in serious danger of collapse. The arrival of the plane was, in a real sense, *a deus ex machina* and once the captain of the aircraft had been persuaded (by whatever means) to fly them to Durban and once arrangements were made to monitor him during the flight they had no occasion to treat the members of the crew or the passengers impolitely or uncivilly. This was wholly unnecessary as long as their decision to fly to Durban was respected and very little can be made out of the fact that the accused behaved well on the plane. However, even if these facts are accepted in general outline and the accused's conduct does not amount to a typical hi-jacking (as it is popularly understood), it must not be forgotten that the Civil Aviation Offences Act 10 of 1972 does not make hi-jacking (as such) a specific offence nor does it seek to distinguish between differing types of unlawful interference in the operations of civil aviation, for example, between cases where the motive is self-preservation and cases involving political or financial blackmail or violent intimidation. The Act treats virtually every unlawful interference with the smooth operation of civil aviation with the utmost seriousness and takes little or no account of the motive for such interference, as can be readily appreciated when it is observed that the Act imposes a minimum sentence of five years' imprisonment for any contravention of s 2 (1) of the Act regardless of the motives of the perpetrator.”

13.195 Although “any interference” with the navigation of an aircraft is already covered in the *Civil Aviation Offences Act* of 1972, the committee recommended that a specific offence of hijacking of an aircraft be created, in addition to the existing offences under the *Civil Aviation Offences Act*. The committee suggested that the word “detained” is enough to cover “confined or imprisoned” in clause 6(a) and should be amended accordingly. The project committee also noted that clause 6(d) seeks to provide that it is an offence to cause an aircraft to deviate *materially* from its course. The committee supposed that it would normally mean that when a person unlawfully seizes or exercises control of an aircraft with the intent to cause the aircraft to deviate from its course that there will be a material geographical deviation. The committee was, however, of the view that “*materially*” should be deleted and that the Bill should make it an offence if someone causes an aircraft to *deviate* from its flight-plan. The committee considered also that there is no need to set out the sentence to be imposed under this clause as it is the same sentence as provided for

¹ 1982(4) SA 865 (T) at 871D - I.

already in clause two, namely imprisonment for life.

(b) Comment on discussion paper 92

13.196 Ms Schneeberger points out that they have no recommendation or objection to the inclusion of this section but would simply like to point out the following: Paragraphs (a) – (d) of section 6 are additions to an offence of hijacking formulated in Article 1 of the Convention for the Suppression of the Unlawful Seizure of Aircraft, to which South Africa is a party and accordingly is obliged to give effect to the Convention through its domestic law. She notes that technically therefore the added dimension of the intent may create differences in our domestic law that are not countenanced by the Convention. She remarks that it is, however, difficult to conceive of a situation where a hijacking would not be accompanied by one of the intentions listed in section 6. She notes that in an exceptional case, moreover, the offence in section 2(1) of the *Civil Aviation Offences Act* will remain and can therefore deal with such unusual situations. She points out that South Africa's international obligations under the Convention are therefore covered.

13.197 The Chief: Military Legal Services considers that the explanatory note given in the footnote to the clause is inconsistent with the spirit of the Bill regarding the punishment for the offence of highjacking. They note that the Bill makes provision for a sentence in respect of each offence and suggest that the deleted penalty be retained. Mr H Wildenboer² comments that the main objects of the 1963 Tokyo Convention were—

- to ensure that persons committing crimes aboard an aircraft in flight, or on the surface of the high seas or any area outside the territory of any country on committing acts aboard such aircraft to the danger of air safety, would not go unpunished simply because no country would assume jurisdiction to apprehend them;

²

Legal Adviser of the South African Civil Aviation Authority.

- for protective and disciplinary purposes to give special authority and powers to the aircraft commander, member of the crew, and even passengers.¹

13.198 Mr Wildenboer points out that the shortcomings of the Tokyo Convention were said to be with regard to hijacking, that it is fair to say that the Tokyo Convention made no frontal attack upon this offence but that it dealt in only a limited manner with hijackers, for example, by enabling hijackers to be taken into custody or subjected to restraint in the same manner as other offenders, and by providing for restoration of control of the hijacked aircraft to the lawful commander, and for the continuance of the journey of passengers and crew. He notes that this aspect was recognised by the court in *S v Hoare*. Mr Wildenboer further points out that the 1970 Convention was confined to hijacking, leaving the matter of armed attacks, sabotage and other forms of in violent action directed against civil aviation and aviation facilities to be dealt with by a later diplomatic conference. He explains that the Convention did not fully apply the *aut punire, aut dedere* principle (ie the country where the offender might happen to be should prosecute him or her or extradite him or her to a country having jurisdiction to try him or her for the offence) but provided a reasonably adequate framework for the exercise of jurisdiction with obligations of extradition or rendition according to the existence of an extradition treaty or of a reciprocal practice of rendition. He also states that the 1971 Convention covered, moreover, the related aircraft crimes of armed attacks, sabotage and other forms of violence and intimidation directed against civil aviation including the appearance of bomb-hoax extortion as a new kind of menace undermining public confidence in the security of international air transport and prejudicing the administrative and financial conduct of air services.

13.199 Mr Wildenboer notes that section 2(1)(g) of the Act to a certain extent incorporates the supplement to article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation by the Protocol for the Suppression of Unlawful Acts at Airports Serving International Civil Aviation. He points out that at the moment the *Civil Aviation Offences Act* is being scrutinized by a committee consisting of members of the Department of Transport, the Authority, South African Airways, Airports Company Limited and the South African Police Service with a view to the drafting of a new *Civil Aviation Offences Act* which would inter alia also reflect the amendments of the relevant Conventions which have not been adopted by the Republic.

13.200 Mr Wildenboer remarks that in the light of the wide wording of the expression "terrorist act" it would see that acts contemplated in section 2 of the *Civil Aviation Offences*

¹ Mr Wildenboer notes the author Sheare -Starkes *International Law* (1994) at p 213 — 214).

Act would also resort under the definition and a prosecuting authority would therefore have a choice of prosecuting in terms of either this Bill or the 1972 Act. He says it has, however, to be pointed out that in terms of clause 2 of the proposed Bill a sentence of life imprisonment has to be imposed while a maximum sentence of 30 years imprisonment may be imposed in terms of section 2(1) of the Act. He notes that the sentence of life imprisonment would seem to be a mandatory sentence which does not give the court a discretion in sentencing. Mr Wildenboer points out that clause 6 of the proposed Bill makes provision for the hijacking of an aircraft as an offence, based on the recommendation of the Court in *S v Hoare*. He supports the wording of the proposed clause.

13.201 Mr Wildenboer states that considering clause 15(a), (b)(ii) and (b)(vii) with relation to the jurisdiction of the Courts it appears that jurisdiction will only exist in respect of South African aircraft. He points out that section 3 of the *Civil Aviation Offences Act* makes provision in regard to acts or omissions taking place outside the Republic and for jurisdiction in respect of non South African aircraft. He explains that in terms of section 3(2), acts committed outside the Republic of South Africa and on board of non-South African aircraft are deemed to have been committed within the territory of the Republic. He suggests that clause 15 be amended to make provision for jurisdiction in respect of non-South African aircraft, noting that the facts in *S v Hoare* fall within the ambit of section 3(2)(a) of the Act.

13.202 Mr Wildenboer suggests with regard to the wording of clause 15(b)(vii) that the wording be amended to read as follows: "On board an aircraft in respect of which the operator is licenced in terms of the *Air Services Act* 1990 (Act No 115 of 1990) or the *International Air Services Act* 1993 (Act No 60 of 1993)". He notes that the word licensee is defined in section 1 of both Acts. He further suggests, in the light of the content of clause 6 that the provisions of section 6 of the *Civil Aviation Offences Act* (powers of commanders of aircraft and certain other persons on board on aircraft) be incorporated into the Bill. He considers that it is essential that these powers, which may be exercised in respect of an offence contained in section 2(1) also be available in the event of a contravention of clause 6 of the Bill. In his view there is no reason to differentiate between an offence as contemplated in clause 6 of the Bill and an offence referred to in section 2(1) of the Act. He also notes that should any of the offences listed in section 2(1) of the Act fall within the ambit at the definition of a "terrorist act" as set out in clause 1 of the Bill it would be possible to institute a prosecution in terms of the Bill which would enable the State (unlike in the case of a prosecution in terms of Act No 10 of 1972) to utilize the provisions of clauses 16, 20 and 22 of the Bill. He also considers that the proposed insertion of section 2(1)(h)² into Act 10 of

² (h) unlawfully and intentionally uses any device, substance or weapon and performs an act of violence against a person at a designated airport, airport, heliport or navigational facility.

1972 is unnecessary and that the proposed wording could be incorporated into section 2(1)(g)³ of the Act.

13.203 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal comment that the sentences prescribed in clauses 6 and 7 do not make sense. They explain that upon a conviction for the prohibited acts pertaining to an aircraft, the sentence would be life imprisonment, however, save for the killing of a person or persons, the prescribed sentence in clause 7 for even worse acts committed aboard a ship is a fine or imprisonment not exceeding 20 years.

(a) **Evaluation and recommendation**

³

(g) performs any other act which jeopardizes or may jeopardize the operation of an air carrier or the safety of a designated airport, airport, heliport, aircraft in service or of persons or property thereon or therein or which may jeopardize good order and discipline at a designated airport, airport or heliport or on board an aircraft in service.

13.204 Although “any interference” with the navigation of an aircraft is already covered in the *Civil Aviation Offences Act* of 1972, the committee recommends that there is still a need for a specific offence of hijacking of an aircraft to be created, in addition to the existing offences under the *Civil Aviation Offences Act*. The project committee agrees with Mr Wildenboer on amending clause 15 as he suggests. The committee considers that the clause should provide that on conviction the offender should be liable to imprisonment for life. The court would then have a discretion when imposing sentence and life imprisonment would be the maximum to be imposed. Imprisonment for life would not be a mandatory minimum sentence as one respondent seems to argue. The committee does not agree that the powers of commanders of aircraft and certain other persons on board on aircraft be incorporated into the Bill. Section 2 of the *Civil Aviation Offences Act* should also provide that it constitutes an offence if any person unlawfully and intentionally uses any device, substance or weapon and performs an act of violence against a person at a designated airport, airport, heliport or navigational facility, as was proposed in the discussion paper.¹ The Commission agrees with these recommendations made by the project committee.

J. CLAUSE 6: ENDANGERING THE SAFETY OF MARITIME NAVIGATION

(a) Evaluation contained in discussion paper 92

13.205 The project committee noted that in the old days piracy was maritime robbery. The committee was of the view that any interference with a ship or a navigational facility which endangers maritime safety should qualify as an offence. The project committee also considered that in view of the provisions of the *Riotous Assemblies Act* there is no need set out separately in clause 7(h) that attempting or conspiring or instigating any act contemplated in clause 7 constitutes an offence.²

(b) Comment on discussion paper 92

13.206 Ms Schneeberger comments that they note that section 7 deals with ships registered in the Republic, whereas section 15 on jurisdiction deals with offences committed

¹ This offence would bring the *Civil Aviation Offences Act*, 1972 in line with the provisions of the *Protocol for the Suppression of Violence at Airports serving International Civil Aviation*.

² Section 18(1) of the *Riotous Assemblies Act* provides that any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable. In terms of section 18(2) any person who conspires with any other person to aid or procure the commission of or to commit, or incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

on board a ship flying the flag of the Republic, and it seems to be a discrepancy. It is, however, beyond their expertise to comment on whether this would amount to a conflict between the two provisions, but they suggest it be noted. She further remarks that they also note that Article 3 of the Convention for the Suppression of Unlawful Acts Against Maritime Navigation provides in paragraph 2(c), for threats aimed at compelling a person to commit one of the offences listed. She points out that this element of the crime has not been incorporated into section 7. She states that article 2(c)(i) of the Convention, as they interpret it, is however a discretionary clause, and the offence is only covered if it is provided for under national law. It is therefore not essential to provide for threats as an offence in terms of South Africa's international obligations under this Convention. Ms Schneeberger suggests that the Commission may wish to consider including the element of a threat as some of the crimes under the Bill include threats whereas others don't. She states that since a viable and serious threat could have as serious a consequence as the terrorist act itself, it may be necessary to consider providing for threats in respect of all the offences under the Bill.

13.207 The Chief: Military Legal Services suggests that the word "seriously" in clause 7(e) be omitted or, alternatively, if it were retained, that a definition be included in clause 1 on "seriously damages and seriously interferes with their operation".

(c) Evaluation and recommendation

13.208 It should constitute an offence if someone interferes with, seizes or exercises control over a ship by force or threat, destroys a ship or causes damage to such ship or to its cargo which is likely to endanger the safe navigation of that ship or endangers maritime safety. The project committee notes that the concept of *seriously interfere* and *seriously damage* is also applied extensively in other jurisdictions such as the UK and Australia,³ without defining the meaning thereof. The committee considers that the concept *seriously* denotes the degree of interference required, that it is self-explanatory and that a definition would be superfluous. The committee considers that since section 18 of the *Riotous Assembly Act* deals with threats it is unnecessary to make provision for threats in this clause. The project committee also recommends that there should not be reference in this provision to a fine to be imposed. The committee and Commission agrees with Ms

³ For example clause (2) of the *Security Legislation Amendment (Terrorism) Bill 2002* provides that action falls within the subsection if it: (a) involves serious harm to a person; or (b) involves serious damage to property; or (c) endangers a person's life, other than the life of the person taking the action; or (d) creates a serious risk to the health or safety of the public or a section of the public; or (e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to: . . .

Schneeberger in so far as the provisions should be consistent and recommends that references to threats should be deleted in this and the other clauses.

K. CLAUSE 7: BOMBING OFFENCES

(a) Evaluation contained in discussion paper 92

13.209 The project committee raised the question in the discussion paper whether the committee can say in the light of the definition of terrorist act, in regard to clause 2 (offences relating to terrorist acts) and the other provisions in the Bill, that there is any need for providing separately for terrorist bombings. The committee noted the *International Convention for the Suppression of Terrorist Bombings*, and thought that an attempt was probably made by the drafters to get everything possible into the proposed Bill, but that it may be an unnecessary duplication.⁴ The SA Police Service were of the view that the intent required under this clause is different from the intent required for terrorist activity and could be proved much easier than the intent required to qualify as a “terrorist act”. The SA Police Service consequently thought that there is a need for dealing with terrorist bombings in a separate clause. The committee was of the view that “terrorist bombings” is covered by “terrorist acts” and that it is really the prosecutor’s problem in relation to the required intent because surely if a person performs a bombing act his act would qualify as coercing or inducing etc other persons to do or abstain from doing things. The committee invited specific comment on the question whether there is any need for making provision separately for terrorist bombings in the Bill.

⁴ It is noteworthy that the English *Terrorism Bill* dealt with terrorist bombings by addressing the issue of jurisdiction and extradition. The clause as submitted to the House of Lords provided as follows on the issue of jurisdiction:

62. (1) If-

- (a) a person does anything outside the United Kingdom as an act of terrorism or for the purposes of terrorism, and
- (b) his action would have constituted the commission of one of the offences listed in subsection (2) if it had been done in the United Kingdom,

he shall be guilty of the offence.

- (a) The offences referred to in subsection (1)(b) are-

- (c) an offence under section 2, 3 or 5 of the Explosive Substances Act 1883 (causing explosions, etc.),
- (d) an offence under section 1 of the Biological Weapons Act 1974 (biological weapons), and
- (e) an offence under section 2 of the Chemical Weapons Act 1996 (chemical weapons).

13.210 The question also arose whether the exemption contained in clause 8(2)⁵ of the Bill should be retained and, if so, where in the Bill it should be set out. The committee noted that the exemption for the military seemed to apply solely in relation to bombings, and enables the members of the military in an armed conflict to perform bombings as part of their official duties. This exemption seems to be subject to a war-time situation although the military wouldn't be able to perform terrorist acts. The committee noted that the military may detonate suspected packets and that the intentional detonation of explosives would theoretically fall within clause 8(1) although it would also be part of their legitimate crime prevention exercises. Another suggestion considered by the committee was to insert a clause in the Bill which provides that the Bill binds the State save for detonations or bombings carried out by the military during an armed conflict and in the exercise of their official duties. The committee realized that the military taking hostages for example can hardly be exempted, even in a time of war. The committee wondered, however, whether the drafters didn't intend the exemption contained in clause 8(2) to be somewhat broader than actually detonations or bombings.⁶ The project committee noted that the drafters said in the Bill that detonations constitute an offence but that this clause doesn't apply to the military if they undertake activities in the exercise of their official duties during an armed conflict. The committee also noted that clause 8(2) refers to "the military forces of a State" and not the government of the day or the State and that it could be of any state even outside forces. The committee further noted article 19 of the Convention for the Suppression of Terrorist Bombings. The committee was of the view that if an exemption were to be included in the Bill, an audit ought to be made in respect of each offence created under the Bill. The committee considered that the question then need to be asked whether the military should be exempted or not and from what they should be exempted. The committee considered that there shouldn't be an omnibus exemption. The committee however also considered clause 25 of the Bill which provided that the definition of "terrorist acts" must be interpreted in accordance with the principles of international law. The committee was of the view that if the military or armed forces were to act in accordance with the applicable conventions, one of which is the Terrorist Bombing Convention, clause 25 was enough and that there would be no need for an exemption clause.

(b) Comment on the discussion paper

⁵ 8(2) This section does not apply to the military forces of a State - (a) during an armed conflict; or (b) in respect of activities undertaken in the exercise of their official duties.

⁶ The drafters however suggested that criticism may be raised if the military forces of the State were to be exempted from causing death or serious bodily injury under other clauses of this Bill and considered that the savings clause should apply specifically to terrorist bombings only.

13.211 Ms Schneeberger comments that they support the inclusion of a separate offence for terrorist bombings in the Bill and that they agree with the drafters that the intent is different from the more stringent test for “terrorist act”. She remarks that the specificity of this crime, which is based on the International Convention for the Suppression of Terrorist Bombings, will allow for compatibility with other legal systems, thereby enabling South Africa to fulfil the requirement for specificity in an extradition request. She notes however that clause 8(1) includes the ancillary offences of conspiracy, instigation and attempt. She says that as these ancillary offences have been omitted from other sections of the Bill on the basis that they are included in the *Riotous Assemblies Act* it would seem to be consistent to omit them here as well. She remarks that this however is subject to their point that it is essential to ensure that all ancillary crimes, including accomplices and persons acting with a common purpose are covered by the Bill. Ms Schneeberger explains that the corresponding clause was notoriously controversial when it was negotiated in the UN Ad Hoc Committee. She remarks that as the drafters noted, it was only included in the exceptional circumstance of the Terrorist Bombings Convention because it was accepted that the military might have to detonate explosives, and that the compromise however was that there should be equal treatment between armed forces and military forces i.e. that the Convention would also not apply to armed forces during armed conflict. She points out that this is on the basis of equality for treatment between military forces and armed forces in armed conflict in accordance with international humanitarian law, and specifically the Second Additional Protocol to the Geneva Conventions of 1949.

13.212 Ms Schneeberger says that they are of the opinion that the same equality of treatment will have to be reflected in the Bill in order to accord with our obligations under international law, both in terms of the Terrorist Bombings Convention and the Second Additional Protocol. She suggests that if this was done in paragraph 2 of section 8 it should read as follows: “This section does not apply to armed forces during armed conflict and to military forces of a State in respect of activities undertaken in the exercise of their official duties”. She points out that such a formulation however incorporates all the controversy of the international negotiations and has an inflexibility that may not be suited to legislation of this kind. She comments that an alternative can be to utilise the interpretation clause in clause 25 of the Bill to deal with the difficult situation of armed conflicts and military and other armed forces, and clause 25 could then be amended to read: “The provisions of this Act shall be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles”.

13.213 Ms Schneeberger notes that utilising the interpretation clause is admittedly an indirect method of dealing with the difficulties raised by the current formulation of paragraph

2 of clause 7. She considers that an indirect method might, however, in this instance may well be preferably as it allows for the necessary flexibility for the courts to deal with a variety of situations. She considers that amending section 25 in the manner suggested above would also have the added advantage of ensuring that the entire Bill, and not just the definition of terrorist act, are consistent with our international obligations. She notes that it is for this reason that they prefer the latter formulation i.e. the deletion of paragraph 2 of section 8 and the amendment of section 25.

13.214 The SAPS: Legal Component: Detective Service and Crime Intelligence comments that there is a difference between the intent required for the offence of *“terrorist bombing”*, as opposed to the intent required in the definition of a *“terrorist act”*. The SAPS explains that in the Terrorist Bombing Convention, the intent required for a terrorist act is *“with the intent to cause death or serious injury; or with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.”* The SAPS points out that on the other hand, the intent required for a terrorist act, in terms of the Bill, is *“to intimidate, coerce or induce any government or persons, the general public or any section thereof, or disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or to create unrest or general insurrection in a State”*. The SAPS notes, furthermore, that the *Terrorist Bombing Convention* specifically requires the broader offence to be enacted. The SAPS states that they hold the opinion that separate provision should therefore be made for terrorist bombings, as the widening of the definition of *“terrorist act”* might make the definition unacceptable. The SAPS proposes that the offence of *“terrorist bombing”* should be retained as either a separate offence or that the intent referred to in the *Terrorist Bombing Convention* should be added to the definition of a *“terrorist act”* in the Bill, together with the other elements of the offence of terrorist bombing.

13.215 The SAPS: Legal Component: Detective Service and Crime Intelligence notes that it is appreciated that a decision will eventually have to be made on the question whether one should have only a very comprehensive definition of a *“terrorist act”* and to criminalise that, or to have a comprehensive definition of a *“terrorist act”* which is criminalised, as well as separate offences which specifically give effect to the respective international instruments on terrorism. The SAPS explains that it is in favour of the latter approach, simply to ensure legal certainty on questions such as jurisdiction and extradition and more serious penalties. The SAPS points out that it should be mentioned in this respect that the penalties in the Bill should be seriously reviewed to ensure that it is not less than existing penalties of related offences drawing attention particularly to the offence of abduction or kidnapping, and the proposed offence of kidnapping of diplomats.

13.216 The SAPS: Legal Component: Detective Service and Crime Intelligence states that it is a fact that the types of bombings as set out in the *Terrorist Bombing Convention*, namely bombings at public places, are regarded in terms of that *Convention* as terrorist bombings, despite the fact that they are not linked to the type of intent required in the usual definitions of terrorist acts or terrorism. The SAPS notes that “terrorism” is described in the British *Terrorism Act 2000* as follows:

- (a) In this Act, terrorism” means the use or threat of action where-
 - (ii) the action falls within subsection(2),
 - (iii) the use of threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (iv) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (b) Action falls within this section if it-
 - (ii) involves serious violence against a person,
 - (iii) involves serious damage to property,
 - (iv) endanger a person’s life, other than the person committing the action,
 - (v) creates a serious risk to the health or safety of the public or a section of the public, or
 - (vi) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

13.217 The SAPS: Legal Component: Detective Service and Crime Intelligence considers that even this definition is indicative of acknowledging that the use of explosives or firearms need not to be aimed at influencing or intimidating government, although the British definition still requires that the use of violence should at least be for some cause of a political, religious or ideological cause, to qualify as terrorism. The SAPS remarks that it is obvious that the thinking behind the *Terrorist Bombing Convention* is that the detonation of an explosive device in a public place with the intent to cause death or serious bodily injury or major economic loss, is so abhorrent that it falls within the same category as terrorism, despite the fact that it was not done with a political, religious or ideological cause or to coerce the government or the public. The SAPS remarks that one cannot but agree with this thinking, and that one might be able to prove that an individual has been responsible for the placing of an explosive device at a court or at a police station, although the motive might be related to a case completely remote from an ideological, political or religious cause, for

example, mere retribution, a person dissatisfied, because the court has acquitted the rapist of his child. The SAPS points out that the motive in this case does not make the act less abhorrent, and it should be placed on the same footing of a terrorist act, at least for purposes of investigation and sentence.

13.218 The SAPS: Legal Component: Detective Service and Crime Intelligence also says that the argument of the Commission is supported, namely that it might not be necessary to enact the exemption clause, noting that this aspect would probably also be commented on by the State Law Adviser International Law. The SAPS believes that the latter have in the past expressed reservations against the phrase “that the definition of “terrorist act” must be interpreted against the principles of international law, in particular international humanitarian law, in order not to derogate from those principles”, the argument of the State Law Advisers having been that the principles of the international law which are incorporated in South African Law are applicable, irrespective of the proposed provision.

13.219 The South African Human Rights Commission (SAHRC) comments that they take note of the argument that terrorist bombings would form part of the offence “terrorist act”, as defined in clause 1, and also note the argument of the drafters that separate provision was made for terrorist bombing because it would be easier for the prosecution to prove the required intent in the case of a terrorist bombing than it would be in the case of an act of terrorism. The SAHRC points out that for the prosecution authorities to prove an act of terrorism in terms of clause 1 it will have to establish an intentional link between the act that was committed and certain objectives.⁷ The SAHRC remarks that if terrorist bombings are removed from the Bill as a distinct offence, a prosecutor will have to prove above reasonable doubt that the accused planted and detonated a bomb with the intent to *intimidate, disrupt and cause unrest*. The SAHRC remarks that the aforesaid are in the first place subjective objectives and may be difficult to verify independently. The SAHRC points out that in the case of a terrorist bombing, as provided for by clause 7, the prosecution will have to prove an intentional link between the bombing and certain other objectives⁸ that may be easier to verify objectively, for example, a prosecutor will only have to prove that the accused planted a bomb with the intent to *cause death, injury or damage to property*. The SAHRC says that to prove the aforesaid elements of intent will require no more than the presentation of evidence that a bomb was planted and the death, injury and damage it caused whereas in the case of a terrorist act, as defined by clause 1, the prosecutor will have to lead evidence

⁷ See Clause 1, namely, to intimidate, coerce or induce any government or persons, the general public or any section thereof, or to disrupt any public service, the delivery of any essential service to the public or to create a public emergency, or to create unrest or general insurrection.

⁸ See Clause 7(1)(a), namely, causing death or serious injury, or causing extensive damage to property that results in major economic loss.

to establish that people were intimidated, services were disrupted and unrest created as a result of the bomb. The SAHRC notes that in view of the aforesaid, they support the inclusion to the Bill of clause 8 to cater specifically for terrorist bombings, and particularly in the light of the Cape Town bombings, the SAHRC welcomes constitutionally sound measures that would facilitate the effective eradication of this offence. The SAHRC states that they also agree with the exclusion of the savings clause relating to the military forces. The SAHRC remarks that if the armed forces were to act in terms of applicable international conventions to which South Africa is a signatory, taking into account clause 25 of the Bill, the need of an armed forces exemption will fall away.

13.220 The Chief: Military Legal Services suggests that the words “or unlawfully and intentionally causes to deliver, discharge or detonate” be inserted after the words “intentionally delivers” explaining that the common-purpose-principle will be applicable to both persons. They note that it is unclear whether the definition in clause 1 includes SANDF/SAPS structures as the destruction of facilities used or occupied by “members of government” is made an offence, and that it is also unclear whether SANDF/SAPS structures are included so as to make it an offence to unlawfully and intentionally destroy SANDF/SAPS structures. They comment that if these structures are excluded, it constitutes unfounded discrimination and that it might render SANDF/SAPS structures legitimate targets if not declared an offence.

13.221 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal consider that the acts referred to in clause 7 are already covered by the definition of a terrorist act. They say that the intent referred to in sub-clauses (1)(a) and (1)(b) can be added to the definition of terrorist acts. They consider that to do this will not only simplify the identification of offences in drafting charge sheets or indictments, but will also broaden the scope of intents on which to formulate terrorist acts. They argue that if this clause is, however, retained, the prohibited acts pertaining to the explosives should be supplemented with the acts of the instructing, building, manufacturing and the making available of such devices. They pose the question why is it necessary that the device be placed at a public place, what about the private dwellings of people like judges, magistrates or ministers? They are of the view that no reason can be found why clause 7(1)(b) should include the phrase “where such a destruction results in or is likely to result in major economic loss”. They note that surely, because of the basic despicable nature of a bomb attack, even bombings with minor results or likely results should fall within the ambit of the Act. They consider that the exemption clause in clause 8(2) is clearly superfluous as the obvious criminal intent described in this clause as well as in the definition of a terrorist act clearly excludes lawful acts by the armed forces.

(c) Evaluation and recommendation

13.222 The Australian *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002* provides as follows:.

72.2 ADF members not liable for prosecution

Nothing in this Division makes a member of the Australian Defence Force acting in connection with the defence or security of Australia liable to be prosecuted for an offence.

72.3 Offences

(1) A person commits an offence if:

- (a) the person intentionally delivers, places, discharges or detonates a device; and
- (b) the device is an explosive or other lethal device and the person is reckless as to that fact; and
- (c) the device is delivered, placed, discharged, or detonated, to, in, into or against:
 - (ii) a place of public use; or
 - (iii) a government facility; or
 - (iv) a public transportation system; or
 - (v) an infrastructure facility; and
- (d) the person intends to cause death or serious harm. Penalty: Imprisonment for life.
- (2) A person commits an offence if:
 - (a) the person intentionally delivers, places, discharges or detonates a device; and
 - (b) the device is an explosive or other lethal device and the person is reckless as to that fact; and
 - (3) the device is delivered, placed, discharged, or detonated, to, in, into or against:
 - (a) a place of public use; or
 - (b) a government facility; or
 - (c) a public transportation system; or
 - (d) an infrastructure facility; and
 - (e) the person intends to cause extensive destruction to the place, facility or system; and
 - (f) the person is reckless as to whether that intended destruction results or is likely to result in major economic loss. Penalty: Imprisonment for life.

13.223 The project committee and the Commission are of the view after having considered what Ms Schneeberger and the SAPS: Legal Component: Detective Service and Crime Intelligence commented, and particularly that the exception for the military forces was only included in the exceptional circumstance of the Terrorist Bombings Convention because it was accepted that the military might have to detonate explosives, that the compromise was that there should be equal treatment between armed forces and military forces i.e. that the Convention would also not apply to armed forces during armed conflict and that this is on the basis of equality for treatment between military forces and armed forces in armed conflict in accordance with international humanitarian law, and specifically the Second Additional Protocol to the Geneva Conventions of 1949. The committee and the

Commission therefore recommend the proposed clause making provision for the offence of terrorist bombings but with the exception recognising that the clause does not apply to the military forces of a State during an armed conflict; or in respect of activities undertaken in the exercise of their official duties.

L. CLAUSE 8: TAKING OF HOSTAGES

(a) Comment on the discussion paper

13.225 Ms Schneeberger remarks that the reference in the *chapeau* to “or elsewhere” creates an almost unlimited extra-territorial jurisdiction, and could include offences which have no jurisdictional link with South Africa through either the nationality of the victim or the perpetrator or the place of the crime. She points out that as clause 15 of the Bill deals with all viable jurisdictions they suggest that the phrase be amended to read “Any person who . . .”, as jurisdictional issues can be, and are, dealt with in clause 15. The Chief: Military Legal Services suggests that clause 6(a), namely *highjacking of an aircraft* be noted and that a proper definition be included in the Bill describing *hostages*. They consider that the intention of the offender(s) is the same which justifies one detention and suggest the wording “any person detained against his or her will on land, air or sea”. They consider clause 6(a) could then be deleted and the clause be absorbed into clause 8(a). They also suggest that the word “and” at the end of clause 9(a) be replaced as this will create another offence which is equally as serious as the offence in section 9(a). The Chief: Military Legal Services notes that as the word “State” is not defined in clause 9(a) it can be assumed that it must be understood to include the RSA although the clause may not necessarily be applicable to the RSA. They thus suggest that the words “the RSA Government” be inserted after the words “in order to compel” at the beginning of clause 9(b) and that the words “threatens to kill” be inserted in clause 8(b).

13.226 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal consider that clause 8 seems to be superfluous. They note that the offence described is clearly covered by the definition of a terrorist act, the detaining of a person endangers the freedom and physical integrity of a person, and if subclause (a)(i) in the definition of a terrorist act is retained as suggested above, clause 8(b) is covered by the definition of a terrorist act. They consider that the described aim as set out in clause 8(b) is in anyway too broadly put, as a person who, for instance, takes a family member hostage in order to compel other family members to act in a way he or she wishes to, like the changing of a last will and testament, will also fall within the ambit of this offence and will be liable to life imprisonment. They also point out a situation where students, for example, take

University Management Members hostage in order to enforce some or other claim? They consider many other examples can be quoted which will fall within the ambit of this clause, but which should not be covered by the Bill. They further consider that for the same reasons as mentioned under clause 2, the words "or elsewhere" should be deleted in this clause.

(b) Evaluation and recommendation

13.227 Provision should be made for the offence of hostage taking. The project committee and Commission agree with the reasoning why the words "or elsewhere" should be deleted, but do not agree with respondents that clause 6 dealing with highjackings of aircraft be absorbed into clause 8 dealing with hostage taking.

M. CLAUSE 9: INTERNATIONALLY PROTECTED PERSONS

(a) Evaluation contained in discussion paper 92

13.228 The project committee noted in the discussion paper that there may be a lot of instances where the jurisdiction of different countries are going to overlap. The committee considered that this would have to be dealt with on diplomatic level by the countries involved. The committee questioned the use of the phrase "offers violence to ..." and suggested that it should be substituted with the word "threatens". The committee also considered that since clause 12 deals separately with the issue of the protection of property occupied by internationally protected persons, references to protection of property should be deleted in clause 10. The committee recommended that the wording of clause 10(1) should be as follows: "Any person who perpetrates or threatens any attack upon the person or liberty of an internationally protected person commits an offence and is liable on conviction to ..." The committee further noted that under clause 10(1)(a) a sentence of three years imprisonment may be imposed for committing an offence against the person or liberty of an internationally protected person whereas a five year sentence may be imposed for committing an offence against the property of internationally protected persons. The committee considered that the term of imprisonment should correspond in the two clauses and that it should be five years in clause 10(1)(a) as well. The committee further considered that clauses 10(1)(a) and (b) should not only make provision for a sentence of a fine or imprisonment but also for imposing both a fine and imprisonment. The project committee also noted that the sentence dramatically increases in clause 10(1)(b) to ten years imprisonment where a deadly or a dangerous weapon is used in the commission of the offence. The project committee was further of the view that there is no need for clauses 10(2)(a) and (b) which provide that it is an offence to intimidate, coerce, threaten, or harass

an internationally protected person in the performance of his or her duties or to attempt to intimidate, coerce, threaten, or harass such an internationally protected person in the performance of his or her duties.¹

(b) Comment on discussion paper 92

13.228 Ms Schneeberger remarks that the provisions of clauses 10 and 11 appear to conflict. She notes that clause 10 provides *inter alia* for an attack on the liberty of an internationally protected person and provides for sentences of 5 or 10 years, whilst clause 11 on the other hand provides for the kidnapping of an internationally protected person with a life sentence. She says that it is difficult to conceive of a situation when kidnapping would also not be classified as an attack on the liberty of a person, in which case there are conflicting sentences. She suggests that clauses 10 and 11 should accordingly be reconciled. She comments that this is dealt with in the *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents* by dealing with the various crimes in the same provision. She notes further that the provisions regarding attempt are also dealt with inconsistently in clauses 10 and 11. Thus in clause 10(2)(b) references to attempt are deleted on the basis that this is covered by section 18(1) and (2) of the *Riotous Assemblies Act* while in section 11(1)(b) a separate provision is made for attempt. She remarks that the ancillary crimes such as attempt, threat; common purpose etc should be covered by legislation and should be consistently dealt with throughout the Bill.

13.229 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal point out that it is difficult to appreciate what the prohibited acts described in clauses 10 to 12 have to do with terrorism. They say although it is appreciated that the international community requires protection of their officials abroad, clearly the prohibited acts have nothing to do with terrorism and these offences should be contained in a separate Act. They also consider that the acts against an internationally protected person prohibited in clause 10 are too wide. They explain that these offences as presently set out, would mean that a normal assault upon such a person or, for instance, the tying down of such a person during a common criminal housebreaking will result in a sentence of a minimum of five years imprisonment. They consider that in many cases the perpetrator, when committing the act, will not even know that his victim is an internationally protected person. They suggest that prohibited acts should be limited to cases where the perpetration thereof can be linked to the fact that the victim is an internationally protected person. It is said in an extract of a statement by the United Ulama Council of SA and the Media Review Network

¹ See section 18(1) and (2) of the Riotous Assemblies Act.

issued on the Bill that the proposed legislation would allow for someone who intentionally scratches the car of a foreign diplomat, *to be ridiculously charged under the Terrorism Act*, and that *this would give prosecutors unfettered powers when sentencing minor offenders.*²

(c) **Evaluation and recommendation**

²

Hundreds of respondents sent extracts from this statement to the Commission.

13.230 The project committee does not agree with Messrs Fick and Luyt on their difficulty to appreciate what the prohibited acts described in clauses 10 to 12 have to do with terrorism. The international community has identified the protection of internationally protected from harm and included these issues in international conventions as actions which constitute terrorism. The project committee agrees with this approach and considers that these issues should be included in the proposed Bill. The project committee agrees with Ms Schneeberger that clauses 10 and 11 deal with attacks on the liberty of an internationally protected person and that it can be questioned why different sentences apply to what seems to constitute the same offence. However, there are degrees of seriousness included in these offences which could be set out more appropriately. The project committee noted that the Australian *Crimes (Internationally Protected Persons) Act* 1976 provides in section 8 as follows:¹

- (1) A person who murders or kidnaps an internationally protected person is guilty of an offence against this Act and is punishable on conviction by imprisonment for life.
- (2) A person who commits any other attack upon the person or liberty of an internationally protected person is guilty of an offence against this Act and is punishable on conviction:
 - (a) where the attack causes death—by imprisonment for life;
 - (b) where the attack causes grievous bodily harm—by imprisonment for a period not exceeding 20 years; or
 - (c) in any other case—by imprisonment for a period not exceeding 10 years.
- (3) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):
 - (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;
 is guilty of an offence against this Act and is punishable upon conviction by imprisonment for a period not exceeding 10 years.
- (3A) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):
 - (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

¹ The Canadian Criminal Code says in section 431: Every one who commits an attack on the official premises, private accommodation or means of transport of an internationally protected person that is likely to endanger the life or liberty of such person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence against this Act and is punishable upon conviction by imprisonment for a period not exceeding 20 years.

(3B) A person who intentionally destroys or damages by means of fire or explosive:

- (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
- (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

is guilty of an offence against this Act and is punishable upon conviction by imprisonment for a period not exceeding 15 years.

(3C) A person who intentionally destroys or damages by means of fire or explosive:

- (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
- (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence against this Act and is punishable upon conviction by imprisonment for a period not exceeding 25 years.

(4) A person who threatens to do anything that would constitute an offence against subsection (1), (2), (3), (3A), (3B) or (3C) is guilty of an offence against this Act and is punishable on conviction by imprisonment for a period not exceeding 7 years.

...

(7) For the purposes of this section:

- (h) kidnapping a person consists of leading, taking or enticing the person away, or detaining the person, with intent to hold the person for ransom or as a hostage or otherwise for the purpose of inducing compliance with any demand or obtaining any advantage;
- (i) murdering a person consists of causing the death of that person in circumstances in which the person causing the death would be guilty of murder according to the law in force in the Australian Capital Territory at the time of the conduct causing the death, whether or not the conduct took place in that Territory;
- (j) a reference to an attack upon the person of an internationally protected person shall be read as including a reference to assaulting an internationally protected person or to administering or applying to an internationally protected person, or causing an internationally protected person to take, a poison, drug or other destructive or noxious substance or thing;
- (k) a person who destroys or damages any official premises, private accommodation or means of transport or any other premises or property shall be taken to have done so intentionally if the person acted:
 - (ii) with intent to destroy or damage those premises or that property; or
 - (iii) in the knowledge or belief that the actions were likely to result in the destruction of, or damage to, those premises or that property; and
- (l) a person who destroys or damages any official premises, private accommodation or means of transport or any other premises or property shall be taken to have intended to endanger the life of another person by that destruction or damage if the first-mentioned person acted:
 - (ii) with intent to endanger the life of that other person; or
 - (iii) in the knowledge or belief that the actions were likely to endanger the

life of that other person.

13.231 The project committee is of the view that the issue of attacks on and kidnapping of internationally protected persons is set out more appropriately in the Australian legislation than was provisionally proposed in the discussion paper. The project committee considers that it should therefore follow the wording contained in the Australian legislation. The Commission agrees with this recommendation. The project committee and the Commission recommend that the issue of attacks on and hijacking of internationally protected persons be dealt with in one clause and propose the following clause:

(1) A person who murders or kidnaps an internationally protected person is guilty of an offence and shall be liable on conviction to imprisonment for life.

(2) A person who commits any other attack upon the person or liberty of an internationally protected person is guilty of an offence and shall be liable on conviction:

(b) where the attack causes death — to imprisonment for life;

(c) where the attack causes grievous bodily harm — to imprisonment for a period not exceeding 20 years; or

(d) in any other case — to imprisonment for a period not exceeding 10 years.

(3) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):

(a) any official premises, private accommodation or means of transport, of an internationally protected person; or

(b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 10 years.

(4) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):

(a) any official premises, private accommodation or means of transport, of an internationally protected person; or

(b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 20 years.

(5) A person who intentionally destroys or damages by means of fire or explosive:

(a) any official premises, private accommodation or means of transport, of an internationally protected person; or

- (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present; is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 15 years.
- (6) A person who intentionally destroys or damages by means of fire or explosive:
- (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
- (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present; with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 25 years.
- (7) A person who threatens to do anything that would constitute an offence against subsection (1), (2), (3), (4), (5) or (6) is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 10 years.
- (8) For the purposes of this section kidnapping a person consists of leading, taking or enticing the person away, or detaining the person, with intent to hold the person for ransom or as a hostage or otherwise for the purpose of inducing compliance with any demand or obtaining any advantage.

N. MURDER OR KIDNAPPING OF INTERNATIONALLY PROTECTED PERSONS

(a) Evaluation and recommendation

13.232 The original clause as presented by the SAPS contained two subclauses. Subclause (1) provided that any person who murders or attempts to murder or kidnaps or attempts to kidnap, an internationally protected person, is liable, in the case of a on conviction (a) of murder or kidnapping, to imprisonment for life; or (b) of attempted murder or kidnapping, to imprisonment for a period not exceeding 20 years, without the option of a fine. Subclause (2) provided that if the victim of an offence under subsection (1) is an internationally protected person, a court may exercise jurisdiction over the alleged offence if the alleged perpetrator of the offence is present in the Republic, irrespective of the place where the offence was committed or the nationality of the victim or offender. The project committee was of the view that there is no need for clause 11(2) as this issue is already covered under clause 15 which deals with the jurisdiction of courts of the Republic in respect of offences under the Bill.

13.233 Ms Schneeberger's comments on this clause was noted in the discussion of

clause 10. Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal note that in clause 11 reference is only made to "internationally protected persons" which is defined in clause 1. They pose the question whether their families should not also be included in this clause. They are of the view that there is also a striking anomaly in the prescribed sentences, and that both sub-clauses refer to kidnapping, but different sentences are prescribed. They suggest that kidnapping be deleted from sub-clause (a).

13.234 Messrs Fick and Luyt's suggestion that provision need to be made for the protection of members of staff and family of internationally protected persons is noted and the Bill was amended to provide accordingly. (See the discussion above under the heading definitions in respect of internationally protected persons.)

13.235 In view of the project committee's recommendation in the previous paragraph this clause was amended and became part of the previous clause.

O. PROTECTION OF PROPERTY OCCUPIED BY INTERNATIONALLY PROTECTED PERSONS

(a) Evaluation contained in discussion paper 92

13.236 The clause contained in the discussion paper provided that it constitutes an offence to damage or destroy, enter or refuse to depart from property occupied by internationally protected persons. The committee was of the view that there is no need in the light of sections 18(1) and (2) of the *Riotous Assemblies Act* to provide that an attempt to damage or destroy property within the Republic and belonging to or being utilised or occupied by any internationally protected person constitutes an offence. The committee further considered that the clause should be aimed at the damaging or destroying of such property but not the "injuring" of property. The committee was further of the view that it would be sufficient to refer to "property" instead of "real or personal" property. The committee also considered that the words "wilfully, with intent to intimidate, coerce, threaten or harass, enters or introduces any part of himself or herself or any object within that portion of any building or premises within the Republic, which portion is used or occupied for official business or for diplomatic, consular, or residential purposes by an internationally protected person" should be substituted for the words "wilfully, with intent to intimidate, coerces, threatens or harasses, forcibly thrusts any part of himself or herself or any object within or upon that portion of any building or premises within the Republic, ...". The committee also considered that clause 12 should make provision not only for a fine or imprisonment which may be imposed but also for imposing both such fine and imprisonment.

(b) Comment on discussion paper 92

13.237 The Chief: Military Legal Services suggests that the clause reads as follows: "Any person who unlawfully and intentionally damages and/or destroys any property belonging to or being utilised or occupied within the Republic by any internationally protected person . . ." They also suggest that the words "wilfully with the intent to" in clause 12(1)(b) be amended to read "unlawfully and intentionally intimidate" and that the words "within the Republic" be moved from the present position in the clause to the end of the clause. Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal remark in respect of clause 12(1)(a) that this broad prohibited act can also include instances of mere malicious damage to property for which a sentence of 5 years imprisonment would be too harsh. They note that a typical example in the South African situation would be so-called "road rage" where a person breaks the window of the car of an internationally protected person.

(a) Evaluation and recommendation

13.238 What remains to be considered in the context of property of internationally protected persons is those instances where someone enters such property or refuses to depart when requested to do so. The committee considers these aspects should be incorporated into the amended clause 10 it proposed above. The committee took the remarks into account that imprisonment for a period of five years might be harsh under certain circumstances. The committee considers that should someone be charged under these provisions the circumstances will be taken into account and an appropriate sentence fitting the seriousness of the offence be imposed. The project committee and Commission recommends the following clause:

Any person who -

- (a) wilfully and unlawfully, with intent to intimidate, coerce, threaten or harass, enters or attempts to enter any building or premises which is used or occupied for official business or for diplomatic, consular, or residential purposes by an internationally protected person within the Republic; or
- (b) refuses to depart from such building or premises after a request by an employee of a foreign government or an international organisation, if such employee is authorised to make such request,

commits an offence, and is liable on conviction to a fine or to imprisonment for a period not

exceeding five years or to both such fine and imprisonment.¹

P. CLAUSE 10: OFFENCES RELATING TO FIXED PLATFORMS

(a) **Evaluation contained in discussion paper 92**

13.239 The project committee suggested in the discussion paper that the drafters be asked why this clause cannot also be incorporated into “terrorism act” as well. The drafters considered that very specific offences are involved under this heading at that in they should be dealt with separately and not as part of the definition of “terrorist act”.

(a) **Comment on discussion paper 92**

13.240 Ms Schneeberger comments that the reference to “any fixed platform on the High Seas” creates the possibility of extra-territorial jurisdiction without any jurisdictional link to South Africa. She says that as this clause incorporates the offences referred to in Article 2 of the *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* they advise that the jurisdictional basis provided for in Article 3 of that Convention be used as well. She suggests that clause 12(1)(a) would then read “seizes or exercises control over a fixed platform while it is located on the continental shelf of the Republic”, and the other bases for jurisdiction are covered by section 15 of the Bill. She also points out that they wish to draw attention to the fact that the ancillary offence of attempts, threats etc are dealt with in this provision, and they have no objection to this formulation but it should be used consistently throughout the Bill.

13.241 The SAPS: Legal Component: Detective Service and Crime Intelligence refer to their observations made in respect of the two possible approaches, and the preference to include a wide definition of terrorist acts, as well as specific offences to give effect to the respective international instruments. The SAHRC considers that it is unnecessary to make special provision for the offences listed in this clause. The SAHRC notes that the definition of a terrorism act in clause 1 is sufficiently wide to incorporate this clause, and that its inclusion can also not be justified by reference to the evidentiary onus it creates when

¹ See Article 2 of the *Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 1979. Chapter 45, Title 18 *United States Code*, Article 970 *Protection of Property occupied by Foreign Governments*.

prosecuting this crime. The SAHRC remarks that clause 13 itself makes no provision any elements other than those listed in the definition of terrorism act to be proven to establish intent on the part of an accused and in the absence of additional compelling evidence that would justify its inclusion, the SAHRC recommends that this clause be deleted in its entirety. The Chief: Military Legal Services suggests that the words “and/or” should be substituted for the word “or” in clause 13(1)(b) and that the words “or causes to destroy” be inserted after the word “destroys” as the common purpose principles will be applicable.

(c) Evaluation and recommendation

13.242 The project committee considers that it should retain this provision which creates offences for interference with fixed platforms on the high seas and on the continental shelf. It agrees with Ms Schneeberger on clarifying the jurisdiction of the platform by inserting the words “while it is located on the continental shelf of the Republic”. The Commission agrees with the project committee.

Q. CLAUSE 11: OFFENCES WITH REGARD TO NUCLEAR MATTER OR FACILITIES

(a) Evaluation contained in discussion paper 92

13.243 The project committee was of the view that it should be an offence to possess radioactive material or design or manufacture or possess a device, with the intent to cause death or serious bodily injury, or to cause substantial damage to property or the environment. The committee further considered that it should constitute an offence to use radioactive material or a device, to use or damage a nuclear facility in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury, to cause substantial damage to property or the environment, or to compel a natural or juristic person, an international organization or a State to do or refrain from doing an act.

(b) Comment on discussion paper 92

13.244 Ms Schneeberger notes that clause 14 is taken from the *draft Convention for the Suppression of Acts of Nuclear Terrorism*, that this Convention has not been adopted yet and is still being negotiated. She explains that South Africa has difficulties with the draft Convention, not because of the offences defined but because of the exceptions for military and armed forces. She remarks that as this exception is not included in the Bill they have no difficulty from an international law point of view with the inclusion of offences for nuclear terrorism, although there is no international obligation yet to provide for these types of offences. She notes that the offences as defined in Article 2 of the *draft Convention* are generally accepted and is unlikely to undergo substantive changes during further negotiations. She comments that they are however unsure about the compatibility of the provisions of clause 14 with the provisions of the *Nuclear Energy Act, 1999* (Act No. 46 of 1999). She says that the *Nuclear Energy Act* does not deal with crimes to the degree of specificity done by clause 14 of the Bill. She notes that it does however provide for a comprehensive regime for the regulation and use of nuclear material, and provides for offences and penalties for the breach of these regulations. Ms Schneeberger explains that as it is impossible that the use of nuclear materials will every be authorised for the kinds of intent specified in clause 14, it is quite possible that the *Nuclear Energy Act* already covers the types of offences referred to here. She remarks that as this is, however, an extremely technical matter, especially in establishing whether the various definitions for nuclear and radioactive material, nuclear devices and nuclear facilities are compatible, it would be preferable if the Department of Minerals and Energy could comment on the compatibility of

the Bill and the Act.

13.245 Ms Schneeberger notes that on a related matter, one of the conventions identified as being part of the compendium of international conventions against terrorism is the *Convention on the Physical Protection of Nuclear Material*, and that this *Convention* provides, in Article 7, for offences for the unlawful receipt, possession or use of nuclear material. She explains that this *Convention* has been identified as one of those that must be ratified as a priority, and accordingly it is necessary to establish a legislative basis to prosecute or extradite on the basis of the offences identified in Article 7 of the *Convention*. She points out that once again it is quite possible that the *Nuclear Energy Act* would provide a sufficient legislative basis for this. She considers that if it does however not, it would be useful to provide for the specified offences under this Bill. She notes that once again this determination falls with the expertise of the Department of Minerals and Energy and their comments on this issue would be most useful in compiling a comprehensive Bill. The Chief: Military Legal Services points out that the words “terrorist” and “terrorism” are not defined in the Bill. They suggest that the word “harm” be substituted for the word “injury” so as to align the offence with the offence of assault.

(c) Evaluation

13.246 The project committee noted the following provision of the UK Anti-terrorism, Crime and Security Act of 2001 which provides as follows:

- | | | | | | |
|-----|--|--|----|---------|----------|
| 47 | Use | etc. | of | nuclear | weapons |
| (1) | A person who- | | | | |
| | (a) | knowingly causes a nuclear weapon explosion; | | | |
| | (b) | develops or produces, or participates in the development or production of, a nuclear weapon; | | | |
| | (c) | has a nuclear weapon in his possession; | | | |
| | (d) | participates in the transfer of a nuclear weapon; or | | | |
| | (e) | engages in military preparations, or in preparations of a military nature, intending to use, or threaten to use, a nuclear weapon, | | | |
| | is | guilty | of | an | offence. |
| (2) | Subsection (1) has effect subject to the exceptions and defences in sections 48 and 49. | | | | |
| (3) | For the purposes of subsection (1)(b) a person participates in the development or production of a nuclear weapon if he does any act which- | | | | |
| (a) | facilitates the development by another of the capability to produce or use a nuclear weapon, or | | | | |
| (b) | facilitates the making by another of a nuclear weapon, | | | | |
| | knowing or having reason to believe that his act has (or will have) that effect. | | | | |
| (4) | For the purposes of subsection (1)(d) a person participates in the transfer of a nuclear weapon if- | | | | |
| (a) | he buys or otherwise acquires it or agrees with another to do so; | | | | |
| (b) | he sells or otherwise disposes of it or agrees with another to do so; or | | | | |
| (c) | he makes arrangements under which another person either | | | | |

acquires or disposes of it or agrees with a third person to do so.

(5) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

(6) In this section "nuclear weapon" includes a nuclear explosive device that is not intended for use as a weapon.

(7) This section applies to acts done outside the United Kingdom, but only if they are done by a United Kingdom person.

(8) Nothing in subsection (7) affects any criminal liability arising otherwise than under that subsection.

(9) Paragraph (a) of subsection (1) shall cease to have effect on the coming into force of the Nuclear Explosions (Prohibition and Inspections) Act 1998 (c. 7).

48 Exceptions

(1) Nothing in section 47 applies-

- (f) to an act which is authorised under subsection (2); or
- (g) to an act done in the course of an armed conflict.
- (8) The Secretary of State may-
- (i) authorise any act which would otherwise contravene section 47 in such manner and on such terms as he thinks fit; and
- (j) withdraw or vary any authorisation given under this subsection.

(3) Any question arising in proceedings for an offence under section 47 as to whether anything was done in the course of an armed conflict shall be determined by the Secretary of State.

(4) A certificate purporting to set out any such determination and to be signed by the Secretary of State shall be received in evidence in any such proceedings and shall be presumed to be so signed unless the contrary is shown.

49 Defences

(1) In proceedings for an offence under section 47(1)(c) or (d) relating to an object it is a defence for the accused to show that he did not know and had no reason to believe that the object was a nuclear weapon.

(2) But he shall be taken to have shown that fact if-

- (a) sufficient evidence is adduced to raise an issue with respect to it; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.

(3) In proceedings for such an offence it is also a defence for the accused to show that he knew or believed that the object was a nuclear weapon but, as soon as reasonably practicable after he first knew or believed that fact, he took all reasonable steps to inform the Secretary of State or a constable of his knowledge or belief.

50 Assisting or inducing weapons-related acts overseas

(1) A person who aids, abets, counsels or procures, or incites, a person who is not a United Kingdom person to do a relevant act outside the United Kingdom is guilty of an offence.

(2) For this purpose a relevant act is an act that, if done by a United Kingdom person, would contravene any of the following provisions-

- (a) section 1 of the Biological Weapons Act 1974 (offences relating to biological agents and toxins);
- (b) section 2 of the Chemical Weapons Act 1996 (offences relating to chemical weapons); or
- (c) section 47 above (offences relating to nuclear weapons).

(3) Nothing in this section applies to an act mentioned in subsection (1) which-

- (a) relates to a relevant act which would contravene section 47; and
- (b) is authorised by the Secretary of State;

and section 48(2) applies for the purpose of authorising acts that would otherwise constitute an offence under this section.

(4) A person accused of an offence under this section in relation to a relevant act which would contravene a provision mentioned in subsection (2) may raise any defence which would be open to a person accused of the corresponding offence ancillary to an offence under that provision.

(5) A person convicted of an offence under this section is liable on conviction on indictment to imprisonment for life.

(6) This section applies to acts done outside the United Kingdom, but only if they are done by a United Kingdom person.

(7) Nothing in this section prejudices any criminal liability existing apart from this section.

Supplemental provisions relating to sections 47 and 50

51 Extraterritorial application

(1) Proceedings for an offence committed under section 47 or 50 outside the United Kingdom may be taken, and the offence may for incidental purposes be treated as having been committed, in any part of the United Kingdom.

(2) Her Majesty may by Order in Council extend the application of section 47 or 50, so far as it applies to acts done outside the United Kingdom, to bodies incorporated under the law of any of the Channel Islands, the Isle of Man or any colony.

13.247 The committee noted the following provisions contained in the South African *Nuclear Energy Act* which regulates the possession of nuclear material:

34(1) Except with the written authorisation of the Minister, no person, institution, organisation or body may-

- (a) be in possession of any source material, except where-
 - (i) the possession has resulted from prospecting, reclamation or mining operations lawfully undertaken by the person, institution, organisation or body; or
 - (ii) the possession is on behalf of anyone who had acquired possession of the source material in the manner mentioned in subparagraph (i); or
 - (iii) the person, institution, organisation or body has lawfully acquired the source material in any other manner;
- (b) be in possession of the following, namely-
 - (i) special nuclear material;
 - (ii) restricted material;
 - (iii) uranium hexafluoride (UF₆);
 - (iv) nuclear fuel;
 - (v) nuclear-related equipment and material;
- (c) acquire, use or dispose of any source material;
- (d) import any source material into the Republic;
- (e) process, enrich or reprocess any source material;
- (f) acquire any special nuclear material;
- (g) import any special nuclear material into the Republic;
- (h) use or dispose of any special nuclear material;
- (i) process, enrich or reprocess any special nuclear material;
- (j) acquire any restricted material;
- (k) import any restricted material into the Republic;
- (l) use or dispose of any restricted material;
- (m) produce nuclear energy;
- (n) manufacture or otherwise produce or acquire, or dispose of, uranium hexafluoride (UF₆);
- (o) import uranium hexafluoride (UF₆) into the Republic;
- (p) manufacture, or acquire, or dispose of, nuclear fuel;
- (q) import nuclear fuel into the Republic;
- (r) manufacture or otherwise produce, import, acquire use or dispose of nuclear-related equipment and material;
- (s) dispose of, store or reprocess any radioactive waste or irradiated fuel (when the latter is external to the spent fuel pool);
- (t) transport any of the abovementioned materials;
- (u) dispose of any technology related to any of the

abovementioned materials or equipment.

(2)(a) The Minister may after consultation with the South African Council for the Non-Proliferation of Weapons of Mass Destruction on any matter affecting the proliferation of weapons of mass destruction grant any authorisation required by subsection (1), after application made to the Minister in the prescribed manner for that purpose.

(b) The authorisation may be granted subject to any conditions (if any) that the Minister may determine.

35(1) No person may export any source material, special nuclear material or restricted material or any nuclear-related equipment and material from the Republic except with the written authorisation of the Minister.

(2) The Minister, having consulted with the South African Council for the Non-Proliferation of Weapons of Mass Destruction on any matter affecting the proliferation of weapons of mass destruction and duly taken into account the provisions of the Nuclear Non-proliferation Treaty, the Safeguards Agreement and the Republic's obligations under any other treaty or international agreement with another state, may grant any authorisation required by subsection (1) after application made to the Minister in the manner as prescribed for that purpose.

13.248 The committee considers it noteworthy that very few comments were elicited on this clause. In view of the fact that it did not give rise to major concern, the committee considers that the clause as provisionally proposed in the discussion paper be included in the Bill. The committee is however of the view that a more appropriate heading to the clause would be "offences with regard to nuclear matter or facilities" than the heading "nuclear terrorism" which was proposed in the discussion paper. The Commission agrees with the recommendation.

(d) Recommendation

13.249 The project committee and Commission recommend that the Bill should make provision for the following offences:

- the unlawful and intention possession of radioactive material or the design or manufacturing or possession of a device, with the intent -
 - (i) to cause death or serious bodily injury; or
 - (ii) to cause substantial damage to property or the environment;
- the use in any way of radioactive material or a device, or the use or damage of a nuclear facility in the manner which releases or risks the release of radioactive material with the intent -
 - (i) to cause death or serious bodily injury;
 - (ii) to cause substantial damage to property or the environment; or
 - (iii) to compel a natural or juristic person, an international organization or a State to do or refrain from doing an act.

R. CLAUSE 12: HOAXES

(a) Evaluation

13.250 Following the events of 11 September 2001 in the USA, there have been nationally and internationally a significant number of false alarms involving packages or letters containing apparently hazardous material, which have highlighted the need to have specific offences on the statute books and for tough penalties to deter such malicious and irresponsible actions. It was explained in the USA that since the 11 September 2001 attacks and the ongoing anthrax attacks against United States citizens on United States soil, the nation has been engaged in a war at home and abroad, and that emergency responders, law enforcement and investigation officials have been working overtime to prevent terrorist acts and investigate suspicious events and actual terrorist acts. It was said that the efforts on the American home front have understandably drained Federal, state and local resources, because of these tragic attacks, the American public is alarmed and appropriately reporting suspicious activity, the nation is on high alert and law enforcement cannot afford to be distracted. It was noted that sadly, while law enforcement and emergency responders work tirelessly to prevent, respond, and investigate real cases of terrorism, some have played upon the public's apprehension with hoaxes. It was pointed out that HR 3209, the *Anti-Hoax Terrorism Act* of 2001, addresses this growing phenomena of hoaxes that have further terrorized the American public into falsely thinking biological attacks have occurred. A hoax of terrorism is considered as terrorism, since such a hoax is designed to instill fear into the public or its target, and while such hoaxes may not be designed to influence public policy or governments, they are a serious threat to the public's safety on many levels. First, such a hoax distracts law enforcement from the actual threats or actual emergencies and, in effect, assists terrorists. Second, these hoaxes often cause buildings and businesses to be evacuated and closed, and, if a hoax causes a hospital to be evacuated, for instance, people could die. The US Department of Justice and the Federal Bureau of Investigation testified on November 7th, before the Subcommittee on Crime, and made it clear that these types of hoaxes threaten the health and safety of the American public and the national security of the nation. Under current US law, it is a felony to perpetrate a hoax such as falsely claiming there is a bomb on an aircraft, and it is also a felony to communicate in interstate commerce threatening personal injury to another. A gap exist, however, in the current law as it does not address a hoax related to biological, chemical, or nuclear dangers where there is no specific threat. It was considered that this gap needs to be closed. This legislation makes it a felony to perpetrate a hoax related to biological, chemical, nuclear, and weapons of mass destruction attacks. The *Anti-Hoax Terrorism Bill* of 2001 was intended to impose civil and criminal penalties to deter and punish a person or persons for perpetrating a hoax that others could reasonable believe under the circumstance is or may be a biological, chemical, nuclear or weapons of mass destruction attack. Such hoaxes diminish Federal law enforcement resources and divert Federal investigators attention away from actual threats or cases of terrorism. The legislation was intended to prevent such a drain and aberration of

Federal resources that threaten the citizens and the national security of the United States and provides as follows:¹

`Sec. 1037. False information and hoaxes

`(a) Criminal Violation- Whoever engages in any conduct, with intent to convey false or misleading information, under circumstances where such information may reasonably be believed and where such information concerns an activity which would constitute a violation of section 175², 229³, 831⁴, or 2332a⁵, shall be fined under this title or

¹ The *Protection Against Terrorist Hoaxes Act* of 2001 introduced in the Senate on 8 November 2001 provided as follows:

Sec. 2339C. False Information

`(a) Criminal Violation- Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, knowingly engages in any conduct that is likely to impart the false impression that activity is taking place, or will take place, that violates section 175, 229, 831, or 2332a of this title shall be fined under this title, imprisoned not more than 5 years, or both.

`(b) Civil Penalty- Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, knowingly engages in any conduct that is likely to impart the false impression that activity is taking place, or will take place, that violates section 175, 229, 831, or 2332a of this title is liable to the United States or any State for a civil penalty of the greater of \$10,000 or the amount of money expended by the United States or the State in responding to the false information.

`(c) Reimbursement-

`(1) Convicted Defendant- The court, in imposing a sentence on a defendant who has been convicted of an offense under subsection (a), shall order the defendant to reimburse the United States or a State for any expenses incurred by the United States or a State incident to the investigation of the offense, including the cost of any response made to protect public health or safety.

`(2) Jointly and Severally Liable- A person ordered to reimburse the United States for expenses under paragraph (1) shall be jointly and severally liable for such expenses with each other person, if any, who is ordered under this chapter to reimburse the United States or any State.'

² Section 175. Prohibitions with respect to biological weapons

(a) In General. - Whoever knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin, or delivery system for use as a weapon, or knowingly assists a foreign state or any organization to do so, or attempts, threatens, or conspires to do the same, shall be fined under this title or imprisoned for life or any term of years, or both. There is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States.

(p) Definition. - For purposes of this section, the term "for use as a weapon" does not include the development, production, transfer, acquisition, retention, or possession of any biological agent, toxin, or delivery system for prophylactic, protective, or other peaceful purposes.

³ Section 229. Prohibited activities

(p) Unlawful Conduct. - Except as provided in subsection (b), it shall be unlawful for any person knowingly -

(b) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or

(c) to assist or induce, in any way, any person to violate

paragraph (1), or to attempt or conspire to violate paragraph (1).

4

Section 831. Prohibited transactions involving nuclear materials

- (a) Whoever, if one of the circumstances described in subsection (c) of this section occurs -
 - (1) without lawful authority, intentionally receives, possesses, uses, transfers, alters, disposes of, or disperses any nuclear material or nuclear byproduct material and -
 - (a) thereby knowingly causes the death of or serious bodily injury to any person or substantial damage to property or to the environment; or
 - (b) circumstances exist, or have been represented to the defendant to exist, that are likely to cause the death or serious bodily injury to any person, or substantial damage to property or to the environment;
 - (2) with intent to deprive another of nuclear material or nuclear byproduct material, knowingly -
 - (a) takes and carries away nuclear material or nuclear byproduct material of another without authority;
 - (b) makes an unauthorized use, disposition, or transfer, of nuclear material or nuclear byproduct material belonging to another; or
 - (c) uses fraud and thereby obtains nuclear material or nuclear byproduct material belonging to another;
 - (q) knowingly -
 - (a) uses force; or
 - (b) threatens or places another in fear that any person other than the actor will imminently be subject to bodily injury;
 - (c) and thereby takes nuclear material or nuclear byproduct material belonging to another from the person or presence of any other;
 - (r) intentionally intimidates any person and thereby obtains nuclear material or nuclear byproduct material belonging to another;
 - (t) with intent to compel any person, international organization, or governmental entity to do or refrain from doing any act, knowingly threatens to engage in conduct described in paragraph (2)(A) or (3) of this subsection;
 - (v) knowingly threatens to use nuclear material or nuclear byproduct material to cause death or serious bodily injury to any person or substantial damage to property or to the environment under circumstances in which the threat may reasonably be understood as an expression of serious purposes;
 - (x) attempts to commit an offense under paragraph (1), (2), (3), or (4) of this subsection; or
 - (z) is a party to a conspiracy of two or more persons to commit an offense under paragraph (1), (2), (3), or (4) of this subsection, if any of the parties intentionally engages in any conduct in furtherance of such offense;
- shall be punished as provided in subsection (b) of this section.

5

Section 2332. Criminal penalties

- (p) Homicide. - Whoever kills a national of the United States, while such national is outside the United States, shall -
 - (b) if the killing is murder (as defined in section 1111(a)), be fined under this title, punished by death or imprisonment for any term of years

imprisoned not more than 5 years, or both.

`(b) Civil Action- Whoever engages in any conduct, with intent to convey false or misleading information, under circumstances where such information concerns an activity which would constitute a violation of section 175, 229, 831, or 2332a, is liable in a civil action to any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses.

`(c) Reimbursement- The court, in imposing a sentence on a defendant who has been convicted of an offense under subsection (a), shall order the defendant to reimburse any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses. A person ordered to make reimbursement under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement under this subsection for the same expenses. An order of reimbursement under this subsection shall, for the purposes of enforcement, be treated as a civil judgment.'

13.251 **The UK *Anti-terrorism, Crime and Security Act* provides as follows on hoaxes:**

114(1) A person is guilty of an offence if he-

- (a) places any substance or other thing in any place; or
- (b) sends any substance or other thing from one place to another (by post, rail or any other means whatever);
- (c) with the intention of inducing in a person anywhere in the world a belief that it is likely to be (or contain) a noxious substance or other noxious thing and thereby endanger human life or create a serious risk to human health.

(2) A person is guilty of an offence if he communicates any information which he knows or believes to be false with the intention of inducing in a person anywhere in the world a belief that a noxious substance or other noxious thing is likely to be present (whether at the time the information is communicated or later) in any place and thereby endanger human life or create a serious risk to human health.

(3) A person guilty of an offence under this section is liable-

- (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both); and

-
- or for life, or both;
 - (c) if the killing is a voluntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than ten years, or both; and
 - (d) if the killing is an involuntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than three years, or both.

- (b) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine (or both).
- 115(1) For the purposes of sections 113 and 114 "substance" includes any biological agent and any other natural or artificial substance (whatever its form, origin or method of production).
- (2) For a person to be guilty of an offence under section 113(3) or 114 it is not necessary for him to have any particular person in mind as the person in whom he intends to induce the belief in question.

13.252 As was noted above the *Criminal Code Amendment (Anti-hoax and Other Measures) Bill* 2002 was also recently introduced in Australia which is aimed at combatting hoaxes:¹

- 471.11 Using a postal or similar service to make a threat**
Threat to kill
- (1) A person (the *first person*) is guilty of an offence if:
- (a) the first person uses a postal or similar service to make to another person (the *second person*) a threat to kill the second person or a third person; and
- (b) the first person intends the second person to fear that the threat will be carried out.
- Penalty: Imprisonment for 10 years.**

¹ The Public Safety Bill (Bill C-42) introduced in Canada on 29 April 2002 also contains a hoax provision. It is explained that the amendments to the proposed *Criminal Code* terrorist hoax offences are broader in scope, and are no longer restricted to the parameters of the UN International Convention for the Suppression of Terrorist Bombings. Instead, they build upon the definition of "terrorist activity" contained in the *Anti-terrorism Act*, and also separately criminalize: (1) those who convey false information that is likely to cause a reasonable apprehension that terrorist activity is occurring or will occur; and (2) those who commit acts that are likely to cause a reasonable, but false, apprehension that terrorist activity is occurring or will occur. In both cases, there is also an expanded specific requirement that there be intent to cause fear of death, bodily harm, substantial damage to property, or serious interference with the lawful use or operation of property. The proposed maximum penalties for these offences have also been amended to provide for increases proportionate to the harm caused. The maximum penalty for the base offence is five years imprisonment. However, if the hoax causes actual bodily harm, the maximum penalty is increased to 10 years imprisonment, and if the hoax causes death, the maximum penalty is increased to life imprisonment. See <http://www.sgc.gc.ca/Releases/e20011015.htm> and also Darren Yourk "Liberals introduce new antiterror legislation" *Globe and Mail* 29 April 2002.

Threat to cause serious harm

(2) A person (the *first person*) is guilty of an offence if:

- (a) the first person uses a postal or similar service to make to another person (the *second person*) a threat to cause serious harm to the second person or a third person; and
- (b) the first person intends the second person to fear that the threat will be carried out.

Penalty: Imprisonment for 7 years.

Threats

- (3) For the purposes of this section, a *threat* may be:
- (a) express or implied; or
 - (b) conditional or unconditional.

Threat to cause serious harm

(4) A reference in this section to a *threat to cause serious harm to a person* includes a reference to a threat to substantially contribute to serious harm to the person.

Definition

(5) In this section: *fear* includes apprehension.

471.12 Using a postal or similar service to menace, harass or cause offence

A person is guilty of an offence if:

- (a) the person uses a postal or similar service; and
- (b) the person does so in such a way as would be regarded by reasonable persons as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 2 years.

471.13 Causing a dangerous article to be carried by a postal or similar service

A person (the *first person*) is guilty of an offence if:

- (a) the first person causes an article to be carried by a postal or similar service; and
- (b) the person does so in a way that gives rise to a danger of death or serious harm to another person; and
- (c) the first person is reckless as to the danger of death or serious harm.

Penalty: Imprisonment for 10 years.

Danger of death or serious harm

(2) For the purposes of this section, if a person's conduct exposes another person to the risk of catching a disease that may give rise to a danger of death or serious harm to the other person, the conduct is taken to give rise to a danger of death or serious harm to the other person.

(3) For the purposes of this section, a person's conduct gives rise to a danger of death or serious harm if the conduct is ordinarily capable of creating a real, and not merely a theoretical, danger of death or serious harm.

(4) For the purposes of this section, a person's conduct may give rise to a danger of death or serious harm whatever the statistical or arithmetical calculation of the degree of risk of death or serious harm involved.

(5) In a prosecution for an offence against subsection (1), it is not necessary to prove that a specific person was actually placed in danger of death or serious harm by the conduct concerned.

Definition

(6) To avoid doubt, the definition of *carry by post* in section 470.1 does not apply to this section.

13.253 The question arises whether there is also a need in South African law¹ for a

¹ See "DA urges govt to join anti-terror alliance" Mon, 17 Sep 2001 <http://iafrica.com/news/sa/805363.htm> where it was reported that the South African police was praised for their speedy arrest of two brothers in connection with the hoax email message implicating South Africa in the USA attacks of September 11th. It was noted that it was said that South Africa suffered severe damages due to the sick joke of these two men, and that it also lead to a drop in the rand's value. It was explained that the two were arrested in Cape Town and were to appear in the Stellenbosch Magistrates Court on fraud charges. It was reported that it was noted that it was important that the country demonstrated that it would not stand for "this sort of cyber-terrorism" and that the senior prosecutor in Stellenbosch would be requested to ensure that their trial starts as soon as possible and that they are made to face the full extent of the law. See also "Hoax emailers face sabotage charges" Mon, 17 Sep 2001 at <http://iafrica.com/news/sa/805644.htm> where it was reported that the brothers face a charge of sabotage, framed under the Internal Security Act, and that fraud charges were also a possibility as the alleged email had also affected the economy of the country, including the value of the rand. See also "Hoaxes frustrate SAPS" *Business Day* 5 Nov 2001 where it was reported that National Police Commissioner Jackie Selebi told Parliament's budget committee that a frustrated policeman on his 30th anthrax scare tasted the powder and declared: "You see, I am still alive." It was noted that he told the story after stressing the seriousness of anthrax hoaxes. He said that samples from Tuynhuys the previous week had to be taken by car to Pretoria for tests as airlines refused to transport them, and that every report had to be investigated. Only the Onderstepoort laboratories near Pretoria could do the tests, which cost R80 each. All 300 reports were hoaxes, he said. He asked who is going to pay, and whether it would be the department of health, agriculture or the police.

Tamar Kahn and Ernest Mabuza reported in "One arrest after rash of anthrax scares" *Business Day* on 19 Oct 2001 that following a spate of anthrax scares, police arrested a 32-year old man who allegedly left an envelope containing white powder on his boss's desk. It was reported that the man, who is a council employee, told police the powder was coffee creamer and his action was intended as a prank. He was to appear in the Wynberg Magistrate's Court on charges of intimidation, and samples of the powder have been sent to Pretoria for forensic testing. It was also pointed out that earlier that week, the Claremont and Athlone police stations were cordoned off after anthrax scares there, and Claremont police officers had responded to a call from a local resident who found a threatening letter covered in white powder in his letter box, and taken the letter to the police station. It was also reported that in Athlone, police officers complained of sinus irritation following the discovery of a white powder in a rubbish bin, and that the Fish Hoek Middle School was evacuated after a suspicious letter was discovered in the principal's office. It was also reported that twenty-four police officers and emergency workers were taken to Wynberg Military Hospital for tests and observation. It was also noted that Strand police station was the scene of an anthrax scare and that National police spokeswoman Charmaine Muller said that although the results of forensic tests had not yet been determined, police believed the incidents to be hoaxes. It was explained that she appealed to the public to refrain from wasting state resources with hoaxes, and warned that such actions were considered a criminal offence, and that civil charges could also be laid. The report also stated that the Johannesburg City's hazardous materials response team responded to two incidents feared to be cases of anthrax distribution. It was noted that Police assistant commissioner Joseph Ngobeni said police took seriously all suspected cases of anthrax distribution and would respond to all reports of suspicious parcels and letters.

See also "No evidence of anthrax in SA: Selebi" *Business Day* Oct 19 2001 where it was reported that national police commissioner Jackie Selebi said that there is no indication that a biological threat such as anthrax exists in South Africa, and that forty people who were thought to have come into contact with the substance have been tested. It was explained that all the results have been negative, that two cases have proved to be hoaxes, arrests have been made, and that the forensic tests on packages thought to contain anthrax should be available within a week. It was also reported that he said that he must issue a serious warning to any person contemplating passing on a package containing powder as a joke or as a threat to any other person, and that the SAPS had already proved that they would arrest and prosecute those who do so, no matter what the motive and whether intended as a threat or not. It was also pointed out that the police were taking legal advice to see if they could

provision providing that a person would be guilty of an offence if they placed, sent or communicated false information about any substance or article intending to make others believe that it was likely to be a noxious substance or thing which could endanger human life or health.²

The *Explosives Act* of 1956 contains the following provisions on bomb hoaxes:³

recover money used on lost man hours from people who carry out hoaxes.

² See John Makoni "Anthrax reportage worries Cabinet" Posted Thu, 25 Oct 2001 at <http://iafrica.com/news/sa/833453.htm> who reported that the Cabinet has expressed concern about the prominence the South African media were giving to anthrax hoaxes and warned the instigators of the hoaxes that they faced severe punishment. It was said that the warning came as a Pretoria prosecutor casually blew away white powder from court desks after deciding the series of South African anthrax hoaxes were less important than valuable court time. It was pointed out that a statement from the Cabinet after their meeting in Cape Town urged all government departments, companies, institutions and individuals dealing with post, to exercise maximum care, but also noted that of the 88 cases reported in South Africa had all turned out to be hoaxes.

See also "Five SA anthrax scares since Thursday" Sat, 20 Oct 2001 at <http://iafrica.com/news/sa/831042.htm> where it was reported that two South African Airways (SAA) planes were grounded after a white powder was found on board both, and that eleven people in Durban received preventative treatment for possible anthrax infection. It was pointed out that an SAA plane was grounded in Cape Town after flight attendants and cleaners discovered latex gloves covered in white powder on one of the seats. The police were called and a team of experts from Waste Care was flown to Cape Town to disinfect the aircraft. The gloves and powder were taken to Pretoria for forensic tests. None of the 116 passengers was exposed to the powder. It was also stated that another plane was grounded after a disembarked passenger told Johannesburg police that there was white powder on his bag when he removed it from the overhead storage bin. The plane had already returned to Durban airport when police ordered it grounded for investigation. It was also said that a Parow Valley man, Jerome Andrews (32), appeared in the Wynberg Magistrate's Court on a charge of intimidation after allegedly giving a colleague an envelope filled with coffee creamer as a practical joke, and Andrews was granted R2 000 bail.

See also "Alleged anthrax prankster gets bail" Wed, 31 Oct 2001 at <http://iafrica.com/news/sa/836947.htm> where it was noted that Madeleine Howard arrested after an anthrax scare at the offices of medical aid administrators Medscheme, was granted bail of R3 000. It was explained that Howard, in custody since her arrest, would face charges of sabotage, intimidation and fraud and face a separate R12 000 civil suit from the police for playing an alleged hoax and a disciplinary hearing when she returns to work. It was reported that Howard had been sent a letter of demand for the amount as the prank had cost the police R12 000 in manpower, time and resources, and the police had earlier threatened to recover such expenses from pranksters. It was also pointed out that Police said that a total of 414 anthrax scares in South Africa had been reported to police since the beginning of October 2001, and that all the South African scares have been hoaxes. Another report indicated that in Pretoria a man was behind bars after playing a practical joke on a colleague by sending him an envelope containing a coffee creamer intended to resemble anthrax, and that Police Commissioner Joseph Ngobeni said police were called to the offices of the Registrar of Deeds in central Pretoria after an envelope containing a powdery substance was found in a mailbox. It was explained that investigations revealed that someone played a practical joke on a colleague by placing an envelope containing Cremora in his mailbox. It was pointed out that the suspect is to face a charge of intimidation. See John Makoni "Man behind bars over anthrax hoax" Thu, 18 Oct 2001 at <http://iafrica.com/news/sa/826651.htm>

³ See "Bomb hoax prankster faces prison term" Fri, 14 Sep 2001 at <http://iafrica.com/news/sa/804558.htm> where it was reported that a 40-year-old passenger was arrested at the Johannesburg International Airport after allegedly making a bomb threat on a flight from Durban, that police Superintendent Eugene Opperman said the man told a crew member on a flight from Durban to Johannesburg that he had a bomb in his bag. He

27(1A) Any person who in any manner-

- (a) threatens, or falsely alleges, knowing it to be false, that any other person intends, to cause an explosion whereby life or property is or may be endangered or in order to intimidate any person;
- (b) communicates false information, knowing it to be false, regarding any explosion or alleged explosion or any attempt or alleged attempt thereto,

shall be guilty of an offence and liable on conviction to imprisonment without the option of a fine for a period of not less than three years and not more than fifteen years.

(2) Nothing in this section contained shall be construed as exempting any person from being charged and punished under the common law or any other statute in respect of any such act or omission as is described in this section.

(3) For the purposes of this section 'explosion' includes a fire caused by an explosive.

13.254 The project committee is of the view that the incidence of hundreds of hoax cases perpetrated in South Africa warrants the adoption of a measure to address this issue. The committee is of the view that there is a need in South African law for a provision setting out that a person would be guilty of an offence if they placed, sent or communicated false information about any substance or article intending to make others believe that it was likely to be a noxious substance. The *Anti-Terrorism Bill* should introduce a new offence of hoaxing involving allegedly toxic substances eg anthrax, smallpox, acids or other similar substances. The committee considers, however, that provision should also be made in regard to hoaxes involving lethal devices and weapons of mass destruction. The committee is of the view that there is no need to qualify the required intention by saying "thereby endanger human life or create a serious risk to human health", as was done in the UK. It is noteworthy that this formulation is restrictive in the sense that it takes only human life into account and not animal life or harming the environment. It is therefore considered that these words should not be included in the proposed clause. It is also considered that the legislation should provide, as US legislation does, that in imposing a sentence on a person convicted of such an offence, the court may order that person to reimburse any party incurring expenses incident to any emergency or

later said that he was only joking. It was explained that he was to appear in the Kempton Park Magistrates Court for contravening the Act on Explosives and the Civil Aviation Act. Opperman said he could face a jail term of between five and 25 years without the option of a fine if found guilty. He reportedly said that it must be clearly understood that the SA Police Service, airport security and airline companies do not take lightly any bomb threat or the conveyance of any false information regarding an explosion or imminent explosion.

investigative response to that conduct, for those expenses. The committee is also of the view that a person ordered to make reimbursement must be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement for the same expenses. An order of reimbursement under this subsection must, for the purposes of enforcement, be treated as a civil judgment. The Commission agrees with the project committee.

(b) **Recommendation**

13.255 The project committee and Commission recommend the adoption in the *Anti-Terrorism Bill* of a provision aimed at hoaxes and recommend the following provision:

12. Hoaxes involving noxious substances or things, lethal devices and weapons of mass destruction

- (1) A person is guilty of an offence if he or she —
 - (a) places any substance or other thing in any place; or
 - (b) sends any substance or other thing from one place to another (by post, rail or any other means whatever);
 - (c) with the intention of inducing in a person anywhere in the world a belief that it is likely to be (or contain) a noxious substance or other noxious thing or a lethal device or a weapon of mass destruction.
- (2) A person is guilty of an offence if he or she communicates any information which he or she knows or believes to be false with the intention of inducing in a person anywhere in the world a belief that a noxious substance or other noxious thing or a lethal device, or a weapon of mass destruction is likely to be present (whether at the time the information is communicated or later) in any place.
- (3) A person guilty of an offence under this section is liable to imprisonment for a period not exceeding seven years or a fine or both.
- (4) For the purposes of this section "substance" includes any biological agent and any other natural or artificial substance (whatever its form, origin or method of production).
- (5) For a person to be guilty of an offence under this section it is not necessary for him or her to have any particular person in mind as the person in whom he or she intends to induce the belief in question.
- (6) The court, in imposing a sentence on person who has been convicted of an offence under subsection (1), may order that person to reimburse any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses. A person ordered to make reimbursement under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement under this subsection for the same expenses. An order of reimbursement under this subsection shall, for the purposes of enforcement, be treated as a civil judgment.

S. CLAUSE 13: WEAPONS OF MASS DESTRUCTION

(a) **Evaluation**

13.256 The Commission has noted that in the UK although the heading to part 6 of their *Anti-terrorism, Crime and Security Act 2001* talks of weapons of mass destruction¹ **it is not defined there, neither is it defined in their *Chemical Weapons Act of 1996*. The American provisions provide as follows on this issue:**

Section 2332a. Use of certain weapons of mass destruction

(a) A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction (other than a chemical weapon as that term is defined in section 229F), including any biological agent, toxin, or vector (as those terms are defined in section 178) -

- (i) against a national of the United States while such national is outside of the United States;**
- (ii) against any person within the United States, and the results of such use affect interstate or foreign commerce or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce; or**
- (iii) against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States,**

shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

(b) Offense by National of the United States Outside of the United States. - Any national of the United States who, without lawful authority, uses, or threatens, attempts, or conspires to use, a weapon of mass destruction (other than a chemical weapon (as that term is defined in section 229F)) outside of the United States shall be imprisoned for any term of years or for life, and if death results, shall be punished by death, or by imprisonment for any term of years or for life.

(a) Definitions. - For purposes of this section -

- (ii) the term "national of the United States" has the meaning given in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and**
- (iii) the term "weapon of mass destruction" means -**
- (b) any destructive device as defined in section 921 of this title;**
- (c) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors;**
- (d) any weapon involving a disease organism; or**

¹ Part 6 of the *Anti-terrorism, Crime and Security Act* strengthens current legislation controlling chemical, nuclear and biological weapons (WMD). It makes it an offence to aid or abet the overseas use or development of chemical, nuclear, biological. It introduces offences equivalent to those in the Chemical Weapons Act 1996 in relation to biological and nuclear weapons. This brings legislation on biological and nuclear weapons into line with existing legislation on chemical weapons. These provisions will cover nuclear and radiological weapons, chemical weapons and biological agents and toxins. There is also a new provision for customs and excise to prosecute.

- (e) **any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.**

13.257 The project committee considers that there is a need to insert a provision into the Bill dealing with weapons of mass destruction. The committee considers that there is no need to qualify the provision as the US legislation does, to require that interstate or foreign commerce or, in the case of a threat, attempt, or conspiracy, interstate or foreign commerce would have been affected. This would be an unnecessary limitation. The committee is of the view that the use of weapons of mass destruction warrants a substantive provision setting out that the use of such a weapon constitutes an offence under the Bill. The Commission agrees with the project committee.

(b) **Recommendation**

13.258 The project committee and Commission recommend the following clause:

Use of weapons of mass destruction

- 15(1) Any person who, unlawfully and intentionally uses a weapon of mass destruction —
- (a) against a national of the Republic or a person ordinarily resident in the Republic while either such person is outside the Republic;
 - (b) against any person within the Republic; or
 - (c) against any property that is owned, leased or used by the Republic or by any department or agency of the Republic, whether the property is within or outside of the Republic,
- commits an offence and shall be liable on conviction to imprisonment for life.
- (2) Any national of the Republic who, unlawfully and intentionally, uses a weapon of mass destruction outside of the Republic commits an offence and shall be liable on conviction to imprisonment for life.

T. CLAUSE 14: JURISDICTION OF THE COURTS OF THE REPUBLIC

(a) **Evaluation contained in discussion paper 92**

13.259 The project committee explained in the discussion paper that the word “arrested” should be inserted in clause 15(a) to provide that South African courts shall have jurisdiction in respect of any offence referred to in the Bill, if the perpetrator of the act is arrested in the territory of the Republic or in its territorial waters or on board a ship flying the flag of the Republic or an aircraft registered in the Republic.¹ **The committee remarked**

¹ The following clause was proposed in the discussion paper:

15. The Courts of the Republic shall have jurisdiction in respect of any offence referred to in this Act, if —

- (a) the perpetrator of the act is arrested in the territory of the Republic, in its territorial waters or on board a ship flying the flag of the Republic or an aircraft registered in the Republic; and
- (b) the act has been or is committed —

that it would seem that jurisdiction will be dependent, *inter alia*, on the alleged offender being in the Republic, the commission of the act in the Republic or elsewhere and that the act is punishable in terms of domestic laws. The committee considered that the “elsewhere” relates to the commission of the act and not the arrest and proposed that in clause 15(b)(i) the word “committed” should be insert before the word “elsewhere” to make this absolutely sure. The committee considered a suggestion that it may be necessary to include in clause 15 also situations which constitute a breach in respect of which the Republic has an obligation under international agreement to prosecute an offender.² The committee noted that the suggestion is that there may be offences which are committed somewhere else but they are in the normal course not punishable under the domestic laws of the Republic. The project committee was of the view that the suggestion appears to touch on an emerging customary international law rule under which South Africa should be able to prosecute certain offences although they would not be offences under South African domestic law. Noting that the obligations under international law might be by treaty or custom, the committee proposed that the following words be added to the last line of clause 15(b)(i) namely “or in terms of the obligations of the Republic under international law”.

13.260 The project committee also considered a suggestion that the word “refugee” should be added to clause 15(b)(vi). This clause makes provision for an act having been committed by a stateless person who has his or her habitual residence in the territory of the Republic. The suggestion was that refugees are not necessarily stateless and that maybe provision needs to be made to cater for them specifically. The committee had no difficulty with his suggestion and it agreed with the insertion

-
- (i) in the territory of the Republic and the perpetrator of the act is arrested in the territory of the Republic, or committed elsewhere, if the act is punishable in terms of the domestic laws of the Republic or in terms of the obligations of the Republic under international law;
 - (ii) on board a vessel or a ship or fixed platform flying the flag of the Republic or an aircraft which is registered under the laws of the Republic at the time the offence is committed;
 - (iii) by a national or group of nationals of the Republic;
 - (iv) against a national of the Republic;
 - (v) against the Republic or a government facility of the Republic abroad, including an embassy or other diplomatic or consular premisses, or any other property of the Republic;
 - (vi) by a stateless person or refugee who has his or her habitual residence in the territory of the Republic;
 - (vii) on board an aircraft which is operated by any carrier registered in the Republic; or
 - (viii) against the security of the Republic.

² By Prof Medard Rwelamira at the time of the Department of Justice’s Policy Unit.

of the word “refugee” in clause 15(b)(vi). The project committee further stated that the question arises what is meant by the phrase in clause 15(b)(vii) “any carrier of the Republic” and whether it means any carrier based, operating or registered in the Republic or any commercial airline? The project committee noted that the *Civil Aviation Offences Act* defines “South African aircraft” as meaning “an aircraft registered in the Republic and that it includes any aircraft that is operated by joint air transport operating organizations or international operating agencies established by the State and any other convention country and that is declared by the Minister of Transport, by notice in the Gazette, to be a South African aircraft”. The project committee therefore considered that the appropriate wording should be “aircraft registered in the Republic”.

(b) Comment on discussion paper 92

13.261 Ms Schneeberger comments that the jurisdiction provisions are essential from an international law point of view, as a jurisdictional basis to prosecute the various offences in the international conventions is an essential precondition for their ratification. She explains that for the majority of the international conventions it is obligatory to establish jurisdiction over offences committed in the territory of the Republic, as well as on the grounds provided for in section 15 (b)(ii) and (iii). She notes that all other grounds are discretionary in terms of international law. She points out that they are, however, concerned that the proviso on the first part of section 15(b)(i), that the act must be committed on the territory of the Republic *and* the perpetrator must be arrested in the Republic, may be an unnecessary limitation on what is otherwise a very broad jurisdictional basis and that it may conflict both with South African international obligations and the other provisions of clause 15.

13.262 She remarks that in the first place it is an international obligation to prosecute or extradite an offender if the offence was committed in the territory of the Republic, regardless of where the offender is arrested. Furthermore clause 15(b)(i) already provides for a jurisdiction based on South Africa’s international obligations, which as explained above includes a territorial jurisdiction regardless of the place of arrest. She explains that there is therefore an inherent contradiction here — if the jurisdiction is made conditional on the place of arrest then South Africa could be denying itself the possibility of making an extradition request for an offender simply because he or she was arrested elsewhere. She points out that secondly, there are situations where the only jurisdictional link will be the territory: a hypothetical example would be where the perpetrator is a foreign national, the victims are all foreign nationals and the property damaged belongs to a foreign government; the

perpetrator flees immediately after committing the offence and is arrested in a third State. She notes that the only jurisdictional link with the Republic is that the offence was committed on South Africa territory. She explains that this hypothetical example is not far removed from reality, as it is a slight variation of the facts of the horrific US Embassy bombings in Kenya and Tanzania in 1998. She submits that in such a case South Africa would want to exercise jurisdiction over the perpetrators and should not deny itself this possibility simply because the perpetrators were arrested elsewhere. Ms Schneeberger states that they would therefore favour the deletion of any reference to the place of arrest in clause 15(b)(i).

13.263 The Chief: Military Legal Services considers that the words *the act* at the beginning of clauses 15(a) and 15(b) are meaningless in that it does not refer to an act discussed in the Bill and could thus be any act. They suggest that the clause should read *the perpetrator of an act of terrorism is arrested*, that *terrorism* should be defined, that the word *or* should be substituted for the word *and* as more offences are thus created and that the words *security of the Republic* used in clause 15(b) (viii) be clearly defined in clause 1.

13.264 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal pose the question why sub-clauses (b) (iii), (b) (iv) and (b) (vi) have been included in clause 15. They consider that it does not make sense that only nationals and stateless persons with habitual residence in the Republic fall within the jurisdiction of our Courts, and ask what reason can there be for foreigners to be excluded. They suggest that these mentioned sub-sections do not make sense and should be deleted. They ask further that as this clause pertains to the jurisdiction of the courts in judging offences in terms of this Act, where does sub-clause (b)(viii) fit in? They point out that none of the offences introduced or consolidated by the Bill refer to the "security of the Republic". They pose the question whether this sub-clause now governs the jurisdiction of the courts pertaining to the common law offence of high treason. They suggest that as they presume that this is not the case, this sub-clause should be deleted.

(b) **Evaluation**

13.265 Prof John Dugard in *International Law: A South African Perspective* 2nd edition Lansdown: Juta 2000 points the following out on the issue of jurisdiction:

Although the principle of the *Lotus Case* that a state may exercise jurisdiction over acts occurring abroad in the absence of a prohibitory rule remains unchanged, states have sought to limit the exercise of extraterritorial jurisdiction in criminal matters to cases in which there is a direct and substantial connection between the state exercising jurisdiction and the matter in question. Failure to establish such a connection may result in an abuse of right. For instance, while it would be within the competence of the South African Parliament to make it an offence for any person to smoke anywhere in the world, it would be an abuse of right if a

South African court were to try a visiting Japanese national for smoking in Tokyo, even where there was clear evidence that he had done so. In order to confine the exercise of their extraterritorial jurisdiction in criminal matters within reasonable limits states generally restrict the exercise of jurisdiction to matters committed within their territories or having an effect within their territories, to matters affecting their nationals, or to acts threatening their security. Where, however, the crime threatens the international order there is no reason for such restraint.

A state may assert its jurisdiction over all criminal act that occur within its territory and over all persons responsible for such criminal acts, whatever their nationality. In South Africa, as in other countries influenced by the Anglo-American law, this is the principle basis for the exercise of criminal jurisdiction. This is reflected in the presumption against the extraterritorial operation of criminal laws.

13.266 In the case of *S v Dersley* 1997 2 SACR 253 (Ck) at 255 - 260 the court analysed jurisdiction as follows:

The general rule accepted by our courts is that a court's jurisdiction extends only to crimes committed within its area of jurisdiction - Lord Halsbury LC in *Macleod v Attorney - General for New South Wales* [1891] AC 455 at 458. There are accepted exceptions to the general rule in respect of certain offences under common law, eg treason and the continuous crime of theft, and under statute law, eg aviation and shipping offences. In the latter exceptions the Legislature has specifically extended the jurisdiction of the courts to cover those offences when committed outside the boundaries of their jurisdiction. . . .

I turn now to the situation where a material element of the crime was committed within the area of jurisdiction of the court and the remainder of the crime, whether committed before or after that material element, was committed outside such area of jurisdiction. There is manifestly in this modern era, with its means of rapid communication and travel, a need for the relaxation of the principles relating to jurisdiction. This need is reflected in the statement by *Lansdown and Campbell, South African Criminal Law and Procedure*, vol 5, at 9:

'The general principle of the common law that jurisdiction does not extend to acts committed abroad appears to be losing ground in the face of a trend indicating that where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements, or their harmful effects, occurred.'

And at 11:

'It is accordingly submitted that there may be circumstances where, in a case reflecting foreign and domestic elements, it becomes irrelevant to ask where the crime was committed or whether the last essential act occurred within the territory of the Republic. Our courts may find themselves not compelled to disclaim jurisdiction if satisfied that either a substantial element of the offence or the harmful effect thereof occurred within the Republic. It is conceded that where the foreign elements in an offence predominate the connection between the physical acts of the offender or their harmful effects, on the one hand, and the Republic, on the other, may indeed be so tenuous that our courts will hesitate to exercise criminal jurisdiction.'

In *S v Mharapara* 1986 (1) SA 556 (Z) at 563G-564A, Gubbay JA stated:

'With regard to the law of Zimbabwe, I can see no justification for a rigid adherence to the principle that, with the exception of treason, only those common-law crimes perpetrated within our borders are punishable. That principle is becoming decreasingly appropriate to the facts of international life. The facility of communication and of movement from country to country is no longer restricted or difficult. Both may be undertaken expeditiously and at short notice. Past is the era when almost invariably the preparation and completion of a crime and the presence of the criminal would coincide in one place, with that place being the one most harmed by its commission. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led crimes to become more and more complex and their capacity for harming victims even greater. They are no longer as simple in nature or as limited in their effect as they used to be. Thus

a strict interpretation of the principle of territoriality could create injustice where the constituent elements of the crime occur in more than one state or where the locus commissi is fortuitous so far as the harm flowing from the crime is concerned. Any reluctance to liberalise the principle and adopt Anglo - American thinking could well result in the negation of the object of criminal law in protecting the public and punishing the wrongdoer. A more flexible and realistic approach based on the place of impact, or of intended impact, of the crime must be favoured.'

...

It seems to me, therefore, that not only do our courts have jurisdiction abroad in the recognised exceptions under the common and statute law - treason, theft, aviation and shipping - and where a crime is commenced outside and completed inside the area of jurisdiction, but also when the offence is commenced inside the area of jurisdiction and completed outside the area, or when any material element of the crime is committed within the area of jurisdiction. A substantial argument can also be made for extending that jurisdiction in certain circumstances to offences, the whole of which are committed outside the boundaries of the area of jurisdiction by citizens domiciled within those boundaries.

13.267 Prof John Dugard explains universal jurisdiction and international crimes as follows:

Some conduct violates not only the domestic legal order of a state but also the international order. Such conduct constitutes an international crime. . . .

True universal jurisdiction applies only in cases under customary international law, in respect of which all states have the right to prosecute. Such crimes are limited to piracy, slave-trading, war crimes, crimes against humanity, genocide and torture. However, in recent years a number of international crimes have been created by multilateral treaties, which confer wide jurisdictional powers upon state parties. Here there is a type of quasi-universal jurisdiction. Some of these crimes, both customary and treaty based, are examined below.

It must be emphasized that international law *permits* states to exercise jurisdiction over international crimes. It does not compel them to do so. Moreover most states, including South Africa, will not try a person for an international crime unless the conduct has been criminalized under municipal law. . . .

13.268 Prof John Dugard also explains that the jurisdiction provisions of the *Convention for the Suppression of Terrorist Bombings* means that a state party is required to exercise criminal jurisdiction over such crimes under domestic laws on grounds of territoriality and active nationality¹ **and may do so on grounds of passive personality (which allows a state to exercise jurisdiction over a person who commits an offence abroad which harms one of its own nationals) or where the offence is committed in an attempt to compel that state to do or abstain from doing any act.**² Peter Malanczuk

¹ He explains many countries, particularly those with a civil-law tradition prosecute and punish their own nationals for offences committed abroad, but that countries influenced by Anglo-American common law will not exercise jurisdiction on this ground unless the municipal law clearly confers jurisdiction.

² Hari M Osofsky explains that international law recognises five grounds upon which states can base their jurisdiction: territorial jurisdiction which stems from wrongs occurring within a nation's territory; national jurisdiction which is based on an offender being a national of the state taking jurisdiction; passive jurisdiction when a victim is a national of the state; protective jurisdiction which is based on the acts impinging upon important state interests or national security; and universal jurisdiction which stems from the notion that some international prohibitions are so important that a violation of them by anyone, anywhere warrant any nation taking jurisdiction. See "Domesticating International Criminal Law: Bringing Human Rights

also points out that some states claim jurisdiction over all crimes, including those or at least serious crimes committed by foreigners abroad,³ and that English-speaking

Violators to Justice" *Yale Law Journal* Oct 1997 191 at 191.

³

Akehurst's Modern Introduction to International Law 7th edition London: Routledge 1997 at 112. See also Doug Cassel "The World Reaches Out for Justice" *Chicago Tribune* August 12, 2001 at <http://www.law.nwu.edu/depts/clinic/ihr/issues/Trib.univ.jur8.12.01.htm>

Kissinger's potential encounter with universal jurisdiction comes as the doctrine may be nearing a crossroads. Although long endorsed for war crimes by most nations — including the U.S.— when they joined the 1949 Geneva Conventions, universal jurisdiction was rarely used. The breakthrough came in 1998 and 1999 when Spain's highest criminal court and Britain's Law Lords upheld Spain's prosecution and Britain's extradition of Chile's Gen. Augusto Pinochet for torture. Although Pinochet was later sent back to Chile for reasons of health, these rulings gave universal jurisdiction a new respectability. But the British ruling had three important, practical limitations. First, the Law Lords ruled that although Pinochet as a former head of state was not immune, sitting heads of state have immunity from prosecution by national courts. (Their ruling does not apply to international courts; witness the indictment of then-President Slobodan Milosevic of Yugoslavia by the International Criminal Tribunal for the Former Yugoslavia.) Second, the Law Lords allowed universal jurisdiction in a case in which the three nations involved — Britain, Spain and Chile — arguably consented to it by joining the United Nations Convention Against Torture. Other than torture, certain war crimes and some terrorist acts, there are few international crimes for which universal jurisdiction is provided by treaty. Third, Britain had physical custody of Pinochet. Unlike Spain, whose prosecution of Pinochet began in his absence, Britain does not prosecute people in absentia. Increase seen Since then, courts elsewhere have increasingly exercised universal jurisdiction — and not all within these three limits. In Belgium, a criminal investigation was recently begun against Israeli Prime Minister Ariel Sharon — a sitting head of government, not present in Belgium — for a 1982 massacre of Palestinians in Lebanese refugee camps. And Belgian law allows courts to exercise universal jurisdiction over crimes against humanity and war crimes committed in civil wars, even without authorization by treaty. The ambitious reach of Belgian law has not only provoked a pending parliamentary move to rein it in but also has landed Belgium in a case before the World Court. The case arose from statements broadcast in 1998 in the Democratic Republic of the Congo by then-presidential secretary Yero dia Ndombasi. At the time, Congo was being invaded by the Tutsi-dominated government of Rwanda. Ndombasi declared that the "vermin" and "microbes must be methodically eradicated." Hundreds of ethnic Tutsi Congolese were slaughtered. Exercising universal jurisdiction over war crimes and crimes against humanity, a Belgian judge in April 2000 issued a warrant for the arrest of Ndombasi. By then, however, Ndombasi was Congo's foreign minister. Congo sued Belgium before the International Court of Justice (World Court). Congo argued that the Belgian warrant blocked international travel by its foreign minister and interfered with its sovereign right to conduct foreign policy. Congo also pointed to the breach of all three Pinochet limits: its foreign minister had diplomatic immunity, he was not physically present in Belgium and no treaty specifically authorized universal jurisdiction for the alleged crimes. It asked the World Court for an emergency order to annul the warrant. When the case was argued in November, Congo announced that Ndombasi had been shifted from foreign minister to education minister. With the urgency thus removed, the World Court, by a vote of 15-2, refused to grant emergency relief but set the case on an expedited briefing schedule. Meanwhile a group of 30 international law experts convened by Princeton University last month published the "Princeton Principles" on universal jurisdiction. The principles combine a distillation of

countries consider that such universal jurisdiction is normally forbidden by international law. He notes, however, that the universality principle is less objectionable when it is applied to acts which are regarded as crimes in all countries.⁴ He explains that even English-speaking countries accept that international law allows states to exercise universal jurisdiction over certain acts which threaten the international community as a whole and which are criminal in all countries, such as war crimes, piracy, hijacking and various forms of international terrorism.⁵

existing international law with proposals for clarification. Drafted by a committee chaired by Cherif Bassiouni of DePaul University's College of Law, they aim to encourage responsible use of universal jurisdiction within more clearly defined boundaries, while guarding against political prosecutions, kangaroo courts and other abuses. Although leaving the list open, the principles propose that universal jurisdiction can now be exercised for genocide, war crimes, crimes against humanity, crimes against peace, piracy, slavery and torture. Thus they do not accept the Pinochet limitation that allows universal jurisdiction only where states consent to it by treaty. For this reason among others, Lord Browne-Wilkinson — one of the Law Lords who ruled on Pinochet — was the only member of the Princeton group to dissent from its principles. The others — such as former World Court President Stephen Schwebel, chief UN lawyer Hans Corell and former Canadian Foreign Minister Lloyd Axworthy — contend that some crimes are so serious that consent by treaty is not needed. On another Pinochet limitation, the principles split the difference: Courts exercising universal jurisdiction can begin investigations and prosecutions of persons in absentia but cannot actually put them on trial unless they are present. Immunity compromise
The principles propose a similarly sensible compromise on immunity: Sitting heads of state are not immune from prosecution for their crimes committed in office, but they may not be prosecuted by national courts of other countries (as opposed to international courts) until after they leave office. The impact of the carefully crafted Princeton Principles remains to be seen. The Princeton group appears to include no current government lawyers and has few members from outside North America and Europe. Much could turn on the World Court's ruling in the Belgian case. The lines are drawn: Kissinger calls universal jurisdiction a threat to rights and peace; the Princeton group sees it as essential for justice in a world where tyrants have gotten away with too much for too long. If recent history is any guide, the momentum is — and should be — more with the Princeton group than with Kissinger.

⁴ See Saul Mendlovitz "Crime(s) of Terror: Developing Law and Legal Institutions" who remarks, inter alia, as follows: (<http://www.lcn.org/pubs/Bombsaway!SPE01/article3.htm>)
One of the major objectives of the existing conventions is, of course, the prosecution of individuals who engage in the proscribed acts. The attempt here is to move towards universal jurisdiction. All states who are party to a convention have the obligation to apprehend the perpetrator of the acts. Beyond that, their duty is to prosecute or extradite. Such a requirement exists in most of the conventions already noted with extradition being the most likely and preferred outcome. This has sometimes produced ad hoc arrangements as in the recent trial of two Libyan citizens for destroying a civilian aircraft over Lockerbie, Scotland. Libya agreed to extradite the suspects on the basis that the trial, while presided over by Scottish judges, would be held in The Hague.

⁵ See also "Universal Jurisdiction in Europe" <http://www.redress.org/annex.html>
The notion that certain crimes are so universally abhorred that they constitute crimes against international law is now widely recognised. War crimes, crimes against humanity, genocide and torture are examples of such crimes. The need to hold individuals accountable for such atrocities has also become an accepted part of international law. Since the Nuremberg and Tokyo trials following World War II, the principle that it is the right or even the duty of states to bring to justice those responsible for international crimes when they are not prosecuted in

their own countries has gathered momentum.

Certain international treaties place states parties under a duty to ensure that suspects who come within their borders are brought to justice, either by prosecuting them in their own courts or by extraditing them to stand trial elsewhere. This duty to either prosecute or extradite is contained in the four Geneva Conventions of 1949. States parties to the Geneva Conventions are obliged to seek out and either prosecute or extradite those suspected of having committed "grave breaches" of those Conventions:

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

"Grave breaches", as defined in the Conventions, includes wilful killing, torture or inhuman treatment, causing great suffering or serious injury to body or health, and other serious violations of the laws of war. . . .

Parties to the UN Convention against Torture are similarly obliged to either extradite or prosecute alleged torturers who come within their borders. Article 7.1 provides:

"The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

In addition to these treaties which impose obligations on states parties in relation to specific offences, it is widely recognised that customary international law permits the exercise of universal jurisdiction for genocide) and crimes against humanity, and possibly for serious violations of the laws of war in internal armed conflicts. All of these are within the jurisdiction of the International Criminal Court in the Rome Statute of July 1998, and this may encourage states to provide for universal jurisdiction for these offences.

The exercise of universal jurisdiction, whereby a state prosecutes a person regardless of where the crime was committed or against whom, is an example of extra-territorial jurisdiction, and an exception to the normal situation where a state prosecutes for crimes committed within its own territory. Extra-territorial jurisdiction is becoming increasingly common. Typically, European states have legislated to provide extra-territorial jurisdiction for offences such as terrorism, hijacking and hostage taking and, more recently, to tackle international paedophile rings.

Another type of extra-territorial jurisdiction accepted by some states is jurisdiction on the basis of *passive personality*, according to which a state will prosecute a person for committing a crime against its own nationals, even if the crime was committed abroad. While strictly speaking the passive personality principle is not an example of universal jurisdiction, it is discussed in this report because of its importance in the international enforcement of human rights and international humanitarian law.

International human rights law imposes a duty on states to investigate and prosecute violations committed within their jurisdictions, and the primary duty to end impunity rests with the state authorities where the violation is committed. However all too often, violators are not brought to justice in their own countries. The sight of large scale human suffering and mass violations of human rights and humanitarian law in recent years has given new impetus to international determination to bring violators to justice. . . .

Despite these important moves to create a system of international criminal justice, for the foreseeable future there will still remain a role for national courts in prosecuting those suspected of international crimes who come within their borders. . . .

The effective exercise of universal jurisdiction is one important tool in the struggle to end impunity for international crimes. Most European states have accepted universal jurisdiction for the prosecution of war criminals and human rights violators through ratifying international treaties, and many have exercised jurisdiction on this basis during the 1990s. Nevertheless, an adequate legal basis for exercising universal jurisdiction remains lacking in many

13.269 The Australian Government also considered the extraterritorial application of Australian anti-terrorist laws.⁶ It was said that it was unclear at that stage whether the extension of anti-terrorist laws would be designed to capture Australians who commit terrorist or terrorist financing offences overseas or to establish more in the nature of a universal jurisdiction to try terrorists of all nationalities. They explained that generally, offences are presumed to be local and territorial, and Australian statutes are presumed to extend only to the territorial limits of Australia, unless a contrary intention is expressed. It was noted that they are presumed not to extend to cases governed by foreign law, neither are they presumed to extend to actions of foreigners overseas, although the presumption can be rebutted, but only by express intention or by necessary implication from the nature, purpose and policy of the legislation. It was explained that while the *Crimes Act 1914* is generally expressed to operate 'beyond the Commonwealth and the Territories' (s. 3A) there are few offences that are expressly intended to capture foreign offenders overseas. The remark was made that arguably, there is a policy tension between prescriptive and enforcement jurisdictions, that clearly, the Commonwealth has the power to enact extraterritorial laws, and, that it has a power to enforce those laws at least in terms of a physical or personal jurisdiction. They however considered that while there is a growing jurisprudence regarding the capacity to legislate extraterritorially, there is a lack of clear understanding regarding the desirability of doing so. They explained that in civil cases, 'choice of law' rules determine the law to be applied to the particular action but that in criminal cases, these rules are largely unknown, although there may be some development of these rules. They noted that courts may come to place emphasis on notions of 'international comity' which was originally proposed as a theory of criminal jurisdiction, but would seem to have relevance and which states that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign states where that conduct has no harmful consequences within the territory of the state which imposes the punishment. It was pointed out that one commentator put forward a range of similar policy considerations or guidelines that include: there should be no legal vacuum; penalties should not exceed those under the most appropriate law; defences under the most appropriate law should be available wherever the defendant is tried; and international sensitivities should be respected.⁷

instances.

⁶ See *Research Paper No. 12 2001-2002: Terrorism and the Law in Australia: Legislation, Commentary and Constraints* at 2.3.7 Extraterritorial Application of Australian Law Parliament of Australia.

⁷ See also Mark Gibney "The Rule of Law and Universal Jurisdiction" presentation given at the conference *the Rule of Law in the Global Village - Issues of Sovereignty and Universality*

13.270 The Canadian provisions on jurisdiction contained in their anti-terrorism legislation in Bill C3-36 is instructive:

Offence against internationally protected person: (3) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against the person of an internationally protected person or against any property referred to in section 431 used by that person that, if committed in Canada would be an offence against any of sections 235, 236, 266, 267, 268, 269, 269.1, 271, 272, 273, 279, 279.1, 280 to 283, 424 and 431 is deemed to commit that act or omission in Canada if . . .

(3.71) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against a member of United Nations personnel or associated personnel or against property referred to in section 431.1 that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 235, 236, 266, 267, 268, 269, 269.1, 271, 272, 273, 279, 279.1, 424.1 or 431.1 is deemed to

Palermo, Palazzo dei Normanni, 12-14 December 2000 who comments that —

. . . perhaps we are beginning to realize that maybe – just maybe – we truly are our brothers' keepers.

It is within this context of changing notions of state sovereignty, but also changing ideas about our relationship and our responsibilities to others, that the principle of universal jurisdiction must be viewed. Universal jurisdiction allows any nation to prosecute offenders of certain crimes even when the prosecuting state lacks a traditional nexus with either the crime, the alleged offender, or the victim. As is well known, universal jurisdiction has ancient roots, going all the way back to the time when pirates routinely sailed the high seas. Pirates were deemed *hosti humani generis* (the enemy of all mankind) not only because their crimes were committed beyond the territorial jurisdiction of any one state, but because through their wrongful deeds they were, in fact, the enemy of all people – and mankind writ large responded accordingly. . . .

Not only does the international community want it both ways, the problem is that the international community has been able to have it both ways. On the one hand, there is an apparent need to promote the notion of universal jurisdiction, as evidenced in the myriad of conventions with universal jurisdiction provisions in them. Yet, at the same time, the international community has shown almost no interest in meeting any of the duties that arise under these same provisions.

Perhaps the attempt to prosecute Pinochet will change all this but I am not optimistic. One clear lesson that will not be lost on the world's political thugs is this: don't leave home. The international community apparently does not like to be reminded of its many inadequacies, and these shortcomings are most evident when those responsible for directing or carrying out human rights abuses are able to roam around the globe with impunity. But as long as these perpetrators stay home, there is little that the international community can do – or at least this is what the international community conveniently has allowed itself to think.

What is needed is a real system of universal jurisdiction. Certainly one important component of such a system would be criminal prosecutions against those who leave their home country. However, there is something decidedly wrong with this 'wait and see' approach. The international community needs to begin to exert strong pressure on states that house international criminals, much like the United States did in the Letelier matter. The 'hands off' approach that has been readily accepted as the norm is nothing less than a perversion of international law.

Beyond this, however, the international community has to recognize that as important as criminal prosecutions are (or, to be accurate, as important as they could be) prosecutions alone will not be sufficient. . . .

Let me close where I began. We live in a remarkable age. For the very first time in human history we have started to at least envision ourselves as our brothers' keeper. Universal jurisdiction will be an important component in this journey. However, the present day notion of universal jurisdiction is incomplete at best and hypocritical at worst. In order to achieve the rule of law, it is imperative that we start to bring the reality of universal jurisdiction much closer to the promise that it holds out to all mankind.

commit that act or omission in Canada if

- (a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under an Act of Parliament;
- (b) the act or omission is committed on an aircraft
 - (c) registered in Canada under regulations made under the *Aeronautics Act*, or
 - (d) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations;
- (c) the person who commits the act or omission
 - (b) is a Canadian citizen, or
 - (c) is not a citizen of any state and ordinarily resides in Canada;
- (d) the person who commits the act or omission is, after the commission of the act or omission, present in Canada;
- (e) the act or omission is committed against a Canadian citizen; or
- (f) the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act.

(3.72) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 431.2 is deemed to commit that act or omission in Canada if

- (a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under any Act of Parliament;
- (b) the act or omission is committed on an aircraft
 - (ii) registered in Canada under regulations made under the *Aeronautics Act*,
 - (iii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations, or
 - (iv) operated for or on behalf of the Government of Canada;
- (c) the person who commits the act or omission
 - (i) is a Canadian citizen, or
 - (ii) is not a citizen of any state and ordinarily resides in Canada;
- (b) the person who commits the act or omission is, after the commission of the act or omission, present in Canada;
- (c) the act or omission is committed against a Canadian citizen;
- (d) the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act; or
- (e) the act or omission is committed against a Canadian government or public facility located outside Canada.

(3.73) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 83.02, is deemed to commit the act or omission in Canada if

- (a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under an Act of Parliament;
- (b) the act or omission is committed on an aircraft
- (c) registered in Canada under regulations made under the *Aeronautics Act*, or
- (d) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as the owner of an aircraft in Canada under those regulations;
- (v) the person who commits the act or omission
 - (aa) is a Canadian citizen, or
 - (bb) is not a citizen of any state and ordinarily resides in Canada;
- (ii) the person who commits the act or omission is, after its commission, present in Canada;
- (e) the act or omission is committed for the purpose of committing an act or

omission referred to in paragraph 83.02(a) or (b) in order to compel the Government of Canada or of a province to do or refrain from doing any act;

- (f) the act or omission is committed for the purpose of committing an act or omission referred to in paragraph 83.02(a) or (b) against a Canadian government or public facility located outside Canada; or
- (g) the act or omission is committed for the purpose of committing an act or omission referred to in paragraph 83.02(a) or (b) in Canada or against a Canadian citizen.

(3.74) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada that, if committed in Canada, would be a terrorism offence, other than an offence under section 83.02 or an offence referred to in paragraph (a) of the definition "terrorist activity" in subsection 83.01(1), is deemed to have committed that act or omission in Canada if the person

- (a) is a Canadian citizen;
- (b) is not a citizen of any state and ordinarily resides in Canada; or
- (c) is a permanent resident within the meaning of subsection 2(1) of the *Immigration Act* and is, after the commission of the act or omission, present in Canada.

Terrorist activity committed outside Canada (3.75) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada that, if committed in Canada, would be an indictable offence and would also constitute a terrorist activity referred to in paragraph (b) of the definition "terrorist activity" in subsection 83.01(1), is deemed to commit that act or omission in Canada if

- (a) the act or omission is committed against a Canadian citizen;
- (b) the act or omission is committed against a Canadian government or public facility located outside Canada; or
- (c) the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act.

13.271 In *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* Judge Gilbert Guillaume, the President of the International Court of Justice said on 14 February 2002 in a separate opinion that he fully subscribes to the judgment rendered by the Court but that he believes it useful to set out his position on one question which the judgment has not addressed: whether the Belgian judge had jurisdiction to issue an international arrest warrant against Mr. Yerodia Ndombasi on 11 April 2000.¹ **He noted that this question was raised in the Democratic Republic of the Congo's Application instituting proceedings, that the Congo maintained that the arrest warrant violated not only Mr. Yerodia's immunity as Minister for Foreign Affairs but also "the principle that a State may not exercise its authority on the territory of another State". He pointed out that the application accordingly concluded that the universal jurisdiction which the Belgian State had conferred upon itself pursuant to Article 7 of the Law of 16 June 1993, as amended on 10 February 1999, was in breach of international law and that the same was therefore true of the disputed arrest warrant.**² He explained that the Congo

¹

http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_cobe%20judgement_20020214.htm and
http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-04_cobe_20020214.htm

²

The Belgian Law of 16 June 1993, as amended by the Law of 10 February 1999, aims at punishing serious violations of international humanitarian law. It covers certain violations of the Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977

did not elaborate on this line of argument during the oral proceedings and did not include it in its final submissions. Thus, the Court could not rule on this point in the operative part of its judgment. He considered that it could, however, have addressed certain aspects of the question of universal jurisdiction in the reasoning for its decision. That, he stated, would have been a logical approach; a court's jurisdiction is a question which it must decide before considering the immunity of those before it or in other words, there can only be immunity from jurisdiction where there is jurisdiction. Moreover, this is an important and controversial issue, clarification of which would have been in the interest of all States, including Belgium in particular. He believed it worthwhile to provide such clarification in his judgment:

4. . . . the fundamental principles of international law governing States' exercise of their criminal jurisdiction should first be reviewed.

The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example. Thus, the Permanent Court of International Justice observed as far back as 1927 that "in all systems of law the principle of the territorial character of criminal law is fundamental". The question has, however, always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on this subject began as early as the foundation in Europe of the major modern States. Some writers, like Covarruvias and Grotius, pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge. In their view, that country was under an obligation to arrest, followed by extradition or prosecution, in accordance with the maxim *aut dedere, aut judicare*. Beginning in the eighteenth century however, this school of thought favouring universal punishment was challenged by another body of opinion, one opposed to such punishment and exemplified notably by Montesquieu, Voltaire and Jean-Jacques Rousseau. Their views found expression in terms of criminal law in the works of Beccaria, who stated in 1764 that "judges are not the avengers of humankind in general . . . A crime is punishable only in the country where it was committed." Enlightenment philosophy inspired the lawmakers of the Revolution and nineteenth

additional to those Conventions. It also extends to crimes against humanity, which it defines in the terms used in the Rome Convention of 17 July 1998. Article 7 of the Law adds that "[t]he Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". The disputed arrest warrant accuses Mr. Yerodia of grave breaches of the Geneva Conventions and of crimes against humanity. It states that under Article 7 of the Law of 16 June 1993, as amended, perpetrators of those offences "fall under the jurisdiction of the Belgian courts, regardless of their nationality or that of the victims". It adds that "the Belgian courts have jurisdiction even if the accused (Belgian or foreign) is not found in Belgium". It states that "[i]n the matter of humanitarian law, the lawmaker's intention was thus to derogate from the principle of the territorial character of criminal law, in keeping with the provisions of the four Geneva Conventions and of Protocol I". It notes that the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [is] to be viewed in the same way, recognizing the legitimacy of extra-territorial jurisdiction in the area and enshrining the principle of *aut dedere aut judicare*". It concludes on these bases that the Belgian courts have jurisdiction.

century law. Some went so far as to push the underlying logic to its conclusion, and in 1831 Martens could assert that “the lawmaker’s power [extends] over all persons and property present in the State” and that “the law does not extend over other States and their subjects”. A century later, Max Huber echoed that assertion when he stated in 1928, in the Award in the *Island of Palmas* case, that a State has “exclusive competence in regard to its own territory”. In practice, the principle of territorial sovereignty did not permit of any exception in respect of coercive action, but that was not the case in regard to legislative and judicial jurisdiction. In particular, classic international law does not exclude a State’s power in some cases to exercise its judicial jurisdiction over offences committed abroad. But as the Permanent Court stated, once again in the “*Lotus*” case, the exercise of that jurisdiction is not without its limits. Under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners.

5. Traditionally, customary international law did, however, recognize one case of universal jurisdiction, that of piracy. In more recent times, Article 19 of the Geneva Convention on the High Seas of 29 April 1958 and Article 105 of the Montego Bay Convention of 10 December 1982 have provided:

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft . . . and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed.”

Thus, under these conventions, universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory. However, even on the high seas, classic international law is highly restrictive, for it recognizes universal jurisdiction only in cases of piracy and not of other comparable crimes which might also be committed outside the jurisdiction of coastal States, such as trafficking in slaves or in narcotic drugs or psychotropic substances.

6. The drawbacks of this approach became clear at the beginning of the twentieth century in respect of currency counterfeiting, and the Convention of 20 April 1929, prepared within the League of Nations, marked a certain development in this regard. That Convention enabled States to extend their criminal legislation to counterfeiting crimes involving foreign currency. It added that “[f]oreigners who have committed abroad” any offence referred to in the Convention “and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country”. But it made that obligation subject to various conditions. A similar approach was taken by the Single Convention on Narcotic Drugs of 30 March 1961 and by the United Nations Convention on Psychotropic Substances of 21 February 1971, both of which make certain provisions subject to “the constitutional limitations of a Party, its legal system and domestic law”. There is no provision governing the jurisdiction of national courts in any of these conventions, or for that matter in the Geneva Conventions of 1949.

7. A further step was taken in this direction beginning in 1970 in connection with the fight against international terrorism. To that end, States established a novel mechanism: compulsory, albeit subsidiary, universal jurisdiction. This fundamental innovation was effected by The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970. The Convention places an obligation on the State in whose territory the perpetrator of the crime takes refuge to extradite or prosecute him. But this would have been insufficient if the Convention had not at the same time placed the States parties under an obligation to establish their jurisdiction for that purpose. Thus, Article 4, paragraph 2, of the Convention provides:

“Each Contracting State shall . . . take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to [the Convention].”

This provision marked a turning point, of which The Hague Conference was moreover conscious. From then on, the obligation to prosecute was no longer conditional on the

existence of jurisdiction, but rather jurisdiction itself had to be established in order to make prosecution possible.

8. The system as thus adopted was repeated with some minor variations in a large number of conventions: the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973; the New York Convention Against the Taking of Hostages of 17 December 1979; the Vienna Convention on the Physical Protection of Nuclear Materials of 3 March 1980; the New York Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; the Montreal Protocol of 24 February 1988 concerning acts of violence at airports; the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988; the Protocol of the same date concerning the safety of platforms located on the continental shelf; the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988; the New York Convention for the Suppression of Terrorist Bombings of 15 December 1997; and finally the New York Convention for the Suppression of the Financing of Terrorism of 9 December 1999.

9. Thus, a system corresponding to the doctrines espoused long ago by Grotius was set up by treaty. Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. It must have first conferred jurisdiction on its courts to try him if he is not extradited. Thus, universal punishment of the offences in question is assured, as the perpetrators are denied refuge in all States. By contrast, none of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.

10. Thus, in the absence of conventional provisions, Belgium, both in its written Memorial and in oral argument, relies essentially on this point on international customary law.

11. In this connection, Belgium cites the development of international criminal courts. But this development was precisely in order to provide a remedy for the deficiencies of national courts, and the rules governing the jurisdiction of international courts as laid down by treaty or by the Security Council of course have no effect upon the jurisdiction of national courts.

12. Hence, Belgium essentially seeks to justify its position by relying on the practice of States and their *opinio juris*. However, the national legislation and jurisprudence cited in the case file do not support the Belgian argument, and I will give some topical examples of this. In France, Article 689-I of the Code of Criminal Procedure provides:

“Pursuant to the international conventions referred to in the following articles, any person, if present in France, may be prosecuted and tried by the French courts if that person has committed outside the territory of the Republic one of the offences specified in those articles.”

Two Laws, of 2 January 1995 and 22 May 1996, concerning certain crimes committed in the former Yugoslavia and in Rwanda extended the jurisdiction of the French courts to such crimes where, again, the presumed author of the offence is found in French territory. Moreover, the French Court of Cassation has interpreted Article 689-I restrictively, holding that, “in the absence of any direct effect of the four Geneva Conventions in regard to search and prosecution of the perpetrators of grave breaches, Article 689 of the Code of Criminal Procedure cannot be applied” in relation to the perpetrators of grave breaches of those Conventions found on French territory.

In Germany, the Criminal Code (*Strafgesetzbuch*) contains in Section 6, paragraphs 1 and 9, and in Section 7, paragraph 2, provisions permitting the prosecution in certain circumstances of crimes committed abroad. And indeed in a case of genocide (*Tadić*) the German Federal Supreme Court (*Bundesgerichtshof*) recalled that: “German criminal law is applicable pursuant to section 6, paragraph 1, to an act of genocide committed abroad independently of the law of the territorial State (principle of so-called universal jurisdiction)”. The Court added, however, that “a condition precedent is that international law does not

prohibit such action"; it is only, moreover, where there exists in the case in question a "link" legitimizing prosecution in Germany "that it is possible to apply German criminal law to the conduct of a foreigner abroad. In the absence of such a link with the forum State, prosecution would violate the principle of non-interference, under which every State is required to respect the sovereignty of other States". In that case, the Federal Court held that there was such a link by reason of the fact that the accused had been voluntarily residing for some months in Germany, that he had established his centre of interests there and that he had been arrested on German territory.

The Netherlands Supreme Court (*Hoge Raad*) was faced with comparable problems in the *Bouterse* case. It noted that the Dutch legislation adopted to implement The Hague and Montreal Conventions of 1970 and 1971 only gave the Dutch courts jurisdiction in respect of offences committed abroad if "the accused was found in the Netherlands". It concluded from this that the same applied in the case of the 1984 Convention against Torture, even though no such specific provision had been included in the legislation implementing that Convention. It accordingly held that prosecution in the Netherlands for acts of torture committed abroad was possible only "if one of the conditions of connection provided for in that Convention for the establishment of jurisdiction was satisfied, for example if the accused or the victim was Dutch or fell to be regarded as such, or if the accused was on Dutch territory at the time of his arrest".

Numbers of other examples could be given, and the only country whose legislation and jurisprudence appear clearly to go the other way is the State of Israel, which in this field obviously constitutes a very special case. To conclude, I cannot do better than quote what Lord Slynn of Hadley had to say on this point in the first *Pinochet* case:

"It does not seem . . . that it has been shown that there is any State practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in National Courts on the basis of the universality of jurisdiction . . . That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long established customary international law rule in the Courts of other states is another . . . The fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it . . . There is no universality of jurisdiction for crimes against international law . . ."

In other words, international law knows only one true case of universal jurisdiction: piracy. Further, a number of international conventions provide for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country. Universal jurisdiction *in absentia* as applied in the present case is unknown to international law.

13. Having found that neither treaty law nor international customary law provide a State with the possibility of conferring universal jurisdiction on its courts where the author of the offence is not present on its territory, Belgium contends lastly that, even in the absence of any treaty or custom to this effect, it enjoyed total freedom of action. To this end it cites from the Judgment of the Permanent Court of International Justice in the "*Lotus*" case:

"Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . ."

Hence, so Belgium claimed, in the absence of any prohibitive rule it was entitled to confer upon itself a universal jurisdiction *in absentia*.

14. This argument is hardly persuasive. Indeed the Permanent Court itself, having laid down the general principle cited by Belgium, then asked itself "whether the foregoing considerations really apply as regards criminal jurisdiction". It held that either this might be the case, or alternatively, that: "the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers". In the particular case before it, the Permanent Court took the view that it was unnecessary to decide the point. Given that the case

involved the collision of a French vessel with a Turkish vessel, the Court confined itself to noting that the effects of the offence in question had made themselves felt on Turkish territory, and that consequently a criminal prosecution might “be justified from the point of view of this so-called territorial principle”.

15. The absence of a decision by the Permanent Court on the point was understandable in 1927, given the sparse treaty law at that time. The situation is different today, it seems to me totally different. The adoption of the United Nations Charter proclaiming the sovereign equality of States, and the appearance on the international scene of new States, born of decolonization, have strengthened the territorial principle. International criminal law has itself undergone considerable development and constitutes today an impressive legal *corpus*. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined “international community”. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.

16. States primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.

17. Passing now to the specific case before us, I would observe that Mr. Yerodia Ndombasi is accused of two types of offence, namely serious war crimes, punishable under the Geneva Conventions, and crimes against humanity.

As regards the first count, I note that, under Article 49 of the First Geneva Convention, Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention:

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, [certain] grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned . . .”

This provision requires each contracting party to search out alleged offenders and bring them before its courts (unless it prefers to hand them over to another party). However, the Geneva Conventions do not contain any provision on jurisdiction comparable, for example, to Article 4 of The Hague Convention already cited. What is more, they do not create any obligation of search, arrest or prosecution in cases where the offenders are not present on the territory of the State concerned.

They accordingly cannot in any event found a universal jurisdiction *in absentia*. Thus Belgium could not confer such jurisdiction on its courts on the basis of these Conventions, and the proceedings instituted in this case against Mr. Yerodia Ndombasi on account of war crimes were brought by a judge who was not competent to do so in the eyes of international law. . . .

13.272 Various international conventions require of South Africa to create extra-territorial jurisdiction over the offences set out in these Conventions, such as the OAU Convention on the Prevention and Combating of Terrorism, the Convention

for the Suppression of the Financing of Terrorism, and the International Convention for the Suppression of Terrorist Bombings . The Bill must therefore make provision for extra-territorial jurisdiction of South African courts. Also of relevance is the fact that Parliament is presently considering the enactment of the *Implementation of the Rome Statute of the International Criminal Court Bill* of 2001.³ The objects of the *International Criminal Court Bill* are to—

- (a) create a framework to ensure that the Statute is effectively implemented in the Republic;
- (b) ensure that anything done in terms of the Act conforms with the obligations of the Republic in terms of the Statute;
- (c) enable, the national prosecuting authority to prosecute and the High Courts of the Republic as far as possible and in accordance with the principle of complementarity as contemplated in Article 1 of the Statute, to adjudicate in cases against persons accused of having committed a crime; and
- (d) in the event of the national prosecuting authority declining or being unable to prosecute a person enable the Republic to cooperate with the Court in the investigation and prosecution of persons accused of having committed crimes or offences referred to in the Statute, and in particular to-
 - (i) enable the Court to make requests for assistance;
 - (ii) provide mechanisms for the surrender to the Court of persons accused of having committed a crime referred to in the Statute;
 - (iii) enable the Court to sit in the Republic; and
 - (iv) enforce any sentence imposed or order made by the Court.

13.273 The crimes provided for by *International Criminal Court Bill* are genocide, crimes against humanity, and war crimes. It was pointed out that some large-scale acts of terror, like the September 11 attacks, appear to fit under crimes against humanity as defined in the Statute of the International Criminal Court, but

³ On 17 July 1998 the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ('the Court') at which South Africa was represented, adopted the Rome Statute on the International Criminal Court ('the Statute'). This was the first important step towards the establishment of a permanent international criminal justice system which will complement national laws of States Parties to the Statute in the prosecution of individuals for crimes of international concern, namely genocide, crimes against humanity, war crimes and the crime of aggression. South Africa has already signed the Statute and ratified the Statute on 10 November 2000.

many others of lesser scale or where no *organization* is involved would not.⁴ The suggestion was therefore made that a crime or crimes of terrorism could be added to the Statute of the International Criminal Court to address future events.

13.274 The *International Criminal Court Bill* provides as follows on the jurisdiction of South African courts:⁵

4. (1) Despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment.

...

4.(3) In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if—

- (a) that person is a South African citizen; or
- (b) that person is not a South African citizen but is ordinarily resident in the Republic; or

4

Saul Mendlovitz "Crime(s) of Terror: Developing Law and Legal Institutions" in *BOMBS AWAY!* Fall 2001 Vol 13 No 2 the newsletter of the Lawyers' Committee on Nuclear Policy (LCNP) suggests that there are 3 approaches to dealing with terrorism:

What is needed at this juncture is the establishment of a global legal regime dealing specifically with terrorism. Some large-scale acts of terror, like the September 11 attacks, appear to fit under crimes against humanity as defined in the Statute of the International Criminal Court, but many others of lesser scale or where no "organization" is involved would not. A crime or crimes of terrorism could be added to the Statute of the International Criminal Court to address future events (the Statute has not yet entered into force, and when it does will only deal with crimes committed thereafter). However, given the Statute's amendment provisions, that process could take a decade or more. Another approach would be the establishment of a specialized permanent international tribunal on terrorism. A third possibility is to continue to rely on the system of national courts and the prosecute or extradite requirement and further develop through international lawmaking the definition(s) of terrorism. Under all three approaches, an accompanying development, which may in part just evolve, would be a system of global policing involving at least a very high degree of coordination and collaboration among national police forces. Eventually, this could - and should - lead to the establishment of a global police force.

See also the article by John Burroughs "A Rule-of-Law Response" in *Bombs Away* Fall 2001 Vol 13 No 2 who argues as follows:

To attract support and cooperation of countries in the Middle East, and to advance an international regime on suppression of terrorism, the best approach to trying suspects would be the establishment of an ad hoc tribunal, by the Security Council or interested states, and prosecution under a statute including crimes against humanity as defined in the Rome Statute, the treaty establishing the International Criminal Court. The ICC itself, currently opposed by the Bush administration, cannot be used for this purpose, because the Statute has not yet come into force, and when it does in the next year or two will only apply to crimes committed thereafter.

Under the Rome Statute, murder and other inhumane acts intentionally causing great suffering or serious injury, when committed as part of a widespread or systematic attack against any civilian population in furtherance of a state or *organizational* policy, constitute crimes against humanity. Thus acts committed by members of terrorist groups or networks found to have sufficient longevity and coherence to qualify as an organization could come under the definition.

5

See <http://www.pmg.org.za/docs/2002/appendices/020531iccbill.htm>

- (c) that person, after the commission of the crime, is present in the territory of the Republic; or
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

...

Offences against administration of justice in terms of Statute

37.(1) Any person who—

- (a) in the Republic; or
- (b) outside the territory of the Republic and who—
 - (i) is a South African citizen;
 - (ii) is not a South African citizen but who is ordinarily resident in the Republic;
 - (iii) after the commission of the offence, is present in the territory of the Republic; and
- (c) during his or her interaction, in any matter whatsoever, with the Court, in respect of any matter over which the Court has jurisdiction and whether or not the Court is functioning in the Republic or not, intentionally –
 - (i) gives false evidence when under an obligation to tell the truth pursuant to paragraph 1 of Article 69 of the Statute;
 - (ii) presents evidence that he or she knows is false or forged; . . .

13.275 The project committee considers that in order to comply with the requirements imposed by the international conventions to combat terrorism, South Africa has to ensure that its legislation provides for extra-territorial jurisdiction. A provision based on the clause provisionally proposed in the discussion paper need to be included in the *Anti-terrorism Bill* To effect this. The committee agrees with Ms Schneeberger's reasoning that it would be an inhibiting and unnecessary qualification to require also that the offender should be arrested on South African territory, and it is of the view that the words in clause 15(b)(i) "and the perpetrator of the act is arrested in the territory of the Republic" should be deleted. The committee also noted her remark about the conflicting provisions making provision in clause 6 on endangering the safety of maritime navigation for a ship *registered in the Republic* and clause 14 which provides for a *ship flying the flag of the Republic*. The committee agrees that it should be consistent and that provision should be made for a ship *registered* in the Republic. The committee is of the view that it should follow the wording used in the *International Criminal Court* in regard to citizens and persons ordinarily resident in the Republic. The committee also considers that the criticism on the offence being aimed at the *security of the Republic*, is persuasive. The committee considers that since the Act lists a number of offences which is related to the security of the Republic, it is questionable to enumerate this ground as yet another factor which bestows jurisdiction on South African courts. The project committee is therefore of the view that this ground should be deleted. The committee does not share the concerns of the Chief: Military Law Services on the acts referred to not relating to the terrorist offences set out in the Bill. He also proposes that the word *or* should be substituted for the word *and* as more offences are thus created. The committee does not agree with the latter proposal as subsection (b) lists what would usually

be alternative cases which may arise, and therefore considers that the word “or” should be retained. The committee considers that the clause should also make provision in subclause (b) for the case where the offence has been committed outside of the Republic, and the person who has committed the act is, after the commission of the act, present in the territory of the Republic. The project committee is further of the view that the clause should also provide for the jurisdiction of South African courts if the evidence reveals any other basis recognised by law.

13.276 It has been suggested to the Commission to consider the situation where the National Director decides not to institute a prosecution in the Republic against an alleged offender. The Bill did not make provision for the extradition of a person accused of having committed a terrorist act outside the Republic's territory where the National Director declines to prosecute such a person in the courts of the Republic. The provisions of the *Implementation of the Rome Statute of the International Criminal Court Bill* were drawn to the committee's attention. In terms of this Bill if the National Director, for any reason, declines to institute a prosecution, he or she must inform the Director-General of the Department for Justice and Constitutional Development accordingly with the view to the surrender of such person to the International Criminal Court. It was suggested that a similar mechanism could possibly be adopted in the Anti-Terrorism Bill which will provide for the *lacuna* in the Bill.

13.277 The committee noted that the New Zealand *Terrorism (Bombing and Financing) Suppression Bill* of 2002 addresses this issue partially. It provides that proceedings may also be brought in a New Zealand court for terrorist bombing or financing of terrorism if the acts alleged to constitute the offence occurred wholly outside New Zealand, but —

- (i) there is present in New Zealand a person alleged to have committed an offence referred to in the Bombings Convention or the Financing Convention; and
- (ii) the person is not extradited to a State Party to the Bombings Convention that has established jurisdiction in accordance with that Convention; or a State Party to the Financing Convention that has established jurisdiction in accordance with that Convention.

13.278 The New Zealand Bill also requires that when an investigation has been undertaken the Attorney-General must inform the relevant States Parties promptly of the findings of the investigation, and indicate promptly to the relevant States Parties whether New Zealand intends to exercise jurisdiction. The New Zealand Bill provides that relevant

States Parties means any States Parties that have established jurisdiction in accordance with the Bombings Convention or the Financing Convention, and any other interested States Parties the Attorney-General considers advisable to inform or notify. If the measures taken under New Zealand law to ensure the person's presence for the purpose of prosecution or extradition include taking the person into custody, the Attorney-General must, immediately after the person is taken into custody, notify the relevant States Parties, either directly or through the Secretary-General of the United Nations, of the fact that the person is in custody and the circumstances that justify the person's detention. The Bill also sets out the rights of persons taken into custody to communicate with consular representatives. It provides that the clause applies to a person who is taken into custody in New Zealand and who is neither — a New Zealand citizen; nor a person who is ordinarily resident in New Zealand but is not a citizen of any State. Promptly after being taken into custody, a person must be informed that he or she is entitled, and must be permitted to communicate without delay with the nearest appropriate representative of the relevant State, and to be visited by a representative of the relevant State. Relevant State, in relation to a person, means the State of which the person is a citizen; or the State that is otherwise entitled to protect the person's rights; or if the person is not a citizen of any State, the State in whose territory the person ordinarily resides. The Bill provides further that nothing affects any other rights of a person to whom the section applies. No proceedings for any offence against the Act may be instituted in any court except with the consent of the Attorney-General. However, a person alleged to have committed any offence against the Act may be arrested, or a warrant for the person's arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the Attorney-General's consent has not been obtained. If a person is prosecuted for terrorist bombing or financing of terrorism, the Attorney-General must communicate the final outcome of the proceedings promptly to the Secretary-General of the United Nations, so that he or she may transmit the information to other States Parties to the Bombings Convention or, as the case requires, the Financing Convention.

13.279 The committee considers that the suggestion that it should provide for the situation where the NDPP declines to institute a prosecution in the Republic is persuasive. The committee considers that the Bill should provide that whenever the National Director receives information that there may be present in the Republic a person who is alleged to have committed an offence under the Act, the National Director must order an investigation to be carried out in respect of the allegation; inform any other foreign State which might also have jurisdiction over the alleged offence promptly of the findings of the investigation; and indicate promptly to other foreign States which might also have jurisdiction over the alleged offence whether he or she intends to prosecute. The committee considers that the Bill should contain criteria to be considered by the NDPP in deciding whether to prosecute. The

committee considers that the Bill should provide that in deciding whether to prosecute, the National Director shall take into account — considerations of international law, practice and comity; international relations, prosecution action that is being or might be taken by a foreign State; and other public interest considerations. The Bill should further provide that if a person has been taken into custody to ensure the person's presence for the purpose of prosecution or surrender to a foreign State, the NDPP must, immediately after the person is taken into custody, notify any foreign State which might have jurisdiction over the offence concerned, and any other State the National Director considers advisable to inform or notify either directly or through the Secretary-General of the United Nations, of the fact that the person is in custody; and the circumstances that justify the person's detention. When the NDPP declines to prosecute, and another foreign State has jurisdiction over the offence concerned, he or she must inform such foreign State, accordingly with the view to the surrender of such person to such foreign State for prosecution by that State.

13.280 It is clear to the project committee that the provisions of the *Extradition Act*, 1962 (Act No 16 of 1962) should also apply in respect of terrorist offences. The project committee has noted the remarks on the desirability of including terrorism as one of the listed offences in the Rome Statute. Since it is not the case yet, the comment referred to above that it might very well take 10 years for its inclusion seems apposite. The mechanisms for surrender provided for by the South African *Implementation of the Rome Statute of the International Criminal Court Bill* would therefore clearly not be applicable or suited where an offence in terms of the *Anti-Terrorism Bill* is concerned.

13.281 The application of the *Extradition Act* is explained as follows in *Harksen v President of the Republic of South Africa*:¹

[3] South Africa has been party to very few extradition treaties. Its withdrawal from the Commonwealth in 1961 resulted in the lapse of many of its extradition treaties with other Commonwealth States. In subsequent years, foreign States were reluctant to enter into any new extradition treaties with South Africa, largely because of its policy of apartheid. While this is no longer the case, South Africa, post-1994, has entered into few extradition treaties and is not a party to one with the FRG. This, however, is no bar to the extradition of requested individuals. International law has long recognised that extradition may also be granted on the basis of reciprocity or comity.

[4] An extradition procedure works both on an international and a domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign State to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. At play are the relations between States. However, before the requested State may surrender the requested individual, there must be compliance with its own domestic laws. Each State is free to prescribe when and how an extradition request will be acted upon and the procedures for the arrest and surrender of the requested individual. Accordingly, many countries have extradition laws that provide domestic procedures to be followed before there is approval to extradite.

¹ 2000 (2) SA 825 (CC) at 828 *et seq.*

[5] In South Africa, extradition is governed domestically by the provisions of the Extradition Act, 1962 (the Act). Until amended in 1996, the Act made provision for two situations in which extradition might take place. The first is governed by the provisions of s 3(1) of the Act and applies to any person who is accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is a party to an extradition agreement with South Africa. The requested person is liable to be surrendered to the requesting State, subject to the provisions of the Act, in accordance with the terms of such agreement. The second basis for extradition is governed by the provisions of s 3(2) of the Act which, prior to the 1996 amendment, read as follows:

'Any person accused or convicted of an offence contemplated by ss (2) of s 2 and committed within the jurisdiction of a foreign State not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the State President has in writing consented to his being so surrendered.'

Since 1996 there is a third situation in which a person might become liable to be extradited and that is where the foreign State which requests the surrender has been 'designated' by the President.

[6] In the case before us, where there is no extradition treaty between South Africa and the FRG, the provisions of s 3(1) do not apply. The provisions of s 3(3) also do not apply because the FRG has not been 'designated' by the President and, in any event, the provisions of s 3(3) were added only after the extradition proceedings against the appellant were set in motion. It follows that of the three alternatives of s 3, the request from the FRG could be entertained in terms of the provisions of s 3(2) only.

[7] On 24 May 1995 the President, on receipt of a memorandum from the second respondent (the Minister), consented in writing in terms of s 3(2) of the Act to the extradition of the appellant. The Minister thereupon sent a notice in terms of s 5(1) to the fifth respondent (the magistrate), who issued a warrant for the arrest of the appellant. Thereafter an extradition enquiry was held by the magistrate, who found, under s 10(1), 7 that there was sufficient evidence to warrant a prosecution of the appellant in the FRG for the offences in respect of which the extradition was sought and that therefore the appellant was liable to be surrendered to the FRG. The magistrate accordingly ordered the committal of the appellant to prison to await the Minister's decision with regard to his surrender.

...

The legal nature of the President's consent

[13] The appellant's submissions rely on the proposition that an international agreement was concluded in consequence of the presidential consent under s 3(2). It is therefore necessary now to consider the legal effect of that consent.

[14] Although presidential consent under s 3(2) may eventually have international resonance, the Act governs applications for extradition on the domestic plane only. This is true whether there is a treaty or not. Where South Africa is bound by an extradition treaty, its terms will govern the international obligations of this country to the foreign State. Nonetheless, as far as domestic law is concerned the implementation of those international obligations is expressly made subject to the provisions of the Act. Similarly, in a non-treaty extradition, the surrender of the person sought is subject to the requirements of the Act. In other words, before the person whose extradition is sought may be surrendered to the foreign State, the procedures prescribed in the Act must be completed. This includes the arrest of the person under s 5(1), the holding of an enquiry under s 9(1) and a finding by a magistrate under s 10 that the evidence is sufficient to make the person liable to surrender. If the magistrate makes that finding, the Minister of Justice is given a discretion under s 11 to order the surrender of the requested person to any person authorised by the foreign State to receive him or her.

[15] The effect of s 3(2) is no less domestic in its reach than the other provisions of the Act. It neither initiates nor concludes extradition. Where there is an extradition treaty between South Africa and a requesting State, the Minister is authorised by the provisions of s 5(1) to set in motion the provisions of the Act by notifying the magistrate of the request. Where there is no extradition treaty between the requesting State and South Africa, it is the Minister who forwards the request for extradition to the President. Then under s 3(2) the President's consent is necessary to enable the

Minister to give the notification to the magistrate. Section 3(2) and the Act as a whole regulate the domestic procedures which then govern the extradition proceedings and which protect the rights of persons present in South Africa whose surrender is sought by a foreign State.

...

The constitutionality of s 3(2)

[17] The appellant's submission was that, in the absence of express reference in s 3(2) to the provisions of s 231 of the Constitution, the President is empowered to enter into an international agreement with a foreign State without having to comply with the Constitution: that is without the approval by resolution of each of the Houses of Parliament under s 231(2).

[18] This submission was correctly rejected by the High Court. I have already examined the purpose and effect of s 3(2) of the Act, from which it emerges that presidential consent has domestic application only. Section 231 of the Constitution is thus inapplicable to such consent. In any event, even if s 231 of the Constitution does govern acts under s 3(2), the failure to expressly incorporate its terms cannot render that section unconstitutional. The Constitution is the supreme law of the land. It is unnecessary for legislation expressly to incorporate terms of the Constitution. All legislation must be read subject thereto. To the extent that s 231 of the Constitution might apply to acts performed under s 3(2), those acts and that section must be read consistently with the provisions of the Constitution. Nothing in the terms of s 3(2) precludes the observance of the provisions of s 231 of the Constitution. This submission must therefore fail.

13.282 The Cape High Court also recently considered the application of the *Extradition Act* in *Geuking v President of the Republic of South Africa and Others* 2002 (1) SA 204 (C) at 211 *et seq*:

The Act makes provision for three situations in which extradition might take place. The first is governed by the provisions of s 3(1) of the Act and applies to any person who is accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is a party to an extradition agreement with South Africa. The requested person is liable to be surrendered to the requesting State in accordance with the terms of such agreement.

The second is governed by s 3(2) of the Act in terms of which a person, accused or convicted of an extraditable offence, committed within the jurisdiction of a foreign State which is not a party to an extradition agreement with South Africa, is liable to be surrendered to such a State if the President has in writing consented to his or her being surrendered.

The third situation is governed by s 3(3) of the Act which provides for the surrender of a person who is accused or convicted of an extraditable offence committed within the jurisdiction of a State which has been 'designated' by the President in terms of s 2(1)(b) of the Act.

In all three situations, the extradition process is set in motion by a request for extradition by the foreign State to the Minister of Justice ('the Minister') in terms of s 4(1) of the Act. Section 5(1) of the Act authorises a magistrate to issue a warrant for the arrest of any person, *inter alia*, upon the receipt of notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister. In all three situations an enquiry must be held with a view to the surrender of the person concerned to the requesting State. The enquiry is regulated by ss 9 and 10 of the Act.

In terms of s 9 any person detained under a warrant of arrest shall as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon the magistrate shall hold an enquiry with a view to the surrender of the person concerned to the requesting State. Section 9(2) provides that the magistrate holding the enquiry shall proceed in a manner in which a preparatory examination is to be held. This provision has the effect of incorporating the provisions of chap 20 of the Criminal Procedure Act 51 of 1977 *mutatis mutandis* into the Act. Chapter 20 of the

Criminal Procedure Act provides, inter alia, for the calling of witnesses on behalf of the State and for the accused to give evidence or to make an unsworn statement and to call any competent witness on his behalf. Section 9(3) specifies the documentary evidence which may be received in evidence at the enquiry.

Section 10 sets out the prerequisites for an order committing the person sought to be extradited to prison to await the Minister's decision with regard to his surrender. Before he can make an order of committal, the magistrate must find that the person in question is liable to be surrendered to the foreign State concerned and that there is sufficient evidence to warrant the prosecution for the offence in the foreign State. If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he must discharge the person brought before him (s 10(3) of the Act).

Section 10(4) requires the magistrate who has issued an order of committal to forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary.

The proceedings before the magistrate is an enquiry, not a trial. Questions may, accordingly, properly be raised before the magistrate which are not related to the guilt or innocence of the person concerned on the charges which the requesting State intends bringing against him - indeed, the magistrate is not concerned with questions concerning the guilt or innocence of the person concerned. . . .

Section 11 of the Act vests the ultimate decision to surrender a person to a foreign State in the Minister

South African domestic extradition procedure resembles the practice adopted in many other countries. It is a process with two distinct phases: the first, the judicial phase, encompasses the court proceedings which determine whether a factual or legal basis for extradition exists; in the second phase, the Minister exercises his or her discretion whether or not to surrender the person concerned to the requesting State. The first phase is judicial in its nature and warrants the application of the full panoply of procedural safeguards; the second phase is political in nature. This feature of extradition proceedings is emphasised in the Canadian cases *Idziak v Canada* (Minister of Justice) [1992] 3 SCR 631 and *United States v F Dynar* [1997] 2 SCR 462. The process is described in the following terms by Van den Wijngaardt *The Political Offence Exception to Extradition. The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (1980) at 39:

'In this system, the judicial control no longer has the character of an advisory opinion. It is binding insofar as it is negative and consultative insofar as it is positive. As such, it constitutes a judicial veto. If the court holds that extradition can be granted, then the executive power retains the right to refuse extradition, because extradition is a matter of foreign policy, which falls within the exclusive competence of the executive state power.'

Extradition is, therefore, a process which is initiated on the international plane, passes through a domestic phase, and comes full circle to end on the international plane with the delivery of the individual . . .

Extradition in the absence of a treaty

The legal basis for extradition in the absence of a treaty may be reciprocity or comity . . . Reciprocity in extradition occurs where the request for surrender is accompanied by assurances of reciprocal extradition in comparable circumstances. Professor Neville Botha . . . says that reciprocity in extradition should be seen as

'a loosely structured and informal means of treaty conclusion. The offer of reciprocity coupled with the request for extradition, once acted upon, gives rise to "binding treaty obligations" for both parties involved and can consequently - subject always to the intention of the parties - not be regarded as anything other than an internationally binding treaty.'

The rules of comity are 'for the most part rules of goodwill and civility, founded on the moral right of each state to receive courtesy from others . . . Comity in the sphere of extradition 'means little more than that the requested State will receive and consider requests for extradition from other States . . . In the case of comity there is no on-going relationship of mutual surrender between the parties. As Professor Botha points out . . . the grant of extradition -

'is to be regarded as a one-off concession to the requesting state which does

not give rise to a duty of counter-performance. It is an act of courtesy performed by one state towards another in the broad interests of justice.'

Section 3(2) of the Act

Where there is an extradition treaty between South Africa and the requesting State, the Minister in terms of s 5(1) sets in motion the provisions of the Act by notifying the magistrate of the request for extradition. Where there is no extradition treaty between the requesting State and South Africa, the President's consent under s 3(2) of the Act is necessary to enable the Minister to give the notification to the magistrate.

The provisions of s 3(2) of the Act read as follows:

'Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered.'

In *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC) para [21] at 834C (2000 (1) SACR 300 H at 308d; 2000 (5) BCLR 478 (CC) at 487B - C) the Constitutional Court held that the President's consent in terms of s 3(2) of the Act was a domestic act which was not intended to create international rights and obligations:

'It was not an agreement at all: neither an international agreement as maintained by the appellant nor an "informal agreement" as suggested by the High Court.' I

(In *S v Harksen; Harksen v President of the Republic of South Africa and Others; Harksen v Wagner NO and Others* 2000 (1) SA 1185 (C) at 1204A - B it is said that the President, by granting his consent in terms of the subsection, was

'... simply giving his country's co-operation in what may be called an informal arrangement. It may indeed, in loose terminology, also be termed an informal agreement, subject thereto, however, that it was not internationally enforceable and did not create reciprocal rights and duties.')

It is clear from the foregoing that s 3(2) has its basis in comity and not in reciprocity; the wording of the section, in any event, does not demand reciprocity. Professor Botha submits, rightly in my view, that the President's consent under the section is 'the legislative embodiment of one of the most basic tenets of international law, namely comity'...

In order to obtain the President's consent under s 3(2) of the Act, the Minister must forward the request for extradition to the President. Section 4 of the Act which deals with the request for extradition does not prescribe the form and content of the request. All that is required is that a request is to be made to the Minister by a person recognised by the Minister as a diplomatic or consular representative. The request does not have to be made in any set form... In terms of s 3(2) it is required that it must be shown that the extradition is sought of (i) a person accused or convicted of (ii) an extraditable offence (iii) committed within the jurisdiction of the foreign (requesting) State (iv) which is not a party to an extradition agreement with South Africa. It is clear that in terms of the section the President is not called upon to examine the merits of the request...

In *Abel v Minister of Justice and Others* 2001 (1) SA 1230 (C) the Court was concerned with a notification by the Minister in terms of s 5(1)(a) of the Act in a situation where there was an extradition treaty between the requesting State and South Africa. In her judgment, Traverso J (Hlophe JP concurring) cites the above passages (at 1241B - D) with approval and states that they apply

'with equal force to the Minister's notification in terms of s 5(1)(a)'.

The learned Judge stresses (at 1244E - F) that the requirements for a request for extradition must be distinguished from the requirements of a extradition order, and continues at 1244H/I:

'If due regard is had to the purpose, wording and proper context of s 4, read with s 5(1)(a) of the Act, it is clear that the Legislature did not intend, nor provide for an enquiry by the Minister before he issues a notification for the purposes of s 5(1)(a).'

Echoing the words of Traverso J, it can be said that the aforesaid dictum applies with equal force to the President's consent in terms of s 3(2) and the Minister's notification in terms of s 5(1)(b) of the Act, and that the Legislature did not intend, nor provide for,

an enquiry or some form of preliminary hearing by the President before the giving of consent in terms of s 3(2) (see also *Harksen v President of the Republic of South Africa and Others* 1998 (2) SA 1011 (C) at 1042F).

This approach has earned the stamp of approval of the Constitutional Court. In *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC) para [15] at 832C (2000 (1) SACR 300 at 306b; 2000 (5) BCLR 478 at 485C) Goldstone J held that, once the presidential consent has been obtained under s 3(2), that section and

'... the Act as a whole regulate the domestic procedures which then govern the extradition proceedings and which protect the rights of persons present in South Africa whose surrender is sought by a foreign State'.

In a footnote (at 832I (SA); 485I (BCLR)) Goldstone J cites with approval the following words of Professor Botha:

'As s 3(2) does not, in fact, authorise the State President to order the extradition of the person sought, but merely classifies him as a "person liable to be surrendered", it avoids the pitfalls inherent in comity and allows the individual full protection of the law. He is merely brought within the ambit of the Act and the hearing follows its normal course.'

The domestic procedures which govern the extradition proceedings and which protect the rights of persons present in South Africa whose surrender is sought by a foreign State are those contained in ss 9 and 10 of the Act. The provisions of these sections are '... designed to ensure that the statutory prerequisites are complied with before any person is extradited. The magistrate is accordingly the person who is enjoined in terms of the general scheme of the Act to properly consider the evidence and the requirements of the Act and, where applicable, the extradition treaty in question. It is not the Minister who is so enjoined.'...

Nor, one may add, is the President so enjoined.

The enquiry in terms of ss 9 and 10 of the Act before the magistrate is, therefore, the appropriate forum in which to raise the question of the applicant's nationality. The manner in which he had acquired his South African citizenship, the question whether he had misled the authorities (as the respondents maintain) by neglecting to mention his conviction for a criminal offence in Germany in his application for citizenship, and whether he had acquired South African citizenship after his alleged conviction and sentence in Germany, and after the commission of the offences on which his extradition was being sought, are matters which can be canvassed at the enquiry before the magistrate and on which he can report to the Minister under s 10(4) of the Act.

Once the Minister has received from a magistrate, who has issued an order for committal after the enquiry under ss 9 and 10, the record of the proceedings together with such report as the magistrate may deem necessary under s 10(4) of the Act, the Minister may, in terms of the discretion conferred upon him in s 11 of the Act, order or refuse surrender of the person concerned to the requesting State.

Section 21(3) of the Constitution

Section 21(3) of the Constitution provides:

'Every citizen has the right to enter, to remain and reside anywhere in the Republic.'

The applicant contends that this provision places a limit upon the power of the executive to extradite its own citizens, and that the section requires the Executive, at the very least, to take into consideration the fact that the person sought to be extradited is a South African citizen.

... Mr Katz, who ... appeared on behalf of the applicant, referred to s 6(1) of the Canadian Charter of Rights and Freedoms ('the Canadian Charter') which provides:

'Every citizen of Canada has the right to enter, remain in and leave Canada.'

Section 6(1) of the Canadian Charter does not provide a blanket protection against extradition to Canadian citizens. ...

The applicant's rights under s 23(1) of the Constitution and the question whether the extradition of the applicant to Germany in the circumstances of the case would constitute a reasonable limit which can be justified in a free and democratic society under s 36 of the Constitution, is a matter for the consideration of the Minister with knowledge of the full factual context within which the extradition of the applicant is

being sought.

...

The constitutionality of s 10(2)

Section 10(1) and (2) of the Act provide as follows:

'(1) If upon consideration of the evidence adduced at the enquiry referred to in s 9(4)(a) and (b)(i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against the order to the Supreme Court.

(2) For the purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.'

In response to a letter addressed to him by the applicant's attorneys, the Attorney-General (now the Director of Public Prosecution) indicated:

'It is confirmed that the State intends relying on a certificate as contemplated in s 10(2) of the Extradition Act 67 of 1962, as amended, at the proposed enquiry.'

The applicant contends that s 10(2) is inconsistent with the provisions of the Constitution inasmuch as it infringes his right to a fair trial (s 35(3)); his right to a fair public hearing (s 34)); his right to be presumed innocent (s 35(3)(h)), and the doctrine of the separation of powers in that it violates the independence of the Judiciary (ss 43, 85 and 125 read with s 165).

In *Bell v S* [1997] 2 B All SA 692 (E) it was held that s 10(2) does not fall foul of the Constitution. In the course of his judgment, Zietsman JP (Jennett J concurring) said (at 698e - g):

'... (W)e are dealing here with an enquiry and not a trial. The trial will come later, in Australia, and the appellant will no doubt at that stage be given the opportunity to adduce evidence and to challenge the evidence. If s 10(2) is held to be unconstitutional it could mean that a person in the position of the appellant would in effect have to be tried twice, and that all of the witnesses in the foreign State would have to be brought to South Africa for the purposes of the extradition enquiry to substantiate and prove the allegations made against him. This is certainly not the purpose of extradition proceedings. ...'

A similar view was expressed, though obiter, in *S v Von Schlicht* 2000 (1) SACR 558 (C) at 563h - 564c.

...

It is not necessary to resolve the issue of the constitutionality of s 10(2) in this judgment. Indeed, to do so would be premature and may, in given circumstances, amount to an academic exercise ...

Section 10(2) applies where the magistrate has to satisfy him or herself 'that there is sufficient evidence to warrant a prosecution in the foreign State'. The subsection, therefore, applies only where the requesting State seeks the surrender of the person concerned in order to prosecute him or her for an extraditable offence committed within its jurisdiction. Germany seeks the extradition of the applicant not only for offences allegedly committed in Germany but also on the ground that the applicant had been convicted of an extraditable offence committed within its jurisdiction. Section 10(2) does not apply to the proof of the latter. The German authorities may decide to proceed with their request only on the basis of the applicant's conviction for offences committed within its jurisdiction.

The German authorities may, despite the expressed intention to do so, decide not to rely upon a certificate under s 10(2) and to place evidence in regard to the commission of the alleged offences before the magistrate. In such circumstances, the magistrate would be free to decide whether or not there is sufficient evidence to warrant prosecution in Germany without the restraint of s 10(2). Such a situation arose in *S v*

Thornhill 1997 (2) SACR 626 (C). At 636g - i Friedman JP (Selikowitz J concurring) said:

'The magistrate in his judgment relied on such a certificate as constituting "conclusive proof". Mr Katz, during the course of his argument, conceded, however, that, if the certificate were to be ignored, there was sufficient evidence in the documents placed before the magistrate to warrant a prosecution. The magistrate was accordingly entitled to find that there was sufficient evidence without relying on the presumption. As this issue is capable of being decided without determining whether s 10(2) of the Act is a violation of the Constitution, it is unnecessary to make any finding on its constitutionality.'

Similar views were expressed by Heher J in *McCarthy v Additional Magistrate, Johannesburg, and Others* (case No 96/21842, A WLD, dated 14 May 1998) at p 39.

If the German authorities choose to rely upon a certificate under the section, the magistrate may find that the certificate placed before him does not comply with the requirements of s 10(2); for example, the certificate does not appear to him or her to be issued by an appropriate authority in charge of the prosecution in Germany.

If the magistrate, in reliance upon a certificate under s 10(2), finds that there is sufficient evidence to warrant a prosecution of the applicant in Germany, the applicant would be entitled to raise the question of the constitutionality of the subsection in an appeal to the High Court under s 13 of the Act. The High Court would then be able to deal with the constitutionality of the subsection in the full factual context within which it is sought to be applied.

(c) Recommendation

13.283 The project committee and Commission recommend that the Bill should make provision for South African courts to have jurisdiction over terrorist offences if -

- (a) the alleged perpetrator of the offence is arrested in the territory of the Republic, in its territorial waters or on board a ship registered in the Republic or an aircraft registered in the Republic; and
- (b) the offence has been or is committed -
 - (i) in the territory of the Republic, or committed elsewhere, if the act is punishable in terms of the domestic laws of the Republic, including the Act or in terms of the obligations of the Republic under international law;
 - (ii) on board a vessel or a ship or fixed platform registered in the Republic or an aircraft which is registered under the laws of the Republic at the time the offence is committed;
 - (iii) by a citizen of the Republic or a person ordinarily resident in the Republic;
 - (iv) against a citizen of the Republic or a person ordinarily resident in the Republic;
 - (v) outside of the Republic, and the person who has committed the act

- is, after the commission of the act, present in the territory of the Republic; or
- (viii) on board an aircraft in respect of which the operator is licenced in terms of the Air Services Act 1990 (Act No 115 of 1990) or the International Air Services Act 1993 (Act No 60 of 1993); or
- (c) the evidence reveals any other basis recognised by law.

13.284 The committee considers that the Bill should provide that whenever the National Director receives information that there may be present in the Republic a person who is alleged to have committed an offence under the Act, the National Director must order an investigation to be carried out in respect of the allegation; inform any other foreign State which might also have jurisdiction over the alleged offence promptly of the findings of the investigation; and indicate promptly to other foreign States which might also have jurisdiction over the alleged offence whether he or she intends to prosecute. The Bill should contain criteria to be considered by the NDPP in deciding whether to prosecute, namely — considerations of international law, practice and comity; international relations, prosecution action that is being or might be taken by a foreign State; and other public interest considerations.

13.285 The Bill should further provide that if a person has been taken into custody to ensure the person's presence for the purpose of prosecution or surrender to a foreign State, the NDPP must, immediately after the person is taken into custody, notify any foreign State which might have jurisdiction over the offence concerned, and any other State the National Director considers advisable to inform or notify either directly or through the Secretary-General of the United Nations, of the fact that the person is in custody; and the circumstances that justify the person's detention. When the NDPP declines to prosecute, and another foreign State has jurisdiction over the offence concerned, he or she must inform such foreign State, accordingly with the view to the surrender of such person to such foreign State for prosecution by that State.

13.286 The provisions of the *Extradition Act, 1962*¹ **must apply (with the necessary**

¹ Hence the *Extradition Act* will govern issues such as -

- (a) persons liable to be extradited;
- (b) requests for extradition from the Republic of a person suspected of having committed a terrorist act;
- (c) warrants of arrest issued in the Republic;
- (d) warrants of arrest issued in certain foreign States in Africa;
- (e) warrants for further detention of persons arrested without warrant;
- (f) the furnishing of particulars by the magistrate to the Minister;
- (g) the bringing of persons detained under warrant before a magistrate for the holding of an enquiry;

changes) in respect of any surrender.² Promptly after being detained as contemplated in section 7 or 9 of the *Extradition Act*, 1962, a person who is not — a South African citizen; a person ordinarily resident in the Republic; or a citizen of any State, must be informed that he or she is entitled, and must be permitted — to communicate without delay with the nearest appropriate representative of — the State of which the person is a citizen; if the person is not a citizen of any State, the State in whose territory the person ordinarily resides; or the State, if any that is otherwise entitled to protect the person's rights; and to be visited by such representative.

13.287 No prosecution under the Act may be instituted in any court except with the consent of the National Director. Provided that a person alleged to have committed any offence under the Act may be arrested, or a warrant for the person's arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the National Director's consent has not been obtained. If a person is prosecuted for an offence under the Act, the National Director must communicate the final outcome of the proceedings promptly to the Secretary-General of the United Nations, so that he or she may transmit the information to other States Parties to the United Nations.³

V. DETENTION FOR INTERROGATION

-
- (h) an enquiry where the offence concerned was committed in a foreign State;
 - (i) the Minister ordering or refusing the surrender of a person detained to a foreign State;
 - (j) an enquiry where offence committed in associated State;
 - (k) any person against whom a order of committal or a surrender order has been issued appealing against such order to the High Court having jurisdiction;
 - (l) the limitation of execution of orders for the surrender of any person;
 - (m) the Minister ordering cancellation of warrants of arrest or discharge of detained persons;
 - (n) the removal of persons surrendered;
 - (o) the National Director or a prosecutor appearing at extradition proceedings;
 - (p) the Minister's power to prescribe forms;
 - (q) persons surrendered to the Republic not being detained or tried for certain offences in certain circumstances;
 - (r) certain persons surrendered to a foreign State, being returned to the Republic; and
 - (s) the entry and passage through the Republic of persons in custody.

² The *Extradition Act* defines "Minister" as the Minister of Justice. It was recommended above that the Bill should provide that 'Minister' means the Minister to whom the administration of this Act has been assigned by the President by proclamation in the Gazette, and that the President should also be empowered to determine that any power or duty conferred or imposed by the Act on such Minister, shall be exercised or carried out by that Minister after consultation with one or more other Ministers.

³ This is a requirement of the Terrorist Bombing and Suppression of Financing of Terrorism Conventions but it is considered that it should apply in respect of all offences set out in the Act.

(a) Justification for detention for interrogation

(i) Evaluation contained in discussion paper 92

13.288 The following clauses was proposed in the discussion paper:

15. (1) Whenever it appears to a judge of the high court on the ground of information submitted under oath by a Director of Public Prosecutions that there is reason to believe that any person possesses or is withholding from a law enforcement officer any information regarding any offence under this Act, the judge may, at the request of such Director, issue a warrant for the detention of such person and subject to such conditions as the judge may determine, which conditions may be amplified or amended by such judge or any other judge from time to time.

(2) Notwithstanding anything to the contrary in any law contained, any person detained by virtue of a warrant, under subsection (1), must as soon as possible be-

- (a) taken to the place mentioned in the warrant,
- (b) furnished with the reasons for such detention, and
- (c) detained there,

for interrogation until-

- (ii) a judge orders his or her release if satisfied-
 - (aa) that the detainee, has satisfactorily replied to all questions under interrogation; or
 - (bb) that no lawful purpose will be served by further detention; or
- (ii) the detention period referred to in subsection (4) has expired.

(3)(a) Any person detained in terms of a warrant issued under subsection (1), must be brought before a judge within 48 hours of such detention and again after a further 5 days.

(b) The judge referred to in paragraph (a) must at each appearance of the detainee enquire as to-

- (i) the conditions of the detainee's detention and welfare,
- (ii) whether such detainee has satisfactorily replied to all questions under interrogation, and
- (iii) whether further detention will serve any lawful purpose:

provided that the onus in showing reasons for the further detention shall be on the Director of Public Prosecutions, failing which the judge shall order the release of the detainee.

(c) Any person detained under subsection (1), may at any time make representations to a judge relating to his or her detention or release or conditions of detention.

(d) The Director of Public Prosecutions in whose area of jurisdiction any person is being detained under subsection(1) may at any time stop the interrogation of such person, and thereupon such person must be released from detention immediately.

(4) Detention under a warrant issued in terms of this section shall be for a period no longer than 14 days.

(5) Subject to the terms of subsection (6), no person, other than a judge of the high court, an officer in the service of the State acting in the performance of official duties, or a person authorised by the National Director of Public Prosecutions, or a Director of Public Prosecutions may have access to a detainee under subsection(1), or is entitled to any official information relating to or obtained from such detainee.

(6)(a) A detainee shall be entitled to consult with a legal practitioner of his or her choice and such legal practitioner shall be entitled to be present when the detainee is interrogated.

(b) A detainee shall be entitled to be visited in detention by his or her medical practitioner.

(c) A detainee shall have the right to communicate with and be visited by his or her-

- (i) spouse or partner,
- (ii) next of kin, and
- (iii) chosen religious counsellor,

unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such communication or visit should be refused.

(7) The need for detention or continued detention must be motivated in relation to one or other of the following purposes:

- (a) To compare fingerprints, do forensic tests and verify answers provided by the detainee;
- (b) to explore new avenues of interrogation;
- (c) through interrogation to determine accomplices;
- (d) to correlate information provided by the person in custody with relevant information provided by other persons in custody;
- (e) to find and consult other witnesses identified through interrogation;
- (f) to hold an identification parade;
- (g) to obtain an interpreter and to continue interrogation by means of an interpreter;
- (h) to communicate with any other police services and agencies;
- (i) to evaluate documents which have to be translated; or
- (j) any other purpose relating to the investigation of the case approved by the judge.

(8) Upon expiry of the period referred to in subsection (4) a detainee shall be released immediately.

13.289 The project committee emphasised that it had been presented with a proposal emanating from the Police Service and that the committee had not received evidence of the justification for what the Police have in mind. The committee noted that it had not been told why measures of the sort set out under clause 16 are required and why conventional policing methods are inadequate. It seemed to the committee that since countries such as the United States, Canada or Australia¹ **did not have such measures at the time,**

¹ The provisions of the Australian Northern Territory Criminal Code on terrorism was considered noteworthy which provides as follows: 50. Definitions In this Division - "act of terrorism" means the use or threatened use of violence -

(a) to procure or attempt to procure - the alteration of; (ii) the cessation of; or (iii) the doing of, any matter or thing established by a law of, or within the competence or power of, a legally constituted government or other political body (whether or not legally constituted) in the Territory, the Commonwealth or any other place;

(b) for the purpose of putting the public or a section of the public in fear; or

(c) for the purpose of preventing or dissuading the public or a section of the public from carrying out, either generally or at a particular place, an activity it is entitled to carry out;

"organization" means an association, society or confederacy;

"unlawful organization" means an organization that uses, threatens to use or advocates the use of unlawful violence in the Territory to achieve its ends;

"violence" means violence of a kind that causes, or is likely to cause, the death of, or grievous harm to, a person.

51(1) Any person who, knowing an organization to be an unlawful organization -

(1) belongs or professes to belong to it;

(3) solicits or invites financial or other support for it or knowingly makes or receives a contribution of money or other property to or for its resources; or

(4) arranges or assists in the arrangement or management of or addresses a meeting of 3 or more persons knowing that the meeting is to support or further the activities of that unlawful organization or is to be addressed by a person belonging or professing to belong to that unlawful organization,

is guilty of a crime and is liable to imprisonment for 2 years.

(2) The court by or before which a person is found guilty of a crime defined by this section may order the forfeiture to the Crown of any money or other property that, at the time of the offence, he had in his possession or under his control for the use or benefit of the unlawful organization.

52. Proof of the fact that a person has belonged to an unlawful organization for 28 days or was a member of any committee of it is evidence that he knew it to be an unlawful organization.

53. Any person who, knowing an organization to be an unlawful organization, in a public place, or in any other place with the intention that it can be seen by persons in a public place -

(1) wears an item of dress; or (b)

wears, carries or displays a sign or article,

in such a way or in such circumstances that it can reasonably be inferred he is a member or supporter of an unlawful organization, is guilty of an offence and is liable to imprisonment for 6 months.

54 Any person who commits an act of terrorism is guilty of a crime and is liable to imprisonment for life.

55(1) Any person who obtains for himself or another or supplies anything with the intention that it be used, or knowing that it is intended to be used, for or in connection with the preparation or commission of an act of terrorism is guilty of a crime and is liable to imprisonment for 10 years.

conventional policing methods seemed to be regarded adequate in these countries even in the USA which also faced serious terrorist incidents from time to time. The committee appreciated that arguments were raised about a lack of resources in the Republic but it seemed terribly important to the committee to make it absolutely clear that nothing which the committee said should be conveying its acceptance as advised at the time that there is evidence to justify these measures. The committee was therefore of the view that before these measures can be considered by the Commission and subsequently in all probability by Parliament, compelling evidence of justification needs to be presented.

13.290 The project committee considered that it should be guided by the Constitution and the fact that other countries may or may not achieve or have problems with is instructive and helpful but squarely, the committee has to deal with section 36 of the Constitution. The committee was of the view that detention for interrogation is permissible provided legal representation is allowed, time limits are set and that the question of admissibility of evidence should be left to the trial court. The project committee was of the view that the Bill would seem to be a law of general application, and that the proposed clause 16 seeks to limit the right to freedom from arbitrary detention and the right to remain silent. The committee considered the question whether the limitations are reasonable and justifiable in the light of the prevalence of terrorism in the country. The committee noted that South Africa does not seem to be in the situation in which Britain and Northern Ireland have found themselves in. However, the committee considered that terrorism is a matter of serious and grave concern as is reflected by the bombing incidents which was reflected in the discussion paper. The project committee however also noted that countries from which South Africa would be happy to take a lead, had not considered it necessary in the light of their problems, to providing for the kind of measures proposed under clause 16 of the Bill.

13.291 The project committee noted that what was initially proposed in the Bill was detention without trial for purposes of interrogation, no access to lawyers, and that some of the language contained in clause 16 was taken straight taken out of the

(2) Any court by or before which a person is found guilty of a crime defined by this section may order the forfeiture to the Crown of any property that, at the time of the crime -

(1) he had in his possession or under his control; and

(2) he intended should be used for or in connection with the preparation or commission of an act of terrorism.

old section 29 and old section 6 of the *Internal Security Act*. The committee noted the history of the detention for interrogation and was of the view that the lessons to be learnt from it should not be allowed to go unnoticed:²

Section 6 of the Terrorism Act of 1967, which allowed a person suspected of involvement in terrorist activities to be held indefinitely for the purpose of interrogation at the instance of a senior police officer, was undoubtedly the focal point of the pre-1982 security system.³ By the time the Rabie Commission⁴ was appointed in 1979, forty-seven persons had died while held under this law or one of its predecessors, and most of the criticism directed at the security laws was directed at this provision. Indeed, looked at in historical perspective, it was the *raison d' être* for the Rabie Commission. From the outset it was clear therefore that the Rabie Commission would be judged by its response to this law.

Here the police testimony was apparently most persuasive as far as the Rabie Commission was concerned. Although it acknowledged the criticisms that had been levelled at s 6, the Rabie Commission found, on the basis of police evidence, that it was essential to retain this provision on the ground that 'information obtained from persons in detention is the most important, and to a large extent, the only weapon of the Police for anticipating and preventing terroristic and other subversive activities'. Consequently the Rabie Commission recommended the retention of this measure subject to 'certain modifications aimed at protecting detainees'.

The modifications recommended by the Rabie Commission were regular visits to a detainee of not less than once a fortnight by a magistrate and district surgeon; the statutory recognition of the office of inspector of detainees; the granting of statutory

² In *Nombanga and another v Minister of Police, Transkei* 1992 3 SA 988 (Tk) the court said: "The corresponding South African legislation has always been regarded as one of the worst examples of statutory violation of the rights and liberties of subjects. Section 47, prior to the amendment was, in many respects, similar to the South African s 29 of the Internal Security Act 74 of 1982. . . . South Africa has reached an advanced stage in amending the said Act to alleviate the inroads which it makes into the liberty of the individual. This form of detention has already been referred to as 'cruelty reminiscent of the Middle Ages' in that its 'arbitrary or uncontrolled powers oversteps almost every norm of the legal idea. It is indeed the function of the State authority to maintain legal order and to stabilise the peaceful coexistence of the members of the civil community. ... The maintenance of the law is, however, subject to proven "rules of the game" based on justice. This applies too when the security of the State and public order are implicated. *Salus reipublicae suprema lex* does not mean that the welfare of the State should be pursued by means that do not conform to the ethically founded demands of the legal idea. Arbitrary powers, sanctioned injustices and brutal application of the law of or by the upholders of law and order cannot be countenanced even in the guise of security actions or under the pretext of total onslaught. (Basson and Viljoen *South African Constitutional Law* 1st ed at 259.)' ..."

³ Prof John Dugard "A Triumph for Executive Power - An Examination of the Rabie Report and the Internal Security Act 74 of 1982" 1982 SALJ 589 - 604 at p 595 - 601.

⁴ *Die Verslag van die Kommissie van Ondersoek na Veiligheidswetgewing* Rp 90/1981 (the Report of the Commissie of Inquiry into Security Legislation was appointed to examine the necessity, adequacy, fairness and efficacy of legislation relating to the protection of internal security.) See Prof John Dugard "A Triumph for Executive Power - An Examination of the Rabie Report and the Internal Security Act 74 of 1982" 1982 SALJ 589 - 604 at p 590.

authority to the Commissioner of Police to allow persons other than state officials to visit detainees; the requirement of written ministerial authorization for any detention in excess of 30 days; and the review of a detention order after the lapse of six months by a review committee of the kind appointed for restricted persons. As detainees were before 1982 visited by magistrates, district surgeons, inspectors of detainees and the non-state officials in the discretion of the Commissioner of Police, the above modifications represented little advance on existing practice. The only real innovation recommended was the introduction of the review committee. But here - where the need for review was the greatest - the review system is even more ineffectual than in the case of 'restricted' persons. For the review hearing itself is delayed for six months; and, if the review committee should recommend a detainee's release, the Minister's rejection of such a recommendation is not subject to even the limited review by the Chief Justice granted to restricted persons and those subject to preventative detention.

13.292 The project committee noted that the example that is thrown up in places like Northern Ireland and Israel is the so-called ticking bomb, where the question is posed what does one do about the ticking bomb and how should the law deal with such a situation. The committee however considered that certainly for the extent that bombs are ticking, they are more ticking in Israel and Northern Ireland than they are ticking in South Africa. The committee pointed out that on the face of it clause 16 as originally drafted clearly violated the Constitution and the question was whether it can be justified. The committee considered that there was no way to escape the fact that if the provisions as initially proposed were to become law, it was conceivable that they could not survive constitutional challenge. The project committee was further of the view that Minister Tswete's threats of amending the Constitution was an incredibly drastic measure.

13.293 The project committee was of the view that in any attempt whereby legislative measures providing for detention for purposes of interrogation are sought to be justified, the following remarks by the Justices of the Constitutional Court in the case of *De Lange v Smuts NO*⁵ should be considered. Justice Ackermann remarked as follows:

[23] . . . a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur 'arbitrarily'; there must, in other words, be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or 'cause' for the deprivation must be a 'just' one. What 'just cause' more precisely means will be dealt with below. . . .

[26] When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression 'detained without trial' in s 12(1)(b) is the notorious administrative detention without trial for purposes of political control. This took place during the previous constitutional dispensation under various statutory provisions

⁵ 1998 3 SA 785 (CC).

which were effectively insulated against meaningful judicial control. Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this country.

[27] Even where a derogation from a s 12(1)(b) right has validly taken place in consequence of a state of emergency duly declared under the provisions of the 1996 Constitution, and such derogation has excluded a trial prior to detention, detailed and stringent provisions are made for the protection of the detainee and in particular for subsequent judicial control by the courts over the detention. It is difficult to imagine that any form of detention without trial which takes place for purposes of political control and is not constitutionally sanctioned under the state of emergency provisions of s 37 could properly be justified under s 36. It is, however, unnecessary to decide that issue in the present case. History nevertheless emphasises how important the right not to be detained without trial is and how important proper judicial control is in order to prevent the abuses which must almost inevitably flow from such judicially uncontrolled detention.

[28] Although administrative detention without trial for purposes of political control (or for that matter completely arbitrary detention without trial) might very well be the most serious infringement of s 12(1)(b), the protection afforded by the right guaranteed thereunder goes considerably further. . . .

It is not possible to attempt, in advance, a comprehensive definition of what would constitute a 'just cause' for the deprivation of freedom in all imaginable circumstances. The law in this regard must be developed incrementally and on a case by case basis. Suffice it to say that the concept of 'just cause' must be grounded upon and consonant with the values expressed in s 1 of the 1996 Constitution and gathered from the provisions of the Constitution as a whole. I wish to say no more about 'just cause' than is necessary for the decision of the present case.

...

[47] It must be borne in mind that we are here dealing with the rule of law in relation to personal freedom. In the sphere of personal freedom, particularly, the 1996 Constitution must be seen as a decisive rejection of and reaction against the severe erosion of the rule of law in relation to personal freedom in the apartheid era by a government . . . one 'based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of restraint'. . . .

13.294 Justice Diddcott remarked as follows in *De Lange v Smuts NO*.⁶

[115] Those words, the words 'detained without trial', ought not in my opinion to be construed separately. They comprise a single and composite phrase which expresses a single and composite notion and must therefore be read as a whole. Both the usage of the phrase in this country and the provenance here of the notion are unfortunately familiar to us all. Neither should be viewed apart from our ugly history of political repression. For detention without trial was a powerful instrument designed to suppress resistance to the programmes and policies of the former government. The process was an arbitrary one, set in motion by the police alone on grounds of their own, controlled throughout by them, and hidden from the scrutiny of the Courts, to which scant recourse could be had. And it was marked by sudden and secret arrests, indefinite incarceration, isolation from families, friends and lawyers, and protracted interrogations, accompanied often by violence. Detentions without trial of that nature, detentions which might be disfigured by those or comparable features, were surely the sort that the framers of the Constitution had in mind when they wrote s 12(1)(b).

⁶ 1998 3 SA 785 (CC).

[116] A committal to prison of the kind now in question bears no resemblance to a detention with such evil characteristics. It is not a legacy of apartheid and has nothing to do with either that era or the supposed security of the State. Nor does it serve any other political purpose. Indeed, the State has no interest in the proceedings but to oil the statutory machinery constructed for the proper administration of insolvent estates. No dispute about the occasion for any committal concerns it. The parties to that are private individuals, the trustee and the creditors on one side, the insolvent and recalcitrant witnesses on the other, between whom the presiding officer acts as a referee. The proceedings are open to the public. Legal representation is allowed. The person committed to prison, should that happen, can obtain a release at any time by undertaking to supply all the information required. If the undertaking is withheld, or furnished unsuccessfully, he or she may apply immediately to the High Court under s 66(5) for a discharge from custody, which it will grant on finding the committal to have been, or the continuing imprisonment to be, wrongful on any score. The application would doubtless be brought before and treated by it as a matter of urgency, in accordance with the practice invariably observed once personal liberty is at stake. A loss of liberty might admittedly have been suffered in the meantime. But the same occurs whenever someone arrested and detained on a criminal charge remains in custody until the opportunity arises for a release on bail, and longer still if bail is denied. Yet that can hardly be called detention without trial. Even so brief a period of imprisonment would be avoided by a witness, however, were the presiding officer or the High Court itself to suspend forthwith the warrant of committal, pending its decision on the application. . . .

13.295 Justice Sachs discussed detention without trial as follows in *De Lange v Smuts NO*.⁷

In the interim Constitution, on the other hand, the words 'detention without trial' stood alone as an express bar to physical restraint by the State and accordingly had to function as the sole textual basis for analysing the constitutionality of all forms of coercive State power involving physical restraint. . . . It accordingly reclaims its commonly accepted identity in South Africa as relating to a specific and unmistakable prohibition of the special and intense form of deprivation of liberty that scarred our recent history. So firm is the prohibition, as Ackermann J points out, that even in the extreme conditions where a state of emergency is declared, rigorous constitutional conditions are imposed on the use of detention without trial. I accordingly tend strongly to the view that the manner in which the phrase 'detention without trial' was construed in *Nel v Roux* needs to be revisited.

[174] In my opinion, however, it is not necessary to resolve the problems of how to construe s 12. As I see it, the matter falls properly to be determined by the application of the doctrine of separation of powers. Section 66(3) of the Insolvency Act gives authority to appointees who happen not to be judicial officers to send recalcitrant witnesses to jail. Even though the processes followed by non-judicial but experienced appointees may in practice show the utmost procedural fairness and even if the dangers of abuse may in reality be minimal, there is a simple, profound and well-understood principle which I believe this Court should uphold, and that is that only judicial officers should have the power to send people to prison.

⁷

1998 3 SA 785 (CC).

13.296 The committee noted that in considering whether the proposed legislation was justified¹ it must keep in mind that section 36 of the Constitution requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other, and that although the level of terrorist activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of section 36 of the Constitution, it is not the only factor relevant to that exercise. The committee also noted that it must be careful to ensure that the alarming level of terrorist activities is not used to justify extensive and inappropriate invasions of individual rights. The clear purpose of clause 16 is deterring and controlling terrorist activities, an indubitably important goal and its effect is to limit, to an appreciable extent, the right of a detained person to freedom and to silence. The committee pointed out that a question to be answered is whether the extent of that limitation is justifiable and in

¹ See Justice Kriegler's reasoning in *S v Dlamini, S v Dladla and others, S v Joubert, S v Schietekat* 1999 2 SACR 51 (CC) at 88 *et seq* where he remarked as follows in determining the constitutionality of the bail provisions contained in section 60 of the Criminal Procedure Act:

"[54] . . . Looking at public opinion and taking into account the likely behaviour of persons other than the detainee, so counsel suggested, smack of preventive detention and infringe a detainee's liberty interest protected by s 35(1)(f) of the Constitution. . . ."

It would be disturbing that an individual's legitimate interests should so invasively be subjected to societal interests. It is indeed even more disturbing where the two provisions do not postulate that the likelihood of public disorder should in any way be laid at the door of the accused. . . . Nevertheless, albeit reluctantly and subject to express qualifications to be mentioned shortly, I believe the provisions pass constitutional muster. I do so on the basis that although they do infringe the s 35(1)(f) right to be released on reasonable conditions, they are saved by s 36 of the Constitution. It would be irresponsible to ignore the harsh reality of the society in which the Constitution is to operate. Crime is a serious national concern, and a worrying feature for some time has been public eruptions of violence related to court proceedings. In the present context we are not so much concerned with violent public reaction to unpopular verdicts or sentences, but with such reactions to unpopular grants of bail. . . .

Their arrest and detention on serious charges does instil confidence in the criminal justice system and does tend to settle disquiet, whether the arrestees are war-lords or drug-lords. In my view, open and democratic societies based on human dignity, equality and freedom, after weighing the factors enumerated in paras (a) to (e) of s 36(1) of the Constitution, would find ss 60(4)(e) and (8A) reasonable and justifiable in the prevailing climate in our country.

[56] That conclusion is based, first, on the inherently temporary nature of awaiting trial detention then weighed against the compelling interest in maintaining public peace. In the second place, there is a close relationship and appropriate fit between the temporary withholding of liberty and the disruption that release would unleash. I do not wish to be understood as saying anything in favour of detention without trial. We are concerned here with detention or release in anticipation of a proper trial. We are moreover and more importantly concerned with possible detention following upon a proper and public hearing before a judicial officer. . . ."

order to determine whether the limitation is permissible in terms of section 36, it is necessary to consider whether the limitation would be considered reasonable and justifiable in democratic societies based on freedom, equality and dignity. The committee also noted that the Constitutional Court remarked that it is not possible to attempt, in advance, a comprehensive definition of what would constitute a “just cause” for the deprivation of freedom in all imaginable circumstances, that the law in this regard must be developed incrementally and on a case by case basis, and suffice it to say that the concept of “just cause” must be grounded upon and consonant with the values expressed in section 1 of the 1996 Constitution and gathered from the provisions of the Constitution as a whole.²

13.297 The project committee considered it noteworthy at the time when the discussion paper was finalised, that measures such as was proposed in the discussion paper providing for detention for interrogation, did not exist in other democratic societies. The committee noted that a serious threat exists in the Republic, although not on the same scale as in Northern Ireland, and that one of the questions probably to be resolved is whether the threat to the South African community justifies controlled measures, tailored as narrowly as possible to meet the legitimate state interest of investigating and prosecuting crime³ and, particularly, terrorism. The committee considered that safeguards ensuring the ultimate

² *De Lange v Smuts NO* 1998 3 SA 785 (CC).

³ In *Nel v Le Roux and Others* 1996 (1) SACR 572 (CC) the court noted the implications of the qualification to s 189(1) of the Criminal Procedure Act as it applies to s 205, namely, that the examinee is not obliged to testify or to answer any particular question put or to produce any book, paper or document if he/she has 'a just excuse' for refusing or failing so to answer or to produce. The Court said that if the answer to any question put to an examinee at an examination under s 205 would infringe or threaten to infringe any of the examinee's Chapter 3 rights, this would constitute a 'just excuse' for purposes of s 189(1) for refusing to answer the question unless the s 189(1) compulsion to answer the particular question would, in the circumstances, constitute a limitation on such right which is justified under s 33(1) of the Constitution. In determining the applicability of s 33(1), regard must be had not only to the right asserted but also to the State's interest in securing information necessary for the prosecution of crimes. There is nothing in the provisions of s 205 read with s 189 of the Criminal Procedure Act which compels or requires the examinee to answer a question (or for that matter to produce a document) which would unjustifiably infringe or threaten to infringe any of the examinee's Chapter 3 rights. The s 205 summary procedure for imprisoning a recalcitrant witness is, when read in the context of s 205 proceedings as a whole, as narrowly tailored as possible to meet the legitimate state interest of investigating and prosecuting crime. Persons who are authorised to take evidence at the s 205 proceedings are all independent judicial officers and also preside over criminal trials; the subpoena to attend the proceedings is obtained at the request of an Attorney-General or prosecutor authorised thereto in writing by an A-G and can only be issued at the instance of the judicial officer; a person can only be summoned to attend 'who is likely to give material or relevant information as to any alleged offence'. Section 205(4) prohibits the presiding judicial officer from sentencing the examinee to imprisonment as contemplated in s 189 unless such judicial officer 'is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order'. This affords an examinee the widest possible residual protection.

protection of detainees should be contained in the proposed legislation, such as the fact that the detention and further detention is authorised by a judge of the High Court, the setting of stringent time limits for the period of detention such as 14 days, by providing that the detainee is entitled to contact and consult with the lawyer of his or her choice and who is entitled to be present at all times during questioning or interrogations, by providing that the detainee is entitled to be treated by a medical doctor of his or her own choice, that the detainee has the right to contact and communicate his or her spouse or partner, next of kin and chosen religious counsellor, and that reasons must be given to the detainee for his or her detention.

13.298 The project committee posed the question what evidence would be needed in order to justify the type of measure proposed in clause 16: perhaps the police evidence on the prevalence of the terrorist threat, particularly the extent of the problem and whether there are other less intrusive means available to achieve the end. The committee considered that evidence about the emergence of terrorist organisations, international terrorist links with South Africa, and the effect of the acts of terror on the economy would go to the principle of why one there should be anti-terrorist legislation. The project committee noted that the newspapers suggested that police officers should be paid better. The committee considered that it should approach the matter from the point of view that even if South Africa had a well-paid police force but nonetheless a serious terrorist threat, it could perhaps be said that the envisaged provision would be justified provided the necessary safeguards are contained in the provision. The project committee considered that the envisaged measures are incredibly drastic but that the list of incidents seems to justify the adoption of carefully drafted measures which limit but do not absolutely abrogate section 35 of the Constitution and which contain the necessary safeguards.

13.299 Although the committee considered that these safeguards should be included in the Bill, the committee was of the view that insufficient justification for these measures had been presented to it. Hence, the project committee considered that it is an unanswered question whether the proposed legislation will survive constitutional scrutiny in the absence of justification for the limitations to the right to freedom from detention and the right to silence and whether these limitations are regarded reasonable and justifiable in a democratic society.

(ii) Comment on discussion paper 92

13.300 Amnesty International comments that it shares the Commission's

concerns based on its own reported observations during that period reviewed by the TRC,⁴ as well as on the current evidence of human rights violations committed by law enforcement agencies. AI notes that the depth and persistence of abuses in the past strongly suggest that the reintroduction of the power to detain without charge carries the grave risk of a repetition of the past pattern of human rights violations. AI remarks that the likelihood of repetition is increased by the reality that torture still occurs in South Africa, primarily in the context of criminal investigation. AI states that its investigations and others by statutory and civil society organisations in South Africa clearly indicate that the police and the military (in its domestic law enforcement role) have not yet overcome the legacies of the past. AI comments that despite efforts by post-1994 governments, with the assistance of certain foreign governments, to retrain law enforcement agencies and subject them to greater scrutiny, incidents of torture or ill-treatment during interrogations or at the point of arrest or during house searches are still occurring and that there is corroborated evidence of the infliction of torture on individuals in the custody of law enforcement agents, particularly from specialised units, such as electric shock and suffocation tortures, forced painful postures, suspension from moving vehicles and helicopters, and severe and prolonged beatings.⁵

13.301 AI remarks that while it must be said that law enforcement agencies, particularly the police, are under extreme pressure to deal effectively with rampant crime, often of the most vicious sort, some of the victims of these current incidents of torture were completely innocent of the crimes of which they were apparently suspected, and were subsequently never brought to trial or convicted of any offence. However, even if the arrested person was in fact guilty of the crime of which they were suspected, state officials are absolutely forbidden to use torture. AI comments that there can be no justification for torture, even under the most extreme circumstances or conditions of war, civil unrest or high levels of criminal activity. AI states that the bombings and other violence in the greater Cape Town area, much of which has gone unresolved for two or more years, represents in acute form those pressures on the

⁴ See for instance, Amnesty International, *Political Imprisonment and Torture in South Africa* (PUB 81/00/78) January 1978; *South Africa: Human rights violations under the national state of emergency* (AFR 53/92/86) June 1986; *South Africa State of Fear: Security force complicity in torture and political killings, 1990-1992* (AFR 53/09/92) June 1992.

⁵ See for instance, Amnesty International *Report 2000*; "Amnesty International welcomes Government action against racially-motivated violence by police" (AFR 53/003/2000) 8 November 2000; "South Africa: Torture and misuse of lethal force by security forces must end" (AFR 53/05/99) 20 April 1999; *Forensic Medicine and Ethics* (ACT 75/12/99) December 1999; *South Africa The criminal justice system and the protection of human rights: the role of the prosecution service* (AFR 53/01/98), February 1998.

government which appear to have led it to consider a return to drastic measures. In Al's view the response to these pressures should not be the re-introduction of old "solutions" and the adoption of measures which cannot deliver security and crime prevention, and that such measures will, at the same time, put South Africa in breach of its own Constitution and its obligations under international human rights law.

13.302 IDASA suggests a useful "test" when evaluating the proposed legislation would be:

- Is the provision necessary?
- Could one achieve the same result by alternative means?
- Does an institutional weakness exist that could limit the effectiveness of the legislation?

13.303 IDASA considers that the proposed clause 16(1) advocates what could be a severe infringement of someone's rights in terms of the Constitution, and as such, they would submit that the clause would not survive constitutional scrutiny. IDASA notes section 35(1) of the Constitution which states that everyone who is arrested for allegedly committing an offence has the right to remain silent and to be brought before a court as soon as is reasonably possible, but not later than 48 hours after the arrest; or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not a court day. IDASA also points to section 36(1) of the Constitution which allows rights to be limited in the Constitution only in exceptional circumstances as the rights in the Bill of Rights may be limited only to the extent that the limitation is *reasonable* and *justifiable* in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including, the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose. IDASA remarks that it is against this constitutional standard that the proposed clause 16 must be interpreted, and suggests that clause 16 as it stands severely infringes the rights of the accused in terms of s 35. IDASA however also comments that in terms of their "test" mentioned above, it could be said that the provision is necessary, given the threat of terrorism in our country, particularly areas such as the Western Cape, and that there is a need for persons alleged to be involved in acts of terror to be apprehended speedily. The same result, they contend, could be reached by simply following the example already set by s 37(6)(e), the circumstances in s 37(6)(e) are different yet very similar although in both instances there is a threat to the stability of the state, and the constitutional threshold for a detention period has

been laid down in s 37(6)(e). There appears to them to be no reason not to utilise it in similar circumstances. IDASA notes that the European Court of Human Rights has in various instances held prolonged detention to be unlawful and that it has granted compensation in several cases. They note that an arrested person is entitled to trial or release within a reasonable period of time; a person claiming unlawful detention is entitled to have a court decide on that issue; and if the arrest or detention is found to have been unlawful, the individual is entitled to compensation, but in South Africa the court would be involved in sanctioning the initial period of detention.

13.304 The South African Human Rights Commission (SAHRC) comments that the potential impact of detention without trial provisions are so far reaching and severe that the motivation and rational for their inclusion in the Bill requires focussed consideration. The SAHRC notes that they support the overall need for an *Anti-Terrorism Act* for the reasons put forward by the Commission, although they have to point out that they do not support all the provisions of the Bill, particularly those contained in clause 16. The SAHRC says it takes note of the Government's response to crime and urban bombings to date, but that they submit that the debate around the introduction of the Bill, and in particular clause 16, should be reconsidered and take place in a rational and dispassionate environment. They are of the view that any rational and dispassionate discussion of the issues at hand has to be based on a Constitutional and Human Rights perspective.

13.305 The SAHRC states to survive Constitutional scrutiny, the provisions of clause 16 will have to be measured against the general limitations clause in the Bill of Rights. The SAHRC notes that in terms of Section 36 the limitation of a right is only permissible if that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and at the aforesaid conclusion certain factors have to be taken into account. These include the nature of the rights that are being affected and the importance of the purpose of the limitation. The SAHRC explains that it is most concerned by resent levels of crime and urban terror in Cape Town, all reasonable South Africans share this concern and are demanding immediate action from the State. The SAHRC points out that as of 15 September 2000, three people have died and at least 130 have been injured in 21 bomb blasts in Cape Town since June 1998.¹ The SAHRC remarks that Capetonians are particularly outraged by the wave of bombings in their city and the detrimental effect it has had on local businesses and the city's overall reputation as a tourist haven.²

¹ Marianne Merten, "Back to detention without trial?" *Mail and Guardian* 15 September 2000.

² Mike Cohen, "South African government declares war on Muslim vigilante group" *The Associated Press* 13 September 2000.

13.306 The SAHRC notes that in response to these demands from the public, the government argues that tough new anti-terrorism laws are necessary to deal with urban bombings in the Western Cape, and that President Thabo Mbeki has warned that the recent wave of urban terrorism in Cape Town threatens the entire political and constitutional order of South Africa. The SAHRC points out that accompanied by Safety and Security Minister, Steve Tshwete, and Justice Minister, Penuell Maduna³, President Mbeki said he recognised that it was ‘critically important’ that his government takes sweeping steps to restore law and order.⁴ The SAHRC remarks that Justice Minister Penuel Maduna, in giving his broad approval to the draft anti-terrorism legislation, recently stated that South Africa does not have the legal instruments to combat urban terror adequately,⁵ and, similarly, Justice ministry spokesperson Paul Setsetse stated that there is a “sense of urgency” about “passing a law to give police more powers to deal with urban terrorism” than they are allowed under current law.⁶ The SAHRC notes that the sense of urgency and the importance of addressing the bombings effectively should, however, not cloud the consideration of the impact detention without trial will have on the development of a culture of human rights in South Africa. The SAHRC points out that clause 16 deals with critical issues that lie at the heart of South Africa’s Constitutional democracy, and that it directly limits the right not to be detained without trial, as guaranteed by Section 12(1)(b) of the Bill of Rights. The SAHRC remarks that South Africa has a long and tragic history of detention without trial associated with gross human rights abuses, that this history is well documented and that they concur with the views of the

³ See also “no right to remain silent” *The Citizen* 19 February 2001 at p 5 which notes that the Bill signifies a low regarding constitutional rights, according to the Democratic Alliance, and that Dene Smuts, the DA’s spokesman on Human Rights, said this would mean detention without trial and interrogation without charge. She said that if the Bill which was sent to Parliament resembled the Bill contained in discussion paper 92, the government’s lack of commitment to constitutional order it claims to support will have reached a new low. She pointed out that the Bill provided for the detention not only of suspects but for the interrogation of innocent people deemed to hold information, under lock and key for 14 days. Ms Smuts said the constitutional safeguards have been put there to protect innocent people from governments who try to pass police state laws, and from police who use force instead of conventional investigation methods. She stressed that South Africa had a serious problem with police brutality and add to this Ministers who are panicked into a show of *kragdadigheid* (ironfistedness) because their departments are not getting results, we could soon be as defenceless as anti-apartheid activists who were held by previous governments — were it not for the Constitution which protects us. She also said that it is important to distinguish between legitimate anti-terrorism measures and the erosion of our rights against government, and that once lost, we will not get them back.

⁴ “Mbeki Lends Support to Beleaguered Magistrates” *Panafrican News Agency* 14 September 2000.

⁵ Wyndham Hartley “Anti-Terrorism Laws Get Approval” *Business Day* 14 September 2000.

⁶ Robert Brand “Anti-Terrorism law a ‘matter of urgency’” *Cape Times* 11 September 2000.

Commission in this regard, as appears from the discussion paper.

13.307 The SAHRC notes that in *In De Lange v. Smuts*, Judge Ackermann of the Constitutional Court explained, “[I]n the past there has been much unwarranted deprivation of physical freedom in order to achieve particular social and political goals. . . . Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this country. . . . History . . . emphasises how important the right not to be detained without trial is and how important proper judicial control is in order to prevent the abuses which must almost inevitably flow from such judicially uncontrolled detention.”⁷ The SAHRC states that it would therefore appear that while everyone agrees that urgent steps are necessary to combat urban terrorism, the nature of the rights affected dictate that we proceed with extreme caution when limiting those rights. The SAHRC remarks that in order to do so, the other factors listed in section 36 of the Bill of Rights have to be considered to determine the reasonableness and justifiability of the limitations clause 16 seeks to impose, and that these include the *relation between the limitation and its purpose* and *less restrictive means to achieve the purpose*. The SAHRC notes that to date the government has not offered any constitutionally based reasons why conventional policing methods and other less restrictive means are inadequate. The SAHRC points out that those reasons that have been offered are largely emotional, “in the heat of the moment” statements containing sweeping and unsubstantiated accusations and generalisations such as that the Police is being hampered by the provisions of the Bill of Rights⁸ and that there is a need to rush anti-terrorism legislation through Parliament so that the police are able to catch the bombers. The SAHRC says that for instance, then ANC parliamentary chief whip Tony Yengeni has urged that “strong legislative measures” are needed in order “to speed up the capture and prosecution of urban terrorists.”⁹ The SAHRC notes that unfortunately the government has not yet

⁷ *De Lange v Smuts* 1998 (7) BCLR 779 (CC).

⁸ In January 2000 the South African Human Rights Commission noted with profound concern reports in the media that the Minister of Safety and Security had proposed amendments to the Constitution to aid the war against urban terrorism. According to these reports the Minister allegedly said that a tough new law was being planned to counter terrorism would be effective only if certain constitutional rights were limited. The Minister has since withdrawn these comments.

⁹ “ANC wants faster action on terrorists” *Cape Times* 1 September 2000.

explained why it believes that the Police are presently unable to catch the bombers. The SAHRC says that Mr Yengeni seems to be implying that existing laws are not adequate to cope with present levels of crime and urban terrorism but omits to say why these laws are not adequate. The SAHRC points out that they support the view expressed by the Commission that compelling evidence of justification needs to be presented before these measures can be considered by Parliament.

13.308 The SAHRC says that they offer a different hypothesis for the apparent lack of success in bringing the perpetrators of serious crime and urban terror to book. The SAHRC notes that to date, the government's response to crime has been in the form of the introduction of new policies, the amendment of existing laws relating to crime, the introduction of new laws and crime fighting institutions and the implementation of a new approach towards crime control. The SAHRC considers that these measures have, however, failed to make any significant impact on levels of crime, including urban terrorism in the country, and that the trend to attribute failure to the purposeful development of a culture of human rights by our courts since the introduction of the new Constitution and Bill of Rights, is not accurate. The SAHRC remarks that an evaluation of the measures implemented by the government since 1994¹⁰, reveals the following more plausible explanations for the failure:

- Many of the legal provisions that have been introduced by the government have been struck down by the Constitutional Court and have therefore been ineffective as crime fighting instruments. By and large these provisions have been declared unconstitutional due to:
 - inadequate legislative drafting, or
 - the unconstitutionality of the underlying policies,
- Moreover, measures that have survived constitutional muster have failed to make a significant impact on crime due to implementation problems experienced by the South African Police Service and the prosecution services.

13.309 The SAHRC considers that the inability of our State to effectively deal with crime is not only the result of inadequate legislative process. The SAHRC notes that it is often stated that the South African criminal justice system is in crisis,¹¹ that

¹⁰ The HRC refers to the Human Rights Committee, Quarterly Review, *The Effect of Crime and Violence on the Delivery of Rights and the Creation of a Human Rights Culture*, March 2000.

¹¹ The SAHRC refers to Schönteich *Assessing the crime fighters: The ability of the criminal justice system to solve and prosecute crime*, ISS Papers, Paper 40, September 1999, HRC, Quarterly Review, March 2000, South African Law Commission, Discussion Paper 91, Project 82, *Sentencing: a New Sentencing Framework*.

the awaiting trial population is at an all time high, the prosecution service is taking fewer cases to court than at any time since 1949 and some serious violent crimes are solved so rarely that the perpetrators of these crimes have less than one in a fifty chance of being caught and punished.¹² The SAHRC points out that according to the Institute for Security Studies (“ISS”), there are a number of weak links in South Africa’s criminal justice system. These include:

- Too many cases are withdrawn before they go to trial because of crime victims’ lack of understanding and faith in the criminal justice process, and inordinate delays in the country’s criminal courts;
- Too many cases go undetected because of the public’s general unwillingness to assist the police in its investigation, and to testify for the prosecution in criminal trials. Moreover, many cases go undetected because of the police’s weak criminal investigation capabilities, especially in respect of forensic investigations,
- Too few cases are being taken to court because of a lack of experienced and adequately trained prosecutors.

13.310 The SAHRC says that the legislative framework against which reform of the criminal justice system is taking place is growing every day and poses a challenge to effective law enforcement. The SAHRC notes that the fast growing list of amendments to the *Criminal Procedure Act, 1977* and the *South African Police Service Act, 1995*¹³ offer a good example in this regard, and that research conducted in the Western Cape¹⁴ found that certain police stations did not have a single copy of these statutes or any of their amendments to them. The SAHRC points out that to impact on the level of crime the legislation adopted in respect of lawful procedures for investigation and prosecution must be enforced, and capacity building programmes within the SAPS are critical towards making law enforcement more efficient and effective by fervent legislation. The SAHRC suggests that it would appear therefore that it is not necessarily a lack of legislative initiatives that causes the problem and that the implementation and institutional problems experienced by the criminal justice system should be addressed without delay. The SAHRC submits that solutions should be sought at the level of the criminal justice system rather than the introduction of draconian detention without trial laws reminiscent of apartheid South Africa. The SAHRC remarks that an holistic approach is necessary, encompassing a firm commitment to the values and principles enshrined in our Constitution, the

¹² The SAHRC notes Schönreich at 1.

¹³ Act 68 of 1995.

¹⁴ The SAHRC points to the HRC’s *Quarterly Review* at 17.

continued implementation of government's policies, in particular the National Crime Prevention Strategy, through adequate legislative drafting, education and capacity building within the criminal justice system. The SAHRC notes that although these are medium to long term strategies, it is submitted that they offer the only effective and lasting solution to crime.

13.311 The SAHRC points out that the government's response to urban terrorism in Cape Town to date has also failed to take into account the state of emergency provisions of the Bill of Rights. The SAHRC notes that section 37 makes provision for the declaration of a state of emergency when:

- The life of the nation is threatened by war, invasion, general insurrection, *disorder*, natural disaster or *other public emergency* and
- The declaration is *necessary to restore peace and order*.

13.312 The SAHRC submits that the present situation in the Western Cape may constitute disorder and/or a public emergency that threatens the life of the nation, and that consideration needs therefore to be given to the declaration of a state of emergency to restore peace and order. The SAHRC suggests that at the very least, these measures should be considered with the same vigour as is the case with the detention without trial provisions in the Bill. The SAHRC notes that the advantages of a state of emergency as opposed to the introduction of detention without trial laws include:

- A state of emergency is Constitutionally sanctioned,
- It is of limited duration,
- It does not entail the introduction of detention measures reminiscent of apartheid laws,
- A state of emergency is subject to public scrutiny and detention under a State of Emergency similarly involves the public, and
- Specific limitations are built in to safeguard the rights of persons during a state of emergency. These are as follows:
 - An adult family member or friend of the detainee must be contacted as soon as reasonably possible and informed that the person has been detained.
 - A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.
 - The detainee must be allowed to *choose, and be visited at any reasonable time by, a medical practitioner*.
 - The detainee must be allowed to *choose, and be visited at any reasonable time by, a legal representative*.
 - A court must review the detention as soon as reasonably

possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

- *A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.*
- *The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.*
- *The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.*
- *If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.*

13.313 The SAHRC says for the above reasons they do not support the inclusion of Clause 16 in the Bill, and before these measures can be considered by Parliament the drafters should put forward more compelling reasons why clause 16 is necessary and why conventional policing methods and legal provisions, including the declaration of a state of emergency, are inadequate to deal with the situation. The SAHRC says finally, they must also express concern with the emphasis being put on interrogative detention. The SAHRC remarks that not only is this reminiscent of South Africa's painful past, but that the focus in dealing with terrorism is to obtain information through interrogation rather than through intelligence and proper investigations.

13.314 The Legal Resources Centre (LRC) Cape Town comments that the infamous detention for interrogation purposes refuses to disappear, and it threatens to haunt South Africa in a constitutional dispensation. The LRC remarks that we are able to invoke safeguards provided for in the legislation, and that the five tests expressly laid down in the Constitution as factors to be considered among others can assist in determining whether the proposed drastic measures such as detention are justifiable, namely the nature of the right (freedom and security of person and the right against self-incrimination); the importance of the limitation (to ensure the safety of the republic and the safety of the public against acts of terrorism or threats of terrorism); the nature and extent of the limitation (judicially sanctioned detention for 14 days, access to a legal representative, doctor, family and other constitutionally sanctioned privileges); the relation between the limitation and its purpose (rationale connection test — that it has been argued that detention facilitates the investigation process, if there is a reason to believe that a person possesses or is withholding information from a law enforcement regarding any offence); less restrictive

means to achieve the purpose (the conventional policing methods).

13.315 The LRC comments that the relation between the purpose and its limitations and its purpose seems to be the most crucial test and the question is whether the purpose is sufficient to justify a limitation on individual rights? The LRC says that the underlying assumption seems to be when passing a legislation of this magnitude we do not require proof that the limitation proposed is indeed effective in countering the threat, that there is no magic in the word “detention”, and that detention used to make people talk because it was accompanied by other means of unconstitutional persuasion. The LRC remarks that it should be noted that their detention is for interrogation purposes as opposed to preventative detention. The LRC explains that detention is based on a reasonable suspicion that a person has information, and asks whether the act upon which the suspicion is based on should bear any relation to the likelihood that the suspect has committed the offence? The LRC remarks that the right of an accused to have their position speedily defined or released in the absence of factual certainty should be the same regardless of the gravity of the offence, and the nature of the offence should not be used to compensate for factual uncertainty. The LRC asks whether the fundamental freedoms that this legislation asks the country to hand over are worth what will be get in return. The LRC suggests that the legislation does little to persuade people into believing that the mere act of detention would have prevented any of the bombs from going off. The LRC notes that suspects were arrested, tried and acquitted, and as civil society its members are asked to hand over their freedoms and it they are told it is for their own good and their safety.

13.316 Mr CDHO Nel the Director of Public Prosecutions in Port Elizabeth comments that in 1997 the former Attorneys-General went before the Truth and Reconciliation Commission, at the invitation of the latter, to make submissions as regards their respective roles in the administration of security cases under the previous RSA and Homelands governments. He notes that the prevailing feeling was one of deprecation at having been involved in hard decisions concerning the liberty of untried persons in terms of security legislation previously applicable and having had to do so upon information which had at times been manipulated, if not fabricated. He says to now relive as it were at the start of another era (which he believes it to be as such measures show a tendency to intensify with the passing of time) instills a sense of *dejavu*. He considers that South Africa cannot afford to reconstruct Robben Island and the proposed fourteen days detention for interrogation clause at the same time. He also says that as a matter of principle, if matters are getting out of hand then state emergency type of legislation, even if restricted to a confined area, should be invoked. He remarks that the evidence of confessions obtained in the *Wanna* case related to accused who had performed an incursion much more serious, in fact high treason,

than the activities now before the Commission, but still the attempt at the inclusion of the evidence was given short shift by the court. He notes that one might add that that episode ensued against a regime benign to the liberation movements and by accused who were provisioned by Vlakplaas, a bizarre twist to the theme prevailing in 1990.

13.317 Ms Mary de Haas of the Natal Monitor comments that under no circumstances should any further 'anti-terrorism' legislation be passed, no matter how apparently - and deceptively - compelling the case for it appears to be.¹ She says that the SAPS has more than enough legislation at its disposal to quell internal 'terrorism' and, as the experience under apartheid and, more recently, with the Scorpions, shows, any increased powers given to security forces are invariably abused. She notes that even democracies such as the UK with a firmly entrenched rule of law suffer such abuses, as the wrongful conviction of innocent people for IRA-linked terrorism in Guildford and Birmingham demonstrated. Ms De Haas says that as an anthropologist, she supports the use of a comparative perspective, such as contained in the discussion paper, which draws on the experience of other countries. She notes, however, that such a perspective is more valuable if attention is paid to context. She points out that South Africa cannot be compared to countries in which there are known or declared terrorist or guerilla organisations or bodies. She remarks that nor should it be forgotten that, even in a country with a tried and test judicial system such as the United Kingdom, miscarriages of justice have occurred with regard to terrorism convictions such as the Birmingham 6 and the Guildford 4. Ms De Haas points out that South Africa's terrorism does not have a public face, as is usual with terrorist acts, where a body or organisation claims responsibility. She points out that the paper notes that it is difficult to find purely internal terror campaigns. She poses the question where are the external enemies of South Africa who would finance such a campaign, with across border support,

¹ See <http://www.violence.co.za/> It is explained on the Natal Monitor's Website that it is a University of Natal-based violence monitoring project, which has its roots in social science research on political violence carried out from the mid 1980s. It is also stated that on the webpage that in the past nine years a political transformation has taken place, and patterns of violence have changed. An unacceptably high level of violent crime - which is not a new phenomenon - has become a national preoccupation. Despite multiparty elections in 1994 political violence has continued in KwaZulu-Natal, albeit to a lesser extent during the past two years, and the province is far from stable. Violence against women and children tears at the fabric of social life in the country. The Natal Monitor continues to produce regular (every two to three months) summaries and analyses of politically-linked violence in KZN. It is broadening somewhat in scope its focus to include comment on crime in general, especially in areas which receive little media attention, such as rural communities. Whilst minimal numbers of people killed or injured may be cited, where available, the Monitor cautions against a reliance on statistics as reflecting an accurate picture of what is actually happening - one reason being the unavailability of accurate data on crimes of violence. Its primary emphasis is on interpreting events in the socio-political context in which they are taking place in order to provide a holistic understanding of the dynamics of violence in the province. The Monitor will also continue to place under the spotlight the activities of the security forces in the province, especially as they infringe on basic human rights.

unless one considers so-called third force operatives who siphoned of South Africa's wealth into overseas front companies.

13.318 The SAPS: Legal Component: Detective Service and Crime Intelligence comments that the matter was taken up with the functional police members involved in the prevention, investigation and combating of terrorism, namely the Crime Intelligence Division, the Component Serious Violent Crimes of the Detective Service, as well as the Divisions National Response Service and Crime Prevention. The SAPS points out that the National Response Service is also responsible for the South African Police Service Special Task Force. The SAPS notes that it is pointed out in par. 1.7 of Discussion Paper 92 that the list of events mentioned in the report deals only with explosions and that *"One should keep in mind numerous violent crimes, which could, in view of the number of perpetrators, type of weapons used and their modus operandi be classified as terrorist acts"*.

13.319 The SAPS: Legal Component: Detective Service and Crime Intelligence explains that a more comprehensive list of crimes has been compiled recently, in response to a question in Parliament² and that it is only updated until 31 December 1999, and refers only to the Western Cape. The SAPS remarks that what is notable, and also an indication of the ineffectiveness of normal methods of policing, is the very small number of arrests, prosecutions and convictions. The SAPS also notes that the following information, provided as a background to a speech which the Minister for Safety and Security made on 11 September 2000, is also relevant:

- Dawood Osman has been convicted of four murder and two attempted murder charges on 1999-12-14 and sentenced to 32 years of effective imprisonment. Four people died in this shooting incident at the entrance to the Waterfront. The

² They note that the question posed was — "Whether he (the Minister for Safety and Security) will provide detailed information about the number of acts of urban terror and bombings that took place in the Western Cape province from 1996 up to the specified incident in 2000, including in each case the (a) date of the event, (b) exact location where it occurred, (c) number of injuries sustained, (d) number of deaths resulting therefrom, (e) number of arrests carried out, (f) number of (i) convictions obtained and (ii) sentences handed down and (g) estimate cost to the South African Police Service of conducting these investigations; if not, why not; if so, what is the relevant detail in each case? "

incident can only be described as urban terror. On 2000-08-29 A caller to Cape Talk who threatened further bombings called for the release of Dawood Osman and other Pagad members who are in custody.

- Nasieg Pietersen was found guilty of seven charges of attempted murder, which relate to a pipe bomb attack on an alleged drug dealer's house in Hanover Park in 1988. On 2000-04-17 he was sentenced to eight years imprisonment of which three years were suspended.
- Tapie Fakier was found guilty of possession of an unlicensed firearm on 2000-04-20 and sentence to three years imprisonment.
- D Essop and R Shaik were found guilty of the possession of an explosive device — a pipe bomb to which was tied a litre of petrol. Both were sentenced on 2000-07-07 to seven years imprisonment.
- Afsal Kariem was convicted on 2000-06-15 for the illegal possession of ammunition and was sentenced to a fine of R3 000.
- Sallie Abader - the national chief, security, of Pagad "proclaimed they would make the Western Cape ungovernable". The proclamation was made during the protest march when Tony Blair visited South Africa in 2000.
- Ebrahim Jeneker plus two other persons were to appear on 124 charges in the High Court on 2000-11-06.
- Ibrahim Gennicker and Ismail Edwards, were charged with the murder of Captain Bennie Lategan, investigator in terror related cases. They were also convicted on 2000-08-11 on charges of attempted murder, robbery with aggravating circumstance in an urban terror related matter.
- Ismail Edwards and Fazil Waggie were charged with a pipe bomb attack on Lansdowne Police Station - The magistrate in this case was assassinated.
- On the 2000-09-01 Hasiem Schrich, pleaded guilty to possession of unlicensed firearms and ammunition and seven charges of attempted murder in respect of an attack on alleged drug dealers' house.
- Saris Car Nelson and Annis Adams were charged with the death of Sadika Hendriks (a four -year old girl shot in a drive-by shooting).
- Fizzle Felix was charged with the motorcycle bombing at Weinberg Court. A key witness in this matter was assassinated .

13.320 The SAPS: Legal Component: Detective Service and Crime Intelligence points out that these incidents show that normal police methods are being used, but the successes are still relatively small compared to the total number of events. The SAPS says that it is accepted that the number of terrorist incidents alone cannot serve as justification for special legislation, but that the operational need in respect of the combating of terrorism has

to be taken into account, as well as the possible deficiencies in present legislation. The SAPS remarks that operationally speaking, the full background as to methods of operation used in terrorist activities in South Africa, needs to be elaborated upon, in order to identify deficiencies. The SAPS points out that the bail legislation, as amended not too long ago, can go a long way in addressing some problems. The SAPS says that it is appreciated that a suspect can be arrested and kept in custody for seven days at a time for further investigation, in terms of the bail legislation, and that this could perhaps go further than 14 days detention, if continuously requested. The SAPS states that what should, however, be kept in mind, is that in many instances detention for the purpose of interrogation is not merely aimed at the terrorist himself. The SAPS explains that terrorists also use common criminals as a support system, namely to illegally obtain firearms or explosives, false passports, uniforms, equipment, safe premisses, stolen vehicles and other logistics, and that these persons may not have a fierce desire, apart from defending themselves against retribution, or intimidation, to protect the suspected terrorist, but they fear mostly to incriminate themselves. The SAPS states that in this respect, the power to indemnify such a person, together with the possibility that he can be interrogated, might create the necessary circumstances to elicit basic information to identify the suspected terrorist.

13.321 The SAPS: Legal Component: Detective Service and Crime Intelligence points out that it should also be kept in mind that, although the United States of America and Canada might be more prone to international terrorism all over the world, the level of domestic terrorism, as experienced in the Western Cape, is not being experienced in those countries. The SAPS notes that the Commission refers only to Australia, the United States and Canada, whereas, in fact, detention provisions relating to terrorism have been re-enacted as recently as July 2000 in Britain (section 41, read with Schedule 8 of the *British Terrorism Act 2000*). The SAPS explains that the British Act still provides for detention without trial after arrest without a warrant by a constable of any person “he reasonably suspects to be a terrorist” for an initial period of 48 hours, and that this period may on written application by a police officer of at least the rank of a superintendent “to a judicial authority” be extended to a total period of seven days (which includes the initial 48 hours). The SAPS notes that a person remains in custody even after the 48 hours have expired, if application for extension has been made, but not finalized before the expiry of the 48-hours period, and taking into account, the type of threat in Britain and Northern Ireland and the exposition of terrorist type of actions in the Western Cape, the opinion is held that a limited and controlled period of detention is also justified in South Africa.

13.322 The SAPS: Legal Component: Detective Service and Crime Intelligence points out that the test, in terms of the Constitution, for the constitutionality of the limitation of

fundamental rights is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and that surely the British society qualifies as such. The SAPS considers that the following quotation is indicative of the need for even the most democratic country to provide for exceptional circumstances:¹

Totalitarian states do not need exceptional powers in times of crisis. Their normal powers suffice for any situation, but free societies do need to give their governments wide powers to meet dangerous circumstances.

13.323 The SAPS: Legal Component: Detective Service and Crime Intelligence points out that the words of Mr Douglas Hurd in the second reading debate of the British Public Order Act, also inspire action to guard the rights of society:²

We shall hear much today and in the debates to come about human rights and freedoms, and rightly so. But let us not forget that the right to go about one's lawful occasions in peace is the underlying human right, without which all others are nugatory. . . . Quiet streets and a peaceful framework for our individual lives can never be taken for granted.

13.324 The SAPS: Legal Component: Detective Service and Crime Intelligence considers that it is interesting to note that even in the United States of America, detention, be it through "indiscriminate arrest and excessive bail" have been used in the past to effect detention for periods of up to one month during riots, which might be of a more temporary nature than terrorism.³ The SAPS points out that terrorism in South Africa, manifests itself mainly in the Western Cape, in the form of drive-by shootings, attacks until recently on drug lords by means of shootings, bomb and hand grenade attacks, and that no matter how detestable the actions of drug lords are, in no civilized society can people be allowed to take the law into their own hands and play investigator, prosecutor and judge and at the same time executioner, which is what happened in many instances in the Western Cape. The SAPS notes, furthermore, that bombs are being placed at police stations, public places and courts, a regional court magistrate has been killed, attempts were made to kill a prosecutor, police officials involved in terrorist investigations have been killed, and various key witnesses to cases related to urban terror, have been murdered recently. The SAPS states that training in the handling of firearms, the manufacturing and use of explosives and military tactics is being given, but what is problematic, are the methods of operation used by terrorists, as those involved in urban terrorism, work under utmost secrecy, which makes infiltration and even special investigation methods such as undercover operations difficult, and, moreover, the use of informants and agents is extremely dangerous in view of certain

¹ The SAPS refers to *Jones Constitutional and Administrative Law* 1969 at 135.

² Debates of the House of Commons, column 794 1986-01-13.

³ They refer to Davis KC *Discretionary justice: a preliminary enquiry* 1969.

tactics. The SAPS considers that it should be appreciated that a detailed description of tactics cannot be provided, as it would be counterproductive.⁴ The SAPS notes that suffice to say, every conventional and unconventional method is used to thwart conventional and special investigative methods, the result is a lack of intelligence and leads to act swiftly, resulting in police investigators then becoming bogged down in limited investigation methods such as physical evidence and forensics.

13.325 The SAPS: Legal Component: Detective Service and Crime Intelligence points out that the right to silence is invoked in cases where a suspect really has been in the position where circumstantial evidence requires an explanation from him/her, adding that what is further appreciated, is the fact that the concept of detention without trial, and especially for the purpose of prevention or interrogation, is not only an emotionally sensitive topic in view of the country's history, but would be extremely difficult to justify as constitutional. The SAPS says it supports the following statement of the project committee of the Commission:

The project committee considered that the envisaged measures are incredibly drastic but that the list of incidents seems to justify the adoption of carefully drafted measures which limit but do not absolutely abrogate section 35 of the Constitution and which contain the necessary safeguards.

13.326 The SAPS: Legal Component: Detective Service and Crime Intelligence says that a person who is in possession of key knowledge may be persuaded to divulge such information if some time could be spent with him or her, free from outside influences, but with proper controls. The SAPS remarks that it seems important not to link any detention provisions with an arrest for the purpose of prosecution, where bail legislation is applicable, but rather as a method to obtain information withheld from the police. The SAPS notes that in section 35 of the Constitution, reference is made to the rights of respectively arrested and accused persons, and suggests that if a detention provision is related only to the right of arrested persons, it has much more of a chance to survive a constitutional attack, than if the rights of accused persons would also be applicable.

13.327 Dr Imtiaz Sooliman who commented on behalf of the Gift of the Givers Foundation notes that the proposed measures do not exist in other democratic countries, there appears to be no justification for these measures and therefore such limitations cannot be regarded as reasonable and justifiable in a democratic society.

⁴ The SAPS suggested that a discussion with investigators in this regard could, however, be arranged, should it be deemed necessary, on the basis that such discussion will be confidential and not form part of the published report of the Commission.

13.328 Martin Schönteich of the Institute for Security Studies recently made the following observations in regard to the South African justice system: ⁵

South Africa's criminal justice system is in crisis. The crime rate is high and the prisons are overcrowded. The prosecution rate is low and courts are backlogged. The number of cases being prosecuted has been dropping since the mid-1980s.

The declining number of cases prosecuted indicates that case backlogs are not due to an increase in the crime rate. Rather, they are due to shortcomings in the criminal justice system itself.

In a European Union-funded study of the reasons for the gaps between policy and implementation in justice, many shortcomings were found.

There is a failure to prioritise effectively among policy options and to cost policies. Justice policy has been too comprehensive, attempting to transform every aspect of the justice system simultaneously without due regard for implementation capacity or the long-term sustainability of new policy initiatives. The Department of Justice has passed more than 70 pieces of legislation since 1994. This has strained resources to the maximum and led to disappointed expectations of new policies.

There is a failure to prioritise and fund the justice function adequately. Even if all the problems in the police service were to be ironed out, the courts would remain an obstacle in processing cases. But the percentage of the national budget planned to go towards justice during the course of the medium term expenditure framework is set to drop.

There is a lack of financial management skills in the department. Budgets and finances are handled in hundreds of courts throughout the country and the need for financial management skills is dire. The lack of sound financial management is one of the primary reasons for the department's parlous state of financial affairs. So, while justice desperately needs to be made a higher priority and given additional funding, it can hardly expect this in its current state of financial disarray.

13.329 The Defence Secretariat comments that clause 16 is perhaps the most controversial clause in the light of the fact that it infringes certain fundamental rights of the person suspected of having committed a terrorist act. The Secretariat considers that in view of the objects of the Bill, the fact that many criminal activities mimic terrorist acts and South Africa's commitment to international cooperation in respect of the international threat of terrorist activities it is quite possible that certain parts of the clause might survive constitutional scrutiny. The Chief: Military Legal Services notes that the contents of clause 16 may be interpreted as being contra to sections 12(1)(a) and (b) and 35 of the Constitution. They also consider the wording of clause 2⁶ as well as section 36 and the question of the limitations of rights. They state that the decision whether to implement clause 16 lies with the Government and it requires the political will to do so.

13.330 Ms Esther Steyn remarks that the question should be posed whether such a drastic measure is truly required to deal with targeted individuals, and whether detention without trial can ever be free of abuse, irrespective of any promised safeguards to protect the

⁵ <http://www.mg.co.za/mg/za/archive/2001may/features/16may-justice.html>

⁶ This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

detainee.⁷ She considers that when the police's objective justification for detention of a person is to get information from the very same person and not because they have sufficient evidence to suspect the person of having committed a crime or of withholding evidence from the state, then something is seriously wrong in the way that we investigate criminal offences and gather information in this country. She says that it is assumed that the aim of clause 16 of the Bill is to assist the police in obtaining information. She suggests that there are other ways to address the ineffectiveness of the police force, before even considering the adoption of so drastic a procedure as detention without trial. Ms Steyn argues that the authorities do not require extra powers to detain, since they already have procedures to assist them without the need to go overboard and adopt legislation that not only impinges on constitutionally guaranteed rights but also on international instruments and standards. She notes that should a witness withhold evidence from the state that is essential and material in proving a case then the state is currently empowered by section 205 of the *Criminal Procedure Act* to summons the person to court. She considers that in terms of this provision witnesses are almost compelled to disclose information to a court and should they not cooperate then they may even be incarcerated in terms of section 189 of the *Criminal Procedure Act*, unless they have a *just excuse* for their refusal. She points out that although not above criticism, section 205 is a far less intrusive method of procuring information than detaining an individual with the sole purpose of obtaining information, and it is also constitutionally sound. She argues that in terms of section 205 an individual may at least exercise a choice, ie whether to divulge information in his or her possession or rather suffer incarceration by not answering the questions put in terms of the section 205 enquiry. She notes that the state is not without power: if the individual refuses to cooperate he or she will be severely punished, but the individual would be able to contest the existence of such information in a court by way of a fair procedure and would be granted the protection of a legal process that will be judicially decided.

13.331 Ms Steyn notes that it was suggested in the discussion paper that the following safeguards would be sufficient to protect the detainee: that the detention is authorised by a judge; that there is a time limit of 14 days for detention; that the detainee would be entitled to contact and consult with a lawyer of choice; that such lawyer would be entitled to be present at all times during the questioning and interrogation of the detainee; and that reasons for the detention must be given to the detainee. She remarks that how the committee came to the conclusion that these factors serve as sufficient safeguards against arbitrary detention is not clear. She considers that in order to conform with international standards it is required that there be a procedure before a judicial authority that can decide

⁷ "The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?" 2001 SACJ Vol 14 179 - 194 at 187.

by reference to legal criteria whether there are reasons to justify the individual's detention. She suggests where liberty is at stake the decision should be made by a court of law, exercising a judicial discretion, and not merely by a judge in chambers approached by the Director of Public Prosecutions.

13.332 Ms Steyn considers that section 12 of the Constitution requires for such a decision to be made by a court of law or at least an impartial entity that will exercise a judicial discretion. She notes that the European Court of Human Rights has pointed out on many occasions that the European Convention directs a judicial officer before whom the arrested or suspected person appears, to review the circumstances militating for or against the detention, to decide whether there are reasons to justify the detention, and to release the person if there are no such reasons. She argues that the prohibition in terms of section 12 of the Constitution against arbitrary arrest implies that there must be valid reasons for such arrest. Ms Steyn points out that it has been held in the case of *African National Congress (Border Branch) and Another v Chairman, Council of State of the Republic of Ciskei, and Another*⁸ dealing with a provision akin to clause 16, that valid reasons would be those

⁸ 1992 (4) SA 434 (Ck) at 451 et seq: At first blush, it is immediately evident that there is a tremendous clash between the rights of arrest and detention permitted by s 26, and ss B 2(1) and 3 of Schedule 6. The latter requires persons to be brought before a Court as soon as possible, and that they should not be detained without authority of a Court for more than 72 hours. In contrast, s 26 makes provision for: (i) indefinite detention (s 26(2)(b)); and (ii) termination of detention at the discretion of the Commissioner of Police (ss (1)(b)(i)), or the Minister (ss (5)) or the Attorney-General (ss C (1)(b)(i)). Subsection (6) violates against s 3(1) of Schedule 6 in one sense that no arbitrary arrest can be tested. Furthermore, the prohibition against arbitrary arrest implies clearly that there must be valid 'grounds' or 'reasons' for such arrest. The European Convention (referred to earlier) in art 5(1) lays down six 'valid reasons' for arrest. They are:
'Article 5(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- the lawful detention of a person after conviction by a competent Court;
- the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

It, however, does not make provision for arrest for the sole purposes of interrogation. . . . the signatories to the European Convention, . . . resolve 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration . . . of Human Rights of

contained in Article 5(1) of the European Convention.

13.333 Ms Steyn also notes the European Court of Human Rights case of *Fox, Campbell and Hartley v UK* where the court refused to accept that the *exigencies of dealing with terrorist crime* could justify impairing the safeguards of Article 5(1). She suggests that the Bill by limiting a court's power to set the detainee free in terms of clause 16(9), which declares that no bail may be granted to a detainee nor is such detainee entitled in court to apply for bail, contravenes Article 5(3) of the European Convention, and in doing so, the Bill does not meet recognised international human rights standards. She also remarks that the denial in terms of the proposed legislation of the opportunity to approach a court for bail or any other release conflicts with the individual's rights contained in section 12 of the Constitution.

13.334 In considering the constitutionality of the Bill Ms Steyn notes the two-stage approach involved in such an enquiry, namely first to determine whether or not a fundamental right contained in the Bill of Rights has been infringed and if so then to determine whether such an infringement can be justified in terms of section 36(1) of the Constitution. She points out that she considers that the vagueness and lack of precision of the offence of committing a terrorist act will in all likelihood lead to abuse. She remarks that the broad statement of the offence of terrorism spreads the net too widely and when its is applied it will target people who never intended committing acts of terrorism at all. She argues that interrogation as the sole purpose of detention will not be acceptable in any

the United Nations of 1948). . . . it becomes clear that the European Convention and its interpretation become cogent authority for what is or could be considered to be valid grounds or reasons.

Professor Erasmus further testifies that to his knowledge there has never been an instance where grounds or reasons other than those contained in art 5(1) above have been accepted as valid restrictions. Certainly, interrogation has never been accepted as a valid reason for arrest. He then concludes that in international case law, the only claims, to his knowledge, for justification of detention for the sole purpose of interrogation is the existence of abnormal circumstances like a properly declared state of emergency. Only under such circumstances would a derogation of such a fundamental right be justified, as distinct from permissible limitations. On that score it is therefore argued that s 26 conflicts with ss 2 and 3 of Schedule 6 and requirements of international law. It is well-nigh impossible to escape that conclusion!

A further ground for coming to that conclusion is, however, found in the rest of the requirement that the limitations must be imposed by a valid 'law' - as understood in international law. In this regard it is argued that in s 26 there is a patent lack of precision spelled out for a citizen to know how to regulate his conduct. Neither is there adequate protection built into the measures to prevent arbitrary interference. When one looks at ss (2): '. . . if he has reason to believe'; ss (1)(b)(i) 'when satisfied that the said person has satisfactorily replied to all questions . . . or that no useful purpose will be served . . .'; ss (3)(b) '. . . unless satisfied . . .'; it is abundantly clear that there is no fetter on the discretion granted to the relevant official, neither are there clear guidelines to the individual to guide him as to what would entitle him to his freedom and what not.

For those reasons it is clear that as far as arrest and detention go, the relevant provisions of s 26 abolish, diminish and derogate from the rights in Schedule 6.

democratic society based on human dignity, equality and freedom. She notes that if the Bill is adopted it will deprive persons of their physical freedom and it will be achieved in a manner that cannot be accepted as being procedurally fair. She also considers that an objective consideration of the factors set out in clause 16(7)(a) to (j) shows that they are not sufficiently just to curtail the right to liberty and freedom, and that put differently, the factors listed cannot be considered to be in accordance with basic tenets of a fair legal process. She considers that for these reasons clause 16 is likely to be found unconstitutional. She notes that passing the first stage of the enquiry does not necessarily mean that the provisions will be declared unconstitutional but that what will be required is to see whether there are sufficient reasons to curtail the right to liberty and freedom, by applying the limitation clause. She considers that it will be difficult if not impossible to justify the limitation of these rights in circumstances where less restrictive methods to obtain information from individuals without any need to detain them. She considers that given the justification put forward by the committee for clause 16 it seems that the strongest argument to be made for the re-introduction of detention without trial is lack of sufficient resources to investigate crime. She asks whether this can ever be considered as justification to infringe upon the liberty of an individual, suspected of having committed an offence. She argues that such an infringement cannot be justified by the reasons given by the police and should not be considered as just, at a time when the police should be educated to change their investigation practices to fit a constitutional model.

13.335 Professor Michael Cowling argues that the project committee has gone about the process of evaluating the need for detention without trial in the wrong way.⁹ He considers that this is not the time for vague and indecisive pronouncements, and in addition, it is important when making such assessment to ensure that a clear distinction is drawn between the need or desire for the institution of detention without trial, in the first place, and thereafter evaluating the controls and safeguards that can be put in place in order to reduce as much as possible, inroads that will inevitably be made on such fundamental rights as the right to liberty. He also notes that there are two stages to this process and they need to be kept clearly distinct from each other. He considers that the first stage on the question of the decision to introduce detention without trial, must require extremely thorough and careful consideration. He suggests that the reason for this is that any decision supporting the introduction of detention without trial will be tantamount to a leap in the dark, and this is because the second stage, ie ensuring adequate safeguards and controls, is bound to be problematic, especially in the case of detention without trial for purposes of interrogation

⁹ "The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" 2000 *South African Journal of Criminal Justice* Vol 13 (3) 344 - 359 at 346 *et seq.*

because the extraction of information, by its very nature, invites abuse and evasion of controls.

13.336 Prof Cowling notes on the first stage that compelling reasons need to be advanced before any serious consideration can be given to the introduction of any detention without trial provisions and argues that no such reasons have been forthcoming. He says that it thus becomes necessary to evaluate the situation in South Africa from the perspective of terrorist threats that cannot be contained by the ordinary legal process, and this will also entail furnishing reasons as to why ordinary procedures are inadequate. He notes that the discussion paper details 338 incidents in which explosive devices were discharged causing damage or injury, and argues that whereas such statistics are clearly cause for alarm they are not very informative from the point of view of indicating whether or not detention without trial should be justified. He points out that it is clear that many of these explosives occurred around the time of elections, and suggests that this means that the threat is not ongoing, and that there seems to be a regional bias because a majority of the explosions occurred in the Western Cape during the last three years where there appears to be what can be described as a sustained campaign of terror. He says that it is tempting to point to this list of incidents and, when taken in conjunction with the alarming crime rates to conclude that detention without trial is justified. He notes in a broader context that this debate often occurs in regard to the high crime rate generally and so it is argued that South Africa is not the type of society that can afford the high due process standards inherent in the Bill of Rights. Prof Cowling remarks that thus it can be argued that the *first world* safeguards contained therein must be forfeited in order to allow the under-resourced police force to deal effectively with crime and according to this view, which is generally popular amongst police forces throughout the world most Bill of Rights instruments are nothing more than charters for criminals that favour the latter to the detriment of effective crime control measures. He notes that on the face of it there is some merit in this view-point — especially when ordinary citizens are confronted by ever-spiralling crime rates, and police forces will often blame, without some justification, due process standards for the crime rate. He suggests that whereas it is easy to argue that due process standards create obstacles for the police and prevent them from operating in the most effective manner possible it must also be borne in mind that the protection of fundamental human rights is an inherent aspect of open and democratic government.

13.337 Prof Cowling remarks that in this regard it is the criminal process system that operates at the coal-face of human rights protection, and that this is where the force of state machinery is brought to bear on the individual citizen, on the one hand and the protection of the citizen from crime and criminals, on the other hand. He considers that when the playing field alters — as was the case with the introduction of the Bill of Rights — it is necessary for

the Police to adapt to the changed situation. He considers that law enforcement agents cannot sit back and adopt a *hands-off* approach on the basis that the Bill of Rights ties their hands and consequently renders them ineffective, but in addition, society cannot be held to ransom on the basis that the price of law and order (through the effective curbing of crime) is the widespread repression and violation of basic human rights standards. He suggests that the history of policing in South Africa reveals that law and order was maintained in the past on the basis of such repression and that it is vital to learn from the lessons of the past, but, on the other hand, the right to law and order and to be protected from criminals and criminal activity is also a fundamental right — even if it is not articulated in the same way as other fundamental rights. He says that if compelling reasons can thus be advanced to indicate that, in the light of excessive crime rates and terrorism the situation cannot be brought under control without resorting to detention without trial, then this must be given serious consideration. Prof Cowling also notes the case of *De Lange v Smuts*¹⁰ and says that the clear impression emerging from the pronouncements of the various judges is that detention without trial provisions are very likely to be considered unconstitutional in the sense that the limitations process in section 36 cannot be utilised to justify violating the express and unequivocal right not be detained without trial contained in section 12(1)(b) of the Constitution. He says that it is of vital importance that the above be taken into account before deciding whether detention without trial is an essential tool in order to deal effectively with terrorism and related criminal activities. He considers that from the discussion paper it is not clear at all whether this aspect was considered as a preliminary step: note was taken of the fact that many of the world's leading democracies have not enacted detention without trial measures, but on the other hand, although South Africa did face a terrorist threat that this was not on the same scale as that confronting Northern Ireland or Israel. He says what is disturbing is that the two stages of the enquiry were not kept separate: at times the committee seemed unequivocally to require evidence to show why detention without trial is an essential prerequisite for effectively combating terrorism and yet, on the other hand, reference is also made to adequate safeguards as a means of rendering detention without trial provisions capable of being constitutionally justified.

13.338 Prof Cowling points out that the object of the second stage of the enquiry (ie safeguards that can enable justification in terms of the limitations clause) is to ensure that the detention without trial clause bears as little as possible resemblance to the provisions under the previous dispensation, and in particular, section 29 of the *Internal Security Act of 1982*.¹¹ He notes that there are certain material differences between the old section 29 and

¹⁰ 1998 (3) SA 785 (CC).

¹¹ "The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" 2000 *South African Journal of Criminal Justice* Vol 13 (3) at 349 *et seq.*

the new proposed clause 16 of the Bill:

- the decision in regard to detention is a judicial one since only High Court judges are authorised to make such an order (the discussion paper pointed out that the absence of judicial control had led to gross abuses in the past);¹²
- the application for detention is at the instance of the Director of Public Prosecutions (this removes the monopoly enjoyed by the police in respect of detention powers under the previous dispensation; the DPP must establish that there is *reason to believe* that certain information is being withheld, thus the judge needs to be objectively satisfied that this condition has been met and this requires that the relevant information from which such reasonable inference can be drawn to be placed before the court and it is a significant step away from the conferral of wide powers of detention based on the subjective discretion of a police officer as was previously the case);
- the length of detention is important — in terms of section 29 a detainee could be detained indefinitely until the detaining officer was satisfied that all questions had been satisfactorily replied to or that no useful purpose would be served by further detention, the Bill retains the purpose and conditions upon which detention is to continue but the original length of detention has been reduced to a maximum period of 14 days, and obviously the more limited the maximum detention period the greater the safeguard.
- the actual motives for detention are spelled out in far greater detail than was the case under section 29 (under the latter all that needed to be shown was a subjectively formed opinion that detention for interrogation was necessary, in contrast clause 16(7) spells out a series of specific purposes for the detention and it appears that if one or other of these is not satisfied the

¹²

Prof Cowling notes that this raises the question as to how effective the judiciary is likely to be in ensuring effective control and preventing abuse. He points out that the discussion paper recognised the possibility of executive-minded judges being singled out by the police in order to *rubber-stamp* detention orders and to turn a blind eye to abuses. He asks whether there is not a danger that the entire judiciary might find it expedient to adopt a hands-off approach on the basis of *salus republica suprema lex est*. He notes that this occurred in the previous era with such vigour is something that cannot be ignored, and refers to the case of *Schermerbrucher v Lindt* 1965 4 SA 606 (A) where the court held that 90-day detention law did not allow a detainee to testify in court under any circumstances whatsoever — even where allegations of torture are in issue and thus effectively curbed the jurisdiction of the courts to come to the assistance of detainees and give the green light to interrogators that allegations of torture would not be taken further. He comments that this problem reinforces the fact that detention without trial must be regarded as an absolute and final last resort, however if it is found to be necessary there is no other option than to trust and rely on the judiciary in order to ensure that the whole process is sufficiently transparent so that the performance of individual judges can be subjected to public scrutiny and criticism.

detention will not be justified. This could prove to be a particularly useful safeguard because it can be assumed that, when making an application for detention, the DPP would have to motivate in terms of one of these purposes, and this should narrow down the ambit of the enquiry considerably and give the prospective detainee an opportunity to answer these specific allegations. Prof Cowling also considers that it should effectively counter one of the main criticisms of section 29 of the *Internal Security Act* where persons were detained for lengthy periods without knowing the purpose of such detention or without even being interrogated.¹³ He states that the only problem in regard to these purposes that could undermine their effectivity as a safeguard is that it is possible that an application for detention could be made in respect of a number of different purposes and in addition, the clause contains an *omnibus* purpose in the form of any purpose relating to the investigation of the case approved by the judge.

- conditions of detention and controls that are in place to ensure compliance with various conditions; (These were glaringly absent under the previous dispensation where the police exercised absolute control over detainees who, in terms of legislation, were denied any access to the courts which were either prevented or restrained from any effective intervention on behalf of detainees. Being held incommunicado in solitary confinement without access to any outsiders was the order of the day for section 29 detainees.) The first step in regard to imposition of conditions is that a discretion is conferred upon the judge who orders the detention to impose conditions which can be amplified by such judge or any other judge. This important provision should be regarded by judges as a duty to determine the most appropriate conditions that would give effect of ensuring proper treatment of the detainee in the prevailing circumstances. The Bill allows judicial monitoring to ascertain whether the initial purpose of the detention has been satisfied (in which case the detainee should be released) and also in order to monitor possible abuses. Judges should also evaluate the conditions of detention at each appearance.
- the restriction of access to government officials acting in the performance of their official duties or any other person authorised by the DPP is very much in keeping with the situation under the old dispensation, however there are certain important exceptions to this restriction which go a long way

¹³

"The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" 2000 *South African Journal of Criminal Justice* Vol 13 (3) at 351.

towards addressing the problem of denial of access since it relates to a right to consult with a legal practitioner of choice, visits by preferred medical practitioner and chosen religious counsellor.¹⁴

- provision is made for ensuring that family members of a detainee are informed of the detention and there is publication of the name of the detainee and the place of detention. (This appears to be an attempt to redress the wrongs and abuses of the past where in the past dispensation persons disappeared or were detained without anyone being informed.)

13.339 Prof Cowling remarks that a disturbing feature of clause 16 in relation to conditions is the fact that its extent of operation is extremely broad, since all that needs to be shown is that there is reason to believe that a person possesses or is withholding information regarding any offence in terms of the Bill. He notes that it is interesting that the original draft was narrower in the sense that it prescribed only some of the offences set out in the Bill relating to terrorist acts any arm or ammunition and any explosive device. He considers that a problem arising from this blanket approach relating to any information concerning any offence contained in the Bill is that there are a wide range of offences listed therein ranging from bombing, on the one hand, to endangering protected persons and membership of terrorist organisations, on the other hand. He notes that this is clearly sufficiently broad to turn detention without trial in a blunt instrument capable of being effectively deployed against political opponents, as was the case in the past.

13.340 Prof Cowling notes also that one of the reasons advanced for introducing extreme anti-terrorist measures is that South Africa has either ratified or intends ratifying a number of respective instruments relating to terrorism. He says on the face of it, this is to be welcomed since terrorism has become a global phenomenon and mutual legal assistance and co-operation on the international plane is an essential tool in any effort to combat it, and

¹⁴

Prof Cowling notes that in regard to visits by family and religious counsellors there is always a possibility that logistical problems could compromise any right in this regard, and constant judicial monitoring in this regard is vital. He points out that account should be taken of the fact that the total detention period is 14 days which should set-off, to a certain extent problems arising in this regard. He considers that the right to a legal practitioner, particularly during interrogation, must be considered to be an absolute, as is the case with the right to a visit by a medical practitioner where circumstances deem this necessary. He states that the Bill does contain an attempt to limit this right of access in the form of a rider that a DPP may apply on good cause shown to a judge for such communication or visit to be refused. He remarks that two points require comment in this regard: the first is the way in which this measure is drafted does not clearly indicate whether this applies only in respect of family and religious counselling; under no circumstances should there be any restriction or limitation on the right of access by legal or medical practitioners and under no circumstance should any interrogation take place in the absence of a legal representative. The second point is that the term *good cause shown* must be narrowly construed so as to ensure that rights of access, visits and communication with detainees will only be restricted in extreme cases.

in addition, South Africa's role as a regional role player will be reinforced and enhanced. He suggests that in this regard it can be argued that stringent measures, including detention without trial provisions, are necessary in order to implement or comply with these international instruments. He points out that for example each State Party to the International Convention for the Suppression of Terrorist Bombings is obliged to adopt effective measures by means of domestic legislation to ensure detention and punishment of attacks using explosive devices. He asks whether these measures can be interpreted to include detention without trial provisions or even more to the point, would the South African government in the light of prevailing circumstances be obliged to implement detention without trial provisions in order to comply with the obligations that would arise should the Convention be ratified. He says that this is not the case but that the enactment of detention without trial provisions without adequate safeguards could amount to a violation of South Africa's obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. He notes that this Convention defines torture as the international infliction of pain and suffering (both physical or mental) for purposes of obtaining information. He explains that such action must be by, at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity. He remarks that of more importance is the provision in the Convention that obliges each State Party to keep under *systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest and detention . . . with a view to preventing any cases of torture*. He explains that this means that the South African government is under a duty not only to actively prevent torture by punishing those who perform acts of torture but also to prevent it indirectly by eliminating conditions in which torture is likely to take place. He points out that this is precisely the dilemma thrown up by detention without trial. He suggests that it is just as important when assessing compliance with international obligations that the obligations in terms of the convention on torture are not overlooked in the flurry to ratify various instruments on the combating of terrorism, and this is especially so when such instruments appear to require the adoption of drastic provisions that in turn could serve to encourage torture. He says that what is thus required is a comprehensive set of regulations that put in place an effective control and monitoring system that will have the effect of drastically reducing the risk of torture becoming a common characteristic of any detention without trial and interrogation procedures. He notes the number of detailed procedures set out by Foster, Sandler and Davis which they proposed should be laid down by Parliament in the form of easily accessible legislation, as opposed to what they refer to as inadequate ministerial orders. (See their recommendations in this Chapter under the heading *conditions of detention*.)

13.341 Prof Cowling suggests that what should be focussed upon is the deployment of more effective and sophisticated investigative techniques on the police rather than attempting to rely on more drastic and repressive measures in the fight against crime in all its manifestations. He also notes that information obtained from third degree interrogation methods, particularly if an element of torture is involved, is highly unreliable. He says that another aspect is that, particularly in a country such as South Africa, the proper policing of safeguards is bound to be problematic. He notes that very little control is currently being exercised over the police in remote rural areas and the granting of detention without trial powers, even if accompanied by certain safeguards, is still going to leave the doors open to widespread abuse. He suggests that the question of the re-introduction of detention without trial must be approached with extreme caution, and that it should be regarded as an extreme last resort once it has been established that there are compelling reasons. He considers that the emphasis should be on strengthening the training and international cooperation of the SAPS and rather leaving the law and Constitution alone.

13.342 Mr JHS Hiemstra, Deputy Director of Public Prosecutions in the Free State, notes that the vexed question which needs to be asked is whether it is appropriate and really necessary to have a provision in the Bill that allows detention without trial. He remarks that detention without trial has in the recent past been regarded as draconian and a flagrant disregard of the rule of law. He also notes section 35(1)(a) to (f) of the Constitution and considers that clause 16 would be indirect conflict with the provisions of at least section 35(1) of the Constitution, and may be in conflict with the provisions of section 35(2) to 35(5). He considers that once the principle of detention without trial is legalised and accepted as such, the temptation to gradually increase the period of detention without trial may be irresistible. He considers that it is also doubtful whether the proposed clause would be regarded as reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.

13.343 The South African Police have set in motion a Bill that aims to bring back detention without trial, and such a law would be a travesty, argues George Bizos.¹⁵ He says when the SA government got rid of detention without trial at the end of 1993, he had a sense that real change was at last coming to this country. And on the day that Nelson Mandela was inaugurated as President, he remember his ringing phrase: "Never, never and never again." He was speaking about many of the horrors of apartheid, but he thought at the time that his powerful words must surely apply to detention without trial as well. Bizos notes that detention was a weapon used to crush opponents of the government, as the families and

¹⁵ George Bizos "Never, never and never again: Our police have set in motion a Bill that aims to bring back detention without trial" *Sunday Times* 10 December 2000 at 17.

friends of Ahmed Timol, Neil Aggett and Steve Biko - all of whom died in police custody - discovered. He states that it was fundamentally incompatible with the Universal Declaration of Human Rights, and whose 30 articles permeate our Constitution and Bill of Rights. He says that back in 1948 when the declaration was signed, its lofty humanitarian ideals could not be supported by an apartheid government elected, that same year, through polls from which the vast majority were excluded because they were black, and so South Africa joined the tiny minority distancing themselves from its principles, but with the proposed Antiterrorism Bill, particularly its clause 16, which allows detention without trial, we once again run the risk of becoming a country whose laws are at war with international standards. He points out that the Bill allows detention without trial for the purposes of interrogation, that it would abolish the right to remain silent, to be informed of that right and of the consequences of not remaining silent. The right not to be compelled to make any confession or admission that could be used in evidence against the detainee; the right to be brought before a court not later than 48 hours after arrest and therefore the right to a fair trial - all would go, despite the fact that the drafters of the Constitution believed these rights were so important that they decided they could not be touched even during a national state of emergency.

13.344 George Bizos asks how did this threat emerge. He notes that some who once applauded the adoption of our new Constitution now blame the Constitution and the courts for the high crime rate, and that they want to change the Constitution and make fundamental alterations to the Bill of Rights. He remarks that they forget that the Constitution and the Bill of Rights protect the innocent even though the guilty may benefit from their provisions, and that rights once scrapped can no longer be claimed by anybody. He points out that the project committee concludes that there may be a need for legislation to combat terrorism and for South Africa to adopt a number of conventions dealing with terrorism that transcends national boundaries, but that the committee is obviously concerned about clause 16 - the detention provisions - which it received in draft form from the SA Police Service. He points out that the committee says that it "has not received evidence why measures of the sort set out under clause 16 are required and why conventional policing methods are inadequate", and that its members also express misgivings about whether the judiciary should be involved in the process of issuing warrants, extending periods of detention and determining the conditions under which detainees will be held. He explains that these are all steps in which judges would have to become involved if clause 16 becomes law. He also notes that the committee raises the issue of whether the proposed legislation is constitutional, but that it does not discuss the question further because two of the senior members of the committee are judges who may become involved if there is ever a case on the issue. Clearly, however, he says, the proposals contained in clause 16 of the Anti-Terrorism Bill can hardly be

enacted without affecting the Constitution's fibre.

13.345 George Bizos remarks that calls for the legislation and the amendments to the Constitution it would require come from different quarters, that it is easier to understand those in opposition to the government but asks why did some leaders within the government sponsor or allow clause 16 to be included in the Bill? He points out that in its sanitised form, it may be less objectionable than parts of the apartheid-era Terrorism or Internal Security legislation, but despite proposed safeguards, detention for the purpose of interrogation negates the founding provisions of the Constitution by abrogating its supremacy and the rule of law. He argues that detention without trial, particularly for the purposes of interrogation, takes place on the premise that the suspect is guilty of a serious offence or has information that he or she refuses to disclose about others whom the interrogator suspects of being guilty. He states that the interrogator's suspicion may or may not be well-founded, and that the innocent or ignorant may be at greater risk than the offender and his co-conspirators because she or he is unable to confess or furnish information to the interrogator's satisfaction. He points out that had Aggett been able to provide the information his interrogators wanted, for example, he would have been alive today. He states that we are told that the rights to be limited are a luxury that our young democracy cannot afford because of the country's high crime rate and bombings in the Western Cape; that similar provisions were introduced by the British in Northern Ireland and by the Israelis. Bizos notes that such arguments were favoured by the apartheid regime - and how did detention without trial solve its problems? He considers that there are surely better examples to follow, and that enacting legislation of questionable constitutional validity and contemplating radical constitutional amendments to enact it is a treacherous road to take. He points out that detention without trial is invariably abused, and that even where safeguards are provided, assurances that the power is needed for a limited period and that it will be used with circumspection are hardly ever honoured. He remarks that we are given assurances, but history teaches us how often the temporary becomes permanent, and that the abrogation of one fundamental right always endangers the others. He says that chipping away at one pillar of democracy may imperil the whole edifice, and that we are told by white and black conservatives yearning for authoritarian forms of government that constitutional democracy and the rule of law are not suitable for Africa. He notes, however, that the struggle of the people of this country for freedom and fundamental human rights dates back almost 50 years before the adoption of the UN declaration, to 1912, when the ANC was born, and that our struggle has been nothing if not African.

13.346 George Bizos says that as heirs to this proud tradition, which includes the Freedom Charter, we are entitled to expect that the vast majority of the members of

Parliament will reject any attempt to amend the Constitution, and that our proud history will be diminished if detention without trial for the purposes of interrogation in whatever form and with whatever safeguards is enacted by our Parliament. He points out that Amnesty International has called on President Thabo Mbeki's government to stop it. He notes that all of us who campaigned for human rights should repeat the call to Mbeki, Maduna, Tshwete and Members of Parliament to abandon the proposal, and that we should heed the words of Amnesty International: "If the law in its present form is enacted it will place South Africa in breach of its international and regional obligations and may lead to human rights violations." Bizos argues that for the legislators and many of the rest of us, it will also be a breach of trust: going back on what we stood for and tried to achieve during the better part of our lives. He notes that his involvement in the inquests into the deaths of Biko, Timol and Aggett, to mention just a few, has taught him a lesson he can never forget - how vulnerable detainees are, and that their very lives are inevitably at the mercy of their captors. He points out that no one is able to give us a guarantee that such a thing will not happen again, and that we owe it to the memory of all those who suffered and died in detention not to bring it back in any form, and that it must be repeated to our legislators and those proposing this new law that resounding promise of freedom made by Mandela: "Never, never and never again."

(iii) Evaluation

13.347 Remarks were made by respondents that section 205 should rather be used to obtain information from someone who is suspected of having information in his or her possession than promoting the proposed clause on detention without trial for interrogation. As was noted above, the Constitutional Court consider the constitutionality of section 205 in the case of *Nel v Le Roux* in 1996.¹ The importance of this case necessitates that it be considered in detail. Section 205 of the Criminal Procedure Act provides as follows:

- (1) A Judge of the Supreme Court, a regional court magistrate or a magistrate may, subject to the provisions of ss (4), upon the request of an Attorney-General or a public prosecutor authorised thereto in writing by the Attorney-General, require the attendance before him or any other Judge, regional court magistrate or magistrate, for examination by the Attorney-General or the public prosecutor authorised thereto in writing by the Attorney-General, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Attorney-General or public prosecutor concerned prior to the date on which he is required to appear before a Judge, regional court magistrate or magistrate, he shall be under no further obligation to appear before a Judge, regional court magistrate or magistrate.
- (2) The provisions of ss 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall mutatis mutandis apply with reference to the proceedings under ss (1).
- (3) The examination of any person under ss (1) may be conducted in private at any place designated by the Judge, regional court magistrate or magistrate.
- (4) A person required in terms of ss (1) to appear before a Judge, a regional court

¹ 1996 (1) SACR 572 (CC) see also 1996 (4) BCLR 592 (CC).

magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in ss (1), shall not be sentenced to imprisonment as contemplated in s 189 unless the Judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

13.348 A person by the name of Hoogakker was charged in the Johannesburg magistrate's court on various counts of fraud and of contravening the Exchange Control Regulations promulgated under s 9 of the *Currency and Exchanges Act*. In March 1995 a subpoena in terms of s 205(1) of the *Criminal Procedure Act* was served on the applicant requiring him to appear in the magistrate's court to be examined in connection with information relating to the offences with which Hoogakker had been charged. The subpoena indicated that information was required from the applicant concerning, inter alia, the acquisition of a property by him in Spain and his association with Hoogakker. On presenting himself to the examining magistrate (the first respondent) on 13 April 1995, but before being sworn, the unconstitutionality of s 205 was raised on the applicant's behalf by his attorney. The issue referred to this Court is whether s 205 of the *Criminal Procedure Act* is consistent with the provisions of ss 8(1), 11(1), 11(2), 13, 15(1), 23, 24 and 25(3)(a), (c) and (d) of the Constitution. Sections 189(1) and (3), 203 and 204 of the *Criminal Procedure Act* are relevant to the construction of s 205. Sections 189 and 204 are incorporated therein by reference. Although s 203 is not similarly incorporated by reference, it was held in *S v Waite*² that an examinee at a s 205 examination is fully entitled to claim the privilege against self-incrimination. In view of the transactional indemnity and immunity provisions in s 204(2) and (4) respectively of the *Criminal Procedure Act*, the applicant could not validly (and did not) object to answering self-incriminating questions. His complaint was that if he answered questions foreshadowed in the subpoena he would risk exposing himself to the civil forfeitures provided for in paras 22A, 22B and 22C of the Exchange Control Regulations. This contention formed the point of departure for a substantial part of the attack on s 205 of the *Criminal Procedure Act*. The attack based on ss 8(1) (equality); 13 (privacy); 15(1) (freedom of speech and expression); 25(3)(c) (an accused's right to be presumed innocent and to remain silent) and 25(3)(d) (insofar as it entrenches an accused's right against self-incrimination). The Court noted that in *Bernstein v Bester* the meaning and implications of the provisions of s 418(5)(b)(iii)(aa) of the Companies Act were considered. The Act provides that a person who, having been duly summoned under s 417 or 418 of the Act to an examination, 'fails, without sufficient cause . . . to answer fully and satisfactorily any question lawfully put to him in terms of s 417(2) or this section . . . shall be guilty of an offence'. In that case the Constitutional Court found as follows:

'There is no other provision in s 417 or 418, or for that matter in any other provision of the Act

² 1987 3 SA 896 (O).

which expressly or by necessary implication, compels the examinee to answer a specific question which, if answered, would threaten any of the examinee's Chapter 3 rights. It must in my view follow from this that the provisions of ss 417 and 418 can and must be construed in such a way that an examinee is not compelled to answer a question which would result in the unjustified infringement of any of the examinee's Chapter 3 rights. Fidelity to s 35(2) of the Constitution requires such a construction and fidelity to s 35(3) read with s 7(4) of the Constitution requires an appropriate remedy; in the present case that the examinee should not be compelled to answer a question which would result in the infringement of a Chapter 3 right.'

... 'Nothing could be clearer, in my view, than this. If the answer to any question put at such examination would infringe or threaten to infringe any of the examinee's Chapter 3 rights, this would constitute "sufficient cause", for purposes of the above provision, for refusing to answer the question unless such right of the examinee has been limited in a way which passes s 33(1) scrutiny. By the same token the question itself would not be one "lawfully put" and the examinee would not, in terms of this very provision, be obliged to answer it. The answer to this leg of Mr Marcus' argument is that there is, on a proper construction of these sections, and in the light of this Court's order in *Ferreira v Levin*, no provision in s 417 or 418 of the Act which is inconsistent with the examinee's right to privacy in terms of s 13 of the Constitution now under consideration.'

13.349 The Court said in *Nel v le Roux* that there is no material difference between the expression 'a just excuse' in s 189(1) of the *Criminal Procedure Act* and 'sufficient cause' in s 418(5)(b)(iii)(aa) of the *Companies Act*. If the answer to any question put to an examinee at an examination under s 205 of the *Criminal Procedure Act* would infringe or threaten to infringe any of the examinee's Chapter 3 rights, this would constitute a 'just excuse' for purposes of s 189(1) for refusing to answer the question unless the s 189(1) compulsion to answer the particular question would, in the circumstances, constitute a limitation on such right which is justified under s 33(1) of the Constitution. The Court pointed out that in determining the applicability of s 33(1), regard must be had not only to the right asserted but also to the State's interest in securing information necessary for the prosecution of crimes. The Court noted that South Africa is not alone in adopting a procedure such as that embodied in s 205 but that other open and democratic societies based on freedom and equality do the same. The Court explained that in the United States it is accepted that the investigative authority of the grand jury rests largely on 'the longstanding principle that "the public has a right to every man's evidence" '. The Court said that there is nothing in the provisions of s 205 read with s 189 of the *Criminal Procedure Act* which compels or requires the examinee to answer a question (or for that matter to produce a document) which would unjustifiably infringe or threaten to infringe any of the examinee's Chapter 3 rights. The Court also said that it is for the presiding officer at the s 205 examination to determine, when the objection is raised, whether the examinee has a 'just excuse' for refusing to answer the question in issue, that a considerable body of case law has already developed on the meaning of 'just excuse', and that it is not in the first place the task of the Constitutional Court but that of other courts, including the Supreme Court, to construe what this means.

13.350 The Constitutional Court noted that in doing so they must bear in mind the

duty imposed on them by s 35(3) of the Constitution to have due regard to the spirit, purport and objects' of Chapter 3 '(i)n the interpretation of any law and the application and development of the common law. The Court remarked that what it does hold herein is that ss 189 and 205 of the *Criminal Procedure Act* can and must be construed in the way suggested above so that their application does not unjustifiably infringe or threaten to infringe any of the examinee's Chapter 3 rights. The Court pointed out that this is what the magistrate in the case should have done in the first instance, and if he had found that in answering any of the questions the examinee's Chapter 3 rights would be infringed, he should have held that this constituted a 'just excuse' for the examinee's refusal to answer, unless of course he came to the conclusion in respect of any particular question that the s 189 compulsion to answer constituted, in the context of the s 205 enquiry, a limitation on the examinee's right which was justified under s 33(1) of the Constitution. The Court said if the magistrate had concluded that there was no such infringement nor any other just excuse for refusing to answer, he should have compelled the applicant to answer, and in particular the magistrate should have applied this approach to the applicant's specific objection that answering certain questions would expose him to the civil forfeitures provided for in paras 22A, 22B and 22C of the Exchange Control Regulations.

13.351 The Court also noted that it was contended that certain of the applicant's rights to a fair trial in terms of s 25(3) and his right in terms of s 11(1) 'not to be detained without trial' were infringed by the summary compulsion mechanism of s 189(1) of the *Criminal Procedure Act* (incorporated into s 205) which provides for the recalcitrant witness to be sentenced to imprisonment for a period of up to two years after the court has only enquired in 'a summary manner' into the examinee's failure or refusal to testify or answer questions:

The s 25(3) rights to a fair trial accrue only to an accused person. The recalcitrant examinee who, on refusing or failing to answer a question, triggers the possible operation of the imprisonment provisions of s 189(1) is not, in my view, an 'accused person' for purposes of the protection afforded by s 25(3) of the Constitution. Such examinee is unquestionably entitled to procedural fairness, a matter which will be dealt with below, but not directly to the s 25(3) rights, for the simple reason that such examinee is not an accused facing criminal prosecution. The s 189(1) proceedings are not regarded as criminal proceedings, do not result in the examinee being convicted of any offence and the imprisonment of an examinee is not regarded as a criminal sentence or treated as such. If, after being imprisoned, an examinee becomes willing to testify this would entitle the examinee to immediate release; in American parlance such examinees 'carry the keys of their prison in their own pockets'. The imprisonment provisions in s 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee. This disposes of the attack directly based on the s 5(3) fair trial rights.

[12] In the attack based on s 11(1) of the Constitution it was contended that the s 205(3) procedure (incorporating the summary incarceration procedure of s 189) did not constitute a 'trial' for purposes of s 11(1) and in any event infringed the requirement of 'fairness' or 'due process' or 'natural justice' which is implicit in the 'trial' component of this right. I have no doubt

that this latter requirement, however one wishes to label it, is implicit in this right.

...

[14] The s 11(1) right relied upon by the applicants is the 'right not to be detained without trial'. The mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate procedural safeguards. In its most extreme form, the mischief exhibits itself in the detention of a person pursuant to the exercise by an administrative official of a subjective discretion without any, or grossly inadequate, procedural safeguards. The nature of the fair procedure contemplated by this right will depend upon the circumstances in which it is invoked. The 'trial' envisaged by this right does not, in my view, in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in s 25(3) of the Constitution. In most cases it will require the interposition of an impartial entity, independent of the Executive and the Legislature to act as arbiter between the individual and the State.

[15] . . . As far as s 205 of the Criminal Procedure Act is concerned the entity is indeed a normal judicial officer who ordinarily functions in the ordinary courts. The 'court' before which the s 205 enquiry takes place is in every material respect, particularly insofar as its independence and impartiality is concerned, identical to the 'ordinary court of law' envisaged by s 25(3) of the Constitution. On no basis can this leg of the s 11(1) attack succeed.

[16] It was also argued, as part of this and the wider s 11(1) attack, that the summary s 189 imprisonment proceedings (incorporated into the s 205 proceedings) denied the applicant his right to a 'public' trial by analogy with the s 25(3)(a) right and his right 'to be informed with sufficient particularity of the charge' by analogy with the s 25(3)(b) right. This was so, it was argued, because of the summary nature of the s 205(3) imprisonment proceedings and in particular the fact that the section provides that the examination 'may be conducted in private' and makes no express provision for the examinee to be informed at any stage, whether orally or in writing, of what awaits the examinee if he/she persists in refusing to answer the question.

[17] As far as the first of these two complaints is concerned it is not necessary, for this case, to decide what fair or due process or natural justice requires in this regard. It cannot in principle require more than an ordinary criminal trial requires. There are well-recognised exceptions in our criminal procedure to the general rule that criminal proceedings are to be conducted in open court. . . . The s 205 procedure is an evidence-gathering mechanism; the examinee is not, as it were, giving evidence in a trial; this is a preparatory step and the examinee's evidence might never be utilised in the end. There are obvious and legitimate inhibitions to furnishing evidence in that context in public. Having the s 205 examination in public serves much less of a public interest and could in fact be severely damaging to both the examinee and to the administration of justice. There are accordingly important and justified policy grounds for holding the s 205 enquiry in private. In any event the provision for holding the s 205 enquiry 'in private' is permissive, not mandatory. It is a discretion which must be exercised judicially, taking into account all the relevant facts. One of the relevant facts would be the interests of the examinee. In many cases it would be in the interests of the examinee, and the examinee's express wish, to have the enquiry conducted in private. But before the first respondent in this case has exercised his discretion in favour of conducting the enquiry in private, the question of an infringement of any right of the applicant in this regard simply does not arise.

[18] This illustrates a conceptual confusion which characterised the applicant's argument in other respects as well. The only issue before us is whether, on a proper construction of s 205, it expressly or by necessary implication infringes any of the rights relied upon by the applicant. If the section, properly construed, compels the presiding officer to act or apply the provisions in a way which would infringe any of the rights relied upon, then the constitutionality of the section in respect of that right is properly before us. This would also be the case if the presiding officer were prohibited by the section from acting or intervening in a way which would prevent a particular infringement which would inevitably follow in the absence of such intervention. What is certainly not before us is a consideration of a multitude of questions relating to hypothetical decisions or rulings which may (not must) be made in applying the provisions of s 205 and the question whether such rulings or decisions would or might infringe any of the examinee's Chapter 3 rights or not. We are also not called upon to decide whether the examinee is entitled as of right to legal representation or how precisely the unrepresented examinee must be treated and what must be explained to him/her. Judgments concerning the proper application and construction of s 205 which were delivered before the Constitution came into operation will not necessarily correctly reflect the post-constitutional position,

because s 35(3) of the Constitution requires that this section now be construed by all courts (including the magistrates' courts) having 'due regard to the spirit, purport and objects of Chapter 3.

[19] The second of the two complaints referred to above runs into the same difficulties. Assuming that the applicant is entitled to be informed with sufficient particularity of the 'charge against him' the question as to whether any such right is infringed can only arise after the s 205 proceedings commence and after the applicant has refused to answer any question. While s 205 contains no express provision that the 'charge' be put to the examinee, the section also does not prevent the presiding officer from doing so.

[20] Even taking the broadest and least technical view of the applicant's complaints that s 189 as applied in s 205 proceedings denies him a fair hearing on the imprisonment issue, there is no substance in them. The summary procedure for imprisoning a recalcitrant witness must be adjudged in the context of the s 205 proceedings as a whole. The persons who are authorised to take evidence at the s 205 proceedings (a Judge of the Supreme Court, a regional court magistrate or a magistrate) are all independent judicial officers and the very persons who preside over criminal trials. The subpoena to attend the proceedings is obtained at the request of an Attorney-General or public prosecutor authorised thereto in writing by an Attorney-General and can only be issued at the instance of the abovementioned judicial officer. A person can only be summoned to attend 'who is likely to give material or relevant information as to any alleged offence'. In addition there is the important and far-reaching provision in s 205(4), introduced for the first time in 1993, which prohibits the presiding judicial officer from sentencing the examinee to imprisonment as contemplated in s 189 unless such judicial officer 'is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order'. This affords an examinee the widest possible residual protection. This all shows that the s 205 provisions are as narrowly tailored as possible to meet the legitimate State interest of investigating and prosecuting crime.

[21] What more, one may legitimately ask, can the examinee possibly want to know about the 'charge' than that the law demands, in the absence of a just excuse for the examinee not doing so, that he/she answers all questions, failing which imprisonment will follow? If the examinee is legally represented such representative will know all this. If unrepresented one would expect the presiding officer to explain this to the examinee. There is absolutely nothing to suggest that, on a proper post-constitutional construction of s 205, there is not a duty on the presiding officer to do so. Natural justice and fair procedure would, in my view, require this. That being the case the presiding officer is obliged to do so.

[22] Summary proceedings for imprisoning recalcitrant witnesses, where the normal strict criminal procedure rules are not applied, are not unknown in other open and democratic societies based on freedom and equality. In the United States of America the grand jury investigation, amongst its other objects, fulfils the same function as s 205 of the Criminal Procedure Act of obtaining information under oath from persons unwilling to assist voluntarily in a criminal investigation; both civil and criminal contempt procedures are used to coerce the recalcitrant grand jury witness into testifying. 'Civil contempt is used to coerce the recalcitrant witness into complying with the subpoena. The witness is sentenced to imprisonment or to a fine (which may increase daily), but he may purge himself by complying with the subpoena.' In the case of such civil contempt proceedings in relation to grand jury proceedings departures from criminal procedure applicable to ordinary criminal prosecutions are permissible and even in criminal contempt proceedings 'procedures may vary somewhat from procedures applicable to ordinary criminal prosecutions'. Rule 42(a) of the Federal Rules for Criminal Procedure authorises summary criminal contempt proceedings in matters other than grand jury investigations. In Germany s 70 of the Criminal Procedure Code provides for summary proceedings against a witness who refuses to testify without legal justification. The witness is fined and on failure to pay is imprisoned. The witness may also be imprisoned without being given the option of a fine. Such and similar summary proceedings leading to imprisonment have been upheld as constitutional by the German Federal Constitutional Court.

[23] The applicant's complaints on these grounds can accordingly not, in my view, succeed.

13.352 The committee has noted once again the case of *De Lange v Smuts*. Section 66 of the *Insolvency Act* and section 205 of the *Criminal Procedure Act* were, inter alia,

considered in the case. The Constitutional Court held (per Ackermann J, the other members of the Court concurring), that s 12(1) entrenched two different aspects of the right to freedom. The right not to be deprived of liberty for reasons that were not acceptable or what might also be described as the substantive aspect of the protection of freedom was expressly entrenched in s 12(1)(a), which protected individuals against deprivation of freedom 'arbitrarily or without just cause'. The other, which might be described as the procedural aspect of the protection of freedom, was implicit in s 12(1), as it had been in s 11(1) of the interim Constitution. It was further held³ that committal to prison under s 66(3) did not constitute a violation of the substantive aspect of s 12(1). It was also held⁴ that the power of presiding officers other than magistrates to commit recalcitrant witnesses to prison infringed the procedural aspect of s 12(1) of the Constitution. The infringement of the right was not justifiable in terms of s 36 of the Constitution. Justice Ackermann remarked as follows:

[79] The proceedings under s 205, read with s 189 of the CPA, which were held in *Ne/*'s case to constitute a proper trial for purposes of s 11(1), do not constitute an examination or investigation of any matter or cause in issue between any parties. The purpose is to obtain material or relevant information as to an alleged offence. Yet in substance as well as in form they are judicial proceedings, albeit of an inquisitorial rather than adversarial nature. In this sense they are in principle no different from the interrogation under the relevant sections of the Insolvency Act, which is also aimed at obtaining relevant information concerning the insolvency in question. In presiding over the examination under s 205 of the CPA, and when considering under s 189 whether to sentence an examinee to prison and in so sentencing the examinee, the presiding officer is not presiding in a court over a trial which would meet the criteria of the definitions on which Conradie J relied. Yet, despite that, we held in *Ne/* that it did constitute a trial for purposes of s 11(1) of the interim Constitution. In my view, Conradie J took too narrow a view of the concept of trial in s 12(1)(b) of the 1996 Constitution and in so doing erred.

[80] I am also unable to agree with the learned Judge's conclusion that where it is the magistrate who presides over a meeting of creditors 'it is clear that, in doing so, he fulfils one of the many administrative functions with which he is by law charged' to the extent that this is applied to the committal procedure under s 66(3). . . . The crucial enquiry relates to proceedings for issuing a committal warrant. In such proceedings the presiding officer determines whether the witness has complied with the statutory obligation to produce documents and answer questions and the sanction to be imposed if this has not been done. The witness is entitled to legal representation and may apply to the High Court for his discharge from custody. This is in substance a judicial proceeding even if it is not conducted in a court of law. I have no doubt in my mind that the process of factual and legal evaluation involved in deciding whether or not to commit an examinee to prison and the act of issuing the committal warrant are clearly judicial and nothing else.

. . . I accordingly hold that the committal provision of s 66(3), read with s 39(2) of the Insolvency Act, infringes s 12(1)(b) of the 1996 Constitution only to the extent that a person who is not a magistrate is authorised by the subsection to issue a warrant committing to prison an examinee at a creditors' meeting held under s 65 of the Insolvency Act. . . .

[89] The right we are here concerned with is the right not to be detained without a fair trial, but more particularly with the right to be tried, following on the conclusion earlier reached, in a

³ By Ackermann J, and Chaskalson P, Langa DP and Madala J concurring; Didcott J, Kriegler J, O'Regan J and Sachs J concurring for different reasons; and Mokgoro J dissenting.

⁴ Per Ackermann J, Chaskalson P, Langa DP and Madala J concurring; Mokgoro J and O'Regan J concurring for different reasons; Didcott J and Kriegler J dissenting.

hearing presided over or conducted by a judicial officer of the court structure established by the 1996 Constitution and in which s 165(1) has vested the judicial authority of the Republic. This is a core and most important procedural component of the right not to be detained without trial. It is the pre-eminent, if not the only, guarantee against arbitrary administrative detention and is indispensable for the upholding of the rule of law and the separation of powers in a constitutional State.

[90] The subsection of the Insolvency Act in question, to the extent indicated, takes away this procedural guarantee entirely. Admittedly this deprivation is only temporary, because the person committed can apply immediately under s 66(5) to the appropriate High Court for discharge from prison. I agree in this regard with Mr Trengove's submission that s 66(5) does not amount to a mere appeal or review; it entitles examinees to a full rehearing and reconsideration of the lawfulness of their committal to prison. This does not, however, cure the deprivation of the right, it merely limits the deprivation in time. For the period of deprivation, persons committed to prison consequentially suffer a deprivation of the most important aspect of their right to freedom, namely bodily or personal freedom, without the constitutional procedural guarantee in question.

[91] I have already found that the process in aid constituted by the s 66(3) committal to prison serves a public interest no less compelling than in the case of the winding up of a company and the necessity of compelling the insolvent to furnish the requisite information no less than in the case of the director of a company in the process of being wound up. We are not, however, under s 36(1) presently considering the justification of any limitation of the substantive freedom right, but the justification for limiting the procedural right, namely the right to having the committal to prison adjudicated upon by a judicial officer. When considering the 'importance of the purpose of the limitation' under s 36(1)(b) it is the importance of the purpose of this latter limitation that must be focussed on; in other words, the importance of the purpose of having an officer in the public service (and not a judicial officer) committing a recalcitrant examinee to prison.

...

[93] I accept, as already indicated, that the public service officers designated to preside over creditors' meetings are skilled and experienced. That by itself does not explain why they must have the right to incarcerate examinees. It does not follow, as a matter of logic, that if they do not have this right that their skill and expertise can no longer be used for presiding over meetings. There are simply too many unknown factors in the equation to warrant such a conclusion.

[94] We have no evidence, or other admissible factual material, to indicate (whether statistically or by way of informed expert opinion) what the actual deterrent effect of the summary committal procedure is or how effective the criminal sanction in s 139(2) of the Insolvency Act would be in the absence of the summary committal procedure. It was suggested in argument that if the public service officers did not have summary committal powers this would give rise to delays which would undermine the efficacy of the sequestration process. It is not self-evident to me why this must be so if creditors' meetings and courts are efficiently run.

[95] There is nothing before us to show why these public service officers cannot legitimately be accommodated in the magisterial judiciary and used exclusively to preside over creditors' meetings or why, for that matter, specialist insolvency or bankruptcy courts cannot effectively be established under the Constitution in which their expertise can also be fully employed. As judicial officers with true structural and constitutional independence, there could be no objection to them committing examinees to prison.

[96] Another avenue also remains unexplored. Provision could be made for a procedure whereby, if an examinee refuses to answer a question or produce documents, the matter is automatically referred to an appropriate court to determine the propriety of the question and the witness ordered to answer the question or produce the document. If the witness still refuses, committal for contempt can follow very rapidly without any delay or disruption of the creditors' meeting. These, or analogous procedures, are used in England, Australia and Canada. There is nothing to suggest that they do not work efficiently, nor that the procedures

or their efficacy are dependent on economic or other resources of which our own country is not possessed.

[97] On a broader and more general basis, no example has been offered to us, nor been found by us, of any other country which finds it necessary, in the sphere of insolvency to permit a non-judicial officer to commit a recalcitrant examinee to prison. Nor has it in any way been established that economic or other factors play a role in the other insolvency regimes which are inappropriate to our own circumstances. . . .

[99] The examples of alternative procedures in other jurisdictions indicate, on their face at least, that there are not merely less restrictive procedural means to achieve the purpose at which summary committal is directed in insolvency proceedings, but that these purposes can be achieved without restricting at all the component of the fair trial right with which we are here dealing. This also means that there is no proportionality, or at best very little, between the nature and extent of the limitation of the procedural right here in question and the purpose sought to be achieved by the limitation. In the result it has not, in my view, been established that the limitation in question in this case is reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom.

13.353 Justice Didcott remarked as follows in *De Lange v Smuts*:

[114] I agree with Ackermann J that, in the light of the clearly legitimate and important purposes described by him that are served by s 66(3) and its related provisions, a committal to prison under the subsection does not amount to an invasion of the personal freedom 'arbitrarily or without just cause' which s 12(1)(a) of the Constitution (Act 108 of 1996) forbids. We are then left with the proposition that the person so committed is nevertheless 'detained without trial' in conflict with s 12(1)(b) once the warrant gets issued by a presiding officer who happens not to be a magistrate.

[115] Those words, the words 'detained without trial', ought not in my opinion to be construed separately. They comprise a single and composite phrase which expresses a single and composite notion and must therefore be read as a whole. Both the usage of the phrase in this country and the provenance here of the notion are unfortunately familiar to us all. Neither should be viewed apart from our ugly history of political repression. For detention without trial was a powerful instrument designed to suppress resistance to the programmes and policies of the former government. The process was an arbitrary one, set in motion by the police alone on grounds of their own, controlled throughout by them, and hidden from the scrutiny of the Courts, to which scant recourse could be had. And it was marked by sudden and secret arrests, indefinite incarceration, isolation from families, friends and lawyers, and protracted interrogations, accompanied often by violence. Detentions without trial of that nature, detentions which might be disfigured by those or comparable features, were surely the sort that the framers of the Constitution had in mind when they wrote s 12(1)(b).

[116] A committal to prison of the kind now in question bears no resemblance to a detention with such evil characteristics. It is not a legacy of apartheid and has nothing to do with either that era or the supposed security of the State. Nor does it serve any other political purpose. Indeed, the State has no interest in the proceedings but to oil the statutory machinery constructed for the proper administration of insolvent estates. No dispute about the occasion for any committal concerns it. The parties to that are private individuals, the trustee and the creditors on one side, the insolvent and recalcitrant witnesses on the other, between whom the presiding officer acts as a referee. The proceedings are open to the public. Legal representation is allowed. The person committed to prison, should that happen, can obtain a release at any time by undertaking to supply all the information required. If the undertaking is withheld, or furnished unsuccessfully, he or she may apply immediately to the High Court under s 66(5) for a discharge from custody, which it will grant on finding the committal to have been, or the continuing imprisonment to be, wrongful on any score. The application would doubtless be brought before and treated by it as a matter of urgency, in accordance with the practice invariably observed once personal liberty is at stake. A loss of liberty might admittedly have been suffered in the meantime. But the same occurs whenever someone arrested and detained on a criminal charge remains in custody until the opportunity arises for a release on bail, and longer still if bail is denied. Yet that can hardly be called detention without trial. Even

so brief a period of imprisonment would be avoided by a witness, however, were the presiding officer or the High Court itself to suspend forthwith the warrant of committal, pending its decision on the application. That course was followed in this very case, after all, and is highly likely to be taken in all similar ones.

[117] I therefore conclude that, whether or not the presiding officer is a magistrate, an imprisonment ordered in terms of s 66(3) cannot rightly be stigmatised, for the purposes of s 12(1)(b), as a detention without trial.

...
[120] The conclusion to which I have come disposes straight away, in my opinion, of the reliance placed by counsel on s 12(1)(b). I ought to comment nevertheless on an important consideration that the reasoning of Ackermann J takes into account under the same heading. It is the general principle, which I accept without question, that nobody should be deprived of personal liberty in a manner that is procedurally unfair.

[121] In examining whether imprisonment under s 66(3) meets that requirement I do not think it necessary to classify either the committals or the enquiries leading to them as judicial, quasi-judicial or administrative proceedings, since the principle operates whichever label they may aptly bear. Nor do I find it helpful to investigate what is done in foreign jurisdictions about recalcitrant witnesses, or even how other statutes of ours deal with coercion when the need for its use arises within their areas. Such investigations may tend to distract our attention from where it should now be focussed, on the particular purposes that s 66(3) has been designed to achieve and on the particular circumstances prevailing in this country which are relevant to those purposes. In that situation, I believe, the threat of a subsequent prosecution under s 139(1) would not suffice by itself as coercion, however satisfactorily its counterparts may happen to work elsewhere. Here the threat is too remote. The notorious delays in the progress of prosecutions see to that, delays which were experienced even before the current congestion in the criminal courts prolonged them and, given our systems and procedures, are likely to remain inevitable despite any reduction in their duration that may realistically be expected. One cannot safely brush aside the delays as mere inconveniences. They would gravely damage the efficient administration and liquidation of insolvent estates if we had to rely on the prospect of prosecutions as the sole means by which witnesses might be compelled to co-operate in the process. A threat much more immediate is essential, a swift one taking effect before assets of the estate disappear or information about its affairs becomes unobtainable.

[122] The use of committals rather than prosecutions in the endeavour to overcome recalcitrance has the result, of course, that the coercion thus exerted is not controlled by the safeguards against procedural unfairness which are prescribed for criminal trials. That does not mean, however, that witnesses threatened with committals enjoy no such protection. For the common law entitles them to the procedural fairness on which the rules of natural justice insist. Those certainly cover the right to be told precisely what is wanted of them in case they do not realise that already from the history of their attendance, the right to be warned about the potential consequence of not complying, the right of each to oppose the application for a warrant, and his or her right to be heard in opposition to the application. To that list the statute adds, in s 65(6), the right to be legally represented during the proceedings and, in s 66(5), the right of recourse to the Judiciary in the event of a committal. I can therefore see nothing unfair in the way in which the proceedings are required or allowed to be run. Nor does Ackermann J, not surprisingly since he finds no fault with committals ordered by magistrates and the procedure followed then is exactly the same as that observed whenever others officiate.

[123] Ackermann J believes it to be procedurally unfair, even so, for anybody but a magistrate to issue a warrant of committal. His reason has to do with the very source of the decision. He considers that, in accommodating the performance by others of so grave a function, the structure for the conduct of the proceedings is intrinsically flawed because it does not conform to a couple of cardinal principles, the separation of powers and the rule of law.

[124] The separation between the Executive and the Judiciary is not total in South Africa. We need look no further than the magistracy to see a striking illustration of an overlap. Besides their judicial work magistrates attend to a host of administrative tasks that fall within the exercise of executive power, moving readily and frequently from the bench to the bureaucracy and back.

[125] Ackermann J maintains, however, that sending people to jail should always be the function of the Judiciary alone; that the reason lies in the judicial independence and impartiality which is fundamental to the separation of powers, indeed to the rule of law itself; that presiding officers who are not drawn from the ranks of the magistracy possess no such qualities; and

that both principles are harmed by their lack of those in issuing warrants under s 66(3). That seems to concentrate on form at the expense of substance. Presiding officers situated outside the magistracy are unlikely to be less independent or impartial in doing their duty than those located within it. They, like magistrates, must make up their own minds about committals. Not to do so, but to obey the instructions, succumb to the pressure or defer to the wishes of departmental superiors, would be an improper exercise of their powers and a reviewable irregularity. It seems fanciful, in any event, to imagine a superior wanting to influence the decision of a presiding officer on the case for a committal. The Executive has no interest to promote or protect in that area. And no reason of policy, good or bad, suggests why it should care what happens there. Then one has the ultimate safeguard against an irregularity of that or any other sort, which is the immediate opportunity for an approach to the High Court and the consequent intervention of the Judiciary. In all those circumstances, I consider, s 66(3) contains nothing that infringes or imperils either the rule of law or the doctrine of separate powers.

[126] No dangerous precedent would be set, in my opinion, by a ruling along the lines that I accordingly favour. Interferences with personal liberty are always scrutinised intensively and controlled strictly by this Court and others. Section 12(1)(a) ensures that the supervision will continue. It will be exercised in accordance with the merits or demerits of each particular interference. So nobody need fear that such a ruling might be applied in the future to any case distinguishable from the present one.

Kriegler J concurred in the judgment of Didcott J.

13.354 Madam Justice Mokgoro analysed section 66 of the *Insolvency Act*, detention and the rights under section 12 of the Constitution as follows:

[127] My views have been informed by the opportunity I have had to read the judgments of Ackermann, Didcott, O'Regan and Sachs JJ. I respectfully disagree with the view of Didcott J that s 66(3) of the *Insolvency Act* (the Act) is wholly unobjectionable. However, I associate myself with much in his interpretation (and Sachs J's intimations in that direction) of s 12(1)(b), and to the extent that he construes 'detention without trial' to have a particular historical and political meaning, I agree with his view. Like O'Regan J, though, I am also in respectful disagreement with the view of the matter taken by Ackermann and Sachs JJ: I do not in these circumstances distinguish between judicial officers officiating under appointment of the Master in quasi-judicial proceedings and non-judicial appointees of the Master officiating in a similar capacity. This case is, in my respectful opinion, not about office, but about process. I, however, have a narrow point of disagreement with O'Regan J. Whereas her emphasis is on a judicial forum where fairness is presumed, my emphasis is more centrally on the fairness required of process, regardless of office or forum. In arriving at the same decision as she does, I have merely taken a different route, which I will explain below.

[128] Section 12 protects the freedom and security of the person. I hold it as uncontroversial that a decision which deprives persons of their freedom or their security is policed by at least the twin notions of procedural and substantive fairness. Procedural fairness ordinarily refers to the manner in which a decision is made, and it involves scrutinising the steps that are followed and the checks and balances put in place prior to the decision being taken. The notion of substantive fairness, I believe, is a tool that generally helps us to focus our attention on the reason, grounds or basis of the decision. Considerations of procedural and substantive fairness are therefore instruments that operate in an interactive way to protect an adjudicator from the real possibility of making an unjust decision. Procedural fairness is a hedge that society places around public decision-making in an effort to ensure that the rule of law is upheld and seen to be upheld. Where an interest of paramount importance is at issue, then stringent procedures are called for: indeed, we expect them to be more precise than when a lesser interest is implicated, and our contemplation of the substance of the matter will influence our attitude toward the procedure required. It may, however, be stated that while there are often clear examples of substantive and procedural issues that might be contrasted, sometimes the line is too fine to be drawn.

[129] The notions of procedural and substantive fairness accord with virtually universally held views on the subject, and were already well-established principles of justice in our pre-constitutional era. These principles, then and even more so now, are respectful of the

fundamental premise that decisions affecting paramount human interests be made for good reason and in a fair manner. In giving meaning to s 11(1) of the interim Constitution, this Court upheld this viewpoint in the cases of *Bernstein and Others v Bester and Others NNO*, *S v Coetzee and Others*, and *B Nel v Le Roux NO and Others*. The dicta in these cases are succinctly set out in paras [17]–[21] of the judgment of Ackermann J and I refer to them as they are cited therein so far as they develop the point that fairness in adjudication includes considering both the merits and the process. However, I do not come to the same interpretive conclusion as to the necessary construction to be placed on s 12(1)(b) of the 1996 Constitution that that judgment does.

[130] Whether procedural and substantive fairness are implicit in s 12(1) as a whole or not, I find them at least present in the specified inclusion of s 12(1)(a), which provides that:

'12(1) Everyone has the right to freedom and security of the person, which includes the right -
(a) not to be deprived of freedom arbitrarily or without just cause;

....'

I agree with the view that the phrase 'without just cause' constitutes the substantive fairness leg of the inquiry, but go further to find in the requirement 'not to be deprived of freedom arbitrarily' the additional constitutional protection of procedural fairness, subject, of course, to the knowledge that it is sometimes difficult to draw a clear distinction between what is procedural and what is substantive.

[131] When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his or her own matter and that the other side should be heard aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. Everyone is entitled to an impartial Judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient, should not be presented with a point of view that his or her position inherently loads. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation. When the clear basis for committing a person to prison is coercive rather than punitive, warning lights begin to flash.

[132] Procedural fairness is, however, not confined to the twin maxims referred to above. . . .

[133] The disturbing consequence that s 66(3) of the Act has is that a person arraigned in the Act's terms may be confined to prison or have the confinement renewed in circumstances where the usual safeguards that imprisonment would demand are not afforded the examinee. The imprisonment may be for an indeterminate period. There is no process of automatic review. It occurs in a summary fashion where there has not been adequate time to prepare. And since this is not a criminal trial there is no constitutional right to legal representation at State expense, notwithstanding the fact that the imprisonment, something ordinarily reserved for criminal sanction, occurs. Whether these factors are procedural or substantive is not the important consideration. What is important is that the s 66(3) process does not allow for sufficient or adequate safeguards before inroads are made into an important right such as freedom and security of the person. The sum of all these factors is sufficient to constitute a violation of the right in my view.

[134] In scrutinising other statutes for equivalent provisions relating to the way in which contempt of proceedings is dealt with, one observes that in every instance where the forum which was held in contempt was something other than a court of law, the statute first creates an offence and only after procedural safeguards afforded by a trial and conviction before a court of law is the offender liable to imprisonment. The formula replicates itself again and again: contempt is offensive, so offensive that it may result in incarceration, but only after the intervention of a properly constituted trial procedure which is seen to be fair for the purposes of incarceration. While I do not hold that only a court of law can uphold procedural fairness required by my interpretation of s 12(1)(a), what is clear is that these other statutes require the intervention of a fair trial procedure prior to confinement, which is not the case with s 66(3). Instances of detention in the absence of a criminal conviction authorised in our law might fall

into at least two identifiable categories: on the one hand there are the well-known instances of arrest that precede a trial. Here the person must be brought to trial or else released, and a court of law, again with the safeguards of fair procedure, decides on the conditions of a continued confinement if there is to be any. On the other hand, there are those instances, other than those where it occurs for the reasons set out in the interpretation of detention without trial in terms of s 12(1)(b) and analysed in the judgment of Didcott J, where persons can be detained without any prospect of a trial. These are also the well-known instances of prohibited aliens, mental patients or persons placed under quarantine. In these instances, each confinement is limited in time to establish a procedure that regulates the fairness or otherwise of any continued confinement. . . .

[135] This Court had the occasion to examine provisions in relation to contempt proceedings in *Bernstein* and *Nel*. Passages in those judgements purport to require that a benevolent construction be given to the provisions of statutes. . . .

[136] In *Bernstein* contempt of proceedings in terms of ss 417 and 418 of the Companies Act constituted an offence. Only after conviction for the offence could the person in contempt be imprisoned. It thus fits the formula for confinement described above and is therefore distinguishable from the s 66(3) procedure. It also complies with the sentiments in relation to the necessity of a fair procedure expressed in this judgment. In that decision we held:

'The sanction of imprisonment for ignoring, or failing without sufficient cause to give effect to a subpoena issued under s 417 or 418 of the Companies Act, is a reasonable and necessary sanction. So too is the power to cause a person in breach of such a subpoena to be arrested and brought before the Master or other person appointed to conduct the enquiry. Imprisonment follows in accordance with the normal procedural safeguards, therefore neither s 11(1) nor s 25 is impaired; and it is not a sanction which is disproportionate to the offence, therefore ss 11(1) and 11(2) are not impaired. The sanctions are necessary to enforce the legislation, and insofar as they have to comply with s 11(1) read with s 33, they clearly do so.'

[137] In *Nel*, dealing with s 205 of the Criminal Procedure Act, and therefore under circumstances and within a context where fair procedure obtained, we held:

'The s 11(1) right relied upon by the applicants is the "right not to be detained without trial". The mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate procedural safeguards.'

Leaving open the question of what constituted appropriate procedural safeguards, *Nel* further held:

'It is unnecessary for purposes of this case to decide whether this "entity" to which I have referred must in all cases be a judicial officer who ordinarily functions as such in the ordinary courts.' *

However, it is the pattern of Ackermann J's judgment in the instant case that seeks to conclude that this entity must be a judicial officer that I have disagreement with: I reaffirm that this case is about process and not office. The light by which I navigate this case is captured in the saying of Lord Acton that '(t)here is no worse heresy than that the office sanctifies the holder of it'. The mere fact without more that a person committing the recalcitrant witness to prison is in name a judicial officer, in my view, is, in itself, not an adequate safeguard that the committal is acceptable in an open and democratic society that has such high regard for individual liberty. While it is true that the 'judicial authority of the Republic vests in the courts', that is so, not due to the presence of the judicial officers, but because of the rule of law which is upheld there. Any normative procedure of a court that does not comply with the rule of law loses its legitimacy and, in so undermining the rule of law, may well infringe s 12. This is because process has both instrumental and intrinsic value.

[138] Accordingly, s 66(3) infringes s 12(1)(a) and it now remains to seek grounds of

justification in favour of permitting this infringement. As has been so regularly affirmed by this Court, the policy considerations that are relevant in the justification process are to be balanced in a reasonable and justifiable way, taking into account all the relevant factors, and especially those enumerated in s 36(1). The right whose boundary is trespassed secures values of great importance: there are surely few human interests that are more important than physical security and freedom of the person. The purpose of the limitation being argued for here boils down to one of commercial substance: while not seeking to undermine the legitimacy of the purposes of the Insolvency Act in general, what does it say of a society when commercial interests weigh heavier than personal liberty and security? It surely does not matter that the person is in fact a miserable thief or an embezzler of other people's money: the means by which the limitation of a right-holder's personal liberty occurs can be more judiciously guarded.

[139] In this particular case, several less intrusive means present themselves: for example, the questions that an examinee fails to answer can be dealt with in the way that other statutes do. Admittedly creating a separate offence and going through the trial procedure may not expedite the process, but it is the price we pay for living in a society that has committed itself to the preservation of liberty. Alternatively, the Legislature may opt for a model that could, in turn, expedite these procedures without great difficulty, with surely the equivalent coercive end-result, and in a way that matches the limitation's purpose in a manner consonant with the interest that the right protects.

. . . [141] When responding to the question: 'What is it about courts of law that justifies their being the site where far-reaching decisions are made?', I find it difficult to accept that it is exclusively either the judicial status of their presiding officers or the nature of the forum that warrants the reverence we display toward them. Instead, in my view, it is the way procedure there serves the rule of law. In the case of the s 66(3) proceedings, however, the defining criteria here are the fairness or otherwise of the process under scrutiny, the nature of the right involved, and the existence of less intrusive means to effectively match means with end. Accordingly, but for the reasons set out in this judgment, I concur in the finding of O'Regan J that s 66(3) is unconstitutional.

13.355 Madam Justice O'Regan stated that she agreed with Justice Ackermann that s 66(3) of the *Insolvency Act* 24 of 1936 is in conflict with the provisions of s 12 of the 1996 Constitution to the extent that it permits a person presiding over a creditors' meeting who is not a judicial officer to order the imprisonment of a person who refuses to testify or produce documents to the meeting:

He holds, however, in paras [76]--[83] of his judgment, that where a magistrate presides over the meeting of creditors, there is no breach of s 12. I am in respectful disagreement with this aspect of my Colleague's decision for the reasons given in this judgment.

[143] Section 12(1) of the 1996 Constitution provides that:

'Everyone has the right to freedom and security of the person, which includes the right -

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.'

I agree with Ackermann J at para [22] of his judgment where he states that, amongst other things, this section protects individuals from the deprivation of physical freedom save where there is a good reason for the deprivation and where appropriate procedural safeguards exist. I also agree with Ackermann J that there can be no doubt that in this case there are good reasons for the deprivation of freedom which s 66(3) authorises. The real difficulty lies in the question of whether there are appropriate procedural safeguards accompanying that deprivation. Of course, there is no rigid rule as to what procedural safeguards are appropriate in the context of s 12(1). The procedural safeguards required will depend on the nature of the deprivation and its purpose. It is necessary therefore to examine the nature of deprivation of freedom occasioned by s 66(3) as well as its purpose. This analysis requires an understanding of the role and nature of creditors' meetings in the insolvency process.

[144] The Insolvency Act requires that whenever a final order of sequestration has been granted two creditors' meetings be held. The meetings are presided over either by the Master of the High Court, or a public service official designated by the Master, or a magistrate (in districts where there is no Master's Office) or an officer of the public service designated by a magistrate. Notice of the meetings is given in the Government Gazette. The purpose of the meetings is to permit creditors to appoint a trustee; to prove their claims against the insolvent estate; to provide the trustee with directions in connection with the administration of the estate and to receive the trustee's report. The presiding officer may summon any person to the meetings whom the officer considers may be able to give material information concerning the insolvent or his or her affairs. The presiding officer may administer the oath to persons summoned in this way and permit the trustee or any creditor who has proved a claim against the estate to interrogate such person concerning all matters relating to the insolvent or his or her affairs. The presiding officer must disallow any irrelevant question.

[145] Where a person summoned to the meeting attends, but fails to bring the required documents, or refuses to be sworn in as a witness by the presiding officer, or refuses to answer a particular question put to her or him, or does not answer the question fully or satisfactorily, s 66(3) empowers the presiding officer to issue a warrant committing that person to prison until he or she has undertaken to do what is required. Section 66(4) then provides that a person may be repeatedly imprisoned as often as may be necessary to compel the person to do what is required of him or her.

[146] Section 66(5) permits a person who has been imprisoned in terms of s 66(3) to apply to a High Court for discharge from custody. The Court is empowered to order the discharge if it finds that the person was wrongfully committed to prison or is being wrongfully detained. Section 66(6) confers a judicial immunity upon any presiding officer of a creditors' meeting who exercises the powers of committal conferred upon the officer by s 66.

[147] There can be no doubt that the power conferred upon presiding officers of creditors' meetings is an extraordinary one. It is the power to imprison a person indefinitely until that person complies with what is required of him or her. The purpose of imprisonment in these circumstances is not punishment but coercion. The power to order the summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite imprisonment for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case there is no dispute that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.

...

[149] The procedure authorised by s 205 of the Criminal Procedure Act is quite different from a meeting of creditors convened in terms of the Insolvency Act. Section 205 is part of the criminal justice system which seeks to ensure that persons who may be in possession of material or relevant information concerning alleged criminal offences can be compelled to make that evidence available. It serves an important function in our criminal justice process in relation to the investigation of crime. It also contains safeguards to limit the extent to which it prejudicially affects the rights of citizens. Similar procedures to facilitate the investigation of crime also exist in other countries. As Ackermann J held in *Nel's* case, cited above, the court in s 205 'is in every material respect, particularly insofar as its independence and impartiality is concerned, identical to the "ordinary court of law" envisaged by s 25(3) of the Constitution'.

[150] Creditors' meetings, on the other hand, are part of a process to regulate insolvency. The primary function of the meetings is to attend to the proof of claims by creditors. A decision by a presiding officer not to admit a claim is not final. A creditor can submit it once again at a later meeting of creditors, or he or she can seek relief in a court. In addition to the business of the proof of claims, the meeting may engage upon an investigation of the affairs of the insolvent. Any person who in the opinion of the presiding officer may be able to provide material information concerning the affairs of the insolvent may be required to do so. This investigative aspect of creditors' meetings is a fact-finding process aimed at identifying assets of the insolvent. It can be likened to many fact-finding processes authorised by our law in a wide range of circumstances. It is therefore correct to understand a creditors' meeting as an administrative or quasi-judicial proceeding, rather than judicial proceedings, and our Courts have so held on several occasions. It is extremely rare, as I outline below, not only in our law, but in other jurisdictions as well, for agencies exercising such powers to be granted summary

powers of imprisonment to coerce information from unwilling witnesses.

[151] In *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC) (1996 (4) BCLR 449), we were concerned with a challenge to the provisions of ss 417 and 418 of the Companies Act 61 of 1973. We concluded that those provisions were not in conflict with the provisions of the interim Constitution. Section 418(2) of the Companies Act provides that:

'A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in s 417.'

Although not expressed in the same terms as s 66(3) of the Insolvency Act, there are obvious similarities between the powers contained in the two sections. I agree with Ackermann J where he states at para [84] of his judgment in this matter that in that case this Court did not apply its mind to the argument that a magistrate who exercises powers under s 418(2) of the Companies Act is acting in an administrative and not a judicial capacity and therefore may not permissibly be clothed with powers to imprison witnesses who refuse to testify to coerce them to do so. The issue raised in this case therefore does not fall within the ambit of our judgment in *Bernstein*.

[152] Our common law concerning contempt of court has long recognised the power of courts of law to imprison people at least in part to coerce them to comply with court orders. As Steyn CJ held in *S v Beyers* 1968 (3) SA 70 (A) at 80C--E:

...

('It cannot be doubted that there is an established procedure whereby a litigant who has obtained an order against his opponent can approach the Court in his own interests for the punishment of his opponent for contempt of Court in order to enforce obedience of the order. It is a process of a dual nature which is dealt with in accordance with civil procedures. (Compare *Afrikaanse Pers-Publikasie (Edms) Bpk v Mbeki* 1964 (4) SA 618 (A) at 626.) Following English law the contempt is then described as civil contempt. It is equally clear, however, that at no stage has this form of contempt lost a criminal law content. It is often described and treated as a crime with no indication that it is considered as anything other than the common-law contempt of court. Whether this is in accordance with English law is at least doubtful, but in my opinion of little relevance, because the definition of the crime in our law is not determined by English law.' - Translation by the Editors.)

[153] The common-law powers of the courts have been repeated and in some circumstances extended by statute. Section 31 of the Supreme Court Act 59 of 1959 provides that when a witness refuses to testify without just excuse the Court may adjourn the proceedings for eight days and issue a warrant committing the witness to prison for that period. Upon resumption of the proceedings, if the witness persists in his or her refusal, the proceedings may once again be adjourned for eight days and the witness once again committed to prison.

[154] Section 108 of the Magistrates' Courts Act 32 of 1944 confers upon magistrates the power to punish persons for certain acts committed in the courtroom during court proceedings. So a person who wilfully insults a magistrate during the court's sitting or interrupts the proceedings or 'otherwise misbehaves' is liable to be sentenced summarily or upon summons to a fine not exceeding R2 000 or to imprisonment for a period less than six months. It may be that a refusal to answer a relevant question will constitute a breach of this section. It is clear, however, that this power may only be exercised when magistrates are carrying out their judicial functions as magistrates in terms of the Magistrates' Courts Act and not when they are performing administrative or quasi-judicial functions allocated to them by other legislation.

[155] Section 51(2) of the Magistrates' Courts Act also provides that a person who refuses to obey a subpoena to attend court may be fined R300 or imprisoned for three months. It should be noted that in both s 108 and s 51(2) the extent of the punishment that may be imposed is limited and may not be of an indefinite duration as is permitted by s 66(3). On the other hand, s 189 of the Criminal Procedure Act regulates the situation in criminal proceedings before magistrates. A witness who refuses to be sworn in or to answer a particular question in the absence of a just excuse may be sentenced to imprisonment for a period not exceeding two years. Section 189(2) specifically provides that after the expiration of the first sentence, a witness may be subjected to further imprisonment if he or she persists with a refusal to testify. Other institutions which enjoy similar powers are the Land Claims Court and courts martial.

[156] Powers of contempt to coerce recalcitrant witnesses have, however, generally not been

conferred upon administrative or quasi-judicial bodies established by statute, even where those bodies are exercising powers very similar to the powers of a court of law. Indeed, outside the provisions of the Insolvency Act under consideration now, similar provisions in the Companies Act, and courts martial, counsel could point to no example in our law where powers such as those contained in s 66(3) of the Insolvency Act were conferred upon any person or institution that was not a court of law. . . .

[157] The reluctance to confer powers of civil contempt upon institutions other than courts of law is not peculiar to our legal system. . . .

[158] It seems to me that there are sound reasons for the legislative and judicial reluctance, illustrated above, to extend powers of coercive imprisonment to institutions other than courts. Indefinite imprisonment for coercive purposes is potentially an extremely dangerous mechanism. Like imprisonment for punitive purposes, it is a form of deprivation of physical freedom which requires thorough procedural safeguards. Our Constitution provides detailed and careful procedures to be followed when a person is charged with a crime, including the requirement that the trial should take place before an 'ordinary court'. Imprisonment for coercive purposes should be attended by substantially similar safeguards. It is probably for this reason that institutions other than courts of law have generally not been granted the powers of coercive imprisonment by the Legislature. This reluctance is embedded in an understanding of the nature of courts, on the one hand, and the requirements of appropriate procedural constraints upon the exercise of the power of coercive imprisonment, on the other.

[159] The requirement that it is only a court, or an institution similar to a court, that may exercise powers that involve indefinite deprivation of liberty for coercive purposes is based not only on the nature of the officer presiding but also on the institution itself. There can be no doubt that for the requirements of procedural fairness to be met, the presiding officer must be impartial and independent. Independence of a presiding officer is, as Ackermann J states in his judgment at paras [71]--[74], assured by security of tenure and financial security. But the independence and impartiality of the presiding officer is only the first aspect of judicial independence. In addition to the independence and impartiality of the presiding officer, it seems to me that the institution or proceedings over which the officer presides must also exhibit independence and impartiality in the judicial sense. As Le Dain J held *A* in *R v Valente* (1985) 24 DLR (4th) 161 (SCC) at 171:

'It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a Judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. . . . The relationship between these two aspects of judicial independence is that an individual Judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.'

[162] I conclude, therefore, that it is a requirement of procedural fairness that no person may be imprisoned indefinitely for coercive purposes except by a court of law, or an independent and impartial institution of a character similar to a court of law. As a creditors' meeting convened in terms of the Insolvency Act is not such an institution, even when it is presided over by a magistrate, it is my view that the provisions of s 66(3) of the Insolvency Act are in breach of s 12 of the Constitution.

[164] To determine whether s 66(3) may be justifiable in terms of s 36(1) it is necessary therefore to place its purpose, effect and importance on one side of the scales and the nature and effect of the infringement it causes on the other. It is also necessary to consider whether the same goal could be achieved by less restrictive means. Counsel for the respondents argued that the purpose of s 66(3) was to further the interests of creditors in the insolvency process. I have no doubt that protecting the interests of creditors is an important and legitimate purpose. Counsel argued further that s 66(3) is an extremely effective coercive tool. I do not doubt this either. Indeed, it is stated in the Master's report to us that the powers contained in s 66(3) have never, as far as can be recalled, been used to incarcerate a reluctant witness. Similarly, it is recorded that the powers under s 66(2), not in issue in this case, have only been used once in the past fifteen years. This is evidence indeed of effective coercive powers.

[165] However, on the other hand, it is necessary to realise that the infringement of the procedural fairness requirement of s 12(1) is not insignificant. A person is entitled to expect that he or she will not be summarily imprisoned by a body other than a court of law for an indefinite period for coercive purposes. People in all walks of life and in a wide range of circumstances are regularly required to provide evidence to administrative agencies. It seems to me that it is an element of procedural fairness that such people have the right not to be summarily and indefinitely imprisoned by such agencies without the intervention of a court or a tribunal with the qualities of judicial independence and impartiality. It is true that where a magistrate presides over the enquiry the extent of the breach of s 12 will be reduced because the magistrate will have the skills and experience of a judicial officer in making the order of imprisonment, but the institutional requirements of judicial independence and impartiality remain absent.

[166] On balance, although the purposes of s 66(3) are important, I am not sure that they are sufficiently important to outweigh the infringement to s 12(1) occasioned by the section. In particular, it is not clear to me that the purposes for which the powers under s 66(3) are granted are any more pressing than the purposes for which a variety of non-judicial proceedings are instituted in our law which do not enjoy powers of coercive imprisonment. I find it hard to accept that all non-judicial proceedings presided over by a magistrate but engaged upon investigation and fact-finding could automatically be given powers as sweeping as those contained in s 66(3). It seems to me that to establish justification under s 36(1) something more is needed than the importance of the fact-finding investigation. I can see no special reason which singles out creditors' meetings from other non-judicial proceedings which are engaged in the process of fact-finding.

[167] This conclusion is strengthened by the fact that, as counsel conceded, another mechanism already exists in the Insolvency Act to obtain the compliance of recalcitrant witnesses. Section 139 of the Insolvency Act provides that a person who may have been committed to prison in terms of s 66(3) shall also be guilty of a criminal offence and subject to a fine or imprisonment. . . . Ackermann J has pointed to the fact that powers to imprison a recalcitrant witness in insolvency enquiries are generally reserved to courts of law. It is unnecessary to repeat the references to the foreign jurisdictions here. Suffice it to say that in all jurisdictions to which he refers, the power to imprison a recalcitrant witness in insolvency enquiries in order to compel that witness to testify is reserved for courts of law and is not exercised by administrative or quasi-administrative institutions.

[169] It is true that s 66(5) of the Insolvency Act operates as a safeguard by permitting a person imprisoned pursuant to s 66(3) to approach a court which is empowered to consider the matter afresh. This provision is a statutory invocation of the common law *interdictum de homine libero exhibendo*. However, it is noticeable that there is no automatic or necessary review of the s 66(3) proceedings required by s 66(5). There can be no doubt that an automatic review would constitute a greater safeguard than the simple entitlement afforded by s 66(5) which, for a variety of reasons, an imprisoned person may not be in a position to seek.

[170] For these reasons, therefore, I am not persuaded that s 66(3) may be considered a justifiable limitation of s 12(1) of the Constitution. Counsel for the applicant did not rely on s 165 of the Constitution, which vests the judicial authority of the Republic in the courts. Accordingly, I wish to express no view on the question of whether the power to imprison a person for coercive or punitive purposes forms part of the 'judicial authority' contemplated by that provision.

[171] I agree, therefore, with the decision of Conradie J in the Court a quo and would accordingly dismiss the application. As this is a minority opinion of the Court, it is not necessary for me to consider the appropriate order to be made in the circumstances.

13.356 Mr Justice Sachs argued as follows:

[172] I agree with the order proposed by Ackermann J for reasons that are similar to his in philosophy but different in logic and articulation. I accept his conclusion that in entrenching the right to freedom and security of the person, s 12(1) of the Constitution either expressly or implicitly protects persons against deprivations of freedom that are substantively unacceptable or procedurally unfair. In addition, I concur fully with his eloquent explanation of the special meaning that the phrase 'detention without trial' has acquired in South Africa. I have grave doubts, however, about the more extended interpretation on which he relies and in this respect

would wish to associate myself with the clear and forceful observations on the subject by Didcott J. In my view, s 12(1)(a) serves far more comfortably than does s 12(1)(b) as the basis for any analysis of freedom rights in the present case. I accordingly express my support for the remarks both by Didcott J and by Mokgoro J on this score, and add the following comment.

[173] Section 12 of the Constitution revises and enriches s 11 of the interim Constitution in a number of substantial ways, with the result that the text before us is manifestly different from that which this Court was called upon to analyse in *Nel v Le Roux NO and Others*. In particular, the 1996 text itemises and outlaws three specific invasions of freedom and security of the person which were not expressly articulated in the interim Constitution:

- (i) the right 'not to be deprived of freedom arbitrarily or without just cause' (s 12(1)(a)),
- (ii) the right 'to be free from all forms of violence from either public or private sources' (s 12(1)(c)) and
- (iii) the right 'to bodily and psychological integrity' (s 12(2)).

In the interim Constitution, on the other hand, the words 'detention without trial' stood alone as an express bar to physical restraint by the State and accordingly had to function as the sole textual basis for analysing the constitutionality of all forms of coercive State power involving physical restraint. Now it is just one item in an extensive and nuanced catalogue, and therefore needs to be given a specific significance which both justifies its place in the list and separates it from the other items. It accordingly reclaims its commonly accepted identity in South Africa as relating to a specific and unmistakable prohibition of the special and intense form of deprivation of liberty that scarred our recent history. So firm is the prohibition, as Ackermann J points out, that even in the extreme conditions where a state of emergency is declared, rigorous constitutional conditions are imposed on the use of detention without trial. I accordingly tend strongly to the view that the manner in which the phrase 'detention without trial' was construed in *Nel v Roux* needs to be revisited.

[174] In my opinion, however, it is not necessary to resolve the problems of how to construe s 12. As I see it, the matter falls properly to be determined by the application of the doctrine of separation of powers. Section 66(3) of the Insolvency Act gives authority to appointees who happen not to be judicial officers to send recalcitrant witnesses to jail. Even though the processes followed by non-judicial but experienced appointees may in practice show the utmost procedural fairness and even if the dangers of abuse may in reality be minimal, there is a simple, profound and well-understood principle which I believe this Court should uphold, and that is that only judicial officers should have the power to send people to prison.

[175] Section 165(1) of the Constitution makes it clear that '(t)he judicial authority of the Republic is vested in the courts'. The appointee of the Master or the magistrate, however, need not be a judicial officer serving in any court. When such appointee is not a judicial officer, he or she should not be able to exercise what is really a crucial part of the authority reserved in democratic States to the Judiciary, namely the power to punish misconduct or penalise recalcitrance by means of incarceration in a State jail.

[176] These remarks refer only to the authority to imprison someone as a penalty to mark State reprobation. The situation may be different where persons are deprived of liberty in non-punitive circumstances and where, subject to respect for fundamental rights of personality being maintained, reasons of exigency might render it constitutionally permissible for restraint first to be applied and judicial control to take place only afterwards. Thus it is not uncommon in democratic States for custodial powers to be conferred initially on persons who are not judicial officers where the purpose to be achieved is not that of imposing a penalty, but, for example, that of securing immigration control or dealing with severe health risks. Here the medium of imprisonment is not regarded as the message, but only as the means. In these circumstances custody or physical restraint does not serve in itself as a mechanism for commanding respect for the law. It is neither punishment for past defiance nor compulsion to future compliance but simply the only reasonable way in which a non-punitive objective of pressing public concern can be achieved. By way of contrast, the authority to incarcerate for purposes of imposing penalties for past or continuing misconduct belongs to the Judiciary, and to the judiciary alone. In my view, the doctrine of separation of powers prevents Parliament from entrusting such authority to persons who are not judicial officers performing court functions as contemplated by s 165(1).

[177] The question that remains is whether magistrates functioning in terms of s 66(3) of the Insolvency Act can be said to be exercising the authority reserved to courts by s 165(1) of the Constitution. The word 'court' may refer to a building, to an institution exercising judicial functions and to the persons who carry out such functions. Normally the three go together. In

the present case, the issue is whether persons selected, because of their membership of judicial institutions to exercise the intrinsically judicial function of sending people to jail, are acting within the authority conferred on courts by s 165(1) of the Constitution, even though they may do so outside of the physical, institutional and procedural setting within which courts normally function. With some hesitation I come to the conclusion that, in the context of the present case, they are.

[178] The essential characteristics of the courts exercising judicial authority as contemplated by the Constitution are that '(they) are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. Unlike other appointees, magistrates exercising powers of committal to prison under s 66(3) of the Insolvency Act will enjoy institutional independence and can be expected to apply the law impartially and without fear, favour or prejudice. Furthermore, they will exercise their powers within the matrix of the superior hierarchical judicial control to which they are institutionally and habitually accustomed. The principles embodied in and the values to be protected by the separation of powers will accordingly be secured. In this respect, I agree with the broad evaluation made by Ackermann J on the character of the judicial function and support the distinction which allows magistrates to order committal to prison and denies that power to other State functionaries. For these reasons, I concur in the order he proposes.

13.357 Legislation was enacted in Canada by the end of 2001 which provides for investigative hearings. Australia also recently introduced similar legislation. There were no such legislative precedents at the time of the publication of discussion paper 92. The events of 11 September 2001 has compelled a number of jurisdictions to reconsider their legislative arsenal to deal effectively with terrorism. Concerns were raised in these jurisdictions similar to the concerns raised much earlier in South Africa. The Canadian provisions read as follows:

83.28(1) In this section and section 83.29, "judge" means a provincial court judge or a judge of a superior court of criminal jurisdiction.

(2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information.

(3) A peace officer may make an application under subsection (2) only if the prior consent of the Attorney General was obtained.

(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

- (a) that there are reasonable grounds to believe that
 - (i) a terrorism offence has been committed, and
 - (ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or
- (b) that
 - (i) there are reasonable grounds to believe that a terrorism offence will be committed,
 - (ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and
 - (iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

- (5) An order made under subsection (4) may
 - (a) order the examination, on oath or not, of a person named in the order;
 - (b) order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (d), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;
 - (c) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;
 - (d) designate another judge as the judge before whom the examination is to take place; and
 - (e) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.
- (6) An order made under subsection (4) may be executed anywhere in Canada.
- (7) The judge who made the order under subsection (4), or another judge of the same court, may vary its terms and conditions.
- (8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.
- (9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.
- (10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but
 - (a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132¹ or 136²; and
 - (b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.
- (11) A person has the right to retain and instruct counsel at any stage of the proceedings.
- (12) The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any terrorism offence, shall order that the thing be given into the custody of the peace officer or someone acting on the peace officer's behalf.
- 83.29(1) The judge who made the order under subsection 83.28(4), or another judge of the same court, may issue a warrant for the arrest of the person named in the order if the judge is satisfied, on an information in writing and under oath, that the person
 - (a) is evading service of the order;

¹ 132. Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

² 136. (1) Every one who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years, whether or not the prior or later evidence or either is true, but no person shall be convicted under this section unless the court, judge or provincial court judge, as the case may be, is satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial proceedings, intended to mislead.

- (b) is about to abscond; or
- (c) did not attend the examination, or did not remain in attendance, as required by the order.

(2) A warrant issued under subsection (1) may be executed at any place in Canada by any peace officer having jurisdiction in that place.

(3) A peace officer who arrests a person in the execution of a warrant issued under subsection (1) shall, without delay, bring the person, or cause the person to be brought, before the judge who issued the warrant or another judge of the same court. The judge in question may, to ensure compliance with the order, order that the person be detained in custody or released on recognizance, with or without sureties.

83.3 (1) The consent of the Attorney General is required before a peace officer may lay an information under subsection (2).

(2) Subject to subsection (1), a peace officer may lay an information before a provincial court judge if the peace officer

- (a) believes on reasonable grounds that a terrorist activity will be carried out; and
- (b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity³.

(3) A provincial court judge who receives an information under subsection (2) may cause the person to appear before the provincial court judge.

(4) Notwithstanding subsections (2) and (3), if

- (a) either
 - (i) the grounds for laying an information referred to in paragraphs (2)(a) and (b) exist but, by reason of exigent circumstances, it would be impracticable to lay an information under subsection (2), or
 - (ii) an information has been laid under subsection (2) and a summons has been issued, and
 - (b) the peace officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist activity,
- the peace officer may arrest the person without warrant and cause the person to be detained in custody, to be taken before a provincial court judge in accordance with subsection (6).

(5) If a peace officer arrests a person without warrant in the circumstance described in subparagraph (4)(a)(i), the peace officer shall, within the time prescribed by paragraph (6)(a) or (b),

- (a) lay an information in accordance with subsection (2); or
- (b) release the person.

(6) A person detained in custody shall be taken before a provincial court judge in accordance with the following rules:

- (a) if a provincial court judge is available within a period of twenty-four hours after the person has been arrested, the person shall be taken before a provincial court judge without unreasonable delay and in any event within that period, and
- (b) if a provincial court judge is not available within a period of twenty-four hours after the person has been arrested, the person shall be taken before a provincial court judge as soon as possible,

unless, at any time before the expiry of the time prescribed in paragraph (a) or (b) for taking the person before a provincial court judge, the peace officer, or an officer in charge within the meaning of Part XV, is satisfied that the person should be released from custody

³

Section 810 of the Canadian Code provides as follows:

810. (1) An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property.

unconditionally, and so releases the person.

- (7) When a person is taken before a provincial court judge under subsection (6),
- (a) if an information has not been laid under subsection (2), the judge shall order that the person be released; or
- (b) if an information has been laid under subsection (2),
- (i) the judge shall order that the person be released unless the peace officer who laid the information shows cause why the detention of the person in custody is justified on one or more of the following grounds:
- (A) the detention is necessary to ensure the person's appearance before a provincial court judge in order to be dealt with in accordance with subsection (8),
- (B) the detention is necessary for the protection or safety of the public, including any witness, having regard to all the circumstances including
- (aa) the likelihood that, if the person is released from custody, a terrorist activity will be carried out, and
- (bb) any substantial likelihood that the person will, if released from custody, interfere with the administration of justice, and
- (C) any other just cause and, without limiting the generality of the foregoing, that the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the peace officer's grounds under subsection (2), and the gravity of any terrorist activity that may be carried out, and
- (ii) the judge may adjourn the matter for a hearing under subsection (8) but, if the person is not released under subparagraph (i), the adjournment may not exceed forty-eight hours.
- (8) The provincial court judge before whom the person appears pursuant to subsection (3)—
- (a) may, if satisfied by the evidence adduced that the peace officer has reasonable grounds for the suspicion, order that the person enter into a recognizance to keep the peace and be of good behaviour for any period that does not exceed twelve months and to comply with any other reasonable conditions prescribed in the recognizance, including the conditions set out in subsection (10), that the provincial court judge considers desirable for preventing the carrying out of a terrorist activity; and
- (b) if the person was not released under subparagraph (7)(b)(i), shall order that the person be released, subject to the recognizance, if any, ordered under paragraph (a).
- (9) The provincial court judge may commit the person to prison for a term not exceeding twelve months if the person fails or refuses to enter into the recognizance.
- (10) Before making an order under paragraph (8)(a), the provincial court judge shall consider whether it is desirable, in the interests of the safety of the person or of any other person, to include as a condition of the recognizance that the person be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things, for any period specified in the recognizance, and where the provincial court judge decides that it is so desirable, the provincial court judge shall add such a condition to the recognizance.
- (11) If the provincial court judge adds a condition described in subsection (10) to a recognizance, the provincial court judge shall specify in the recognizance the manner and method by which
- (b) the things referred to in that subsection that are in the possession of the person shall be surrendered, disposed of, detained, stored or dealt with; and

- (c) the authorizations, licences and registration certificates held by the person shall be surrendered.

(12) If the provincial court judge does not add a condition described in subsection (10) to a recognizance, the provincial court judge shall include in the record a statement of the reasons for not adding the condition.

(13) The provincial court judge may, on application of the peace officer, the Attorney General or the person, vary the conditions fixed in the recognizance.

(14) Subsections 810(4) and (5) apply, with any modifications that the circumstances require, to proceedings under this section.

83.31(1) The Attorney General of Canada shall prepare and cause to be laid before Parliament and the Attorney General of every province shall publish or otherwise make available to the public an annual report for the previous year on the operation of sections 83.28 and 83.29 that includes —

- (a) the number of consents to make an application that were sought, and the number that were obtained, by virtue of subsections 83.28(2) and (3);
- (b) the number of orders for the gathering of information that were made under subsection 83.28(4); and
- (c) the number of arrests that were made with a warrant issued under section 83.29.

(2) The Attorney General of Canada shall prepare and cause to be laid before Parliament and the Attorney General of every province shall publish or otherwise make available to the public an annual report for the previous year on the operation of section 83.3 that includes

- (a) the number of consents to lay an information that were sought, and the number that were obtained, by virtue of subsections 83.3(1) and (2);
- (b) the number of cases in which a summons or a warrant of arrest was issued for the purposes of subsection 83.3(3);
- (c) the number of cases where a person was not released under subsection 83.3(7) pending a hearing;
- (d) the number of cases in which an order to enter into a recognizance was made under paragraph 83.3(8)(a), and the types of conditions that were imposed;
- (e) the number of times that a person failed or refused to enter into a recognizance, and the term of imprisonment imposed under subsection 83.3(9) in each case; and
- (f) the number of cases in which the conditions fixed in a recognizance were varied under subsection 83.3(13).

(3) The Solicitor General of Canada shall prepare and cause to be laid before Parliament and the Minister responsible for policing in every province shall publish or otherwise make available to the public an annual report for the previous year on the operation of section 83.3 that includes

- (a) the number of arrests without warrant that were made under subsection 83.3(4) and the period of the arrested person's detention in custody in each case; and
- (b) the number of cases in which a person was arrested without warrant under subsection 83.3(4) and was released
 - (i) by a peace officer under paragraph 83.3(5)(b), or
 - (ii) by a judge under paragraph 83.3(7)(a).

13.358 Legislation addressing this issue was also introduced in Australia in March 2002. The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* provides, inter alia, as follows:

34A Definitions

In this Division:

Federal Magistrate has the same meaning as in the *Federal Magistrates Act 1999*.

police officer means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

prescribed authority means a person appointed under section 34B.

record has the same meaning as in Division 2.

34B Prescribed authorities

- (1) The Minister may, by writing, appoint as a prescribed authority:
 - (b) a Federal Magistrate; or
 - (c) a person who holds one of the following appointments to the Administrative Appeals Tribunal:
 - (i) Deputy President;
 - (ii) full-time senior member;
 - (iii) part-time senior member;
 - (iv) member.
- (2) The Minister must not appoint a Federal Magistrate under paragraph (1)(a) unless:
 - (a) the Magistrate has, by writing, consented to being appointed; and
 - (b) he consent is in force.
- (3) The Minister must not appoint a person under paragraph (1)(b) unless the person:
 - (a) is a Deputy President; or
 - (b) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory and has been enrolled for at least 5 years.
- (4) A prescribed authority has, in the performance of his or her duties under this Division, the same protection and immunity as a Justice of the High Court.
- (5) If a Federal Magistrate has under this Division a function, power or duty that is neither judicial nor incidental to a judicial function or power, the Magistrate has the function, power or duty in a personal capacity and not as a court or a member of a court.

Subdivision B— Questioning, detention etc.

34C Requesting warrants

- (1) The Director-General may seek the Minister's consent to request the issue of a warrant under section 34D in relation to a person.
- (2) In seeking the Minister's consent, the Director-General must give the Minister a draft request that includes:
 - (b) a draft of the warrant to be requested; and
 - (c) a statement of the facts and other grounds on which the Director-General considers it necessary that the warrant should be issued; and
 - (d) a statement of the particulars and outcomes of all previous requests for the issue of a warrant under section 34D relating to the person.
- (3) The Minister may, by writing, consent to the making of the request, but only if the Minister is satisfied:
 - (a) that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
 - (b) that relying on other methods of collecting that intelligence would be ineffective; and
 - (c) if the warrant to be requested is to authorise the person to be immediately taken into custody, brought before a prescribed authority for questioning and detained— that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
 - (i) may alert a person involved in a terrorism offence that the offence is being investigated; or
 - (ii) may not appear before the prescribed authority; or
 - (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

The Minister may make his or her consent subject to changes being made to the draft request.

- (4) If the Minister has consented, the Director-General may request the warrant by giving a prescribed authority:
 - (a) a request that is the same as the draft request except for the changes (if any) required by the Minister; and

- (b) a copy of the Minister's consent.
- (5) The Director-General may request the warrant only by giving the material described in subsection (4) to a prescribed authority who is a Deputy President of the Administrative Appeals Tribunal, if:
 - (a) the person has been detained under this Division for a continuous period of more than 48 hours; and
 - (b) if the requested warrant were issued, the person could be detained under this Division for a continuous period of more than 96 hours that includes the period described in paragraph (a).

Note: Subsection (5) can apply only if, before the request is made, at least 2 warrants have been issued in relation to the person under this Division.

34D Warrants for questioning etc.

- (1) A prescribed authority may issue a warrant under this section relating to a person, but only if:
 - (b) the Director-General has requested it in accordance with subsection 34C(4), and with subsection 34C(5) if relevant; and
 - (c) the prescribed authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.
- (2) The warrant must, in the same terms as the draft warrant given to the prescribed authority as part of the request, either:
 - (b) require a specified person to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant; or
 - (c) do both of the following:
 - (i) authorise a specified person to be immediately taken into custody by a police officer, brought before a prescribed authority for questioning under the warrant and detained under arrangements made by a police officer for a specified period of not more than 48 hours starting when the person is brought before the authority;
 - (ii) specify all the persons whom the person is permitted to contact while in custody or detention authorised by the warrant.
- (1) For the purposes of subparagraph (2)(b)(i), the warrant may specify the end of the period for which the person is to be detained by reference to the opinion of a person exercising authority under the warrant that the Organisation does not have any further request described in paragraph (5)(a) to make of the person. This does not limit the ways in which the warrant may specify the end of the period.
- (2) The warrant may specify someone whom the person is permitted to contact by reference to the fact that he or she is the person's legal adviser. This does not limit the ways in which the warrant may specify persons whom the person is permitted to contact.

Note 1: The warrant may specify persons by reference to a class. See subsection 46(2) of the *Acts Interpretation Act 1901*.

Note 2: Section 34F permits the person to contact the Inspector-General of Intelligence and Security and the Ombudsman while the person is in custody or detention, so the warrant must specify them.

- (5) Also, the warrant must, in the same terms as the draft warrant given to the prescribed authority as part of the request:
 - (b) authorise the Organisation, subject to any restrictions or conditions, to question the person before a prescribed authority by requesting the person to do either or both of the following:
 - (i) give information that is or may be relevant to intelligence that is important in relation to a terrorism offence;
 - (ii) produce records or things that are or may be relevant to intelligence that is important in relation to a terrorism offence;

- (b) authorise the Organisation, subject to any restrictions or conditions, to make copies and/or transcripts of a record produced by the person before a prescribed authority in response to a request in accordance with the warrant.
- (2) Also, the warrant must:
 - (b) be signed by the prescribed authority who issues it; and
 - (c) specify the period during which the warrant is to be in force, which must not be more than 28 days.

34E Prescribed authority must explain warrant

- (1) When the person first appears before a prescribed authority for questioning under the warrant, the prescribed authority must inform the person of the following:
 - (b) whether the warrant authorises detention of the person by a police officer and, if it does, the period for which the warrant authorises detention of the person;
 - (c) what the warrant authorises the Organisation to do;
 - (d) the effect of section 34G (including the fact that the section creates offences);
 - (e) the period for which the warrant is in force;
 - (f) the person's right to make a complaint orally or in writing:
 - (i) to the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986* in relation to the Organisation; or
 - (ii) to the Ombudsman under the *Complaints (Australian Federal Police) Act 1981* in relation to the Australian Federal Police.
- (1) To avoid doubt, subsection (1) does not apply to a prescribed authority if the person has previously appeared before another prescribed authority for questioning under the warrant.

34F Detention of persons

Directions relating to detention or further appearance

- (1) At any time when a person is before a prescribed authority for questioning under a warrant, the authority may give any of the following directions:
 - (a) a direction to detain the person;
 - (b) a direction for the further detention of the person;
 - (c) a direction about any arrangements for the person's detention;
 - (d) a direction permitting the person to contact a specified person (including someone specified by reference to the fact that he or she is the person's legal adviser) or any person;
 - (e) a direction for the person's further appearance before the prescribed authority for questioning under the warrant;
 - (f) a direction that the person be released from detention.
- (2) The prescribed authority is only to give a direction that:
 - (b) is consistent with the warrant; or
 - (c) has been approved in writing by the Minister.
- (3) The prescribed authority is only to give a direction described in paragraph (1)(a) or (b) if he or she is satisfied that there are reasonable grounds for believing that, if the person is not detained, the person:
 - (a) may alert a person involved in a terrorism offence that the offence is being investigated; or
 - (b) may not continue to appear, or may not appear again, before a prescribed authority; or
 - (c) may destroy, damage or alter a record or thing the person has been requested, or may be requested, in accordance with the warrant, to produce.
- (4) A direction under subsection (1) must not result in:
 - (b) a person being detained at a time more than 48 hours after the person first appears before a prescribed authority for questioning under the warrant; or
 - (c) a person's detention being arranged by a person who is not a police officer.

Giving effect to directions

- (5) Directions given by a prescribed authority have effect, and may be implemented or enforced, according to their terms.
- (6) A police officer may take a person into custody and bring him or her before a prescribed authority for questioning under a warrant issued under section 34D if the person fails to appear before a prescribed authority as required by the warrant or a direction given by a prescribed authority under this section.

Direction has no effect on further warrant

- (5) This section does not prevent any of the following occurring in relation to a person who has been released after having been detained under this Division in connection with a warrant issued under section 34D:
 - (a) a prescribed authority issuing a further warrant under that section;
 - (b) the person being detained under this Division in connection with the further warrant.

Communications while in custody or detention

- (5) A person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention.
- (6) However:
 - (a) the person may contact anyone whom the warrant under which he or she is detained, or a direction described in paragraph (1)(d), permits the person to contact; and
 - (b) subsection (8) does not affect the following provisions in relation to contact between the person and the Inspector-General of Intelligence and Security or the Ombudsman:
 - (i) sections 10 and 13 of the *Inspector-General of Intelligence and Security Act 1986*;
 - (ii) section 22 of the *Complaints (Australian Federal Police) Act 1981*; and
 - (c) anyone holding the person in custody or detention under this Division must give the person facilities for contacting the Inspector-General of Intelligence and Security or the Ombudsman to make a complaint orally under a section mentioned in paragraph (b) if the person requests them.

Note: The sections mentioned in paragraph (9)(b) give the person an entitlement to facilities for making a written complaint.

34G Giving information and producing things etc.

- (1) A person must appear before a prescribed authority for questioning, as required by a warrant issued under section 34D or a direction given under section 34F.

Penalty: Imprisonment for 5 years.

- (1) Strict liability applies to the circumstance of an offence against subsection (1) that:
 - (a) the warrant was issued under section 34D; or
 - (b) the direction was given under section 34F.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (1) A person who is before a prescribed authority for questioning under a warrant must not fail to give any information requested in accordance with the warrant.

Penalty: Imprisonment for 5 years.

- (1) Subsection (3) does not apply if the person does not have the information.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

- (1) If:
 - (a) a person is before a prescribed authority for questioning under a warrant; and
 - (b) the person makes a statement that is, to the person's knowledge, false or misleading in a material particular; and
 - (c) the statement is made in purported compliance with a request for information made in accordance with the warrant;

the person is guilty of an offence.

Penalty: Imprisonment for 5 years.

- (6) A person who is before a prescribed authority for questioning under a warrant must not fail to produce any record or thing that the person is requested in accordance with

the warrant to produce.

Penalty: Imprisonment for 5 years.

- (7) Subsection (6) does not apply if the person does not have possession or control of the record or thing.

Note: A defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

- (8) For the purposes of subsections (3) and (6), the person may not fail:

- (a) to give information; or
- (b) to produce a record or thing;

in accordance with a request made of the person in accordance with the warrant, on the ground that the information, or production of the record or thing, might tend to incriminate the person or make the person liable to a penalty.

- (9) However, the following are not admissible in evidence against the person in criminal proceedings other than proceedings for an offence against this section or a terrorism offence:

- (a) anything said by the person, while before a prescribed authority for questioning under a warrant, in response to a request made in accordance with the warrant for the person to give information;
- (b) the production of a record or thing by the person, while before a prescribed authority for questioning under a warrant, in response to a request made in accordance with the warrant for the person to produce a record or thing.

34H Interpreter

- (1) This section applies if the prescribed authority before whom a person first appears for questioning under a warrant believes on reasonable grounds that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in that language.
- (2) A person exercising authority under the warrant must arrange for the presence of an interpreter.
- (3) The prescribed authority must defer informing under section 34E the person to be questioned under the warrant until the interpreter is present.
- (4) A person exercising authority under the warrant must defer the questioning under the warrant until the interpreter is present.

Subdivision C— Miscellaneous

34J Humane treatment of person specified in warrant

- (1) This section applies to a person specified in a warrant issued under section 34D while anything is being done in relation to the person under the warrant or a direction given under section 34F.
- (2) The person must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction.

34K Video recording of procedures

- (1) The Director-General must ensure that video recordings are made of the following:
 - (a) a person's appearance before a prescribed authority for questioning under a warrant;
 - (b) any other matter or thing that the prescribed authority directs is to be video recorded.
- (1) The Director-General must ensure that, if practicable, video recordings are made of any complaint by a person specified in a warrant issued under section 34D when he or she is not appearing before a prescribed authority for questioning under the warrant.

34L Power to conduct an ordinary search or a strip search

- (1) If a person has been detained under this Division, a police officer may:
 - (a) conduct an ordinary search of the person; or
 - (b) subject to this section, conduct a strip search of the person.
- (2) A strip search may be conducted if:
 - (a) a police officer suspects on reasonable grounds that the person has a seizable item on his or her person; and
 - (b) the police officer suspects on reasonable grounds that it is necessary to conduct a strip search of the person in order to recover that item; and
 - (c) a prescribed authority has approved the conduct of the search.
- (3) The prescribed authority's approval may be obtained by telephone, fax or other

electronic means.

- (4) A strip search may also be conducted if the person consents in writing.
- (5) A medical practitioner may be present when a strip search is conducted, and he or she may assist in the search.
- (6) If a prescribed authority gives or refuses to give an approval for the purposes of paragraph (2)(c), the prescribed authority must make a record of the decision and of the reasons for the decision.
- (7) Such force as is necessary and reasonable in the circumstances may be used to conduct a strip search under subsection (1).
- (8) Any item:
 - (a) of a kind mentioned in paragraph (2)(a); or
 - (b) that is relevant to collection of intelligence that is important in relation to a terrorism offence;

that is found during a search under this section may be seized.

34M Rules for conduct of strip search

- (1) A strip search under section 34L:
 - (a) must be conducted in a private area; and
 - (b) must be conducted by a police officer who is of the same sex as the person being searched; and
 - (c) subject to subsection (3), must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched; and
 - (d) must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search; and
 - (e) must not be conducted on a person who is under 10; and
 - (f) if, in a prescribed authority's opinion, the person being searched is at least 10 but under 18, or is incapable of managing his or her affairs:
 - (i) may only be conducted if a prescribed authority orders that it be conducted; and
 - (i) must be conducted in the presence of a parent or guardian of the person or, if that is not acceptable to the person, in the presence of someone else who can represent the person's interests and who, as far as is practicable in the circumstances, is acceptable to the person; and
 - (ii) must not involve a search of a person's body cavities; and
 - (iii) must not involve the removal of more garments than the police officer conducting the search believes on reasonable grounds to be necessary to determine whether the person has a seizable item on his or her person; and
 - (iv) must not involve more visual inspection than the police officer believes on reasonable grounds to be necessary to determine whether the person has a seizable item on his or her person.
- (2) For the purposes of subparagraph (1)(f)(ii), none of the following can represent the person's interests:
 - (a) a police officer;
 - (b) the Director-General;
 - (c) an officer or employee of the Organisation;
 - (d) a person approved under subsection 24(1).
- (3) A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if a medical practitioner of the same sex as the person being searched is not available within a reasonable time.
- (4) If any of a person's garments are seized as a result of a strip search, the person must be provided with adequate clothing.

34N Power to remove, retain and copy materials etc.

- (1) In addition to the things that the Organisation is authorised to do that are specified in the warrant, the Organisation is also authorised:
 - (a) to remove and retain for such time as is reasonable any record or other thing produced before a prescribed authority in response to a request in accordance with the warrant, for the purposes of:

- (i) inspecting or examining it; and
 - (ii) in the case of a record— making copies or transcripts of it, in accordance with the warrant; and
- (b) subject to section 34M, to examine any items or things removed from a person during a search of the person under this Division; and
- (c) to retain for such time as is reasonable, and make copies of, any item seized under paragraph 34L(8)(b); and
- (d) to do any other thing reasonably incidental to:
 - (i) paragraph (a), (b) or (c); or
 - (ii) any of the things that the Organisation is authorised to do that are specified in the warrant.
- (2) A police officer may retain for such time as is reasonable any seizable item seized by the officer under paragraph 34L(8)(a).

34P Providing reports to the Minister

The Director-General must give the Minister, for each warrant issued under section 34D, a written report on the extent to which the action taken under the warrant has assisted the Organisation in carrying out its functions.

34Q Providing information to the Inspector-General

The Director-General must, as soon as practicable, give the following to the Inspector-General of Intelligence and Security:

- (2) a copy of any warrant issued under section 34D;
- (3) a copy of any video recording made under section 34K;
- (4) a statement containing details of any seizure, taking into custody, or detention under this Division.

34R Discontinuing action before warrants expire

If, before a warrant issued under section 34D ceases to be in force, the Director-General is satisfied that the grounds on which the warrant was issued have ceased to exist, the Director-General must:

- (a) inform the Minister, and the prescribed authority who issued the warrant, accordingly; and
- (b) take such steps as are necessary to ensure that action under the warrant is discontinued.

34S Certain records obtained under warrant to be destroyed

The Director-General must cause a record or copy to be destroyed if:

- (b) the record or copy was made because of a warrant issued under section 34D; and
- (c) the record or copy is in the possession or custody, or under the control, of the Organisation; and
- (d) the Director-General is satisfied that the record or copy is not required for the purposes of the performance of functions or exercise of powers under this Act.

34T Certain functions and powers not affected

1. This Division does not affect a function or power of the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986*.
2. This Division does not affect a function or power of the Ombudsman under the *Complaints (Australian Federal Police) Act 1981*.

13.359 The South African *National Prosecuting Authority Act 32 of 1998* governs in section 28 inquiries conducted by Investigating Directors. These inquiries boil down to investigative hearings. Section 28 provides as follows:

28 Inquiries by Investigating Director

(1)(a) If the Investigating Director has reason to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an investigation on the matter in question, whether or not it has been reported to him or her in terms of section 27.

(b) If the National Director refers a matter in relation to the alleged commission or attempted commission of a specified offence to the Investigating Director, the Investigating Director shall conduct an investigation, or a preparatory investigation as referred to in subsection (13), on that matter.

(c) If the Investigating Director, at any time during the conducting of an investigation on a matter referred to in paragraph (a) or (b), considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the investigation so as to include any offence, whether or not it is a specified offence, which he or she suspects to be connected with the subject of the investigation.

(d) If the Investigating Director, at any time during the conducting of an investigation, is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the Investigating Directorate concerned, he or she must without delay inform the National Commissioner of the South African Police Service of the particulars of such matter.

(2)(a) The Investigating Director may, if he or she decides to conduct an investigation, at any time prior to or during the conducting of the investigation designate any person referred to in section 7 (4) (a) to conduct the investigation, or any part thereof, on his or her behalf and to report to him or her.

(b) A person so designated shall for the purpose of the investigation concerned have the same powers as those which the Investigating Director has in terms of this section and section 29 of this Act, and the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act 66 of 1975), in respect of commissions of inquiry shall apply with the necessary changes in respect of such a person.

(3) All proceedings contemplated in subsections (6), (8) and (9) shall take place in camera.

(4) The procedure to be followed in conducting an investigation shall be determined by the Investigating Director at his or her discretion, having regard to the circumstances of each case.

(5) The proceedings contemplated in subsections (6), (8) and (9) shall be recorded in such manner as the Investigating Director may deem fit.

(6) For the purposes of an investigation-

(a) the Investigating Director may summon any person who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the Investigating Director at a time and place specified in the summons, to be questioned or to produce that book, document or other object;

(b) the Investigating Director or a person designated by him or her may question that person, under oath or affirmation administered by the Investigating Director, and examine or retain for further examination or for safe custody such a book, document or other object: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the Investigating Director, at his or her request be allowed, at his or her own expense and under the supervision of the Investigating Director, to make copies thereof or to take extracts therefrom at any reasonable time.

(7) A summons referred to in subsection (6) shall-

- (a) be in the prescribed form;
- (b) contain particulars of the matter in connection with which the person concerned is required to appear before the Investigating Director;
- (c) be signed by the Investigating Director or a person authorized by him or her; and
- (d) be served in the prescribed manner.

(8)(a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (10)(b) or (c), or in section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

(9) A person appearing before the Investigating Director by virtue of subsection (6)-

- (a) may be assisted at his or her examination by an advocate or an attorney;
- (b) shall be entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate's court.

(10) Any person who has been summoned to appear before the Investigating Director and who-

- (a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the Investigating Director from further attendance;
- (b) at his or her appearance before the Investigating Director-
 - (i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;
 - (ii) refuses to be sworn or to make an affirmation after he or she has been asked by the Investigating Director to do so;
- (c) having been sworn or having made an affirmation-
 - (i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;
 - (ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true,

shall be guilty of an offence.

(13) If the Investigating Director considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1) (a), the Investigating Director may hold a preparatory investigation.

(14) The provisions of subsections (2) to (10), inclusive, and of sections 27 and 29 shall, with the necessary changes, apply to a preparatory investigation referred to in subsection (13).

13.360 In the case of *the Investigating Directorate: Serious Economic Offences And Others v Hyundai Motor Distributors (Pty) Ltd And Others*¹ the Constitutional Court considered the constitutionality of the provisions that authorise the issuing of warrants of search and seizure for purposes of a “preparatory investigation”, one of two investigatory procedures provided for in Chapter 5 of the *National Prosecuting Authority Act*:

[52] The proper interpretation of section 29(5) therefore permits a judicial officer to issue a search warrant in respect of a preparatory investigation only when he or she is satisfied that there exists a reasonable suspicion that an offence which might be a specified offence has been committed. The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises, and in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals. In my view, the scope of the limitation of the right to privacy is therefore narrow. It is now necessary to consider briefly the purpose and importance of section 29(5).

Purpose and importance of the search and seizure provisions

[53] It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of fraudulent activity. This has a seriously adverse effect not only on the security of citizens and the morale of the community but also on the country's economy. This ultimately affects the government's ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society, and the setting up of special Investigating Directorates should be seen in that light. The legislature has sought to prioritise the investigation of certain serious offences detrimentally affecting our communities and has set up a specialised

¹ 2000 (10) BCLR 1079 (CC):

[43] In the light of our criminal procedure, the legislative history and the specific provisions of section 29(2) of the Act, the legislature must be taken to have contemplated that a judicial officer would not exercise a discretion to issue a warrant if that would result in an impermissible violation of the right to privacy of the persons to be searched.

[44] The Investigating Directorate is a special unit established under the Act to conduct investigations into serious and complex offences. If it were unable to commence investigations until it had a reasonable suspicion that a specified offence had been committed, initial investigations which may be sensitive and crucial would have been beyond its jurisdiction. The provisions of the Act authorising the Investigating Directorate to engage in preparatory investigations serve the purpose of enabling the Investigating Directorate to be involved in sensitive investigations from an early stage. The purpose therefore is to assist the Investigating Director to cross the threshold from a mere suspicion that a specified offence has been committed to a reasonable suspicion, which is a pre-requisite for the holding of an inquiry.

[45] As outlined at paragraph 7 above, a suspicion, short of a reasonable suspicion that a specified offence has been committed could arise either because there is uncertainty whether an offence has been committed, or because there is uncertainty that an offence in respect of which there is reasonable suspicion, is in fact a specified offence.

[46] In the present case, for instance, the specified offences in the listed schedule are fraud, theft, forgery and uttering, corruption in terms of the Corruption Act, and any other economic common law offence, or economic offence in contravention of any statutory provision which involves patrimonial loss. In order for these offences to fall within the jurisdiction of the Investigating Directorate, they must, however, be of a serious and complicated nature. As we have seen, Investigating Directorates have been established for two other categories of specified offences. In one of the directorates, the requirement is that the offence in question be committed in an organised fashion or that it is one which may endanger the safety or security of the public; in the other, the requirement is that the offence in question must relate to corruption.

structure, the Investigating Directorate, to deal with them. For purposes of conducting its investigatory functions, the Investigating Directorates have been granted the powers of search and seizure. The importance of these powers for the purposes of a preparatory investigation has been canvassed above.

Proportionality analysis

[54] I now turn to weigh the extent of the limitation of the right against the purpose for which the legislation was enacted. There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. On the other hand, state officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the state, a task that lies at the heart of the inquiry into the limitation of rights.

[55] On the proper interpretation of the sections concerned, the Investigating Directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the important right to privacy. The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient reasons for doing so. These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals. Thus construed, section 29(5) provides sufficient safeguards against an unwarranted invasion of the right to privacy. It follows, in my view, that the limitation of the privacy right in these circumstances is reasonable and justifiable.

Conclusion

[56] The conclusion I have reached is that the impugned provisions are reasonably capable of a meaning that is consistent with the requirements of the Constitution. In terms of that interpretation, a search warrant would be granted for purposes of a preparatory investigation only if there is a reasonable suspicion that an offence, which might be a specified offence, has been or is being committed, or that an attempt was or had been made to commit such an offence. It follows from this that no warrant may be applied for or issued in the absence of a reasonable suspicion that an offence has been committed.

[57] The decision of this Court is binding on all judicial officers called upon to issue search warrants. Such warrants can only be issued at the instance of the Investigating Director who will clearly be under a duty to bring this judgment to the attention of the judicial officer before whom the application for a warrant is made. That, and the duty that the judicial officer has to give effect to the terms of this judgment, provides adequate protection against unreasonable searches.

(iv) Recommendation

13.361 It would seem clear that there is no justification for detention for interrogation as was proposed in the discussion paper. Detention for interrogation therefore no longer forms part of the Bill. Hence the question arises whether an alternative measure should be considered to replace the proposed one. As was noted above, the Constitutional Court has found that section 205 of the *Criminal Procedure Act* conforms with the Constitution. Should use therefore be made of section 205 of the *Criminal Procedure Act* or section 28 of the *National Prosecuting Authority Act* in obtaining information from someone who is suspected

of being in possession of information on a terrorist act? The other option would be to enact a separate provision which would enable information being obtained in the same manner as section 205 and 28 would allow but which would not run foul of the Constitution. Such a provision would be similar to that which was recently enacted in Canada. The question arises whether there is anything to be gained if a new provision were to be enacted instead of making use of the procedure which currently exists under section 205 of the *Criminal Procedure Act* or section 28 of the *National Prosecuting Authority Act*. A separate provision would seem to be justified if it were to retain all the constitutional safeguards contained in section 205 and if it were to deal in more detail with the obtaining of information than the *Criminal Procedure Act* or the *National Prosecuting Authority Act* does.² If such a provision were to merely repeat what sections 205 and 28 aim to achieve then there would be no justification for a separate new provision. It should also be noted that Ms Esther Steyn³ says that it is disconcerting that the committee proposed that the ambit of the legislation should be broadened to encompass the use thereof by all law enforcement officers and not only police officers. She considers that to grant such special powers to all law enforcement officers,

² Note Prof Nico Steytler's remarks on sections 184 and 185 of the Criminal Procedure Act in *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa*, 1996 Butterworths: Durban 1998:

The arrest and detention of material witnesses whose presence cannot be secured by a subpoena are for a "just cause", as they further the truth finding function of trial courts. There can thus be no constitutional objection to section 184(1) CPA which provides that a judicial officer, before whom a not too serious charge is pending, may issue a warrant for the arrest of a material witness where such a person is about to abscond or is evading the service of a subpoena. Once arrested the court may release the witness on warning with suitable conditions.

The same cannot be said of section 185 CPA. The section provides that an attorney-general may, if of the opinion that a person may give evidence on behalf of the state on a serious charge, apply to a judge in chambers for the arrest and detention of such a person on one of the following grounds: there is a danger that the personal safety of the person concerned may be threatened, the person may abscond, be tampered with or intimidated or it 'would be in the interests of the person concerned or of the administration of justice. A person arrested on an order issued by a judge is detained until the proceedings have been concluded, unless the attorney-general orders an earlier release or the proceedings have not commenced within six months from the date of detention.

Apart from the constitutional shortcomings with regard to procedural aspects of section 185, the justness of detention under this provision is also open to doubt. First, persons subjected to this power need to be *material* witnesses. Second, after discounting the legitimate concerns of a threat to personal safety to the "witness", or that he or she may abscond, be tampered with or intimidated, it is difficult to conceive what possible legitimate content can be given to the sweeping phrase that detention "would be in the interests of the person concerned or of the administration of justice". With no identifiable content, the justness of the cause cannot be properly assessed. Third, the power to detain a person until the completion of the proceedings may result in the detention of a person after his or her testimony has been given, thus serving no legitimate purpose.

³ "The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?" 2001 SACJ Vol 14 179 - 194 at 192.

including immigration and custom officials, in instances where the liberty of individuals is at stake is not only extraordinary but also irresponsible. It is therefore considered that the proposed power to bring an application for bringing a witness before a judge for an examination in order to obtain information should be given to police officers only and not the more widely defined law enforcement officers. The project committee and the Commission consider that the following aspects warrant a separate provision, namely if the provision were to set out that:

- A police officer may, for the purposes of an investigation of an offence under the Act, apply *ex parte* to a judge of the High Court for an order for the gathering of information;
- Such an application may be made only if the prior written consent of the National Director of Public Prosecutions was obtained;
- A judge of the High Court to whom an application is made may make an order for the gathering of information if the judge is satisfied that the consent of the National Director of Public Prosecutions was obtained as required by subsection (2) and that there are reasonable grounds to believe that
 - an offence under the Act has been committed, and
 - information concerning the offence, or information that may reveal the whereabouts of a person suspected by the police officer of having committed the offence, is likely to be obtained as a result of the order; or that
 - there are reasonable grounds to believe that such an offence will be committed,
 - there are reasonable grounds to believe that a person has direct and material information that relates to such an offence or that may reveal the whereabouts of an individual who the police officer suspects may commit such an offence, and
 - reasonable attempts have been made to obtain the information from the person.
- The judge may
- order the examination, on oath or not, of a person named in the order;
- order the person to attend at the place fixed by the judge, or by the judge designated, as the case may be, for the examination and to remain in attendance until excused by the presiding judge;
- order the person to bring to the examination any thing in his or her possession or control, and produce it to the presiding judge;
- designate another judge as the judge before whom the

- examination is to take place; and
- include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.
- The judge who made the order or another judge of the same court, may vary the terms and conditions of the order.
- The judge who made the order, or another judge of the same court, may issue a warrant for the arrest of the person named in the order if the judge is satisfied, on an information in writing and under oath, that the person —
 - is evading service of the order;
 - is about to abscond; or
 - did not attend the examination, or did not remain in attendance, as required by the order.
- A warrant issued may be executed at any place in the Republic by any police officer having jurisdiction in that place.
- A police officer who arrests a person in the execution of a warrant shall, without delay, bring the person, or cause the person to be brought, before the judge who issued the warrant or another judge of the same court, and must promptly inform the person of the reason for being detained in custody.
- The judge in question may, to ensure compliance with the order, order that the person be detained in custody or released on bail, upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail, or released on warning. Such an order may include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order, including the conditions of detention, if detention is ordered.
- A person named in an order has the right -
 - to retain and instruct a legal practitioner at any stage of the proceedings;
 - to communicate and be visited by that person's -
 - spouse or partner;
 - next of kin;
 - chosen religious counsellor;
 - chosen medical practitioner,
- unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such communication or

visit should be refused.¹

- A person named in an order shall answer questions put to the person by the National Director of Public Prosecutions or person designated by the National Director, and shall produce to the judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.
- The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.
- No person shall be excused from answering a question or producing a thing on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

¹ It is to be noted that the NDPP or DPP's right to apply for refusing communications and visitations is only in respect of the persons who may communicate and visit the detainee and that it does not apply in regard to the right to retain and instruct a legal practitioner.

- no answer given or thing produced shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act (Act No 56 of 1955)¹ or on a charge of perjury; and
 - no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the *Criminal Procedure Act* (Act No 56 of 1955) or on a charge of perjury.
- The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any offence under the Act, shall order that the thing be given into the custody of the police officer or someone acting on the police officer's behalf.

¹ 319 Charges for giving false evidence

(3) If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such firstmentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.

- The provisions of section 189 of the *Criminal Procedure Act*¹ shall with the necessary changes apply in respect of the person who refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or her or refuses or fails to produce any book, paper or document required to be produced by him or her;
- The person who refuses or fails to give the information shall not be sentenced

¹ (1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

(2) After the expiration of any sentence imposed under subsection (1), the person concerned may from time to time again be dealt with under that subsection with regard to any further refusal or failure.

(3) A court may at any time on good cause shown remit any punishment or part thereof imposed by it under subsection (1).

(4) Any sentence imposed by any court under subsection (1) shall be executed and be subject to appeal in the same manner as a sentence imposed in any criminal case by such court, and shall be served before any other sentence of imprisonment imposed on the person concerned.

(5) The court may, notwithstanding any action taken under this section, at any time conclude the criminal proceedings referred to in subsection (1).

(6) No person shall be bound to produce any book, paper or document not specified in any subpoena served upon him, unless he has such book, paper or document in court.

(7) Any lower court shall have jurisdiction to sentence any person to the maximum period of imprisonment prescribed by this section.

to imprisonment as contemplated in s 189 of the *Criminal Procedure Act* unless the judge is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

(b) Withholding information from a law enforcement officer

(i) Evaluation contained in discussion paper 92

13.362 The trigger for the proposed clause contained in the discussion paper was that a law enforcement officer has reason to believe that any person possesses or is withholding from such officer any information regarding any offence under the Bill. It sought to provide whenever it appears to a judge of the high court on the ground of information submitted to him or her under oath by a Director of Public Prosecutions that there is reason to believe that any person possesses or is withholding from a policeman any information regarding any offence under the Bill, he or she may, at the request of a Director of Public Prosecutions, issue a warrant for the detention of such a person. It was suggested to the committee that the word “policeman” in clause 16(1) is rather limiting and that it may be preferable to use a concept which would include all law enforcement agents, such as members of the police services, immigration officials, custom officials, etc.¹ The committee was of the view that this is a valid point and that provision should be made in the Bill for a definition of “law enforcement officer” and that members of the police service, immigration officials and custom officials should be included in the definition.

(ii) Comment on discussion paper 92

13.363 Amnesty International comments that notwithstanding the heading of clause 16 of the Bill (“Custody of persons suspected of *committing* terrorist acts”), subclause 1 allows for very broad grounds for detention under a warrant, namely “that there is reason to believe that *any person possesses or is withholding from a law enforcement officer any information* regarding any offence under this Act”. AI notes that although a warrant can only be issued by a judge of the high court after receipt of information under oath from a Director of Public Prosecutions (DPP), the provision is so widely phrased that it could encompass journalists, lawyers or others with privileged information or family members or witnesses who have been intimidated about specific incidents or particular suspects. Ms De Haas of the Natal Monitor also notes that the Bill seeks to extend policing powers to customs and

¹ Prof Medard Rwelamira at the time of the Department of Justice’s Policy Unit.

immigration officials which she considers should not be permitted.² She considers that notorious old guard members of the police, for example those attached to SANAB are reportedly now employed as customs and immigration officials and considers that an audit of their backgrounds is necessary. Ms De Haas notes that in terms of clause 16 a judge may issue a warrant for detention if a DPP submits information that there is “reason to believe” a person possesses or withholds information from a police officer or immigration or customs official. She says that clearly a DPP will make a decision based on what he or she is told by the police members. She considers that given their known backgrounds, their *evident incompetence* or worse their alleged continued networks, there may be tremendous problems in providing information to these law enforcement officers. Ms De Haas comments that speaking from vast personal experience, she can give the assurance that providing information to the police about witnesses to crimes may lead to their deaths.

13.364 Mr Saber Ahmed Jazbhay points out that in terms of clause 16(1)(a), a judge of the High Court has the discretion to grant a warrant for the detention of any person suspected of possession of or is withholding any information regarding any offence under the Act at the instance of the Director of Public Prosecutions upon submission of information *under oath* to that effect. He notes that unlike section 29(5) of the *National Prosecuting Act* of 1998 which places certain constraints on the exercise of the powers of search and seizure, the proposed clause does not require that there should be a reasonable belief on the part of the DPP. The provision is accordingly in violation of the Constitution since it permits the granting of a warrant of detention on mere suspicion. The absence of reasonable grounds for the belief would be constitutionally impermissible. Mr Jazbhay comments that by comparison, the National Prosecuting Authority Act makes provision for persons who suspect that a specified offence has been committed or that an attempt has been or is being made to commit such offence, to lay the matter before the Investigating Director who has the discretion to either conduct an enquiry or preparatory investigation and that this provision requires such person to have a reasonable grounds to suspect that a specified offence has been or is being committed. He explains that this then requires the Investigating Director to assess the evidence before him and to be satisfied (such evidence being obtained on oath presumably) that an enquiry is warranted in terms of section 28(1) of the Act. He notes that if the evidence is insufficient to institute an inquiry, section 28(13) empowers him to conduct a preparatory investigation. Mr Jazbhay explains that the Director then obtains the necessary

² Ms Esther Steyn “The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?” 2001 SACJ Vol 14 179 - 194 at 192 says that it is disconcerting that the committee proposed that the ambit of the legislation should be broadened to encompass the use thereof by all law enforcement officers and not only police officers. She considers that to grant such special powers to all law enforcement officers, including immigration and customs officials, in instances where the liberty of individuals is at stake is not only extraordinary but also irresponsible.

warrants in terms of section 29(5) which contains what information a judicial officer needs to consider before a search and seizure warrant may be issued. He says that, in short, the scheme of the Act is such that it contains adequate safeguards to protect the constitutional guarantee of privacy. He comments that by contrast, the Bill is lacking such constitutional safeguards and he submits that it is manifestly deficient in that it is insensitive to the constitutional rights of detained persons, notwithstanding the fact that prior judicial authorisation is required for such detention. He says that his point is that the safeguards fail to take into consideration the psychological effects behind detentions especially the 14 day detention clause on to which an extended period is piggy-backed.

13.365 Mr Jazbhay points out that the proposed measures are unique since conventional policing methods appear to be adequate in the USA, Canada and Australia, especially in the USA which faces serious terrorist incidents from time to time. He considers that in the absence of compelling evidence of justification, he submits that the measures will be declared unconstitutional and therefore invalid for being overbroad and too invasive on the grounds that there are less restrictive measures to achieve the purpose behind the provision. Mr Jazbhay also notes that a clause 16 detainee is not entitled to apply for or to be granted bail. He considers that this is too drastic, considering the fact that he is not an accused or that he has not been arrested but merely being deprived of his liberty for the purposes of interrogation and that this section is open to abuse even though the DPP is obliged to submit information to a judge under oath that there is reason to believe that such a person possesses or is withholding information regarding any offence under the ATB. Mr Jazbhay points out that notwithstanding the aforementioned embellishments, it seeks to mimic the discredited practice of detention reminiscent of the apartheid era, when the ruling group sought to maintain political control in South Africa by frequently locking up its citizens which it euphemistically referred as 'detention'. He states that this should be kept in mind when the word 'detention' is used in legal discourse. He notes that section 12 of the Constitution combines the right to freedom and security of the person with a right to bodily and psychological integrity and that it guarantees both substantive as well as procedural protection. He remarks that the substantive component requires that there must be good reason for depriving someone of his freedom whereas the procedural component requires that the deprivation takes place in accordance with fair procedures. Mr Jazbhay points out that section 12(1)(b) guarantees the right not to be detained without the benefit of a trial, and as Ackermann J argued in *Ferreira v Levin NO*³, the right amounted to a presumption against the imposition of legal and other restrictions without sufficient reasons. He comments that what section 12 of the Constitution does is that it protects the individual specifically, though not solely, against invasions of physical integrity by way of arbitrary

³ 1996(1) SA 984 (CC).

arrest, violence, torture or cruel treatment or punishment and that an analysis of section 12(1)(a) clearly evinces the requirement for a rational connection between the deprivation of freedom and some objectively determinable purpose. He notes that according to Ackermann J in *De Lange v Smuts NO*⁴, one must first determine whether the deprivation of physical freedom is arbitrary and then whether the reason for deprivation is a just one and though his test was not supported by the majority, he submits that there is merit in the learned judge's postulation that the concept of a 'just cause' must be grounded upon and consonant with the values expressed in s 1 of the Constitution and gathered from the provisions of the Constitution as a whole. This, as De Waal *et al* point out 'corresponds loosely with the approach of the Canadian Courts in dealing with the standard of 'fundamental justice' in s 7 of the Canadian Charter of Rights and Freedoms.⁵

13.367 Mr Jazbhay submits that, in view of the foregoing, the limitations constituted by this provision are not reasonable and justifiable since prevalence of terrorism in South Africa, though a matter of serious and grave concern, is not the same as in Britain and Northern Ireland and that, in any case the countries from which South Africa would be happy to take the lead (like the USA) have not considered it necessary, in the light of the problems they raise, to providing for the kind of measures proposed in clause 16 of the Bill. He points out that what seems to be intended in the Bill is a detention without trial for purposes of interrogation, no access to lawyers and that, upon close scrutiny, the language as well as the purport of s 16 is a clone of the old s 6 and s 29 of the *Internal Security Act* of the apartheid era. He argues that given the odious history of detention for interrogation under the apartheid era, especially section 6 of the *Terrorism Act* of 1967 which permitted indefinite detention of person suspected of involvement in terrorist activities, even under the 'ticking bomb' scenario, clause 16 clearly violates the Constitution (such as the right to freedom and security) and there is no way it can survive constitutional challenge. He says that as Ackermann J stated in *De Lange v Smuts NO* the "substantive aspect (of the right to freedom and security) ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so". Mr Jazbhay suggests that we need to be mindful of the late Didcott J's remarks in *De Lange* that "detention without trial was a powerful instrument designed to suppress resistance to the programmes and policies of the former government. The process was an *arbitrary* one, set in motion by the police alone on grounds of their own . . ." Mr Jazbhay suggests that in view of the fact that the proposed measures in clause 16 do not exist in other democratic countries, he agrees with the project committee of the Commission that there are insufficient justification for these measures and that, in his view, such limitations cannot be regarded as reasonable and justifiable in a

⁴ 1998 (3) SA 785 (CC).

⁵ *The Bill of Rights Handbook* 3rd edition Kenwyn: Juta & Co 2000 at p 228.

democratic country. He notes that Matthews writes that when any legislation confers the powers to detain without trial, "it authorizes invasion of the individual's most fundamental liberty- the liberty of personal freedom".⁶ He points out that Matthews makes the eloquent point that all other civil liberties, and political rights are of small value if their exercise may result in the arbitrary arrest and imprisonment of subjects.

13.368 IDASA comments that it must be borne in mind that the basis for the accused's detention is "on the ground of information submitted under oath by a Director of Public Prosecution, that there is reason to believe....that the accused has been involved in terrorist activities or has knowledge of such activities." The Director of Public Prosecutions would in all likelihood be relying, inter alia, on the police to furnish him with information. Given the South African experience and the lack of investigative skills amongst the police, it would appear dangerous for the "reason" for the infringement of someone's liberty to be reliant on what may be erroneous information. Any limitation of individual freedom ought only to take place in exceptional circumstances. IDASA remarks that interestingly, in the United Kingdom the laws relating to terrorism have been criticised for causing the detention of hundreds of people each year, of which only a small percent are ever charged. IDASA says that critics contend that the detention route is used primarily as a means of harassment and to obtain information, and that we need to guard that this does not happen in South Africa. IDASA considers that the need to provide additional safeguards for the accused is thus essential.

13.369 IDASA comments that they have touched upon the institutional weaknesses in South Africa that may limit the effectiveness of the legislation: one of them being poor investigative skills of South African police. IDASA considers that for the terrorism legislation to succeed there will need to be an enhanced effort by many government departments and ministries to work together. IDASA notes that this is often difficult in South Africa and the way in which that co-operation manifests itself must be considered, and that the legislation needs to facilitate such constructive co-operation amongst departments and ministries. IDASA notes that it is interesting to note that in the United Kingdom, the *Terrorism Act*, 2000 will not be implemented until the police have been trained in respect of the legislation, and asks how much more will similar training not be needed in South Africa.

13.370 The Ministry of Community Safety of the Western Cape notes that to combat terrorism effectively, it may be necessary to create further scope for the lawful gathering of information. The Ministry suggests an amendment to the *Interception and Monitoring Prohibition Act* of 1992 to enable the police to do surveillance under less restrictive

⁶ Matthews AS : Law, Order and Liberty in South Africa, Juta and Company, 1971 at p133.

conditions. The Ministry remarks that terrorist organisations are normally extremely closed groups with strong ideological coherence and it is very difficult to infiltrate them effectively. The Ministry explains that very often the existing rules governing surveillance are too restrictive as permission to do surveillance must be granted by a judge, and although this is not in itself a problem, the major problem being experienced relates to *reasonable grounds* that have to be advanced to secure permission to do surveillance. The Ministry suggests that these *reasonable grounds* should be more widely defined to include confirmed information or even information from a reliable source.

(iii) Evaluation and recommendation

13.371 The project committee considers that as its proposed provisions included in its final Bill are tailored on section 205 of the *Criminal Procedure Act*, that the concerns of the respondents expressed above, are addressed. The committee also considers that the comments that provision should only be made for police officers applying to a judge for the envisaged investigative hearing, is valid. The Bill should therefore make provision for a police officer being able, for the purposes of an investigation of a terrorism offence, to apply *ex parte* to a judge for an order for the gathering of information.

13.372 The project committee recommends that a provision being included in the Bill whereby a police officer may, for the purposes of an investigation of an offence under the Act, apply *ex parte* to a judge for an order for the gathering of information. The Commission agrees with this recommendation.

(c) Should the judiciary be involved in applications for gathering information

(i) Evaluation contained in the discussion paper

13.373 The project committee considered the question whether the judiciary should be involved in considering and authorising detention as proposed in the discussion paper. The committee noted in the discussion paper that the involvement of the judiciary means that a certain safeguard is built into the provision, and that the alternative would be to involve some or other official. The committee however also noted that there might be a danger that the police may single out certain favourite judges and that these judges will soon be perceived to be executive-minded should they always grant applications for detention. The project committee thought that the discussion paper should reflect the fact that this is a potential area of controversy if the authorisation to detain someone is subject to judicial authorisation but that, on the other hand, any alternative leaves an absence of judicial

scrutiny which is regarded as a crucial safeguard for the rights of the detainee. The committee also noted that one wants at least a safeguard of somebody who is by virtue of his or her office institutionally independent which judges are. The committee also supposed that there is a possible risk that there might be cases in which judicial officers become potential witnesses but considered this as being a remote contingency. The committee recognised that the powers set out in the Bill limit the citizen's rights and was of the view that it is important that an independent judicial officer acts as a buffer between the executive and the citizen.

13.374 The committee noted that an alternative institution could possibly be created for considering detention, perhaps somebody to whom the detainee must answer questions and if it is acceptable the judiciary should then be reserved for review of the grounds of detention. The project committee pointed out that accessibility could pose a problem if another institution were to be established as judges can be accessed at any time. The committee noted that while it would like to insulate judges from matters such as these there does not seem to be a more suitable institution to deal with these issues.¹ The committee considered that the principle should be that there should be independent control in considering applications for the detention and further detention of persons suspected of withholding information on terrorist acts. The committee was of the view that it is a question of who is best suited to provide that independent control, and it does not have to be a judge, but obviously judges by reason of their training and their status offer a significant safeguard. What seems to be necessary is an independent assessment by a judge to determine whether there are grounds for detention for interrogation, and for further detention and also to determine the conditions of detention.

13.375 The committee noted that disquiet was expressed in the past where the control provided for in similar legislation was other than judicial:²

Section 6(5) of the Terrorism Act provides that 'no court of law shall pronounce upon the validity of any action taken under this section, or order the release of the detainee'. The Rabie Report recommends the continued exclusion of judicial supervision in clause 29(6) of the draft

¹ See also *De Lange v Smuts NO* 1998 3 SA 785 (CC):

[178] The essential characteristics of the courts exercising judicial authority as contemplated by the Constitution are that '(they) are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. ... Furthermore, they will exercise their powers within the matrix of the superior hierarchical judicial control to which they are institutionally and habitually accustomed. The principles embodied in and the values to be protected by the separation of powers will accordingly be secured. ... I agree ... on the character of the judicial function and support the distinction which allows magistrates to order committal to prison and denies that power to other State functionaries.

² See the *Report on the Rabie Report: An Examination of Security Legislation in South Africa* March 1982 Centre for Applied Legal Studies, University of the Witwatersrand at p 41 - 43.

Bill. In essence the Rabie Report advances two justifications for this recommendation: first that judicial supervision “*nie prakties is nie*”³ (to quote the police evidence); and secondly, that provision is made for ministerial control.

The seminar did not find the reasons for excluding the jurisdiction of the courts convincing. Judicial control, it believed, was a prerequisite for any public confidence in the implementation of section 6. Ministerial control would certainly not produce such confidence. Moreover concern was expressed over the effect of the courts’ competence on the police who often regard themselves as being accountable to no one. It was recalled that in the Biko inquest the investigating officer, Colonel Goosen, stated when asked what statute gave him the authority to hold Mr Biko in chains, that he did not work under any statutes!

The Rabie Commission’s rejection of the necessity for judicial supervision of section 6 (10.57 - 10.69) is premised on the assumption that only terrorists or persons withholding information about terrorist from the police are detained under this provision. It takes little account of the awful dilemma in which an innocent person held under this law finds himself. For once he is arrested he will be held and interrogated until the police are satisfied that ‘he has satisfactorily replied to all questions’ or that ‘no useful purpose will be served by his further detention’. In practice it is often impossible for the detainee to establish his non-involvement or innocence when the police retain their suspicions, based on false information. In these circumstances it is essential for the detainee to have recourse to a court of law to decide whether the police have reasonable grounds for holding him. The ancient writ of *habeas corpus* (or *interdictum de homine libero exhibendum*) is premised on an appreciation of the need for judicial supervision of the authority’s power to deprive a person of his liberty. Surely the lesson of history required more serious attention than it received from the Rabie Commission. Innocent people have been held under section 6; and will continue to be so held. As in the past, their protestations of innocence will be met with more intensive interrogation. The Rabie Report does not alleviate the lot of the innocent.

Despite the exclusion of the courts’ jurisdiction to pronounce on action taken under section 6, it is clear that a court retains the competence to inquire into allegations that a detainee has been assaulted and to grant an interdict restraining the police from assaulting a detainee. Our courts have granted such interdicts in only a small number of cases, however, as at present it is impossible for a detainee to give evidence in a court of law to substantiate allegations of assault. This is the result of the decision of the Appellate Division in *Scherbrucker v Klindt No 1965 (4) SA 606 (A)* in which the Appellate Division held that the 90-day detention law, on which section 6 is modelled, does not allow a detainee to testify in court under any circumstances - even where allegations that he has been tortured are in issue. Although Didcott J in *Nxasana v Minister of Justice 1976 (3) 745 (DCLD)* held that it might be possible for a court to direct the Chief Magistrate to interview a detainee on its behalf in such a case, it is clear that the judgment in *Scherbrucker v Klindt No* constitutes an obstacle in the way of the protection of the detainee by the courts. The seminar was therefore of the opinion that *at the very least* legislation should be introduced to provide for access of a detainee to a court of law to testify in support of an application for an interdict to prevent the police from interrogating him unlawfully.

13.376 The project committee also noted the following remarks made by Justice Ackermann in the case of *De Lange v Smuts NO*:⁴

[i]n order to determine, for example, what the procedural freedom rights are of persons arrested for allegedly committing an offence and of accused persons, one would have regard to the provisions of ss (1) and (3) respectively of s 35, and of persons after their detention one would have regard to s 35(2). ... sight must not be lost of the fact that, for example, accused persons are entitled to challenge the constitutional validity of a criminal offence with which they

³ Translated the words “is nie prakties nie” means “it is not practical”.

⁴ 1998 3 SA 785 (CC).

are charged on the substantive freedom right ground that such offence does not, for purposes of s 12(1)(a), constitute 'just cause' for the deprivation of their freedom.

When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression 'detained without trial' in s 12(1)(b) is the notorious administrative detention without trial for purposes of political control. This took place during the previous constitutional dispensation under various statutory provisions which were effectively insulated against meaningful judicial control. Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this country.

Even where a derogation from a s 12(1)(b) right has validly taken place in consequence of a state of emergency duly declared under the provisions of the 1996 Constitution, and such derogation has excluded a trial prior to detention, detailed and stringent provisions are made for the protection of the detainee and in particular for subsequent judicial control by the courts over the detention. It is difficult to imagine that any form of detention without trial which takes place for purposes of political control and is not constitutionally sanctioned under the state of emergency provisions of s 37 could properly be justified under s 36. It is, however, unnecessary to decide that issue in the present case. History nevertheless emphasises how important the right not to be detained without trial is and how important proper judicial control is in order to prevent the abuses which must almost inevitably flow from such judicially uncontrolled detention.

13.377 The project committee wanted it to be recorded that there are misgivings whether the judiciary should be involved in these matters and that consideration should be given to the task being fulfilled by another functionary. It was noted above that there must be independent control. It is a question of who is best suited to provide that independent control. The committee was of the view that it does not have to be a judge, but obviously judges by reason of their training and status offer a significant safeguard. What seemed to be necessary was an independent assessment by a judge to determine whether there are grounds for detention for interrogation, for further detention and also to determine the conditions of detention. Comment was invited in particular on this aspect.

(ii) Comment on discussion paper 92

13.378 The Media Review Network comments that an independent judiciary is one of the most important institutional requirements that is contemplated in terms of the Constitution. The Network notes that inevitability of human error, especially when self interest (which includes the exercise of power as an end in itself) comes into conflict with the claims of others, requires that the law, and the assumptions which underlie it, should be interpreted by a judiciary which is totally independent of the executive and the legislature, and without impartial administration of law, the rules are likely to suffer manipulation and distortion in the furtherance of sectional interests. The Network remarks that the issue as to whether the judiciary in its present form having much of the vestiges of the past, quite active in the day-to-day administration of justice, raises the question as to whether a pragmatic and purposive

interpretation of the *Anti-Terrorism Bill* will be secured. The Network says that at the height of its power, the apartheid regime could not isolate the law and the way in which it administered and developed the law; the courts were driven by the political and social circumstances of the times. The Network points out that if the essence of a law is unfair, and the implementation thereof is also unfair, then no matter how independent the judiciary, the infringement of such unfair laws can never be called fair, and that scrupulous adherence to procedural formalities does not necessarily constitute a fair trial. The Network notes that this is particularly so when accused persons are forced to endure pre-trial solitary confinement, interrogation, and subtle forms of torture which are declared unacceptable in most civilized societies. The Network considers that trials contemplated under the *Anti-Terrorism Bill*, no matter how correctly they may be conducted, are frightening in the sense that the status of the High Courts in South Africa will be giving lawful effect to certain injustices that underlie a statute under discussion.

13.379 The Media Review Network considers that the draft Bill is open to a further serious and major flaw, viz. it once again involves the judiciary in controversial political issues, which would do irreparable and permanent harm to the credibility and the independence of the judiciary. This serves only to bring the law into contempt. Moreover, the horrors of systematic use of detention without trial and the ensuing gross abuse of human rights, so fresh in the minds of most South Africans, are set out in graphic detail in the Report of the Truth and Reconciliation Commission.

13.380 The Legal Resources Centre comments that the judiciary is made an integral part of the process, which is quite commendable in comparison to the role played by the judiciary in the past but that the difficulty presented by this approach is whether we do need to have our judiciary to be active participants in this process and that the intention is to have a judicial sanctioned detention. The LRC suggests that there are two problems presented by this approach: Firstly, the doctrine of separation of powers tells us that the judiciary exists to check abuse of power by other organs of state and that we know what happens when the judiciary is in cahoots with the police, it tramples on the dividing line between the executive and the judiciary, and our recent history taught us this lesson very well. Secondly, the proposed legislation further enables a judge to decide whether the detainee should be detained further until s/he is satisfied that *"the accused has satisfactorily replied to all questions under interrogation, that no further lawful purpose will be served by detention"*. The LRC notes that the judge is made a detaining authority in advance, and the judge's decision presents a further problem, namely who gets to review a Judge's decision and can judges exercise both a detaining authority and a reviewing authority? The LRC suggests that it is hard to imagine such a provision effectively working without exposing the judiciary to

review processes.

13.381 The SAPS: Legal Component: Detective Service and Crime Intelligence comments that it is agreed that judges are best suitable as functionaries to provide independent control, saying that although accessibility might be a problem, the functionary should at least be a judicial official, such as a magistrate, or regional court magistrate. The SAPS remarks that it is notable that the functionary who may consider an application for the extension of the detention of a person in terms of the *Terrorism Act* 2000, in Britain, is also a judicial official. Prof Cowling's comments on the Bill was noted above.⁵ He noted that the question arises as to how effective the judiciary is likely to be in ensuring effective control and preventing abuse:

This problem reinforces the fact that detention without trial must be regarded as an absolute and final last resort, however if it is found to be necessary there is no other option than to trust and rely on the judiciary in order to ensure that the whole process is sufficiently transparent so that the performance of individual judges can be subjected to public scrutiny and criticism.

13.382 Mr CDHO Nel, Deputy Director of Public Prosecutions in Port Elizabeth states that it is inconceivable that a judge would upon *ex parte* application basis order detention without the operation of the *audi alterem partem* principle being involved. Ms De Haas of the Natal Monitor says that, if legislation goes ahead, and she strongly argues that it should not, she supports re-worked provisions about involvement of judges since who else could be independent. Mr Justice VEM Tshabala, Judge President of the Natal High Court comments that the general view of the judges in his division is that it is undesirable for judges to authorise detention and that persons should be detained for as long as 14 days without trial.

13.383 Mr Zehir Omar comments that Judge Van Dijkhorst who presided at the *Delmas treason trial* was widely perceived to be supportive of the government of the time as many other judges were and that such support was apparent in their using tools of interpretation of statute to facilitate oppressive provisions contained in, inter alia, the *Internal Security Act*, *Emergency Regulations*. Mr Omar suggests that the single judge referred to in the Bill granting the warrant of arrest must have his or her action the subject matter of an urgent review by the Constitutional Court. He considers that detention without trial emasculates arrestees' rights to silence etc will always be issues for determination by the Constitutional Court which must adjudicate the constitutionality of each arrest on an ad hoc

⁵ "The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" 2000 *South African Journal of Criminal Justice* Vol 13 (3) 344 - 359

basis.

(iii) Evaluation and recommendation

13.384 A case decided after the Commission published its discussion paper and which is crucial to the issue under discussion is *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) (or 2001 (1) BCLR 77 (CC)). The then President of the Constitutional Court and now Chief Justice Chaskelson noted that the case concerns the constitutionality of important provisions of the *Special Investigating Units and Special Tribunals Act* 74 of 1996 and of two proclamations issued by the President pursuant to its provisions and that it reflects a tension that often exists between the need on the part of government to confront threats to the democratic State and the obligation on it to do so in a manner that respects the values of the Constitution.⁶ The Court pointed out that corruption and mal-administration are inconsistent with the rule of law and the fundamental values of the South African Constitution, that they undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms, and that they are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to the South African democratic State. Justice Chaskelson said that there can be no quarrel with the purpose sought to be achieved by the Act or the importance of that purpose, but that that purpose must be pursued in accordance with the provisions of the Constitution, and that the case depends upon whether this has been done. The Court explained that the practical application of the doctrine of separation of powers is influenced by the history, conventions and circumstances of the different countries in which it is applied, pointing out that in *De Lange v Smuts Ackermann J* said:

I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

This is a complex matter which will be developed more fully as cases involving separation of powers issues are decided. For the moment, however, it suffices to say that, whatever the outer boundaries of separation of powers are eventually determined to be, the power in

⁶ The Court said the tension is evident in the affidavit of the Minister of Justice, the fourth respondent in the application, who said:

It is a regrettable and notorious fact that the levels of crime in South Africa are unacceptably high. One aspect of crime which requires special investigative measures relates to corruption and unlawful conduct involving State institutions, State property and public money. Very often, such conduct is perpetrated by public servants and State officials. The experience of other countries suggests that the investigation of conduct of this nature requires special measures beyond the routine investigations conducted by conventional law enforcement agencies.

question here - ie the power to commit an unco-operative witness to prison - is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers.

13.385 The Court explained that Mr Marcus submitted that the principle of separation of powers is not necessarily compromised whenever a particular Judge is required to perform non-judicial functions, and that he, however, accepted that the performance of functions incompatible with judicial office would not be permissible. The court remarked that this is consistent with what the Constitutional Court said in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, where it stated that judicial officers may, from time to time, carry out administrative tasks but noted that there may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers. The Court pointed out that it is also consistent with the United States and Australian cases,⁷ that no precise criteria are set in those decisions for establishing whether or not a particular assignment is permissible, and that the courts in both these countries determine this in the light of relevant considerations referred to in the judgments. The Court noted that Mr Trengove sought to distil from these authorities certain criteria which, he submitted, are relevant to considering whether or not under the South African Constitution it is permissible to assign a non-judicial function to a Judge, and that they are whether the performance of the function —

- (a) is more usual or appropriate to another branch of government;
- (b) is subject to executive control or direction;
- (a) requires the Judge to exercise a discretion and make decisions on the grounds of policy rather than law;
- (d) creates the risk of judicial entanglement in matters of political controversy;
- (e) involves the Judge in the process of law enforcement;
- (f) will occupy the Judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.

13.386 The Court considered that to this may be added Blackmun J's summary of the American jurisprudence as showing that: "Congress may delegate to the judicial branch non-adjudicatory functions that do not trench upon the prerogative of another branch and that are appropriate to the central mission of the Judiciary". The Constitutional Court was of the view that these considerations seem to be relevant to the way our law of separation of powers should be developed. The Court noted that Mr Marcus did not dispute their relevance, but submitted that they must be seen in the context of each particular case, and that they should be given a weight appropriate to the nature of the function that the Judge is

⁷ Referred to by Mr Trengove, who appeared for the appellant.

required to perform and the need for that function to be performed by a person of undoubted independence and integrity. The Court considered that it is undesirable, particularly at this stage of the development of South African jurisprudence concerning the separation of powers, to lay down rigid tests for determining whether or not the performance of a particular function by a Judge is or is not incompatible with the judicial office, and that the question in each case must turn upon considerations such as those referred to by Mr Trengove, and possibly others, which come to the fore because of the nature of the particular function under consideration. Ultimately, the Court said, the question is one calling for a judgement to be made as to whether or not the functions that the Judge is expected to perform are incompatible with the judicial office and, if they are, whether there are countervailing factors that suggest that the performance of such functions by a Judge will not be harmful to the institution of the Judiciary, or materially breach the line that has to be kept between the Judiciary and the other branches of government in order to maintain the independence of the Judiciary. The Court held that in making such judgement, the Court may have regard to the views of the Legislature and Executive but, ultimately, the judgement is one that it must make itself.

13.387 The Constitutional Court also noted the Australian High Court's review of the Australian authorities dealing with the separation of powers in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*¹ where the majority held that the nomination and appointment of the judge was not effective as the performance of the reporting function would be inconsistent with the separation of powers required by the Constitution. The Court pointed out that Kirby J dissented, but notwithstanding his dissent, he expressed sympathy for the view taken by McHugh J in *Grollo's* case in words that seemed to the Constitutional Court to be of particular relevance to the case under consideration:

(I)t is not compatible with the holding of federal judicial office in Australia for such an office holder to become involved as "part of the criminal investigative process", closely engaged in work that may be characterised as an adjunct to the investigatory and prosecutory functions. Such activities could "sap and undermine" both the reality and the appearance of the independence of the Judicature which is made up of the courts constituted by individual Judges. They could impermissibly merge the Judiciary and the other branches of government. The constitutional prohibition is expressed so that the Executive may not borrow a Federal Judge to cloak actions proper to its own functions with the "neutral colours of judicial action."

¹ The case concerned the question whether the Constitution permitted the Minister to appoint Justice Mathews to prepare a report about the declaration for preservation and protection from injury or desecration of land of particular significance to Aboriginals and whether it permitted Justice Mathews to accept such appointment. The report was to be used as an aid to the exercise of the Minister's discretionary power to make a declaration with regard to land in relation to which a group had sought protection. Under the Aboriginal and Torres Strait Islander Heritage Protection Act of 1984 the Minister was required to commission a report from a person nominated by him.

13.388 The project committee considers that judicial authorisation should be sought for applications by police officers to apply *ex parte* to a judge for an order for the gathering of information for the purposes of an investigation of an offence under the Act.² Hence, it is recommended that the judiciary should be involved in considering these applications. The Commission agrees with this recommendation.

(d) Should applications be made by Directors of Public Prosecutions?

(i) Evaluation contained in discussion paper 92

13.389 The project committee considered the question in the discussion paper whether provision should be made for a Director of Public Prosecutions (DPP) having to request a judge to authorise a warrant for the detention of a person withholding information on terrorism from the law enforcement officer. The issue was also considered why the law enforcement officer cannot apply to a judge for such a warrant, and whether it is not too limiting if a DPP only could request a judge to authorise such a detention warrant. It was considered to constitute a valuable safeguard against these detention powers if DPPs and not law enforcement officers were empowered to apply to a judge to issue detention warrants. This means that a law enforcement officer would have to satisfy a DPP that there are sufficient grounds to apply for a warrant. The committee raised the question whether this provision wouldn't grant powers to people it was never intended they should have. The committee considered that the customs officer would have the power in any event to ask for example someone at a customs point to disclose what he or she is carrying in a bag. The committee however appreciated that it would be difficult to imagine not having the police immediately involved before the customs officer would approach a Director of Public Prosecutions to apply for a warrant. The committee considered that it isn't importing an evil

²

It was recently reported that the growing outcry over the treatment of al-Qaeda and Taliban prisoners was joined yesterday by Justice Richard Goldstone, head of a new taskforce set up by the International Bar Association to examine how international law should deal with terrorist groups in the wake of the 11 September attacks. 'At the very least if they are going to be tried they should be tried with a US Federal Court,' Goldstone said. 'What I cannot understand is why the Bush administration is frightened of its own American judges. It was also pointed out that Prime Minister Blair told Bush to tread carefully as opposition grows to treatment of captured Taliban fighters. See Kamal Ahmed and Peter Beaumont 20 January 2002 *The Observer* <http://politics.guardian.co.uk/attacks/story/0,1320,636440,00.html>: Tony Blair has warned President George Bush that the treatment of Taliban prisoners being held at the Guantanamo military base threatens to become a 'political issue' which will lead to widespread and damaging criticism of US policies in Afghanistan. Downing Street sources said that although the Prime Minister was 'relaxed' about the treatment of the prisoners - including three people who claim to be British citizens - he was aware of the dangers of political opposition to their treatment growing in Britain and on the continent. . . . Foreign Office officials have told the Observer that, as long as there is enough evidence against them and the charges would stand up in a British court, it would like to see the British suspects extradited to face trial here.

additional to the present situation by granting these powers to “law enforcement officers” instead of granting them to policemen only.

(ii) Comment on discussion paper 92

13.390_____Mr CDHO Nel, Deputy Director of Public Prosecutions in Port Elizabeth comments that he would be reticent about the Director of Public Prosecutions having to assume responsibility for making the application before a judge. He says that in practice the Director of Public Prosecutions would not merely in case of inadequate application refuse to entertain same and decline to further proceed with the matter and leave it at that. He considers the next logical step would be to be drawn into counselling the police on how to shore up the submissions in the application. He states that he can therefore not agree with the expectation expressed that the Director of Public Prosecution’s involvement would prove a safeguard or filter against these detention powers. The Media Review Network remarks that the powers that the Director of Public Prosecutions enjoys are not too dissimilar that the State President enjoyed under the *Suppression of Communism Act*, and the *Unlawful Organizations Act* under the apartheid regime. The Network states that it would be a sad state of affairs if in the future basic rights are assumed to be absent unless there is statutory provision for them. The Network notes that the right invaded when an individual is detained without a trial, is a right that can be described as one of the most important rights that is enjoyed by any person; that is the right of personal liberty, which is always regarded by the courts of law and one of the most cherished possessions of any civilized society. The Network comments that this right is categorically catered for in our Constitution, the reason why personal liberty is ultimate does not need explanation, and that all civil liberties, and political rights, are of small value if the exercise may result in the arbitrary arrest and detention of subjects. The Network points out that although the State has not interfered directly with the freedom of expression and association, it destroys the foundation of these rights when it attacks personal liberty.

13.391 IDASA considers that although it is more onerous for the Director of Public Prosecutions to meet the requirements of clause 16, the Director could be required to put forward a prima facie case as opposed to what often amounts to a nebulous standard, i.e. a “reasonable belief”. This may prevent a situation where a judge orders the detention of an accused on grounds which may be dubious, but which meet the standard of “reasonableness”. The circumstances in which the proposed clause 16 will be used will always be those in which many doubts exist about the accused’s innocence. The legislation could seek to expand on the grounds or information that the court should take into consideration prior to granting the order to detain, without however diminishing the court’s

discretion.

13.392 The SAPS: Legal Component: Detective Service and Crime Intelligence remarks that it is agreed, in view of the control provided by having a judicial official as functionary to consider detention, that it is not necessary that a Director of Public Prosecutions be involved. It could be a law enforcement official who may bring an application for detention, especially if an application may be in a written form. If some internal control is needed, the Bill could require that an application to a judge first have to be approved by a senior officer, such as a Director or Assistant Commissioner, on the same basis as is required in the *Interception and Monitoring Prohibition Act*, 1992. The SAPS says that it is agreed that a Director of Public Prosecutions need not be involved, but that it provides a further safeguard. For operational purposes, it would be more expedient if provision could be made that application for detention could be made by a police officer of a certain rank, or that the application to the judge should be approved beforehand for submission to the judge. In terms of the *British Terrorism Act* 2000, an arrest for 48 hours may be effected by a constable, whilst an application to a judicial official has to be made by a superintendent.

13.393 Ms De Haas of the Natal Monitor remarks that the powers given to DPPs are worrisome and explains that this comment is made, not to cast any aspersions on the character of DPPs but to point out that they are busy people and dependent on information fed to them by their own staff members and police members. She notes that a recent prosecution in KwaZulu-Natal, brought against two innocent and highly respected police members — who were completely exonerated by the court — suggests that information given to DPPs may be distorted in such a way as to appear credibly and misled them. She remarks that similarly, too much discretion seems to be allowed to a DPP to decide whether an offence constitutes terrorism.

(iii) Evaluation and recommendation

13.394 The project committee is of the view that DPPs should remain part of the proposed system. In Canada the consent of their Attorney-General has to be obtained for their investigative hearings. The same requirement exists under the proposed Australian legislation. This is a clear indication of how serious an inroad this power is regarded in these jurisdictions. It is apparent that the underlying thinking is that this power will not be used easily. The committee therefore considers that in South Africa the consent of the National Director of Public Prosecutions must be obtained for proceeding with applications for obtaining information under the Act. The committee therefore recommends that the Bill

require that a police officer may make an application to a judge only if the prior written consent of the National Director of Public Prosecutions was obtained. The Commission agrees with this reasoning and recommendation.

(e) Limited scope of Bill

(i) Evaluation contained in discussion paper 92

13.395 The project committee raised the question why clause 16(1) of the original draft refers only to a limited number of offences and why any offence under the proposed Bill is not included. The committee considered if this kind of legislation can be justified then it seems questionable to limit its scope for purposes of detention. The committee therefore proposed that clause 16(1) should apply to all offences under the Bill. The committee posed the question whether the clause means to say that there should be reasons to believe that any person has or is withholding information. The project committee considered that the clause should provide “that any person possesses or is withholding information”.

(ii) Comment on discussion paper 92

13.396 Mr AJ Louw, the Convenor of the Laws and Administration Committee of the General Council of the Bar of South Africa suggests that clause 16 be limited to those offences under the Bill for which imprisonment for life is a competent sentence. He points out that detention without trial is a very serious inroad upon the fundamental rights of all persons, and accordingly, the rights to detention of any person ought to be limited to the most serious offences. He notes that to allow detention under this clause for all the offences under the proposed Bill creates the opportunity for misuse.

13.397 Prof Cowling remarks that a disturbing feature of clause 16 in relation to conditions of detention is the fact that its extent of operation is extremely broad, since all that needs to be shown is that there is reason to believe that a person possesses or is withholding information regarding any offence in terms of the Bill. He notes that it is interesting that the original draft was narrower in the sense that it prescribed only some of the offences set out in the Bill relating to terrorist acts any arm or ammunition and any explosive device. He considers that a problem arising from this blanket approach relating to any information concerning any offence contained in the Bill is that there are a wide range of offences listed therein ranging from bombing, on the one hand, to endangering protected persons and membership of terrorist organisations, on the other hand. He notes that this is clearly sufficiently broad to turn detention without trial in a blunt instrument capable of being

effectively deployed against political opponents, as was the case in the past.

(iii) Evaluation and recommendation

13.398 The project committee agrees that possible detention of a person withholding information is a serious issue, but nevertheless considers that the power to apply to a judge to make an order to gather or obtain information should apply in regard to all acts of terrorism constituting offences under the proposed Bill. The Commission agrees with this recommendation.

(f) Conditions of detention

(i) Evaluation contained in discussion paper 92

13.399 The project committee noted in the discussion paper that the Bill made provision for conditions of detention such as the place for interrogation, the time, duration, and circumstances of detention. The committee was of the view that the involvement of a judge serves as a safeguard for these conditions and that the safeguard comes into play yet again when another judge maybe, has to decide whether there should be further detention and under clause 6(3)(b) at each further appearance. The committee was of the opinion that the imposition of conditions need not be all-embracing but that there should be some discretion to impose some conditions¹ although one cannot legislate for every little thing to be ordered.

¹ See on conditions of detention *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A): "At the beginning of the 1988 academic year the plaintiff, who was then a man in his mid-thirties, was a final-year LLB student at the University of Cape Town. . . . It is to the period of his detention at the prison, which lasted some five months, that the plaintiff's action relates. . . . What is in issue is the propriety or otherwise of the conditions in which he was held at the prison. The plaintiff's case was that the manner in which he was treated involved an aggression upon his person and an unlawful infraction of his fundamental personality rights. In the instant case there was not complete isolation of the plaintiff from all human society. He was permitted occasional and limited access to other persons. The plaintiff was nevertheless subjected over many months to a substantial degree of isolation . . . there can be no quarrel with the description of the plaintiff's situation . . . as being one of 'effective solitary confinement'. . . . It cannot be gainsaid that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence. This fact has been recognised since the beginning of time and it is mirrored in the Correctional Services Act and the regulations thereunder. . . . the detention to which the plaintiff was subjected during his detention constituted an infraction of his basic rights. Such segregation involved an aggression upon his absolute right to bodily integrity; and in particular it represented a trespass upon and violation of the plaintiff's right to mental and intellectual well-being . . . The plaintiff was neither a convicted nor an awaiting-trial prisoner. He had been detained in terms of the relevant emergency regulations which provided for detention where it was considered necessary for the safety of the public, or for the safety of the detainee, or for the termination of the state of emergency."

13.400 The project committee took into account, in addition to the findings and recommendations made by Amnesty International on detention and conditions of detention in countries such as Israel, Turkey, Lebanon and India² the following recommendations made in 1987 in the *Study of Detention and Torture in South Africa*:³

1. Since torture as practised in South Africa contravenes the widely accepted international conventions of human rights as well as medical, legal and psychological ethics, and since safeguards both in South Africa and elsewhere have usually proved ineffective in protecting detainees from physical and psychological abuses, it is recommended that the whole system of detention in terms of the Security Laws should be abolished forthwith and that South Africa revert to the ordinary principles of criminal justice.

Our study of the use of security legislation over the past 25 years affords no optimism for concluding that the present South African government would respond sympathetically to this recommendation. Since the introduction of the 90-day detention clause in 1963, the use of such security legislation has been a vital component of government policy. This legislation is particularly important to the government at this time, given its refusal to negotiate with any organisation which is not prepared to accept its prescribed agenda for 'reform'. Given that the present government's reform proposals are inextricably linked to the repression of a whole range of organisations, it is extremely unlikely that such legislation will be abolished; rather it will be brought into increased use. For that reason a series of detailed proposals are made. These offer minimal safeguards against further abuse of detainees. In addition the further proposals carry implications for the medical, legal and psychological professions who should be concerned to erase the blight of torture from this country.

2. As an absolutely minimal safeguard, the rights of detained persons, as well as the duties and limitations of state officials such as police, security police and prison personnel, should be laid down by Parliament in the form of easily accessible legislation as opposed to the inadequate ministerial orders issued to date.

Provision must be made for the following:

²

Amnesty International points out that the possibility for persons taken into police custody to have access to a lawyer, doctors and friends or relatives from the outset of their deprivation of liberty is a fundamental safeguard against ill-treatment and torture, and that incommunicado detention presents ample opportunity to inflict pain, it hides the evidence and excludes potential witnesses. Amnesty International commented that until all detainees have full access to lawyers, doctors and relatives, police stations will remain fortresses of arbitrary state power, places of secrecy and fear where torture can be practised without any restraint. Amnesty International stated that arbitrary detention practices, in which people are held unacknowledged for long periods, have also contributed to the rise of "disappearances" and this is compounded by a persistent failure in some countries to promptly register detentions.

³

Don Foster, Diane Sandler and Dennis Davis A study of Detention and Torture in South Africa: Preliminary Report 1985 published by the Institute of Criminology of the University of Cape Town p 21 - 23. See also Don Foster, Dennis Davis and Diane Sandler *Detention and Torture in South Africa: Psychological, Legal and Historical Studies* David Philip: Cape Town 1987. See also Gilbert Marcus "Safeguarding the Health of Detainees" in *Emergency Law Papers* presented at a workshop in Johannesburg, April 1987 Centre for Applied Legal Studies of the University of the Witwatersrand at 137 - 156: "Emergency detainees are cut off from the outside world. They have no right of access to relatives, friends, or doctors of their own choice. Even access to lawyers was considered by the framers of the regulations to be a privilege and not a right. This view has found favour with our highest court. District surgeons, on the other hand, have a statutory obligation to visit and treat detainees." (See p 137 - 138) Moreover, see also the recommendations made in the *Report on the Rabie Report* that a Code of Conduct be introduced to guide interrogations at p 48 - 49.

- 2a. A clear operational definition of torture which should include at least all those actions, both physical and psychological in forms, as listed in Tables 9⁴ and 10⁵ of this report.
- 2b. A clear statement forbidding the practice of torture as defined under 2a above, together with severe penalties for offenders of such prohibitions.
- 2c. Clarity with respect to routine investigate procedures among police and prison personnel to ensure that torture and abuse of detainees is discontinued.
- 2d. The establishment of an independent body to which police and prison officials are responsible regarding 2c above. Such a body should comprise representatives, acceptable to all sections of the community, of legal (eg. the Bar Council), medical and psychological professions as well as of detainee support groups and churches. Members of this independent body should have full right of access to detainees and detention facilities at any time.
- 2e. All information with respect to detention of persons under security legislation must be treated as public information. Full statistical details regarding detainees should be required as annual reports to Parliament.
- 2f. The provision for an operationally defined code of conduct for interrogation practices including:
 - i) the specific prohibition against - any order or action requiring a prisoner to strip or expose himself or herself;
 - ii) any order or action requiring a prisoner to carry out any physically exhausting or demanding action or to adopt or maintain any such stance (for example, forced standing);
 - iii) the use of obscenities, insults or insulting language concerning the prisoner's friends, families or associates, his political beliefs, religion or race;
 - iv) use or threats of physical force;
 - v) use or threats of sexual assault.
- 2g. There must be no more than two interrogators present during the interrogation at any one time, as well as a limitation on the number of interrogation 'teams' interviewing one detainee.
- 2h. Provision must be made for the interruption of interviews for refreshments and meals after specified times as well as provision for adequate sleep and exercise.
- 2i. Interrogators must identify themselves to detainees by name and number.
- 2j. All interrogation sessions should be monitored by means of videotape recordings, access to which is granted to the independent monitoring body as in 2d above. However, videotape recorders should not be utilised for purposes of monitoring detainee cells. It is important to emphasise that no police questioning of a detainee

⁴ Forms of torture: no physical torture; beatings; forced standing; maintain abnormal body position; forced gym exercises; bag over head; electric shocks; food deprivation; strangulation; suspension; cold water; water deprivation; applications of cigarettes, chemicals etc; bright light; excess cold; excess heat; walk bare-foot over glass, stones etc; other torture.

⁵ Psychological forms of torture: false accusations; solitary confinement; verbal abuse; threatened violence; good/bad interrogators; misleading information; witness/knowledge of others' torture; threats of execution of self or family; offers of rewards; forced to undress; blindfolded; sleep deprivation; threats of prolonged detention; knowledge of abuse to family and friends; sham executions; drug administration; excrement abuse; use of animals; other forms of psychological torture.

- should be allowed unless videotaped.
- 2k. The right of access by detainees to independent medical practitioners of their own choice.
 - 2l. The right of access of detainees to independent lawyers of their own choice.
 - 2m. The right of detainees to receive visitors including family members, friends and members of support groups.
 - 2n. The abolition of solitary confinement and any other forms of prescribed social isolation as conditions for holding detainees.
 - 2o. The provision of sound and adequate facilities for health care, nutrition, washing, exercise, light and air, and clothing change.
 - 2p. The right of detainees to have reading and writing materials of their own choice.
 - 2q. Currently established detainee support groups must be consulted fully in drawing-up legislation as proposed above.
3. It is recommended further that courts of law be provided with the necessary powers and machinery to intervene in the case of alleged failure to subscribe fully to the legislated provisions as recommended above, including the right of the detainee or his family to approach the court to enforce any of the rights to be accorded to a detainee and the unfettered right of the court to demand that the detainee appear in person before the court. Complete jurisdiction must be restored to courts of law to pronounce upon the validity of any action taken by the State President, or Minister of State or official acting under their authority with respect to detention in terms of security legislation, and to order the release of any person detained if satisfied that inadequate grounds exist for further detention.

6. In the light of evidence presented in this report, it is recommended that psychological coercion, apart from physical coercion, be regarded by courts of law as sufficient grounds upon which to challenge admissibility of confessions or admissions, and to challenge the reliability of evidence by witnesses subjected to such coercion.

7. It is recommended that a definition of psychological coercion as in 6 above should include the following classes of actions: (a) mental weakening devices, including, blindfolding, hooding, solitary or isolated confinement, prolonged interrogation, drug administration; (b) communication devices on the part of interrogators which distort, confuse, threaten or humiliate and degrade; (c) mental terror devices, including mock executions, threats of violence to persons or their families and friends, and witness of torture of others; (d) humiliation devices, including verbal abuse, ridicule, nakedness, sexual harassment, excrement abuse, and (e) threats of indefinite, continued or renewed detention.

9. Recognising that provisions for detention under emergency regulations are considerably more severe than those under permanent detention statutes, it is recommended that procedures as laid out above in recommendations 2 to 8 should apply for detention under emergency conditions as well.

10. It is noted that certain professional bodies, for example the Psychological Association of South Africa and the Society of Psychiatrists of South Africa, have failed to make even minimal statements condemning the present system of detention, and that the record of other bodies representing law, medicine and other related professions in South Africa, has been less than adequate in attempting to combat the practice of torture.

It is therefore recommended that professional bodies, such as those representing the institutions of law, medicine, mental health, education and religion, appoint permanent committees with a brief to monitor, challenge, eradicate and outlaw torture and abuse of security detainees in South Africa. We would further warn that if the South African courts do not intervene:

- i) to protect detainees who are being treated in flagrant violation of even the inadequate Ministerial directive of 1982, clause 15 of which provides that a detainee shall at all times be treated in humane manner;
 - ii) to render detainees' admissions and confessions inadmissible;
- the confidence of much of the population in the courts and hence the criminal justice system will be irreparably destroyed.

In conclusion it may be noted that justice is hardly to be expected in a fundamentally unjust society. It is recognised that the origin of torture in South Africa is located in the procedures and institutions designed to maintain the oppressive and exploitative social order. Until these injustices are removed, until the oppressive social order is changed, grave fears are

expressed regarding future protection against torture in South Africa.

13.401 The project committee also noted that in 1998 the South African Truth and Reconciliation Commission made the following recommendations in its final report on the police, training and control mechanisms:

The Commission found that members of the SAPS were responsible for a substantial proportion of human rights violations committed during its mandate period. These recommendations are based on the Commission's understanding of the role played by the South African Police (SAP) in the past and the concern that, despite all efforts to reform the SAPS and improve police performance, reports of torture, coerced confessions, deaths in custody and other human rights violations remain common occurrences. More than 370 deaths in police custody or as a result of police action were reported in the six-month period from April to September 1997. While reform within the SAPS is obviously essential, this must be accompanied by appropriate independent monitoring and proper accountability.

Professionalism and motivation be enhanced, and susceptibility to corruption and unlawful practices be minimised, by promoting employment practices that encourage more educated, literate and professional candidates to apply for employment and to remain in employment with the SAPS. Particularly, immediate attention should be given to salary issues to encourage better candidates to apply for and remain in the employment of the SAPS.

All police officers be imbued, through training and the introduction of a code of ethical practice, with an ethos of service in a democratic state and under a culture of human rights.

Investigating officers be trained in proper forensic investigation techniques, to replace the current practice of extracting confessions under duress, by violence and other irregular and unorthodox methods.

The work of the Detective Academy be expanded as rapidly as possible.

...

The state fund an independent forensic service for the use of the family of anyone who dies in custody. The families be informed of their right to have an independent forensic pathologist present at a *post mortem*.¹

13.402 The remarks made by Chief Justice Gubbay in the Zimbabwean case of *Blanchard and Others v Minister of Justice, Legal and Parliamentary Affairs and Another*² is also noteworthy:

Ancillary to the complaint of the inhumanity of the conditions of confinement and unnatural isolation is that relating to the continuous lighting of the cells occupied by the applicants, which disturbs their sleep. The respondents seek to vindicate this particular practice by drawing attention to clause 113(3) of the Prison Security Standing Orders ... This provides that when confined to their cells 'D' class prisoners ... shall be inspected every twenty minutes by the officer on duty. He, so it is claimed, would be unable to monitor properly the movements and intentions of the applicants, during the hours of darkness, without the facility of such lighting.

I find this reasoning unpersuasive. A warder with back-up is always present in this cell block and a torch could be used effectively to check upon the presence of the applicants in their cells at night. The likelihood of their being able to escape therefrom is, as already mentioned, extremely remote, if not fanciful. The insistence upon lighting is therefore irrational and, so it seems to me, directed at exacerbating the effect of the condition of confinement by making it as uncomfortable and severe as possible for the applicants.

...

The abuse of the applicants by police interrogators prior to admission to prison is also to be

¹ Final report of the Truth and Reconciliation Commission Volume 5 Chapter 8.

² 1999 (4) SA 1108 (ZS).

borne in mind. . . . It was aggravated by the oppressive manner of their confinement - by isolating them from other awaiting trial prisoners, by depriving them of freedom of movement for the greater part of the day and, initially, by stripping them naked and placing them in leg-irons.

Akin to art 7 of the International Covenant on Civil and Political Rights, the aim of s 15(1) of the Constitution is to protect both the dignity and the physical and mental integrity of the individual. The prohibition relates not only to acts that cause physical pain but also to those that cause mental suffering to the victim. It is the duty of the State to afford everyone protection against such acts by legislative and other measures, as may be necessary; not, through its officials, to be responsible for their perpetration.

Taking account of all the circumstances, I am satisfied that the prolonged duration of the ill-treatment the applicants have been compelled to endure and its physical and mental effects upon them attain that minimum level of severity necessary to constitute a violation of s 15(1) of the Constitution. . . . In the result, I am quite unable to hold that the applicants are simply being made to suffer from the inevitable consequence of the operation and administration of a high security prison and the usual element of humiliation associated with detention on remand.

13.403 The committee noted section 35 of the Constitution yet again.³ The committee considered the question at which stage of detention it should be possible to determine the conditions under which the person suspected of withholding information from a law enforcement officer should be detained. The committee was of the view that a judge should have the power to impose, amend or amplify conditions of detention at any stage of the detention. The committee considered that there may be reasons why the judge may or should impose conditions when he or she authorizes the warrant for detention as there might already be enough on record before him or her to indicate that the prospective detainee is, for example, someone who suffers from a certain medical condition and that there must be medical visits to the detainee at set intervals. The committee considered that it should thereafter also be possible to impose or amend the conditions of detention when the detainee is brought to the place of detention or when he or she appears subsequently before a judge. The committee was of the view that one does not want to derogate from the capacity of the second judge to determine or amend conditions of detention. The committee suggested that clause 16(1) should provide that the judge may “issue a warrant for the detention of such person subject to such conditions as the judge may determine, which conditions may be amplified or amended by such judge or any other judge from time to time”.

(ii) Comment on discussion paper 92

13.404 Mr JHS Hiemstra, Deputy Director of Public Prosecutions in the Free State, considers that clause 16(3) is out of touch with reality, as the warrant for detention is issued by a judge, the detainee is in addition entitled to make representations to a judge and is entitled to legal representation. He is of the view to enact that the detainee be brought

³ Section 35(2)(e): Everyone who is detained, ... has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

before a judge after 48 hours is an overcautious resort to formalities and is certain to frustrate the aim of clause 16. He suggests that if the Bill is passed, the period should be extended to have any practical effect at all, and the judge should determine the date of the next appearance which shall not exceed seven days. He considers that this would allow for flexibility coupled with responsibility while avoiding disrupting formalities as ample provision is made for legal and other visitation and assistance to avoid abuse. He is however of the view that our justice system can and should do without such a provision and he considers that it is doubtful whether detention without trial would in practice have the result or which it is enacted, especially in the proposed form.

13.405 Messrs Fick and Luyt of the Office of the Director of Prosecutions: Transvaal remark that in terms of clause 16(3), if a detainee who is brought before a judge is not by order of the judge released within 48 hours of his detention or after a further 5 days since his first appearance, he can be held for a further period up until 14 days since his arrest. They consider that other than his right to make representations to a judge at any time during his detention, it seems that he could be in uncontrolled detention for the remainder of the detention period. They pose the question what form can the proposed representations to a judge take on, and whether the detainee will have the right to be brought before a judge as many a time as he wishes? They explain that surely, the experience with detainees under similar statutes in the past has shown that they will, in order to make life as difficult as they can for the authorities, request to be brought before a judge several times per day. They ask what will the powers of a judge be where the representations of the detainee is made within the remainder of the period?

13.406 The Media Review Network comments that the Bill does not deal with conditions such as the diet, exercise and recreation that would ensure that the individual's health is not adversely affected, and that legal representation has its own price, and the provision in isolation is cold comfort. The Network notes that the present disarray in the Legal Aid Board will not assist individuals requiring legal assistance, that *Pro Deo* counsel is not the ideal situation where the liberty and freedom of an individual has been removed at the fancy of some police official.

(iii) Evaluation and recommendation

13.407 The SAPS: Legal Component: Detective Service and Crime Intelligence website contains the following *Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Service*:

The right not to be tortured is entrenched as a fundamental right in Chapter 2 of the

Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) which is the highest law of the land. The fundamental right of an individual to be protected against torture is widely accepted as a rule of international law. With the signing of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) on 29 January 1993, South Africa explicitly acknowledged the prevention of and protection against torture as part of international law. By signing the Convention government also undertook to work towards ratification and thereby binding the State to adhere to the Convention. This requires government to work actively towards the prevention of torture and to protect people against any act of torture. In terms of the Convention, every state that has signed it, shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

This necessitated a re-evaluation of the treatment of persons in custody of the South African Police Service, and the approach of the South African Police Service towards interrogation methods, detention, etc. By order of the National Commissioner policy has been developed to ensure that torture and other forms of cruel, inhuman or degrading treatment of persons in custody of the South African Police Service, are prevented.

The Policy, adopted by the Service in this regard, is aimed at -

- (1) preventing the torture (including cruel, inhuman or degrading treatment) of persons in the custody of the Service; and
- (2) protecting our members against false allegations of torture. This purpose is achieved by creating a system of checks and balances throughout a person's custody in the Service. The policy places certain obligations on members while they are working with persons in the custody of the Service. These obligations serve as controlling mechanisms to ensure that the human rights of these persons are respected while they are in the custody of the Service. At the same time, the system ensures that the member and the Service will be protected against false allegations of torture and ill-treatment of persons in custody.

In order to ensure that a person in custody is duly informed of his or her rights in terms of the Constitution, the Policy provides that a person must be given a written notice setting out his or her rights upon his or her arrival at the police station. The written notice is contained in a Book called the Notice of Constitutional Rights.

The instructions contained in the Policy necessitated that the current Cell Register be amended to include the recording of all actions taken by a member regarding the person in custody. A Custody Register was developed for this purpose.

The Policy makes it clear that no member may torture any person, permit anyone else to do so, or tolerate the torture of another by anyone. No exception will serve as justification for torture - there can simply be no justification, ever, for torture. Any order by a superior or any other authority that a person be tortured, is therefor unlawful and may not be obeyed. The fact that a member acted upon an order by a superior will not be a ground of justification for torture.

When the effects of an act of torture on the person subjected thereto, the legal and other consequences thereof in relation to the Service and the community and the importance attached to protection against torture in the international community, are considered, it becomes clear that any conduct by a member which constitutes torture will be regarded in a very serious light.

It should be noted that the Policy Document does not deal with pain or suffering arising from, inherent in or incidental to, lawful use of force and is therefor not dealt with in this Policy.

The Policy contains instructions, which will eventually be incorporated into National Orders. Until this is done, it is the responsibility of every station commissioner and other commander to ensure that members under their command at all times adhere to the instructions.

The Service calls upon all its members to once again commit themselves to uphold our

Constitution and to protect and respect the fundamental rights of all persons. In so doing they will contribute to building an effective police service which does not rely on fear and physical force, but rather on honour, professionalism and compliance with the law.

13.408 The provisions of the Constitution on the treatment of detainees mean that torture will never be condoned in order to extract information from someone whom one believes possesses information on a terrorist act which has happened or which is about to be committed.¹ Section 35(2)(e) provides that everyone who is detained, including every

¹ Jim Rutenberg "Torture Seeps Into Discussion" 5 November 2001 *New York Times* <http://www.nytimes.com/2001/11/05/business/media/05TORT.html?todayshheadlines> reports as follows on the use of torture to extract information on terrorist activities:

In many quarters, the Newsweek columnist Jonathan Alter is considered a liberal. Yet there he was last week, raising this question: "In this autumn of anger," he wrote, "even a liberal can find his thoughts turning to . . . torture." He added that he was not necessarily advocating the use of "cattle prods or rubber hoses" on men detained in the investigation into the terrorist attacks. Only, "something to jump-start the stalled investigation of the greatest crime in American history." The column — which ran under the headline "Time to Think About Torture" — set off alarm bells at human rights organizations. The sense of alarm was heightened because Mr. Alter is just one of a growing number of voices in the mainstream news media raising, if not necessarily agreeing with, the idea of torturing terrorism suspects or detainees who refuse to talk. On Thursday night, on the Fox News Channel, the anchor Shepard Smith introduced a segment asking, "Should law enforcement be allowed to do anything, even terrible things, to make suspects spill the beans? Jon DuPre reports. You decide." One week earlier, on CNN's "Crossfire," the conservative commentator Tucker Carlson said: "Torture is bad." But he added: "Keep in mind, some things are worse. And under certain circumstances, it may be the lesser of two evils. Because some evils are pretty evil." The legitimacy of torture as an investigative tool is the latest in a progression of disturbing and horrific topics the news media is now presenting to its audience, like the potential of an Ebola attack on an American city or a terrorist nuclear strike, the kind that, as an article in *The Economist* put it in its latest issue, could cause the disappearance of everything below Gramercy Park in Manhattan. Some human rights advocates say they do not mind theoretical discussions about torture, as long as disapproval is expressed at the end. But they say that weighing the issue as a real possible course of action could begin the process of legitimizing a barbaric form of interrogation. Journalists are approaching the subject cautiously. But some said last week they were duty-bound to address it when suspects and detainees who have refused to talk could have information that could save thousands of lives. Plus, they added, torture is already a topic of discussion in bars, on commuter trains, and at dinner tables. And lastly, they said, well, this is war.

The historian Jay Winik, in an opinion article on Oct. 23 in *The Wall Street Journal*, detailed the reported torture in 1995 of the convicted terrorist plotter Abdul Hakim Murad by Philippine authorities that led to the foiling of a plot to crash nearly a dozen United States commercial airplanes into the Pacific and another into C.I.A. headquarters in Virginia. Mr. Winik went on to write, "One wonders, of course, what would have happened if Murad had been in American custody?" He did not, however, endorse the use of torture but suggested the United States may have to significantly curtail civil liberties, as it had done in past wars. In *Slate*, the online magazine, Dahlia Lithwick wrote, "There's no doubt that torturing terrorists and their associates for information works." But the Oct. 19 article, "Tortured Justice," primarily raised a host of moral and legal problems associated with torture. Mr. Alter said he was surprised that his column did not provoke a significant flood of e-mail messages or letters. And perhaps even more surprising, he said, was that he had been approached by "people who might be described as being on the left whispering, 'I agree with you.'" The problem with those comments, he said, was that they presumed that by writing about torture, Mr. Alter was advocating it, which he said he was not doing, as evident in his point about torture producing false information. ("I'm in favor of court-sanctioned sodium pentothal," he said in an interview. "I'm against court-sanctioned, physical torture.")

The Fox News Channel was less apologetic about its report on Thursday night, in which

advocates for torture said desperate times called for desperate measures and critics said that by abusing suspects the United States would lose its moral standing in pressuring other governments on human rights violations. "They're sitting around and not talking and may have information that could save American lives here and abroad," Bill Shine, the executive producer of the Fox News Channel, said of current government detainees. "And people are starting to say how can we get information out of them," he added, "while respecting their constitutional rights." Mr. Shine, however, said he was amazed that it was a subject for a news report at all. "It shows you where we are now," he said. But where Fox News Channel was willing to run a traditional, network- news style segment on the pros and cons of torture and "suspending writ of habeas corpus," the broadcast news divisions have shied away from doing the same. Jim Murphy, the executive producer of "Evening News with Dan Rather" on CBS, said he would address the topic only if a CBS News correspondent found that law enforcement was seriously considering using torture. He said that speculation about torture and discussion of its merits were, for now, best left to talk shows and columnists. "At this point, for me, it is being covered where it belongs to be covered," he said. Until his network is presented with real evidence that torture is being used or being considered, he added, "It's like the conversation you or I would have at dinner: 'I wonder if we should torture?' " Of course, even that level of discourse is considerably disturbing to groups like Human Rights Watch and Amnesty International, which criticize the use of torture by regimes around the world. And yet, even their leaders said they understood the source of the sentiments. "It reflects people's fear, and the somewhat unexamined instinct to do whatever it takes to meet the threat," said Kenneth Roth, executive director of Human Rights Watch. "And when people step back for a moment, they understand there are reasons why you don't want to open the door." Mr. Roth said he had appeared on CNN and Fox News Channel to discuss those reasons, chief among them that torture often produces false information and that various international laws forbid it. Mr. Roth and the deputy executive director of Amnesty International USA, Curt Goering, said they believed that if the discussion of torture grew, they would be able to counter it on television or in print. Mr. Roth said he was heartened by one thing. "To the

sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment. The project committee recommends that the Bill provide that an order for the detention of a person may include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order, including the conditions of detention. The Commission agrees with this recommendation.

(g) Oral or written applications?

13.409 The project committee noted that clause 16(1) said that whenever it appears to a judge of the high court on the ground of information submitted under oath by a Director of Public Prosecutions that there is reason to believe that any person possesses or is withholding from a law enforcement officer any information regarding any offence under this Act, the judge may issue at the request of such Director a warrant for the detention of such person. The committee supposed that the application is oral and considered whether under clause 16(1) the judge is facing oral or written evidence. The committee also considered whether the Bill should require written evidence and wondered whether that would not unnecessarily limit Directors of Prosecutions. The committee noted that if the Director of Prosecutions appears in person a court room would presumably be set up, the proceedings would be recorded and so the evidence would take the place of an affidavit, the evidence would be taken under oath and the law enforcement officer could also testify. The committee invites comment on the question whether oral evidence or evidence on affidavit should be envisaged by this clause.

13.410 The SAPS: Legal Component: Detective Service and Crime Intelligence proposes that an application should be made in writing to the judge, but that the judge may require the applicant to appear before him in respect of elucidations needed or questions to be answered on the motivation, or other aspects of the application. The SAPS says that the nature of application, might be influenced on whom the functionary will be who may apply for extension, and if it is a police official, they suggest that the application should be in the form of a written application.

13.411 The Bill makes now provision for ex parte applications to a judge. It is

government's credit," he said, "it's not the government proposing this. It's various commentators."

therefore clear that these applications should be in written form.

(h) Detainee taken to place of detention, furnished with reasons, detained for interrogation until judge orders release if satisfied that the detainee has satisfactorily replied to all questions or that no lawful purpose will be served by further detention

(i) Evaluation contained in discussion paper 92

13.412 The project committee noted in the discussion paper that clause 16(6) of the original Bill did not say whether the detainee is entitled to the reason why he or she is being detained, and, further, whether such reasons might constitute official information. The committee also noted that the original draft contains a no-access to official information clause - although there is a whole case law on this aspect of the law. The committee imagined that this war has finally been won but the authorities regarded or certainly took the attitude that medical records of the detainee were official information to which no one was entitled to have access.¹ It was not entirely clear to the project committee what the drafters had in mind

¹ *Nkayi and Another v Head of the Security Branch of the SA Police, Pretoria, and Others* 1993 (3) SA 244 (A): "In terms of para 34 of these directions [Government Notice 877 of 1982 relating to the detention of persons] a magistrate or district surgeon visiting a detainee is obliged to compile a report on such visit and submit it to the office of the Director of Security Legislation and to the divisional commissioner. This instruction confirms that for every visit by such persons there is to be a written report. It would in the nature of things contain information foreshadowed in s 29(7)(b), that is information 'obtained from' a detainee as a result of what was observed, found as a result of an examination or told to the magistrate or district surgeon by the detainee; and perhaps information 'relating to' a detainee obtained from some other source.

There is nothing in the Act to indicate, or even suggest, that the purpose of any such visit is for any reason other than to report, in the interests of a detainee, on his physical and mental health and well-being. ...

Reverting to the wording of the section itself, the fact that 'official' qualifies 'information' is of some significance: it describes the kind of information to which access is restricted. A reference to 'information officially obtained' would more closely conform to the meaning relied upon by the respondents. As a matter of fact on such interpretation there appears to be no need for 'official' or 'officially' to feature at all in the subsection.

Should the acceptance of the meaning of s 29(7) reflected in the Natal decisions erode its efficacy or give rise to problems in the implementation of the prohibition, this would cast a doubt on the correctness of such construction. Two possible difficulties were raised in the course of argument. It was suggested that it might prove difficult to decide whether material in a report is to be classified as security information or as personal information. This does not appear to me to be an obstacle. In the first place both the magistrate and the district surgeon, in the realisation of the true purpose of their visits, are most unlikely to record information not of a personal nature. But in any event, should they do so, the distinction between personal information (that is relating to the health and well-being of the detainee) and any other information (which may obviously or possibly be security information) is not an obscure or an umbrageous one. In this connection the question arises: who would be the person to decide this issue in regard to a particular report, should the nature of its contents be disputed, without the process itself violating the prohibition? This was the second possible difficulty put forward. But, in so far as this may be a concern, such a report would be on the same footing as any other document in respect of which privilege is claimed and disputed. It would be for the Judge at the appropriate time to examine the document in private and decide whether it, or part of it,

whether the reasons founding the detention could be requested and whether should they be made available. The committee expressed its concern by saying that in so far as clause 16(3)(c) appears to envisage the making of representations concerning the detention and the release of the detainee, there appears to be no provision contrary to the Constitution for the furnishing of reasons for detention to the detainee. The committee moreover, considered that there is no clarity on what constitutes official information for the purposes of subclause (5) and whether that information would include or exclude reasons for detention and the motivation for detention.

13.413 The project committee asked how could a detainee ever challenge his or her detention without knowing what the reasons for his or her detention are.² The committee

ought to be protected from disclosure in terms of s 29(7) on the ground that it contains or might contain security information. This is an accepted procedure when privilege is claimed in reference to a document. ... There can be no objection to such an enquiry on the part of the Judge. ...

In the result, for the reasons given, I am of the view that the interpretation placed upon s 29(7) in the *Nxasana* and *Mkize* decisions is the correct one and that no unique problems will arise should it become necessary to decide whether a report or a portion of a report is to be disclosed for the purposes of a pending law suit."

² In *Fei Lui and Others v Commanding officer Kempton Park and others* 1999 3 SA 996 (W) the court found as follows:

"I note that these detainees were informed that they were 'requested to hand to me such representations on or before the 4 March 1999'. At that stage it must have been known to this immigration officer that the papers were already on their way to the learned Judge, that his decision was to be made shortly (it was in fact made the following day, 24 February). To advise persons that they could make representations before 4 March was a cynical, callous and dishonest representations. It rendered completely nugatory the principles to which our Courts have always adhered and to which they have required administrative officials to adhere with regard to fair procedures. I refer in this regard specifically to the judgment of Streicher J in *Foulds v Minister of Home Affairs and Others* 1996 (4) SA 137 (W) at 142A-B, where he said the following:

'In terms of the common law an individual whose liberty or property or existing rights are prejudicially affected by a decision of a public body or of an official empowered by statute to give such decision and also an individual who has a legitimate expectation that the decision by the public body would be favourable or, at least, that before an adverse decision is taken he will be given a fair hearing, has a right to be heard before the decision is taken unless the statute provides otherwise.'

That decision has been followed and approved in numerous cause, and most recently in the case of *Yuen v Minister of Home Affairs an Another* 1988 (1) SA 958 (C). In the present instance the functionaries employed in the Department of Home Affairs had no intention of following those procedures and had every intention of pursuing the review proceedings without enabling the detainees to make any representations that would be in any way meaningful - since the decision of review would have been taken long before their representations were to be received.

The submission made to the Judge for review purposes did not comply with the provisions of s 55(5) or with the regulations provided for ... Regulation 29(2), which deals with the procedure for review of detentions, requires an immigration officer to submit the matter for review '(a) not later than 20 days after the date on which the detention commenced' and '(b) after informing the said detainee on the form which contains substantially the information prescribed in annexure 31 of the reasons why his or her detention is likely to exceed 30 days and that the

considered that the detainee is entitled to be informed of the founding reasons why it is believed that he or she has or possesses information which he or she is withholding from a law enforcement officer.³ The committee noted that the drafters' intention seems to have been to exclude the giving of reasons but considered that such a derogation from the

matter is to be submitted for review'."

³ See Prof LJ Boule "Detainees and the Courts: New Beginnings: *Hurley v Minister of Law and order* (D&CLD 11 September 1985 Case no 5685/85 unreported) 1985 SAJHR 251 - 260 at p 252 *et seq*: "The crucial enquiry concerned the meaning of the phrase 'reason to believe ...', which is one of several jurisdictional facts pertaining to action by the state in terms of section 29(1). In its normal grammatical meaning, according to Leon J, the phrase denotes a belief based upon reason, that is on for which there is a factual basis, and does not mean 'thinks he has reason to believe'. ... In several of these decisions the South African courts expressly or impliedly repudiated the notorious majority decision in *Liversidge v Anderson* [1942] AC 206 (HL), in which the phrase 'reasonable cause to believe' was construed by the Law Lords to mean that the functionary need only honestly think that he has reasonable cause to believe, thereby excluding the court's ability to intervene in the administrative process. ... Another line of local precedents has expressly disapproved the objective approach. ... An objective approach would not require the State to disclose all the information at its disposal, since its only duty would be to adduce enough evidence to bring it within the terms of the statute; the privilege on information cannot per se preclude the furnishing of reasons by a public authority since the two concepts are distinct, although it may result in less ample reasons. ... Moreover as Mureinik (op cit 78) [*Liversidge* in Decay' (1985)102 SALJ 77] points out, the relevant phrase in *Liversidge* was given a subjective meaning despite its ambiguity whereas in *Mbane* it must have been found to be unambiguously subjective since Hefer CJ conceded that in cases of ambiguity the interpretation favouring personal liberty should be followed. In endorsing Mureinik's argument, Leon J held that *Mbane* was wrongly decided because it did not give effect to the ordinary grammatical meaning of the relevant words."

constitutional provision⁴ does not seem to be justifiable on constitutional grounds. The committee considered that there seems to be a unresolvable conundrum here - if the detainee were to be entitled to legal representation (as they should be), how will the representative ever be able to make meaningful representations unless he or she knows why the detainee is detained. The committee noted that clearly a detainee has to be brought before a judge, then the detainee has the opportunity to say whatever he or she wants to say and unless he or she knows why he or she is there, he or she can never get to the root of the detention.

⁴ 35(2)(a) Everyone who is detained, including every sentenced prisoner, has the right to be informed promptly of the reason for being detained.

13.414 The project committee noted the case of *Matanzima v Minister of Police, Transkei*¹ where the court considered the kind of reasons to be supplied to the detainee:

As was stated in *Immerman's* case ..., the police do not have to disclose their whole case. They are also entitled for obvious reasons to protect the identity of the informants and conceal the sources of their information.

The question, however, is whether the quantum of the information supplied by the respondents concerning the grounds for the belief that the detainee had committed an offence under the Public Security Act is sufficient. In my view it is clear from what has been stated in the foregoing cases that the reasons advanced for the arrest of the detainee in respondent's answering affidavits must be critically examined in order to establish whether they have complied with the abovementioned principles. See the remarks made by Kriegler J in *Botha v Minister van Wet en Orde en Andere* 1990 (3) SA 937 (W) at 952B-D.²

¹ 1992 2 SA 401 (Tk). See also *Katofa v Administrator-general for South West Africa and Another* 1986 (1) SA 800 (SWA) where Berker JP said that where in respect of the arrest and detention of a person in terms of Proc AG 26 of 1978 (SWA) the Court, in an application for an order for the release of the detainee, issues a rule nisi calling upon the Administrator-General and the officer in command of the relevant prison to show cause why the detainee should not be released forthwith, the respondents are called upon to supply sufficient information to satisfy the Court that the belief he or they formed was a reasonable belief. This does not mean that all the information, nor necessarily the source of the information, need be disclosed. What must be shown, however, must be sufficient to satisfy the Court that the belief that the detainee is a person who has committed, or attempted to commit, or has promoted the commission of violence or intimidation which obstructs, hinders or threatens the peaceful and orderly constitutional development of the territory, was a reasonable belief formed as a result of information supplied. Levy J also noted that section 4(2) of the proclamation draws an important distinction between "reasons" and "information" and that the section provides that a detainee is entitled to request the Administrator-General for the "reasons for his detention" and for "the information which induced him" to issue the relevant warrant. He said that the Administrator-General is obliged to furnish the reasons aforesaid, he cannot refuse and it is only in respect of the furnishing of information that he has a discretion. It is only in respect of the information that the Administrator-General can plead "privilege" and, he must also give the reasons for his conclusion ..."

² At 951B - 952E: Kriegler J said that in regard to detention under section 29 it is not necessary to look further than the two cases of the Supreme Court of Appeal namely, *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) , and *Minister of Law and Order and Others v Pavlicevic* 1989 (3) SA 679 (A). He noted that the principles contained in the *Hurley* case were clearly set out as follows in *Pavlicevic* at 684G - 685A :

"In the case of *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) it was held by this Court

10. that the words 'he has reason to believe' appearing in s 29 imply that there are grounds, or facts, which give rise to, or form the basis of, the belief of the police officer concerned (see at 577I);
11. that these grounds must be reasonable grounds, ie grounds on which he could reasonably have held the belief he did (see at 578B - F, 586G);
12. that the question as to whether a police officer who has arrested and detained a person in terms of s 29(1) had the required belief, based upon reasonable grounds, is objectively justiciable (see at 578G - 583H);
13. that the jurisdiction of the Court to inquire into whether a police officer who has arrested and detained a person had reasonable grounds for the belief which led him to take this action is not ousted by s 29(6) of the Act (see 583I, 586I);
14. that where the lawfulness of the arrest and detention are in issue the onus is upon the police officer concerned to show that he acted in accordance with the powers granted under the subsection and, therefore, that he had reasonable grounds for his belief (see at 587B - 589H)."

Kriegler J continued as follows: "Die voormelde aanhaling verstrek op een na uitsluitel met

After scrutinising the respondent's affidavits, I am of the opinion that the respondents have failed to place any information on record to enable me to establish objectively whether the person who authorised the arrest had sufficient information to form the belief that the detainee has committed an offence, or intended to commit an offence, or is in possession of information relating to an offence in terms of the Public Security Act. All that the respondents have in fact done was to repeat the words of s 47 of the said Act, that reasonable grounds exist, without supplying any information to enable the Court to establish whether Lieutenant General Damoyi was justified in forming the belief, that he alleges exists.

In my view serious doubt exists as to the existence of facts giving rise to a reasonable belief especially in view of the failure by respondents

- (1) to disclose the nature of the information in their possession;
- (2) to disclose the source of the information;
- (3) to state any reasons for not disclosing the nature of the information.

The only possible reason advanced by Lieutenant General Damoyi is where he stated the following:

'I am unable to reveal the contents of the investigations thus far as I feel this will prejudice the investigation.'

The Court is therefore in the dark as regards which offence in terms of the Public Security Act the detainee allegedly was involved in; in what manner the detainee was allegedly involved in such an offence; and the nature of the acts allegedly committed by the detainee which might involve him in such offence.

As far as the continued detention of the detainee is concerned it is worthwhile to mention that the purpose of an arrest under and in terms of the said section is to interrogate the detainee. He cannot be detained for any other purpose and especially not to enable the police to continue and complete their investigations. ...

Although the allegation is made that interrogation of the detainee will continue and that he still has to answer satisfactorily questions put to him, it is clear that the primary reason for detaining the detainee is to enable the police to continue with their investigations. In my view

betrekking tot iedereen van die regsbevoegdheid wat voor my aangevoer is. Die uitsondering het betrekking op die kwantum inligting aangaande sy gronde vir sy vermoede wat in 'n bepaalde geval deur 'n aanhouer geopenbaar moet word. Rabie HR het in die *Hurley* -saak te 583D - G dienaangaande die volgende gesê:

'I turn now to counsel's final argument in support of his contention that the Legislature did not, when using the words "if he has reason to believe..." in s 29(1) of the Act, intend that the decision of the officer who arrested or caused the arrest of someone should be subject to objective inquiry by the Court. Such an inquiry, counsel says, could result in the police being forced to disclose information which, if divulged, could endanger the security of the State, and the Legislature could not have intended such a result. It must be accepted that occasions may arise when the police will, for security reasons, not be able to disclose information available to them, and it must be acknowledged, in my view, that there is force in counsel's argument. At the same time it should not, I think, be assumed that occasions of the kind mentioned will frequently arise. It is, also, not to be assumed that the police will on such occasions necessarily have to disclose all the information of which they are possessed, or the sources of their information. Section 29(1) requires merely that it be shown that there were grounds on which the officer concerned could reasonably have held the belief that the person whom he arrested or caused to be arrested was a person as described in the subsection.'

Ek is dus by magte en verplig om objektief te bepaal of die bewerings wat brigadier Mostert in die opponerende eedsverklaring vermeld het voldoen aan die vereistes soos saamgevat in die aanhaling uit *Pavlicevic* se saak. ...Enersyds verg die belange van Staatsveiligheid dat bepaalde soorte inligting nie openbaar gemaak word nie. Andersyds verg die beskerming van die vryheid van die individu dat die Hof nie sy hersieningsfunksie abdikeer ten gunste van die betrokke polisiebeampte nie. Hoeveel moet die polisieman in so 'n geval openbaar? Enersyds kan hy nie bloot sê nie: 'Ek het betroubare inligting wat my vermoede steun.' Andersyds het die Wetgewer kennelik nie bedoel dat alles uitgeblaker moet word nie. Erens tussen die twee uiterstes moet in iedere geval die nodige ewewig gevind word. Daar moet in die omringende omstandighede beoordeel word of die polisiebeampte voldoende voorgelê het om die Hof in die vermoë te stel om te kan oordeel of die gronde vir die vermoede redelik was."

the reasonable inference to be drawn from these affidavits is that the detainee is detained pending continued investigations, that his release would interfere with those investigations and that he would be interrogated as and when information was obtained in the course of those investigations. This, in my view, is clearly not the purpose of s 47 of the said Act and the continued detention of the detainee is therefore, in my view, unlawful.

I am not satisfied that respondents did have sufficient facts or grounds to objectively justify the required belief, or that they have disclosed sufficient facts to objectively test and verify that belief.

13.415 The project committee therefore considered that in terms of clause 16(2) the detainee should be entitled to reasons being given for his or her detention and that he or she should be told in broad outlines why he or she is being detained. The committee suggested that subclause (2) should provide that the detainee “must as soon as possible be taken to the place mentioned in the warrant and furnished with the reasons for such detention ...”. The project committee was further of the view that the word “detained” should be substituted for the word “arrested” in the second line of clause 16(2).

13.416 The committee also considered whether the judge referred to in subsection (2) who determines whether the detainee has satisfactorily replied to questions should be released or further detained, is the same judge as the one referred to in clause 16(1) who issued a warrant for the detention for interrogation of the person suspected of withholding information on terrorist acts. The committee was of the view that is not necessarily the case and that it should preferably not be the same judge. The committee considered that it should not be encouraged to have a particular judge assigned to consider these applications. The committee decided that the word “the” used in the phrase “the judge” in the 4th line of the clause should be substituted with “a judge”. The committee further stated if a conflict arises on the evidence whether the detainee has replied satisfactorily to questioning, that is if there is any doubt with the judge, then he or she must order the release of the detainee. The committee stated that under clause 16(2) the detainee is kept in detention for interrogation until a judge orders his or her release, and when a detainee is brought before a judge in terms of clause 16(3) within 48 hours even without representations from the detainee, the judge may consider that there is not enough grounds to justify detention. The committee also considered that the wording of clause 16(2) seems wide enough to enable the second judge to order the release of the detainee in so far as clause 16(2) simply says, “until a judge orders his or her release”.

(ii) Comment on discussion paper 92

13.417 Amnesty International points out that clause 16(2)(a) is of concern, as it does not oblige the authorities to take the detainee *immediately* to the place referred to in the warrant, nor does it specify that the place of detention must be an officially recognised place

of detention. AI notes that past incidents of torture and ill-treatment often reveal that the abuses have been inflicted in non-formal locations (for example, security force vehicles, headquarters of specialised units, the veld) after arrest and prior to the person being brought, if at all, to a police station or other recognised places of detention. AI states that the type of recognized place of detention, whether police station, prison or other institution, will also have implications for the detainee's access, for instance, to proper or emergency medical care, and on the degree of supervision or monitoring of conditions and treatment in detention.³ AI also notes that the subclause has no provision prohibiting the transfer of the detainee to another holding place without immediately informing the detainee's lawyer and family, nor any provision obliging the authorities to maintain accurate records of the detention. AI points out that these requirements are vital protections against enforced disappearances, torture or other forms of ill-treatment.⁴

13.418 Amnesty International remarks that there is a similar concern with clause 16(2)(b) by which the authorities must furnish the detainee with the reasons for the detention "as soon as possible". AI states that international standards require that anyone who is arrested or detained must be informed *immediately, at the time of arrest*, of the reasons why they are being deprived of their liberty. AI explains that the reasons given must be specific and must include a clear explanation of the legal and factual basis for the arrest or detention,⁵ and that a key purpose of this requirement is to allow detainees the opportunity to challenge the legality of their detention.

13.419 AI notes that subclause 2 provides that the detainee shall be held at the place of custody for "interrogation" until the judge orders his or her release or the detention period (see below) has expired, and that the judge may order the release if "no lawful purpose will be served by further detention". AI remarks that the judge may, however, in terms of clause 16 (2)(i)(aa)) extend the detention solely on the grounds that the detainee has not "satisfactorily replied to all questions under interrogation". AI notes that the provision clearly establishes a link between the possibility of release and the exercise of the right to silence. AI considers that it is not clear how the judge can determine if the detainee has responded

³ See Principles 11(2) and 20 of the UN Body of Principles, Article 10 of the UN Declaration on the Protection of All Persons from Enforced Disappearance, and Rule 7(2) of the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules).

⁴ Article 10(2) of the UN Declaration on Disappearance, Principle 12 of the UN Body of Principles.

⁵ Article 9(2) of the ICCPR, Paragraph 2(B) of the African Commission Resolution on the right to Recourse Procedure and Fair Trial, Principles 10 and 11(2) of the UN Body of Principles; Comments of the UN Human Rights Committee in *Drescher Caldas v. Uruguay* (43/1979), 21 July 1983, 2 Sel.Dec.80, and in *Portorreal v. Dominican Republic* (188/1984), 2 Sel.Dec.214; Concluding Observations of the HRC: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para.13. Section 35 (2)(a) of the Constitution provides that "Everyone who is detained...has the right to be informed promptly of the reason for being detained".

satisfactorily to questions, although subsection 3(b) does place the onus on the DPP to show reasons for further detention (see further below). AI points out that if the detainee chooses to exercise his or her constitutional right to silence,⁶ then, however, the possibility of a judicially-ordered release would be prejudiced. AI points out that it is important to note that, in terms of section 37(5)(c) of the Constitution, the right to silence is a non-derogable right during any declared state of emergency. AI explains that recognizing the vulnerability of people in detention, Principle 21 of the *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)* states:

“1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other persons”.

13.420 AI points out that the European Court of Human Rights has stated that “[a]lthough not specifically mentioned in article 6 of the [European] Convention, there can be no doubt that the 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 under article 6”.⁷ AI notes further that the right to silence is also set out as a right in the rules of evidence and procedure of the international tribunals for the former Yugoslavia (Rule 42 (A)) and Rwanda (Rule 42(A)) and in Article 55 (2)(b) of the Rome Statute of the International Criminal Court (ICC).

13.421 The SAHRC comments that while all of the safeguards set out in section 35 of the Bill of Rights have been incorporated into clause 16, the main objective of this provision is to provide for detention for the purpose of interrogation, and it seems it is intended for use against suspects as well as witnesses. The SAHRC notes that while the extensive existence of the section 35 safeguards are to be welcomed, they are still concerned by the rationale of having as detention for interrogation provision such as this and raise the following matters in connection therewith:

- The detainee may be released if he/she has satisfactorily answered all questions. While a judge must make such a determination, in practice a judge will have to largely rely on the police say so in this regard and the value of judicial oversight in that context is accordingly very limited.

⁶ Under section 35 (1)(a) of the Constitution.

⁷ *Murray v United Kingdom* (41/1994/488/570), 8 February 1996, at 20.

- One of the grounds for requesting an extension of the detention period is ‘ to explore new avenues of interrogation ‘. This is so wide, subjective and vague that it makes effective judicial oversight very difficult.
- If the detainee is also a suspect how is the right to remain silent, enshrined in Section 35(1)(a) of the Bill of Rights, to be reconciled with a provision that would effectively allow for extended detention on account of a failure to answer questions satisfactorily?
- It is unclear why a 14 day detention period is necessary, except if it’s objective is to create sufficient pressure on a detainee to reveal information. If this is the rationale, it would certainly amount to the improper use of the law and in any event the admissibility of evidence obtained under such circumstances would no doubt become a matter of some contention.

13.422 The Defence Secretariat suggests that in the light of the perception of the word *interrogation* it should be replaced with the word *questioning* and for the sake of consistency this should be applied throughout the Bill wherever the word *interrogation* has been used. The Secretariat notes on the issue of the detainee’s right to remain silent, that clause 16(6) makes provision for the detainee to be provided with legal presentation. The Secretariat considers that it is unclear whether provision for legal presentation will provide an effective safeguard for the detainee to remain silent and not to answer questions put to the detainee should the legal representative so advise. The Secretariat explains that this follows from the requirements of clause 16(2)(i)(aa) that the detainee must answer questions put to him or her to the satisfaction of the judge. The Secretariat notes that this would imply that the detainee’s right to remain silent is infringed in that it is expected of the detainee to answer questions. The Secretariat considers that this is the purpose of detaining persons suspected of having committed terrorist acts and that this clearly infringes the detainee’s right to remain silent as he or she cannot remain silent and must answer the questions put to him or her. The Defence Secretariat is of the view that the infringement of the person’s right to remain silent cannot be reconciled with the objective of the Bill. The Secretariat considers that it would in all probability fail the limitations test of section 36 of the Constitution.

13.423 The Chief: Military Legal Services remarks that this clause will create the impression that the country’s judiciary is actively involved in fighting terrorism thus losing their independence from Government, as the accused must be brought before a judge who will decide on the case. They consider it should never be for the judge to decide that answers given to questions during interrogation was sufficiently answered as it will be viewed that the judiciary is losing its impartiality.

13.424 Mr JHS Hiemstra, Deputy Director of Public Prosecutions in the Free State, remarks that it would be surprising if a legal practitioner were to advise his client to speak and to incriminate himself. He considers that the right to consult with a legal practitioner, to be visited by his or her medical practitioner or spouse as envisaged by clause 16(6)(c) ought to be qualified so as to not negate the purpose of the detention if it is to have any practical value at all. The LRC remarks that the South African legislation does not provide for drawing of a negative inference should the detainee exercise the right to remain silent, not that they are daring the legislature to do that.

(iii) Evaluation

13.425 The focus of the provisions to induce the cooperation of witnesses has shifted in the proposed new clauses dealing with investigative hearings. Detention is not the only option available. A potential witness could also be released on warning. The message would however be clear. The witness will have to comply and tender the information known to him or her unless he or she can rely on privilege. The remark by the Constitutional Court in the case of *Nel v Le Roux* applies fully:

The s 189(1) proceedings are not regarded as criminal proceedings, do not result in the examinee being convicted of any offence and the imprisonment of an examinee is not regarded as a criminal sentence or treated as such. If, after being imprisoned, an examinee becomes willing to testify this would entitle the examinee to immediate release; in American parlance such examinees 'carry the keys of their prison in their own pockets'. The imprisonment provisions in s 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee.

13.426 The project committee recommends that a police officer who arrests a person in the execution of a warrant issued pursuant to an investigative hearing under clause 19 shall, without delay, bring the person, or cause the person to be brought, before the judge who issued the warrant or another judge of the same court, and must promptly inform the person of the reason for being detained in custody. The Commission agrees with this recommendation.

(i) **Periodic appearances of a detainee before a judge**

(i) Evaluation contained in discussion paper 92

13.427 The project committee considered in the discussion paper the question how often the detainee must appear before a judge. The original draft said that any person arrested in terms of a warrant issued under clause 16(1), must be brought before a judge within 48 hours of such arrest and thereafter not less than every 7 days. The committee noted that it decided under clause 16(4) that the maximum period of detention should be 14 days. The committee proposed that clause 16(3)(a) provide as follows: “within 48 hours of such detention and again after a further five days”. The committee also noted that clause 16(3)(c) talks of detention and decided that in the first line of clause 16(3)(a) the word “arrested” must be substituted with the word “detained” and the word “arrest” in the second line of paragraph (a) be substituted with the word “detention”.

13.428 The committee suggested that the words “every such” in “every such appearance” be deleted in the first clause 16(3)(b), and that it be substituted with “each” appearance. The committee further considered that the judge before whom the detainee appears in terms of clause 16(3)(b) is not necessarily the judge referred to in clause 16(1) or 16(2). The committee noted that under clause 16(2) its view was that it should preferably not be the same judge. The committee therefore suggested that clause 16(3)(b) should provide that “The judge referred to in paragraph (a) must at each appearance of the detainee ...”.

(ii) Comment on discussion paper 92

13.429 Amnesty International notes that the Bill proposes that any person detained in terms of a warrant issued under clause 16 (1) should be brought before a judge within 48 hours and thereafter once every seven days or, as suggested in the discussion paper, again after a further five days (subclause 3 (a)). The Bill proposes that a person should not be detained without being charged for a period in excess of 30 days (subclause 4). AI points out that the project committee noted that it considered 30 days too long and proposed a 14-day limit, adding, however, that this was “a random figure but in principle [the period] ought to be confined to as short a period as can be justified”.¹

¹ AI notes that international standards require that a person must be informed “promptly” of the charges against them (Article 14 (3) of the ICCPR, Article 20(2) of the Yugoslavia Statute; Article 19(2) of the Rwanda Statute, Article 67(1)(a) of the ICC Statute) and that too long a delay will be a breach of the right to trial within a reasonable time (Article 9(3) of the ICCPR). Under section 35 (1)(e) of the Constitution an arrested person must be brought before a court within 48 hours and charged or released.

13.430 AI remarks that the subclauses require the authorities to produce the detainee before a High Court judge within 48 hours, which appears compliant with national and international legal standards. AI comments that the positive effect of this is, however, undermined by the absence in clause 16 of any explicit link between the reason for arrest and the ongoing detention. AI considers that there is a risk that the judge's role becomes primarily one of determining if the detainee has answered questions "satisfactorily", and not of hearing whether or not there exists a *prima facie* basis for charging the detainee with any offence, and in addition, the extension of the period allowing for the interrogation of the detained person to up to 30 days, or even 14 days, is contrary to international human rights standards, as well as South Africa's own Constitution, except under conditions of a declared state of emergency.²

13.431 Amnesty International notes that the judge will be obliged, under clause 3(b), to enquire about the "conditions of the detainee's detention and welfare", but it is not indicated how this should be done, and there is also no indication as to what the judge should do were he or she to find evidence of ill-treatment, nor if such evidence and related concern would be a basis for ordering the release of the detainee. AI states that South Africa is obliged under Article 12 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to ensure that "its competent authorities proceed to a prompt and impartial investigation, whenever there is reasonable ground to believe that an act of torture has been committed". AI suggests that explicit procedures should hence be in place to clarify the judge's responsibility.

13.432 IDASA points out that In the United Kingdom, the *Terrorism Act, 2000* provides that after the first review all subsequent reviews should be carried out at intervals of no more than twelve hours. Thus, the detention period is reviewed every twelve hours to ensure that there is no violation of the individual's rights or of the law. In addition, that if there is no further need to detain and individual the review officer may seek to release the detainee. Our draft legislation only makes provision for 2 possibilities of review and an additional one in terms of clause 16(7) ie 48 hours after being detained and on the fifth day of detention. Thus an individual may be detained for an additional 9 days without review unless he has suffered harm or abuse by the police or interrogators. Understandably, the law does not permit any abuse of the detainee, however, this does not guarantee that his or her rights will be fully upheld.

² Under Sections 35 (1)(d). The right is derogable where a state of emergency has been declared (section 37 (5)(c) and State of Emergency Act, No. 64 of 1997).

Therefore, during the remaining 9 days, no mechanism of review is granted, which is problematic. IDASA says that interestingly, in the United Kingdom the laws relating to terrorism have been criticised for causing the detention of hundreds of people each year, of which only a small percent are ever charged. Critics contend that the detention route is used primarily as a means of harassment and to obtain information. IDASA states that we need to guard that this does not happen in South Africa, and that the need to provide additional safeguards for the accused is thus essential.

13.433 **The SAPS: Legal Component: Detective Service and Crime Intelligence** comments that it is not necessary to require that different judges deal with the initial application and any further applications for extension, as the first judge would have the benefit of the background of the application. He could also ensure that any conditions laid down by him during the initial application, are being adhered to in letter and spirit.

13.434 **Messrs Fick and Luyt of the Office of the Director of Prosecutions: Transvaal** comment that other than his right to make representations to a judge at any time during his detention, it seems that the detainee could be in uncontrolled detention for the remainder of the detention period. They pose the question what form can the proposed representations to a judge take on, and whether the detainee will have the right to be brought before a judge as many a time as he wishes? They explain that surely, the experience with detainees under similar statutes in the past has shown that they will, in order to make life as difficult as they can for the authorities, request to be brought before a judge several times per day. They ask what will the powers of a judge be where the representations of the detainee is made within the remainder of the period?

13.435 **Martin Schönteich** says³ that in its discussion paper, the project committee concedes that the 14-day detention period is a 'thumb-suck'. He considers that this is not surprising, as each terrorist investigation is likely to be different, and some detainees will need to be interrogated for longer periods than others before they reply "to all questions". He suggests that the lack of a proper basis for coming up with a 14-day detention period could easily become the Achilles heel of some of the important liberal principles on which the 'new' South Africa is based. He says once policy makers and the courts accept the principle of detaining someone for 14 days as a legitimate investigative tool, they will be hard pressed to resist police requests for extensions of this period for the investigation of particularly

³ *In Fear in the City, Urban Terrorism in South Africa.*

serious cases. He poses the question which ANC politician would resist increasing the detention period — or even amending the Constitution as then Safety and Security Minister Steve Tshwete has on more than one occasion threatened to do — should there be a resurgence of right-wing terror activities targeted at black people or ANC office bearers.

(iii) Evaluation and recommendation

13.436 The project committee considers that there is no need under its redrafted provision for periodic appearances by the potential witness, as was the case under the clause proposed in the discussion paper. It is however recommended that in clause 22 the judge in question may order that the person be detained in custody or released on bail, upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail, or released on warning. It is further recommended that such an order may include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order, including the conditions of detention, if detention is ordered.

(j) Enquiries by the judge into the detainee's conditions of detention and welfare

13.437 The project committee also considered whether under clause 16(3)(b) the judge should simply only enquire whether the detainee has satisfactorily answered the questions put by the police to him or her. The committee considered that provision should be made in the clause that a judge must enquire about the welfare of the detainee and about the conditions of detention at each appearance before him or her.

13.438 The SAPS: Legal Component: Detective Service and Crime Intelligence supports this proposal. The Chief: Military Legal Services points out that it will be futile if a judge were to enquire whether the detainee has answered questions satisfactorily as the judge might not know what questions were put to the detainee.

(i) Evaluation and recommendation

13.439 It was recommended in the preceding part on periodic appearances of a detainee that a judge before whom an arrested person appears may, to ensure compliance with the order, order that the person be detained in custody or released on bail, upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or

her bail, or released on warning. It was further recommended that an order may include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order, including the conditions of detention, if detention is ordered.

(k) DPPs must justify further detention

(i) Evaluation contained in the discussion paper

13.440 The project committee noted that the original clause 16(3) contemplated that further detention be ordered by a judge and that he or she has to determine whether it will serve any useful purpose to detain the detainee further. The committee raised concern in the discussion paper that there might arise a dispute between what the police and the detainee are alleging. The committee considered that the Director of Prosecutions should justify further detention. The committee noted that there were two aspects involved under clause 16(3)(b), namely whether such detainee has satisfactorily replied to all questions under interrogation and whether it will serve any lawful purpose to detain him or her further. (The original draft suggested the wording “and whether it will serve any useful purpose to detain him or her further”. The committee was of the view that the word “lawful” should be substituted for the word “useful” as it would contain another safeguard for the detainee and that it would in all probability always be “useful” from the police officer’s perspective if judge were to extend the detainee’s detention.) The committee also considered the issue whether the interrogator is satisfied with the information which he or she has obtained. The committee asked the question what will happen under the Bill if the judge says that he or she is not satisfied with the officer’s request to detain the detainee further, and that it seems to the judge that maybe the detainee does not have the information sought. The committee considered if the judge is in doubt then the detainee must be released.

13.441 The project committee recommended that provision be made in clause 16(3)(c) that the onus in showing reasons for the further detention of the detainee shall be on a Director of Public Prosecutions failing which the judge shall order the release of the detainee.

(ii) Comment on discussion paper 92

13.442 IDASA notes that in terms of s35 (1)(a) of the Constitution, “Everyone who is arrested for allegedly committing an offence has the right to remain silent and.... the right to not to be compelled to make any confession or admission that could be used in evidence

against that person.” However, under clause 16(3)(b) of the proposed Bill, a detainee appearing before a judge must “*satisfactorily answer* the questions put to him or her by the police.” IDASA considers that the use of the word “satisfactorily” suggests that a detainee’s ability to answer the question would influence his or her ability to gain release. IDASA notes that no mention is made of the accused’s right to remain silent and what would happen should the accused decide to exercise this right. IDASA considers that there is a definite need to articulate this in the legislation. Therefore, IDASA says, in terms of the Draft Bill, if a detained individual refuses to answer the questions posed by the police his detention may continue as long as the Director of Public Prosecutions together with the police are not in breach of the terms of the court order. In fact, in terms of clause custody may continue “to explore new avenues of investigation” (once again if proved to a judge that it is necessary). Theoretically the accused could remain in custody for a period far in excess of 14 days. Nowhere is a limitation placed on the length of time for which the accused may *in toto* be detained. This may open the door for the repeated detention of the accused. IDASA argues that a Director of Public Prosecutions could argue that further detention is necessary to obtain information, because the detainee refuses to answer the question posed to him or her. Detention by its very nature is a coercive process and the individual may, after a long period of detention either of 14 days or a prolonged period as envisaged in clause 16(7), make an admission more readily to secure his release. IDASA notes that the safeguards in clause 16(3)(a) are therefore not sufficient, in their view, to protect individual rights. IDASA suggests that the Commission should therefore consider limiting detention to 10 days without conclusive evidence of terrorist involvement. IDASA points to the possibility that those detained by false pretence or false information may suffer irreparable damage, such as the loss of employment, status in their community, family stability and psychological trauma, and considers that if adequate or sufficient information cannot be obtained within 10 days as required by the Constitution, the accused should be released. IDASA comments that a court order compelling the accused to remain in the immediate area could be sought in the event that the accused is again needed for questioning and considers that this may occur as new evidence may come to light concerning the involvement of the accused in terrorist acts. IDASA considers that an accused should exercise the right to remain silent and the court should not draw negative inferences as a result of such silence. IDASA notes that in the United States stringent anti-terrorism legislation was implemented but that the right of the accused to remain silent in cases of terrorist attack is paramount. They consider that the *Anti-Terrorism and Effective Death Penalty Act* (“AEDPA”) although very stringent has maintained a balance between the constitutional liberties of citizens and the increased investigative powers of the FBI when implementing anti-terrorist measures.

(iii) Evaluation and recommendation

13.443 The committee discarded the concept of detention for interrogation and the idea that the DPP has an onus to establish the further detention of a witness. The new provisions enable a judge to order a witness to appear at an examination and should the witness fail to appear, to remain present or to furnish information, only then the question of detention or imprisonment arises.

(l) Provision for representations

(i) Evaluation contained in discussion paper 92

13.444 The committee noted that under clause 16(3)(c) any person detained under clause 16(1), may at any time make representations to the judge relating to his or her detention or release. The committee considered whether the words “relating to his or her detention” would include “relating to the conditions of his or her detention”. The committee noted that part of its deliberations was how does the detainee make meaningful representations unless he or she knows the reason for the detention and that the committee considered that the furnishing of reasons should be one of the obligations to be imposed upon the authorities under the Bill. The committee was not sure whether the detainee has the power to make representations relating to his or her conditions of detention considering the way the clause is phrased and whether it is made clear enough. The committee considered that it should be spelled out in clause 16(3)(c) that the detainee may also make representations relating to conditions of detention.

13.445 The committee once again considered the question who the judge is or should be to whom the detainee may make his or her representations. The committee noted that there will be a statement on oath made by a DPP before a judge issues the detention warrant, and even if there is another judge within 48 hours before whom the detainee appears, that judge is entitled to determine whether there was justification for the warrant for detention authorised by the first judge. The committee suggested that for purposes of authorising the detention or considering representations relating to release or conditions of detention, any judge is in as good a position as any other judge to determine the justification for and conditions of detention. The committee considered that the first appearance after the first 48 hours and again after five days, are important. The committee said that where a judge considers the matter after the first 48 hours, he or she will have the statement on oath, will be able to determine what the reasons and justification was for the detention and whether there is any reason why the detention should be continued. The committee considered that the fact that different judges deal with different stages of the

detention of a detainee seems to be a good idea to prevent any suggestion of forum shopping where otherwise particular people are being detained by particular judges on particular days because they happen to be on duty. The project committee noted that the original proposal was that the representations to the judge must be in writing. The committee considered whether provision ought not be made for assistance to be rendered to the detainee. The committee imagined that there may be detainees who are sometimes unable to articulate the reasons why they should be released and as far as written representations are concerned, some might be unable to put something in writing. The project committee therefore considered that reference to the representation to be in writing should be deleted in order to entitle detainees to make representations in any way.

(ii) Comment on discussion paper 92

13.446 Amnesty International comments that the first section of subclause 3(c) of the Bill provides only the right to make written representations to a judge. AI says that the Commission's amendment would have the effect of leaving open the possibility of making oral representations to a judge and that the scope of this right under subclause 3(c) is not clear. AI points out that it is certainly weaker than the provision envisaged under a declared state of emergency by which "the detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings and to make representations against continued detention".⁴ **AI remarks that Principle 32(2) of the UN Body of Principles requires that "the detaining authority shall produce without unreasonable delay the detained person before the reviewing authority" and that it is clearly an important protection to the safety of the detainee that they appear in person in any proceedings challenging the lawfulness of the detention.**

13.447 **Amnesty International considers that it would seem vital that the representations can and should be made to a High Court judge who is not involved in the ongoing review of the detention. AI notes that under Principle 32 of the UN Body of Principles, governments are required to create procedures for challenging the lawfulness of detention and obtaining release without delay if the detention is unlawful, and the review of the lawfulness of the detention must ensure that it was carried out according to the procedures established by national law and that the grounds for detention were authorised by national law. AI explains that the detention must comply with both the substantive and the procedural rules of national legislation, and in addition, courts must also ensure that the detention is not arbitrary according to international standards. AI states that an arrest or detention which may**

⁴ Constitution of the Republic of South Africa, Section 37 (6)(g)

be lawful under national law may nonetheless be arbitrary under international standards, for example, if the law under which the person is detained is vague, excessively broad, or is in violation of other fundamental standards such as the right to freedom of expression, or where elements of inappropriateness, injustice and lack of predictability are involved.⁵

(iii) **Evaluation and recommendation**

13.448 The proposed new provisions also make provision for an arrested person to be brought without delay, before the judge who issued the warrant or another judge of the same court. The police officer must promptly inform the person of the reason for being detained in custody. Hence the person is in a position to challenge his or her detention and to make the necessary representations.

(m) **Duration of period of detention**

(i) **Evaluation contained in discussion paper 92**

13.449 The project committee expressed concern that the Bill provides for detention for the purposes of interrogation for a period of up to 30 days. The committee posed the question why ought this period be sanctioned. It considered that in calculating the period it means it is four times seven days plus 48 hours and wondered whether the period such not be drastically reduced. The committee noted that 30 days is actually the longest period compared to all the other places where detention is allowed. The committee took into account that within the 30 days period the detainee has to appear before a judge every seven days and that under clause 16(4) substantiation is required for justifying a period as extensive as 30 days or indeed for justifying whatever period is considered in substitution.

13.450 The committee noted that one aspect which was absent from the original draft discussion paper is what happened in the past in South Africa in situations where legislation made provision for detention for interrogation. The committee presumed that during the first 48 hours normally the detainee would be broken down by the use of third degree methods. The committee posed the question what justification can be presented for making provision

⁵ Article 9 of the Universal Declaration of Human Rights, Article 9(1) of the ICCPR, Article 6 of the African Charter on Human and Peoples' Rights, Article 55 (1)(d) of the ICC Statute, and the conclusions of the UN Human Rights Committee, *Albert Womah Mukong v. Cameroon* (459/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, p.12. Under the Constitution, courts in South Africa, when interpreting the Bill of Rights, "must consider international law" (section 39(1)(b)).

in the Bill for the proposed period of 30 days as is set out in the original draft. The project committee pointed out that the length and conditions of detention are two of the important safeguards for detainees to be considered. The committee noted the following remarks which made in the past on this matter:

- The Rabie Commissions fails to examine the methods of interrogation employed by security police in their pursuit of information to anticipate and prevent terrorism and to bring persons to trial. This is even more extraordinary than its failure to consider the subject of deaths in detention. After all, it is these methods of interrogation that gave rise to the greatest suspicion and that, together with the death of Steve Biko, contributed to the public disquiet which led to the appointment of the Rabie Commission. At the very least, one expected an account of the police testimony on matters such as the normal length of interrogations, the number of police officers usually present at interrogations, whether interrogations take place after midnight, whether a regular record is kept of interrogations and whether there is any internal police code of conduct regulating the methods of interrogation.⁶
- **The rule of law — that principle which ensures that no edict of state may overrule the rights of citizens, is now specifically protected in the Constitution. Even if conditions require the proclamation of a state of emergency, no one should be able to be held incommunicado and without being charged, or in circumstances where they are vulnerable to torture and severe ill treatment. In addition, government should never again pass legislation indemnifying the police or other security forces against prosecution or civil claims for illegal actions carried out in support of the state, even under a state of emergency.**
 Where human relations are strained by war, meaningful human rights enforcement requires constant vigilance, and an unyielding commitment to sanctions — no matter how worthy the cause for which one is fighting.⁷
- **It is essential that some time limit be placed on the period of detention. The failure of the Rabie Commission to seriously consider the matter is quite extraordinary; particularly if one bears in mind that before 1967 indefinite detention without trial was considered inconceivable in a legal system claiming to be civilized; and if one has regard to the time limitations on detention for interrogation purposes in other jurisdictions.**
 The Rabie report accepts the principle of indefinite detention without trial for the purposes of interrogation subject (a) to written Ministerial approval for any detention exceeding 30 days and (b) to Ministerial approval, following consideration of a review committee's report, for any detention exceeding 6 months (10.82). As the decision to detain will rest throughout the period of detention with the executive authority, this proposal does not depart in substance from the existing statutory provision authorising indefinite detention. The intervention of the review committee does not change the situation: first, the review committee will simply be an agency of the executive authority; and secondly, its recommendations will not be binding on the

⁶ Prof John Dugard "A Triumph for Executive Power - An Examination of the Rabie Report and the Internal Security Act 74 of 1982" 1982 SALJ 589 - 604 at p 596.

⁷ Final report of the Truth And Reconciliation Commission Vol 5 Chapter 8.

Minister. ...

In Northern Ireland, which is subject to a greater security threat than South Africa, the period of detention for interrogation is limited to 3 days under the Northern Ireland (Emergency Provisions) Act of 1978 and to a maximum of 7 days under the Prevention of Terrorism (Temporary Provisions) Act of 1976. The police in Northern Ireland seem quite capable of securing convictions and of curbing terroristic activities with this limited power of detention. Why, it may then be asked, do our police need more than 7 days for this purpose? No doubt it will be argued that geographical distances are greater in South Africa and that it may take several days for a person to be transported from the border or "operational zone" to police headquarters. So be it. But what conceivable justification is there then for detaining a person for more than 14 days for interrogation (as opposed to preventative detention)?¹

13.451 The Committee also considered the findings and recommendations made by Don Foster and Judge Dennis Davis² in *A Study of Detention and torture in South Africa: A Preliminary Report*. The authors explain that their empirical study was conducted by means of personal interviews with former detainees on a country-wide basis and that the sample consisted of 176 cases of detention:³

Questions were directed to obtain information on detainees' experiences of interrogation conditions. In this section, results are reported for length of interrogation sessions, estimated number of interrogation sessions, and the average number of interrogators present as well as other details.

Clearly the time period of interrogation sessions as well as the number of interrogators present, may vary from one session to the next. Therefore the situation as reported here does not necessarily reflect in detail the situation experienced. The picture reported here reflects the average or the typical situation as experienced by detainees.

...

The variation was similarly wide in results of typical time length of sessions; ranging from one to twenty-four hours. The modal value was six hours, closely followed in most frequent time length by eight hours. The mean length of interrogation per session was 6.6 hours. It is noteworthy that some six per cent of the sample claimed typical interrogation sessions of between 16 and 24 hours in length. It may be recalled that the inquest of Dr Aggett also revealed that he was subjected to very lengthy periods of unbroken interrogation.

...

Finally, the majority of cases (67%) claimed that a statement was made. A bald figure such as this tells us little of the nature of such a statement, why it was given, how much information was revealed, or under what duress it was given. One third of

¹ *Report on the Rabie Report: An Examination of Security Legislation in South Africa* March 1982 Centre for Applied Legal Studies, University of the Witwatersrand at p 39 - 41.

² Professor Davis at that stage.

³ By Don Foster and Diane Sandler in 1985 published by the Institute of Criminology of the University of Cape Town. See also Don Foster, Dennis Davis and Diane Sandler *Detention and Torture in South Africa: Psychological, Legal and Historical Studies* David Philip: Cape Town 1987.

respondents claimed on the other hand that no statement was given, yet that does not mean that certain information was not gained by the interrogators.

Results in this section simply provide broad outlines without giving any penetrative understanding of the processes involved. Yet it is not entirely insignificant to know that respondents in this sample were most typically subjected to six to eight hours of interrogation, conducted usually by two or three interrogators at a time, for an average of about 11 sessions and that two-thirds of detainees claimed to have made written statements. Given the assumption that few detainees would have made statements to the security police entirely out of free will (for example if not faced by the system of detention) it is possible to speculate that some degree of coercion - physical, psychological or both - was highly likely to have played a part in drawing statements from as many as two-thirds of respondents.

13.452 The project committee posed the question whether it is to be presumed that it is simply a question of isolation which unlocks the desired information, and how long has it taken statistically and on average to get to this information. The committee however also noted the adverse effect which is caused by detention and the adverse effect it might have on the information which the detainee will in all probability present.⁴ The committee noted that the original draft does not tell anything of the conditions of detention and considered that it was presumably envisaged that detention would be without access to anyone or to any news. The committee also noted the following remarks the court made as recently as 1993 in *S v Wanna*⁵ on conditions of detention and their influence on detainees:

⁴ See Jay Levin "Torture without Violence: clinical and ethical issues for Mental Health Workers in the Treatment of Detainees" 1986 *SAJHR* 177 - 185 at p 178 *et seq*: "It is appropriate to refer to certain forms of detention as torture without physical violence. The non-physical but violent stressors involved in detention have been popularized as debility, dependency and dread, and comprise the DDD syndrome. Debility, dependency and dread are probably the most well-known of the psychological stressors which occur in conditions of detention and cause psychological distress.

'Debility' refers to the psychological effect caused by controlling sensory input from the environment. Prolonged sensory isolation, for example, can result in increased suggestibility, anxiety, tension, inability to concentrate or organize one's thoughts, vivid sensory imagery, usually visual, sometimes reaching the proportions of hallucinations with delusory quality, body illusions, somatic complaints, and intense accompanying subjective emotional reactions and, generally, difficulty in organizing one's behaviour. ... These three factors - uncontrollability, unpredictability and unaccountability (UUU) are common to those situations which would be described by the victim as torture. ... Psychotherapy cannot be more than supportive in the context of detention, and at best may achieve symptomatic relief. Psychological intervention cannot be a substitute for the re-establishment of normal social and environmental controls in the life of the detainee. It is not satisfactory merely to treat the symptoms that a detainee shows."

See further Prof David McQuoid-Mason "Detainees and the Duties of District Surgeons" 1986 *SAJHR* 49 - 59 at p 57: "One of the main problems facing a detainee wishing to bring an action against the authorities for ill-treatment is that very often it is his word against that of a number of policemen or interrogating officers. Apart from this, because of the detainee's exposure to psychological pressures it may be that his powers of recollection are not as great as they could be. This is particularly true of detainees who suffer from the DDD syndrome, whereby as a result of 'debility, dependency and dread' they become disorientated, confused and willing to comply with the wishes of their interrogators. ..."

⁵ 1993 1 *SACR* 582 (Tk) at 589 - 590.

The Attorney-General has drawn attention to the mention in evidence that was made in passing to the effect that of the 19 accused before Court some - the number was not mentioned - did not make a written statement, while others - again no number was given - made exculpatory statements. He further pointed to Professor Mkize's evidence that not all people would be cowed into making a statement by reason of the stress of s 47 detention, and that some people indeed might react in the opposite way and would stiffen their resolve not to yield to the pressures brought to bear on them. Accordingly the Attorney-General submits that one cannot assume that those accused who did make confessions did so because of the undue influence created by s 47 detention.

In the cross-examination of Professor Mkize there was much debate as to what is meant by a 'normal person', and as to what percentage of the population would fall into that category. Courts are not however, concerned with debates of so esoteric a nature, and do not usually experience difficulty in knowing, as a matter of ordinary common-sense, how people in general would be likely to react in a given situation. As Williamson J put it at 585C of Mpetha's case:

'Obviously, if in a particular case there is evidence of factors which a court thinks are objectively calculated or likely to influence the will of a person, then from a purely pragmatic point of view it will not be easy for the prosecution to satisfy the court that there is no reasonable possibility of these factors in fact having had an influence subjectively on the particular accused.'

It hardly needs a psychiatrist to tell one that the mere threat, let alone the actual experience, of indefinite detention in solitary confinement and at a place unknown to and unreachable by family, friends and legal advisers, all in consequence of not speaking, would be a most frightening thing for the overwhelming majority of people, and would exert a most powerful influence on their minds to speak in the hope of ending such misery as soon as possible. When therefore, someone who is in so parlous a predicament does speak, the obvious and natural probability is that he has done so because his freedom of volition to maintain silence has been impaired, and I fail to understand how this probability is lessened by the fact that others seemingly did not yield to such pressure. There will always be those who are made of sterner stuff than their weaker brethren, even to the extent at time of embracing death rather than reveal information required by the interrogators.

13.453 The committee therefore questioned the original proposal that the Bill should provide in clause 16(4) for detention for a period of up to 30 days. The committee recommended that detention under a warrant issued in terms of clause 16 should be for a period no longer than 14 days. The committee explained that the answer that it should be 14 days is a thumb-suck. The committee noted that under British legislation the maximum period was 28 days.⁶ The committee remarked that

⁶ In terms of the English Terrorism Bill the total period for would be possible to detain a person without charge will be seven days from the time of their arrest, or if it is under the provisions concerning port and border controls, seven days from the time when their examination by an examining officer began. The application to extend a person's detention will have to be made within the initial 48 hour period after their arrest or within 6 hours of the end of that period, and the judicial authority will be permitted to issue a warrant of further detention only if satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary to obtain relevant evidence whether by questioning him or otherwise or to preserve relevant evidence, and the investigation in connection with which the person is detained is being conducted diligently and expeditiously.

Under the Lebanese Code of Criminal Procedure an arrested person must be questioned by the examining magistrate or another judge within 24 hours of arrest otherwise the Prosecutor-general must order the arrestee's release.

In 1997 the maximum terms of police detention was substantially shortened in Turkey from 30 days to 10 days in provinces under a state of emergency legislation, and from 14 days to

the period of 14 days is in essence a random figure but in principle it ought to be confined to as short a period as can be justified.⁷

(ii) Comment on discussion paper 92

13.454 IDASA comments that detention for 14 days and longer has been viewed by many human rights groups as being too long a period to detain an accused. They say they would agree and would request that the Commission review its position. They submit that the 14 day detention period is not a "reasonable and justifiable (limitation of rights) in an open and democratic society, as is required by s36 (1). They note that it must be borne in mind that the basis for the accused's detention is "on the ground of information submitted under oath by a Director of Public Prosecution, that there is reason to believe....that the accused has been involved in terrorist activities or has knowledge of such activities." IDASA says that the Director of Public Prosecutions would in all likelihood be relying, inter alia, on the police to furnish him with information, and given the South African experience and the lack of

seven days throughout the rest of the country. The legislation further proposed that detainees suspected of political offences were to be held for four days incommunicado, and that the detention should be extendable to seven days on the order of a judge, with access to a lawyer after the first four days. It was noted above that Amnesty International pointed out that the Commission of Human Rights of the Council of Europe stated in October 1995 that while it recognised the emergency situation in southeast Turkey, the Commission questioned the necessity for prolonged detention without judicial control and that the Commission said: "The individual may therefore, to a large extent, be cut off from the outside world for a period of time which can lend itself to abuse... In these circumstances, the Commission is of the opinion that, despite the serious terrorist threat in Turkey, the measure which [allows detention] for 14 days or more without being brought before a judge ... exceeded the Government's margin of appreciation and could not be said to be strictly required by the exigencies of the situation."

⁷

The committee was of the view that it does not know how the 30 day period is justified and that the 30 day period or any shorter period should be justified for future purposes.

investigative skills amongst the police, it would appear dangerous for the "reason" for the infringement of someone's liberty to be reliant on what may be erroneous information. They consider that any limitation of individual freedom ought only to take place in exceptional circumstances. IDASA remarks that it is however encouraging that the Commission appears to have kept an open mind as regards the detention period by stating that the 14 day period is "a random figure which ought to be confined to as short a period as can be justified." IDASA therefore suggests that the 10 day period as prescribed in terms of s 37(6)(e) of the Constitution (state of emergency provision) would be sufficient and would meet the standard of being a "reasonable and justifiable" limitation. They state that unlike Mr Justice Van Dijkhorst who contends that "there is not much difference between 14 days and 10 days", they would argue that there is a great difference as one could suffer serious psychological trauma as a result of continued detention, and they do not believe that there is justification to restrict the rights of the accused in an even greater manner than the restriction placed on him in a declared state of emergency.

13.455 The SAPS: Legal Component: Detective Service and Crime Intelligence comments that one should not afford too much meaning to the maximum period of detention, as it would always be within the discretion of the judge to allow detention for a much shorter period, depending on the circumstances of the specific case. The SAPS notes that under the *Interception and Monitoring Prohibition Act, 1992*, the maximum period for which a direction may be issued by the judge is three months. The SAPS explains that in effect it often happens that the judge allows it for only a few hours or days, if a longer period is not warranted, that in terms of the present bail legislation a suspect may be kept in custody for further investigation for periods of seven days at a time, and that the total period is not stipulated, since it would be determined by the circumstances of the case. The SAPS points out that the maximum period of detention in Britain is seven days, and in terms of the South African bail legislation a person may be kept in custody for seven days at a time in order to do further investigations. The SAPS suggests that in South Africa, a period of at least 7 days of detention is justified.

13.456 The Defence Secretariat says that no alternative period to the fourteen provided in clause 16(4) can be suggested in view of the fact that the expected results of interrogation may only materialise after a certain length of time. The Secretariat considers that our courts may be called upon in the future to pronounce on the validity of this time frame and the position remains unclear whether in fact this aspect of the clause will survive constitutional scrutiny. The Secretariat suggests that a look

and wait position be adopted if and when the courts are called upon to pronounce on the issue.

13.457 Mr CDHO Nel, Director of Public Prosecutions in Port Elizabeth comments that he was the Attorney-General the Judge referred to in the *Wanna* case (referred to above) and that this case was viewed as a lodestar judgment on the influence and effect of the formal warning administered to a detainee regarding detention until replying satisfactorily. He explains that this judgment excluded confessions after security detention solely upon the basis of such formal caution having been uttered and despite the feature that the deponent accused who bore the legal onus to disprove voluntariness or to prove undue influence, never testified. He notes that nothing had been found by the court by way of criticism militating against the quality of the evidence of the security Branch. He says in consequence he does not entertain much expectation for the prospects of the admissibility of statements procured in the wake of or coinciding with such detention.

13.458 Messrs Fick and Luyt of the Office of the Director of Prosecutions: Transvaal pose the question whether it is possible under the clause to obtain a new warrant for the same person after the expiry of the initial 14 days? They ask if this is so, under what circumstances and on how many occasions?

13.459 Prof Michael Cowling comments that the length of detention is important — in terms of section 29(a) detainee could be detained indefinitely until the detaining officer was satisfied that all questions had been satisfactorily replied to or that no useful purpose would be served by further detention. He says the Bill retains the purpose and conditions upon which detention is to continue but the original length of detention has been reduced to a maximum period of 14 days, and obviously the more limited the maximum detention period the greater the safeguard.¹

(iii) Evaluation and recommendation

13.460 The new provisions providing for investigative hearings focusses on ensuring the cooperation of witnesses, and detention for interrogation is no longer the aim. Detention of a witness is only a last resort under the new provisions similar to section 205 of the *Criminal Procedure Act*. The committee is therefore of the view

¹ "The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" 2000 *South African Journal of Criminal Justice* Vol 13 (3) at 351.

that the necessity for considering an appropriate period of detention ceases to exist. The potential witness, if he or she fails to cooperate and has to be arrested, is brought before a judge who decides whether the person is released or detained.

(n) **Restricted access to a detainee**

(i) **Evaluation contained in discussion paper 92**

13.461 It was proposed in the discussion paper that subject to the terms of clause 16(6), no person, other than a judge of the high court, an officer in the service of the State acting in the performance of official duties, or a person authorised by the National Director of Public Prosecutions, or a Director of Public Prosecutions may have access to a detainee under subclause(1), or is entitled to any official information relating to or obtained from such detainee. Clause 16(6) provided that a detainee shall be entitled to consult with a legal practitioner of his or her choice, and that such legal practitioner shall be entitled to be present when the detainee is interrogated. It also provided that a detainee shall be entitled to be visited in detention by his or her medical practitioner, and that a detainee shall have the right to communicate with and be visited by his or her spouse or partner, next of kin, and chosen religious counsellor, unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such communication or visit should be refused.

(ii) **Comment on discussion paper 92**

13.462 Amnesty International comments that clause 16(5) lays down restrictions on access to the detainee, confining automatic access only to a judge of the High Court, officials, or persons authorised by the National Director of Public Prosecutions (NDPP) or a regional DPP. AI notes that the drafters have not included provision for “international humanitarian organisations” as is envisaged under a declared state of emergency,² **similarly, only the listed judicial and other officials are entitled to any “official information” relating to or obtained from the detainee.**

13.463 AI considers that these provisions are very drastic and would amount to legitimising incommunicado detention, which can increase the risk of torture, ill-treatment and “disappearances”. AI points out that international standards and treaty

² Section 4 of Act 64 of 1997 - “Regulations governing the detention of persons shall provide for such international humanitarian organisations as may be recognised by the Republic to have access to persons detained under such regulations in order to monitor the circumstances under which such persons are detained”.

bodies provide that restrictions and delays in granting detainees access to the outside world are permitted only in very exceptional circumstances and then only for very short periods of time. In the view of the United Nations Commission on Human Rights, “prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment”.³ AI states that the United Nations Special Rapporteur on torture has called for a total ban on incommunicado detention, stating that:

“Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention.”⁴

13.464 Amnesty International notes that the United Nations Human Rights Committee, the treaty body monitoring compliance with the International Covenant on Civil and Political Rights (ICCPR), has found that the practice of incommunicado detention may violate Article 7 of the ICCPR (prohibiting torture and ill-treatment) or Article 10 of the ICCPR (safeguards for people deprived of their liberty).⁵ AI states that in its examination of Peruvian laws allowing up to 15 days’ incommunicado detention at the discretion of the police to interrogate detainees suspected of terrorism-related offences, the same body stated that “incommunicado detention is conducive to torture and ... consequently this practice should be avoided”, and that “urgent measures should be taken to strictly limit incommunicado detention”.⁶ Messrs Fick and Luyt of the Office of the Director of Prosecutions: Transvaal note that no penalty is attached to the prohibition in sub-clause (5) and pose the question what will happen in the event of a transgression? Prof Michael Cowling remarks that the restriction of access to government officials acting in the performance of their official duties or any other person authorised by the DPP is very much in keeping with the situation under the old dispensation.

(iii) Evaluation and recommendation

³ Resolution 1997/38, para.20

⁴ Report of the Special Rapporteur on torture, UN Doc. E/CN.4/1995/434, para.926(d)

⁵ *Albert Womah Mukong v. Cameroon* (458/1991) 21 July 1994, UN Doc. CCPR/C/51/D/458/1991; *El-Megreisi v.Libyan Arab Jamahiriya* (440/1990) 23 March 1994, UN Doc. CCPR/C/50/D/440/1990.

⁶ Preliminary observations of the HRC: Peru, UN Doc. CCPR/c/79/Add.67, paras 18 and 24, 25 July 1996.

13.465 The project committee considers that there is no justification to continue to restrict access to detainees as was done in the past, but that access can only be restricted on good cause shown.

(o) Access to lawyers

(i) Evaluation contained in discussion paper 92

13.466 The project committee noted that the original draft legislation was silent on the issue of the detainee being entitled to legal representation and considered that it is absolutely crucial that consideration be given to aspects such as access to lawyers and admissibility of statements made by detainees while interrogated in detention. The committee also noted that the Constitution provides that detainees are entitled to choose and to consult with a legal practitioner.⁷ The committee pointed out that the original draft derogates from this constitutional position where in clause 16(5) the original Bill prohibited access to the detainee by anyone other than a judge of the high court, an officer in the service of the State acting in the performance of his or her official duties, or a person authorised by the National Director of Public Prosecutions, or a Director of Public Prosecutions. The project committee remarked that in principle it can accept why where a serious terrorist threat exists, the state should be able to detain people provided the necessary safeguards for detainees exist. The committee however raised concern why the state ought to be able to detain people for purposes of interrogation without providing any independent safeguards to the detainee such as access to a legal representative.

13.467 The project committee considered that in principle none of the fundamental rights contained in the Constitution are absolute and that all rights are theoretically capable of limitation, provided the limitation meets the test of section 36

⁷ 35(2) Everyone who is detained, including every sentenced prisoner, has the right-
(a) to be informed promptly of the reason for being detained;

- .. to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
- .. to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- .. to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
- .. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
- .. to communicate with, and be visited by, that person's — (i) spouse or partner; (ii) next of kin; (iii) chosen religious counsellor; and (iv) chosen medical practitioner.

of the Constitution. The committee therefore considered that, in principle, there is no reason why the Constitution should not allow for detention without trial, provided section 36 is met. The project committee however stated that South Africa has had bitter experiences in the past with torture and detention.⁸ The committee considered that a provision prohibiting access by a lawyer to a detainee would not constitute a limitation but an absolute and unjustifiable abolition of the right.

⁸

The project committee noted the following remarks contained in Amnesty International's 1999 Report on South Africa: (see <http://www.amnesty.org/ailib/aireport/ar99/afr53.htm>)

"There were frequent reports of deaths in custody, some of which resulted from torture or ill-treatment of detainees and prisoners by police, the military or prison warders. A number of people shot dead by police may have been extrajudicially executed, and some political killings were carried out apparently with the complicity of security forces. ... Statutory and non-governmental human rights monitoring organizations continued to receive and investigate numerous reports of torture, ill-treatment and suspected unlawful killings by members of the security forces. In March the Minister of Safety and Security stated that more than 5300 complaints of assault during 1997 had been lodged against the police. The statutory Independent Complaints Directorate (ICD) received 607 reports of deaths in police custody in the first 10 months of 1998, the majority in Gauteng and KwaZulu Natal provinces. It also received 13 complaints of torture in police custody and 103 complaints against the police of assault or attempted murder, the majority in Gauteng province. The ICD was still investigating these cases at the end of the year. ..."

13.468 The committee considered that what it is being told is that seemingly the impetus against allowing lawyers access to detainees, is that lawyers might be co-conspirators or that lawyers can be used as a conduit to alert accomplices. The committee remarked that it does not dispute that this is theoretically possible but it believed that this extremely remote possibility should not permit for determining or testing the justifiability of such far reaching measures. The committee considered that even if one acknowledges the risk that there may well be lawyers who are sort of part and parcel of terrorist groupings that might pass on information, the committee cannot postulate them as the yardstick rather than the general body of lawyers who know how they are to behave professionally. The project committee considered that there could be no justification for excluding or limiting the right of a detainee to have access to and to choose a legal representative to represent him or her¹ and that the Bill should make provision for such access as lawyers can at least provide a crucially important safeguard to detainees.²

¹ See *S v Ngwenya* 1998 2 SACR 503 (W) where Levenson J remarked as follows:
 "When it comes to consideration of s 25(1) the factor which gives rise to the requirement that the suspect be notified of his right to legal representation is the fact of detention. There is nothing in the section which embraces any other aspect than detention. On that basis it seems to me that the only factor relevant in notifying the suspect of his rights is the simple fact of detention. That is the *raison d'être*, the very reasons for the existence of the section. I cannot read into it any requirement that action is required to any other occasion. Section 25(3) prescribes that every accused person has a right to a fair trial. What is 'fair' in a particular set of circumstances is something upon which a group of high-minded philosophers, let alone an assembly of Judges, may fail to agree.
 ... because the concept of 'fair trial' has been emblazoned in indestructible parchment in the Constitution of this country, I am bound to accept its presence and deal with it accordingly. Prima facie a direction that an accused person is to enjoy the right to a fair trial postulates his representation by a legal practitioner. It is therefore no accident that this provision as a feature of his right is listed in the section. ...
 I am left with the thought therefore that by 'fair trial' the Legislator had in mind that which was just, open, impartial and equitable. In a broad sense an accused person may be said to have had a fair trial where, if appropriate, all the considerations set out in the section might be called into play and where he has had every opportunity to advance his defence. ...
 Thus one sees that an accused person is enjoying a fair trial when no impediment is placed in his way as to the defence which he wishes to advance and when, if impecunious, he is represented by counsel paid for by the State. In that event, when witnesses have to be found and subpoenaed to attend court at his request one sees to it that he has the same weapons available to him for his defence as are available to the State for the prosecution."

² See also *S v Soci* 1998 2 SACR 275 (E) where Erasmus J said:
 "In *S v Zuma and Others* 1995 (2) SA 642 (CC) at 651J-653B Kentridge AJ stated that the right to a fair trial conferred by s 25(3) of the interim Constitution embraces a concept of substantive fairness, but at the same time one should not neglect the language of the Constitution. A Constitution embodying fundamental rights should be given a broad construction, but only as far as its language permits. ...
 I come to the facts of the case. The failure of the police, especially Superintendent Goosen, to inform the accused properly of his right to consult there and then with a legal practitioner, violated a fundamental right of the accused in relation to the very matter at hand, that is the projected pointing-out."

13.469 The project committee noted the German legislation limiting access to lawyers of the detainee's choice. It also noted the finding of the German Constitutional Court where an application was made by lawyers to reinstate their access to their clients, the detained Baader-Meinhof members. In refusing access to the detainees the German Constitutional Court held that in balancing the interests concerned it came to the conclusion that the reintroduction of access to the detainees by their lawyers would endanger the negotiations for the release of the abducted Dr Hans-Martin Schleyer to the highest extent. The project committee also noted the following remarks which were made in the past on access to legal representation in South Africa:³

- The exhaustive analyses of British, American and Scandinavian literature demonstrate that the impact of allowing suspects to have their legal advisers present when they are questioned by the police has not been fully investigated. ... In the light of the growing recognition which is accorded to the rights of potential accused persons in modern criminal justice theory there are insufficient grounds for continuing to deny suspects the assistance of counsel during police interrogation in the Netherlands. ...

The questioning of suspects does not necessarily play the central part in police practice that is claimed for it; nor are lawyers likely to be as keen to rush to the aid of clients in the police station as their public protestations suggest. Changes in police techniques and in the mode of practice of lawyers, Fijnaut concludes firmly, could accommodate counsel being allowed access to all questioning by the police of suspects without materially affecting the efficacy of the criminal justice system in controlling crime. The advantage would be that the rhetoric of due process at the stage of police investigation would fit reality more closely.

...

³ See also Charles Goredema "Implications of suspects' and other detainees' rights to legal assistance before the first appearance in court in South Africa" 1997 *South African Journal of Criminal Justice* 237 - 253 at 238 who suggests that the police should refrain from taking any action that is intended to gather self-incriminating evidence from the detainee until he or she has had access to a lawyer, and if no counsel is allowed or provided there should be no interrogation.

When analysing access of detainees to legal counsel South African writers on procedure have concentrated primarily, and for impeccable reasons of human rights, on the extraordinary provisions which exclude the rights of detainees to legal advice. What they have failed to do is grapple with how, and to what extent, lawyers should be able to assist their accused clients once they have been allowed some access to them. But purely legal analyses are not sufficient. What is required in South Africa is for scholars whose primary focus is on the police to describe in detail not only police practice but also the underlying police theory about the interrogation of suspects. This is important work not the least because, following the parallel with the wider impact of developments in Northern Ireland ... they may find that techniques developed to deal with extraordinary circumstances have penetrated 'ordinary' police thinking. Only if police theory and practice are opened to detailed scholarly scrutiny can a start be made on constructing a system which will actually protect the citizen. Only if the dynamics of the exercise of power by the forces of 'law and order' are understood at macro-sociological level can strategies be devised which will prevent spurious justifications being advanced for outmoded practices.¹

¹

Prof D van Zyl Smit "Presence of legal advisers at the interrogation of suspects by the police" 1988 SACJ 295 - 300 at 299 and 300 on the review of the publication by Cyrille Fijnat's *De toelating van raadslieden tot het politieke verdachtenverhoor*.

- The denial of a right to access to counsel¹ was effected under regulation 3(10) of the emergency regulations, and rule 5(1),² issued by the Minister of Justice³ in the exercise of his power 'to regulate the detention of persons in terms of' regulation 3. ... *Omar's*⁴ result was that emergency detainees had neither the protection of the *audi alterem partem* maxim nor the right to access to their lawyers ...
- The denial of detainees' right of access to their lawyers also worsened the plight in which detainees were placed. This is not because many detainees were permanently blocked from seeing their lawyers; in practice, they were not. Because permission had to be obtained for such access, however, the system built in the risk of temporary interferences, which could result in significant delays even though permission would ultimately be granted. It requires no special insight to suspect that the occasions of greatest difficulty in obtaining permission would include precisely those cases in which the gaolers had the most to hide - cases, say, of assault on detainees, whose bruises might disappear before their lawyers could win access to them. One would expect this pattern even if the Minister and Commissioner of Police were completely opposed to such abusive treatment, for they must inevitably rely heavily on subordinate officials for their information about particular cases.

¹ Stephen Ellmann *In a time of Trouble: Law and Liberty in South Africa's State of Emergency* Clarendon Press: Oxford 1992 at p 94 - 98.

² No person, other than the Minister or a person acting by virtue of his office in the service of the State - (a) shall have access to any person detained in terms of the provisions of this regulation, except with the consent of and subject to such conditions as may be determined by the Minister or the Commissioner of the South African Police.

³ No person detained ... shall ... be visited by any person, except with the permission of the person in command of the prison in question, acting with the concurrence of the Commissioner of the South African Police or any person acting on his authority: Provided that if a legal representative desires to visit such a detainee, the permission of the Minister of Law and Order or the Commissioner of the South African Police shall be obtained for such a visit.

⁴ *Omar and Others v Minister of Law and Order and Others* 1987 3 SA 859 (A).

- A major criticism of s 6 of the Terrorism Act was the denial of access to detainees by their legal advisers. The [Rabie] Commission considered this matter, but endorsed the denial largely on the ground that lawyers cannot always be trusted and that they might misuse their professional position to convey messages to or from a detainee.¹

Not only does such an approach cast an unwarranted slur on South African lawyers - one which is aggravated by the reference to the notorious conduct of the Baader-Meinhof gang - but it fails to take account of the importance of the fundamental right to counsel and of the fact that in Northern Ireland, where security risks are even greater, lawyers are, in terms of recommended guidelines, granted access to a client after 48 hours 'detention.

- The failure of the Internal Security Act to provide for adequate legal assistance to a detainee while in detention for the purpose of interrogation stems directly from the Rabie Report and is to be deplored. In its report the Rabie Commission stated that while it attached 'great value to legal representation' it was nevertheless of the opinion that the overriding factor was the protection of 'sensitive information' that had necessarily to be disclosed at the proceedings of the review committee. ...

¹ Prof John Dugard "A Triumph for Executive Power - An Examination of the Rabie Report and the Internal Security Act 74 of 1982" 1982 SALJ 589 - 604 at p 599.

The observance of the minimum standards of procedural fairness requires that if one party to a dispute is given the benefit of legal assistance and advice, such a privilege should be extended to the other party to the dispute. While it may be readily conceded that certain lawyers have in the past been guilty of 'subversive activities', it surely does not follow that *all* detainees should be denied *all* access to *all* lawyers. The Rabie Report stated that it doubted whether the legal profession would be prepared to accept any legal system in terms of which particular legal representatives were, for security reasons, not permitted to appear at review proceedings or were permitted to appear only during parts of the proceedings. Once again, the logic behind the assumption is to be doubted. In Israel, a country which has at least the same level of terrorist activity to contend with as does South Africa (and probably much more), a system has been accepted whereby lawyers acting for detainees must be in possession of an official authorization permitting them to act as defence counsel in courts martial. While such a system, no doubt, is not flawless and is open to criticism, it is preferable to the procedure recommended in the Rabie Report and adopted in the Internal Security Act. There can be little doubt that the evidence presented to the review board on behalf of the Minister will be presented to it by a competent and legally trained person. Surely such a 'privilege' should be extended to a detainee.¹

This 'privilege' could be exercised in one of at least four ways:

- (b) by allowing the detainee to choose his own legal adviser; or
- (c) by allowing the detainee to choose his own legal adviser from a panel of lawyers submitted to him by either the Bar council or the Law society or both; or
- (d) by allowing the state to appoint a legal adviser for the detainee from a panel submitted to it by the Bar Council or by the Law society or both;
- (e) by allowing the state to appoint a lawyer for the detainee.

... The defect of the Rabie Report is that in between these two objectives of interrogation and protection there lies an enormous vacuum that was not adequately filled by the recommendations contained in the Report. No guidelines were given in regard to the interrogation: for example, as to by whom should he be interrogated and when. The report is silent on the scores of exercise, reading and recreational facilities, and the very much needed contact - even if it be on a strictly controlled basis - with friend, family and legal adviser. It is very well to state blandly that the purpose of interrogation during detention is the obtaining of information; but the question that must be asked is whether the Rabie Commission did not place too much reliance on the evidence of the police force and paid little heed to the fact that at the time it conducted its inquiry 47 deaths had already taken place of persons who had been detained in terms of the then applicable security laws.

- The seminar was generally of the opinion that section 6 of the Terrorism Act should be repealed. It likewise considered the modifications of the Rabie Commission to be totally inadequate. Discussions in the seminar indicated a consensus that if our law is to retain a provision for detention for the purposes of interrogation, it should be subject to a number of real, rather than illusory, safeguards designed to control the exercise of police power and to protect both the mental and physical health of the detainee. The following safeguards, it was believed, would impose realistic restraints upon the power of the police and ensure that the central security measures in the legal order accords more fully with the basic principles of our legal tradition.² ...

The seminar reaffirmed its belief in the basic common-law right of access of a lawyer to his client - confirmed by section 73(1) of the Criminal Procedure Act 51 of 1977. In

¹ Harold Rudolph *Security, Terrorism Torture: Detainees' Rights in South Africa and Israel - a Comparative Study* Juta: Cape Town 1984 at p 27 - 28.

² *Report on the Rabie Report: An Examination of Security Legislation in South Africa* March 1982 Centre for Applied Legal Studies, University of the Witwatersrand at p 39.

Northern Ireland, where lawyers are more divided along sectarian lines than in South Africa, and where the security risks are greater, lawyers are granted access after detention for 48 hours. It is difficult to understand why South African lawyers should not likewise be granted this right as they are in other cases.

The seminar expressed its concern over the unwarranted reflection cast upon South African Lawyers in paragraphs 10.53 - 10.56 in which it is suggested that lawyers may not be trusted and that they might misuse their professional position to convey messages to or from a detainee. This suggestion, which is simply reported by the commission without criticism, is aggravated by two further innuendoes: first, the comparative reference to the notorious lawyers of the Baader-Meinhof gang (p 150 fn 2) and, secondly the reference to South African lawyers who have engaged in subversive activities. There is no evidence whatsoever to support the suggestion that South African lawyers have or might further the activities of their clients in an unprofessional manner. Moreover, it is unfortunate that in naming South African lawyers who have engaged in subversive activities the Commission did not show more circumspection, as there is no evidence that any of the five lawyers named by the commission abused their professional positions in respect of detainees. ...

It is unfortunate that the [Rabie] Commission reported these unsubstantiated innuendoes without at least presenting the other side of the picture. South African lawyers have acquired a reputation both at home and abroad for the fearless and *professional* manner in which they have represented clients charged with 'political crimes', viz offences under the security laws. Lawyers are still viewed by the general public as persons who might effectively safeguard the detainee's interests if permitted to visit. Hence the repeated demands from the public for this safeguard. It is a sad reflection on the commission that it failed to make this acknowledgement.³

³

Report on the Rabie Report: An Examination of Security Legislation in South Africa March 1982 Centre for Applied Legal Studies, University of the Witwatersrand at p 45 - 46.

- Although accused persons have a constitutional right to legal representation, the way in which this is implemented is often unsatisfactory. Legal representation is one of the most important protections against abuse of suspects by the police and criminal justice system. The Commission thus recommends that:¹

Further attention be given to the role played by the Legal Aid Board and the system of public defenders, to ensure that at least a consistent minimum standard of legal representation is extended to accused persons.

Public defender offices be set up in all the main centres in the country.

...

Prosecutors, magistrates and judges disallow evidence obtained through unlawful methods.

¹

Final Report of the Truth and Reconciliation Commission Volume 5 Chapter 8.

- .. In a very real sense these [right to counsel] are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognise the importance of informing an accused of his right to consult with a legal advisor during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country but also the right to equality before the law.¹
- .. [U]nlike its predecessors, the legislature in South Africa is now compelled to rigorously analyse policy issues as well as empirical evidence underlying proposed limitations of fundamental rights. Parliament will no longer be able to return the country to the era which was characterised by suspensions, modifications and other curtailments of the rights of detainees in criminal cases. The history of South Africa is replete with instances of the restriction of the scope of the right of access to a lawyer. Section 36(1) appears to be the only avenue for the lawful limitation of the right of access to a lawyer. The right will survive the declaration of a state of emergency, on account of the provisions of section 37(6)(a) and (d). The emergency provisions entitle a detainee to have contact with an adult relative or friend and to consult with a legal representative. It is not clear at whose expense the legal representative will be engaged in those circumstances.²

It is possible for the opportunity to make contact with a lawyer to be abused with the objective of obstructing or defeating the course of justice. An arrestee may do so in one of three ways. Firstly, he can do this directly by alerting accomplices. The danger of this is highest in organised crime, or gang related activity. The use of coded messages is common in cases of that nature, in both the execution and concealment of the crimes. A suspect can easily mislead the police into believing that he is contacting his lawyer, when he is scampering the investigations.

Secondly, a suspect can indirectly achieve the same result through an unwitting lawyer. There could well be an arrangement in advance between partners in crime that if in a given period one of them was contacted by the other's lawyer, that was to be regarded as a signal to take evasive action. Finally, a suspect could use an unethical lawyer to pass on information which is intended to lead to the obstruction of justice. Although no evidence of lawyers being involved in this kind of conduct has been produced, strong suspicion lingers. ...

The existing legislation which purports to have this limiting effect was enacted before the advent of the interim Constitution. It is predictable that some of this legislation will fail the proportionality test in s 36.

The police appear to be perceptive of the uncertainty of the situation. It appears that, as a result, the general assumption is that there is no statutory authority to interfere with the opportunity of a suspect to contact a lawyer. Where they suspect that the opportunity may be abused, the police take 'precautionary' measures such as the confiscation of cellphones, making the telephone call on behalf of the suspect, or verifying the credentials of the 'lawyer' before allowing a consultation. ... It is submitted that a more structured approach, such as the one created by the Police and Criminal Evidence Act in England, is preferable. In terms of that Act, a police officer of the rank of superintendent is empowered to suspend the right to access to a lawyer in certain circumstances.³

¹ *S v Melani* 1996 2 BCLR 174 (E) at 187e - g.

² C Goredema "Implications of suspects' and other detainees' rights to legal assistance before the first court appearance in South Africa" 1997 SAJC 237 - 253 at 241 *et seq.*

³ Goredema points out that the superintendent must have reasonable grounds for believing that the exercise of the right of access to a lawyer will-

- lead to interference with or harm to evidence connected with the offence or

-
- interference with or physical injury to other persons; or
 - lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
 - hinder the recovery of any property obtained as a result of such an offence.

- .. In addition to the questionable constitutionality of detention for purposes of interrogation [under the Drug and Drug Trafficking Act of 1992], the denial of access to a lawyer in order to facilitate interrogation is untenable. Allowing access for the limited purpose of ascertaining whether all questions have been satisfactorily answered cannot save this provision. The very substance of the right - assisting a detainee in contesting both the lawfulness and the conditions of detention - is eroded. It is thus submitted that this provision is unconstitutional.¹

13.470 The project committee considered the suggestion that if the lawyer is going to be present during interrogation then it is going to defeat the purpose of interrogation and that there should therefore be legal representation before and during interrogation, at the request of the detainee and for any other purpose but not continuously during the entire interrogation process. The committee noted that legal representation is a constitutional right and wondered why would a lawyer's presence inhibit the interrogators from lawfully acquiring such information as they think they are entitled to. The committee stated that the question is what should the lawyer be allowed to do. The committee considered that it is theoretically possible if the lawyer is not allowed to be present at the questioning but allowed to see the detainee before and after the questioning that the lawyer might advise the detainee to say nothing. The committee considered that a detainee could remain silent without a lawyer being present. The committee noted that in the UK and in the USA in the ordinary course legal representation is allowed and lawyers are allowed to give advice to detainees.²

¹ Prof Nico Steytler *Constitutional Criminal Procedure* Durban: Butterworths 1998 at 163 -164.

² In 1997 it was proposed in Turkey that legislation should provide for detainees suspected of political offences to be held for four days incommunicado, and that the detention should be extendable to seven days on the order of a judge, with access to a lawyer after the first four days. Amnesty International pointed out that the European Committee for the Prevention of Torture described the planned reduction in maximum police detention periods as "a significant step in the right direction", but that the court was categorical in describing the four days' incommunicado detention envisaged in the new bill as being "not acceptable" since access to a lawyer is the most effective safeguard against ill-treatment and torture. Amnesty International commented that in order to tackle torture, the Turkish law must make provision for detainees to have access to their lawyer at an earlier stage than the planned four days, in order to comply with its obligation to provide "prompt access" under Principle 7 of the UN Basic Principles on the Role of Lawyers, and that access must be clearly defined so that the detainee will have continuous and free access to a lawyer throughout custody and interrogation, should the detainee so wish.

Amnesty International also pointed out that Italian legislation requires detaining officers to inform detainees that they may name a lawyer of their own choice or be assigned a duty lawyer *de officio* and these officers have a duty to inform the lawyer concerned of the detainee's detention. Amnesty International however noted that in practice the presence of a lawyer in a police or carabinieri establishment remains a rare thing. Under the Code of Penal Procedure, on the request of a Public Prosecutor, a Judge of Preliminary Examination may authorize delaying a detainee's right of access to a lawyer (whether the detainee's private lawyer or one appointed *de officio*) for up to a maximum of five days after arrest, during the preliminary investigation, if there are "specific and exceptional reasons for caution". Amnesty International stated that such delays appear to occur most usually in the context of defendants accused of serious offences relating to organized crime and public corruption. It was proposed in the UK *Terrorism Bill* that a detainee shall be entitled, if he or she so requests, to consult a solicitor as soon as is reasonably practicable, privately and at any time.

13.471 The committee considered whether the lawyer would be entitled to say that the detainee has the right to remain silent if a detainee were entitled to have a lawyer present at all stages of the interrogation. The lawyer would then be able to put an end to the interrogation. The committee considered whether the lawyer should have the right to say at times “I am telling my client not to answer that”, and whether he or she should merely be present and observing the propriety of the interrogation. The committee noted clause 16(3)(b) which provides that “The Director of Public Prosecutions in whose area of jurisdiction any person is being detained under subsection(1) may at any time stop the interrogation of such person”. The committee considered that if the lawyer is allowed to be present and he or she tells the client to say nothing then obviously the interrogation cannot go on. The committee noted that it does not necessarily mean that if the lawyer is allowed to be present then the detainee is not going to answer to questions. The committee also noted that the Director of Prosecutions will probably say that further detention is not going to serve any purpose if the detainee cannot be interrogated. The committee considered that interrogation can only be allowed with the necessary safeguards such as access to a lawyer.

13.472 The project committee therefore considered that the Bill should make provision in clause 16(6)(a) for a detainee to be entitled to consult with a legal practitioner of his or her choice and that the legal practitioner should be entitled to be present when the detainee is interrogated.

(ii) Comment on discussion paper 92

13.473 Amnesty International comments that clause 6(6) of the Bill proposes some form of access to the detainee which appears to mitigate the effects of the preceding subclause (5). AI remarks that it has been widely recognised that prompt and regular access to a lawyer for a detainee is an important safeguard against torture, ill-treatment,

An officer of at least the rank of superintendent would authorise a delay in permitting a detained person to consult a solicitor only if he had reasonable grounds for believing that the exercise of this right at the time when the detained person desires to exercise it will have any of the following consequences, namely interference with or harm to evidence of a serious arrestable offence, interference with or physical injury to any person, the alerting of persons who are suspected of having committed a serious arrestable offence but who have not been arrested for it, the hindering of the recovery of property obtained as a result of a serious arrestable offence, interference with the gathering of information about the commission, preparation or instigation of acts of terrorism, the alerting of a person and thereby making it more difficult to prevent an act of terrorism, and the alerting of a person and thereby making it more difficult to secure a person's apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism.

coerced confessions and other abuses.³ AI notes that international standards accordingly favour giving detainees access to counsel without delay after arrest, and that the UN Human Rights Committee has stressed that “all persons arrested must have immediate access to counsel”.⁴ AI explains that Principle 7 of the United Nations Basic Principles on the Role of Lawyers states that access to a lawyer must be granted “promptly,”⁵ and that the UN Special Rapporteur on torture has recommended that anyone who has been arrested “should be given access to legal counsel no later than 24 hours after the arrest”.⁶

13.474 Amnesty International is of the view that in light of the above standards, it is of concern that the proposed subclause does not explicitly state when the detainee can have access to his or her lawyer for consultations. AI says that international standards are also clear on the right of any arrested or detained person, whether or not charged with a criminal offence, to confidential written and oral communications with a lawyer, although the latter may take place within sight of law enforcement officials for reasons of security,⁷ and that clause 16(6)(a) is silent again on this particular right. AI notes that the subclause does, however, include an important provision recognised in international standards as a safeguard, namely entitling the detainee’s chosen legal adviser to be present when the detainee is interrogated, and that the UN Special Rapporteur on the independence of judges and lawyers said:

“it is desirable to have the presence of an attorney during police interrogations as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse...”.⁸

13.475 AI also explains that the Rules for the Yugoslavia and Rwanda tribunals and the Rome Statute of the International Criminal Court require that suspects have

³ UN Human Rights Committee General Comment 20, para.11; Report of the UN Special Rapporteur on torture (E/CN.4/1992/17), 17 December 1991, para. 284.

⁴ Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28.

⁵ Less than 48 hours from the time of arrest or detention

⁶ Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1990/17, 18 December 1989, para.272.

⁷ UN Human Rights Committee, General Comment 13, para.9; Principles 22 and 8 of the Basic Principles on the Role of Lawyers, Principle 18 of the UN Body of Principles; Para. 2(E) (1) of the African Commission Resolution on the Right to Recourse Procedures and Fair Trial.

⁸ Report on the Mission of the Special Rapporteur to the United Kingdom, UN Doc. E/CN.4/1998/39/add.4, para 47, 5 March 1998.

the right to counsel when questioned by the Prosecutor,⁹ however, in view of past and some current patterns of police interrogation practices in South Africa, it is difficult to be confident that this requirement would always be complied with, unless it were made absolutely clear that the occurrence of irregular interrogation sessions, i.e. where the chosen legal adviser was not present to guarantee the integrity of the process, would constitute grounds for a judge to order the release of the detainee.

13.476 AI points out that clause 16(6)(c) of the Bill would permit the detainee the right to communicate with and be visited by his or her spouse or partner, next of kin, and chosen religious counsellor, unless the National Director of Public Prosecutions (NDPP) or a DPP “shows on good cause to a judge why such communication or visit should be refused”. AI notes that this proviso should never amount to a generalised or arbitrary prohibition against such visits which would be contrary to international standards. Rule 92 of the UN Standard Minimum Rules, for instance, states that —

“An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.”

13.477 Amnesty International notes that Principle 15 of the UN Body of Principles states that “...communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”

13.478 The LRC comments that another attempt at improving the legislation that sounds noble and yet falls short of logic is the right to legal representation whilst being interrogated. Ideally it makes good sense to have a detainee represented by counsel. The LRC says that it is very hard to imagine any criminal defence lawyer who will allow or advise his client to incriminate himself on a count of terrorism. The LRC notes that in Northern Ireland the right of access to a legal representative could be delayed for a period of 48 hours if the detective superintendent has a reason to believe that such access would interfere with the gathering of information. The LRC points out that this provision also tends to undermine the attorney-client relationship because it exposes the legal advisor to a situation where s/he might have to advise a client not to answer certain questions but when the issue, for argument sake, gets to

⁹ Rule 42 of the Yugoslavia Rules, Rule 42 of the Rwanda Rules, Article 55 (2) (c) of the ICC Statute.

trial and the question is asked why did the detainee not answer any question, and s/he might say "I was advised by my lawyer not to answer any question".

13.479 **The SAPS: Legal Component: Detective Service and Crime Intelligence** considers that access to legal advisers should not be of such a nature that it interferes with the purpose of detention, namely interrogation. The SAPS explains that during investigations the detained person might be taken to point out persons or places, or investigators may be busy to interrogate him or her. The SAPS suggests that if access to the detained person is allowed, it must be strictly controlled and limited, in order not to defeat the purpose of his detention.

13.480 **Ms Mary De Haas of the Natal Monitor** says that, if legislation goes ahead, and she strongly argues that it should not, she supports, in addition to re-worked provisions about involvement of judges, access to legal and medical personnel.

13.481 **The Defence Secretariat** comments that clause 16(6) is inadequate and incomplete as the provision is silent in respect of the situation where a detainee would require the services of a legal practitioner but cannot afford such services. The Secretariat suggests that such a possibility be provided for and that the clause conforms to the provisions of clause 35 of the Constitution.

13.482 **Mr CDHO Nel, Director of Public Prosecutions in Port Elizabeth** comments that the notion that legal representation might be a panacea is fanciful. He notes that subtlety and not necessarily blatant brutality would subvert and contaminate any system which proffers the merest opportunity for abuse. He points out that an attorney cannot be attendance every waking hour through fourteen days of solitary detention. **Mr JHS Hiemstra, Deputy Director of Public Prosecutions in the Free State**, remarks that it would be surprising if a legal practitioner were to advise his client to speak and to incriminate himself. He suggests that should clause 16 be retained, clause 16(6) would lead to abuse by persons detained in terms of the clause as the right to be visited is not qualified. He considers that the right to consult with a legal practitioner, to be visited by his or her medical practitioner or spouse as envisaged by clause 16(6)(c) ought to be qualified so as to not negate the purpose of the detention if it is to have any practical value at all. **Messrs Fick and Luyt of the Office of the Director of Prosecutions: Transvaal** ask whether the detainee will have the right to have his legal representative present at all interrogations; what will happen if the legal representative is continuously not available; and what will the

powers of the legal representative be during the interrogations (can he, for instance, advise the detainee to refuse to answer any questions, in which case the whole purpose of the clause 16 would be defused). They suggest that, inter alia, the duties of the legal representative be confined to being available to ensure that the conditions of the Bill and those prescribed by the judge are strictly adhered to.

13.483 Messrs Fick and Luyt ask how often will the detainee have the rights afforded by sub-clause (6) (c); what form can the communication take; and will the authorities have the right to be privy to the communications? They point out that in deciding on the type of conversations to be allowed by the Bill, it must be born in mind that telephonic (cellular phones included) conversations can be intercepted and taped in which case the investigation can be hampered.

13.484 Prof Michael Cowling comments that there are certain important exceptions to the restriction to access which go a long way towards addressing the problem of denial of access since it relates to a right to consult with a legal practitioner of choice, visits by preferred medical practitioner and chosen religious counsellor.¹⁰

(iii) Evaluation and recommendation

13.485 The committee has no doubt that the right to retain and instruct a legal practitioner at any stage of the proceedings cannot be curtailed and recommends that the Bill should make provision for this right. Respondents also posed the question what would the purpose of the envisaged provision be if the witness were to use the right to silence. The committee considers that the Bill should provide that a person

¹⁰ Prof Cowling notes in "The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" 2000 *South African Journal of Criminal Justice* Vol 13 (3) 344 - 359 that in regard to visits by family and religious counsellors there is always a possibility that logistical problems could compromise any right in this regard, and constant judicial monitoring in this regard is vital. He points out that account should be taken of the fact that the total detention period is 14 days which should set-off, to a certain extent problems arising in this regard. He considers that the right to a legal practitioner, particularly during interrogation, must be considered to be an absolute, as is the case with the right to a visit by a medical practitioner where circumstances deem this necessary. He states that the Bill does contain an attempt to limit this right of access in the form of a rider that a DPP may apply on good cause shown to a judge for such communication or visit to be refused. He remarks that two points require comment in this regard: the first is the way in which this measure is drafted does not clearly indicate whether this applies only in respect of family and religious counselling; under no circumstances should there be any restriction or limitation on the right of access by legal or medical practitioners and under no circumstance should any interrogation take place in the absence of a legal representative. The second point is that the term *good cause shown* must be narrowly construed so as to ensure that rights of access, visits and communication with detainees will only be restricted in extreme cases.

named in an order shall answer questions put to the person by the National Director of Public Prosecutions or the National Director of Public Prosecutions' representative, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege. The Bill should provide that the presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing. Furthermore, no person shall be excused from answering a question or producing a thing on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

- (a) no answer given or thing produced shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act (Act No 56 of 1955)¹¹ or on a charge of perjury; and
- (b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act (Act No 56 of 1955) or on a charge of perjury.

(p) **Access to a medical practitioner of the detainee's choice**

- (i) Evaluation contained in discussion paper 92

¹¹ 319 Charges for giving false evidence
 (3) If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such firstmentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.

13.486 The project committee noted that the original clause 16(5) was taken straight from a long line of security legislation. As was noted above, the clause appears to contain an absolute prohibition on the judge to relax the prohibition on access by, inter alia, lawyers or doctors to detainees. The committee was of the view that the determination or authorisation whether or not the detainee has to be seen by his or her medical doctor should not be left to be decided by the National Director of Prosecutions or a Director of Public Prosecutions. The committee also considered that the question whether a detainee should or should not have access to a doctor of his or her own choice or if needs be, to specialist treatment, forms part of the debate which was conducted right through the seventies and eighties. The committee noted that the absence of independent medical treatment led to the most terrible abuse.¹ **The committee considered that there is no reason why the family doctor shouldn't be able to have access to the detainee.**² **The committee noted that the whole basis for justifying the prohibition on independent medical treatment in the old days was the same as was presented in relation to lawyers, namely that there are co-conspirator doctors. The committee was of the view that the reasoning for such a derogation from section 35 of the Constitution is plainly unjustifiable.**

13.487 The committee considered the suggestion made in the *Report on the Rabie Report*³ that there is a real need for detainees to have access to independent

¹ See Prof Lawrence Baxter "Doctors on Trial: Steve Biko, Medical Ethics, and the Courts" 1985 *SAJHR* 137 - 151; Gilbert Marcus "The Abdication of Responsibility: The Role of Doctors in the Uitenhage Unrest" 1985 *SAJHR* 151 - 154. See also Prof David McQuoid-Mason "Detainees and the Duties of District Surgeons" 1986 *SAJHR* 49 - 59 at p 52: "Statute law restricts access by private practitioners to patients who are detainees. For instance, in the case of detainees detained under the Internal security Act, access by a private practitioner is a privilege, not a right, except perhaps in emergency situations."

² Note also Amnesty International's remark made in relation to Turkey that until all detainees have full access to lawyers, doctors and relatives, police stations will remain fortresses of arbitrary state power, places of secrecy and fear where torture can be practised without any restraint.

³ At p 46. See also Mary Rayner *Turning a Blind Eye: Medical Accountability and the Prevention of Torture in South Africa* Committee on Scientific Freedom and responsibility American Association for the Advancement of Science 1987:

"In the closed world of the detainee in South Africa, the one potentially independent source of contact is the district surgeon - a general practitioner employed by the Department of health whose duties include acting as a prison medical officer. ... The report begins by describing the steps taken by medical organizations and private physicians in South Africa to discipline two district surgeons, Drs Ivor Lang and Benjamin Tucker, for serious professional misconduct while treating a detainee, Steve Biko, who died in police custody in September 1977. Mr Biko's death revealed in tragic relief what can happen whenever medical personnel abandon their role as the patient's ally and use their skills to serve institutional purposes. ... Finally, the report examines the efforts of one district surgeon, Dr Wendy Orr, and other doctors and allied professionals to stop the torture and ill-treatment of detainees, through the use of documentation, publicity, and the courts. At the same time, these practitioners are providing urgently needed post-detention medical care under conditions of civil strife and increasing polarization within the medical community." (See p 1) ...

"In 1982 the death in detention of physician Neil Aggett - the ninth such death since Steve

doctors:

“The conduct of the doctors attending the late Steve Biko, and the failure of the Medical and Dental Council to take disciplinary action against these doctors, has understandably produced a lack of confidence in State-appointed medical practitioners as a check on the abuse of power. In these circumstances the seminar concluded that there was a real need for access to independent doctors, chosen by the family of the detainee, or by some independent authority - such as the detainee’s employer or a panel of private medical practitioners. Significantly there is no bar on the detainee’s own medical practitioner in Northern Ireland (Bennett Report, para 147).”

13.488 The committee considered whether provision should be made under clause 16(1) or under 16(6) for an independent medical practitioner to have access to a detainee. The committee pointed out that a judge may possibly at an appearance of the detainee observe that the detainee appears ill and that the judge should then be able also to make an order allowing the detainee to be seen by an independent doctor. The committee considered that access to a medical practitioner of the detainee’s choice should be a qualification of clause 16(5) and not clause 16(1) as access to medical treatment would be difficult for the judge to determine in advance. The determination or authorisation whether or not the detainee has to be seen by his or her medical doctor should not be left to be decided by the National Director of Public Prosecutions or a Director of Public Prosecutions. The committee recommended that provision should be made in clause 16(6)(b) that a detainee should be entitled to be visited by a medical practitioner of his or her choice.

Biko’s - and revelations of abuses in medical care experienced by dozens of people detained with Dr Aggett, further forced the medical community to address its responsibilities towards those held in police custody. Under pressure from domestic and international critics, the Medical Association of South Africa (MASA) established in May 1982 a committee of inquiry into the medical care of prisoners and detainees. Medical, legal, and human rights organizations presented evidence to the committee and called for definitive action. The issue, as one of these petitioners argued, ‘impinged so drastically on natural justice and medical ethics that MSA should, as a matter of urgency, use its influence to achieve greater protection for the health of detainees in the short term. In the long term, MASA should strive for the abolition of the health-threatening situation of detention and solitary confinement.’ (See p 47 - 48)

“While emergency rule, mass detentions, and the system of indefinite, incommunicado detention continue, medical access to detainees remains a crucial means of preventing torture in south Africa. In this respect the burden of preventative action lies with state-employed district surgeons. The powerful effect of Dr Wendy Orr’s intervention is indicative of the potential in South Africa for medical action against torture.

In Northern Ireland during the 1970’s, physicians in comparable capacities as south African district surgeons helped end the torture and ill-treatment of detainees by their concerted actions including, ultimately, a public denunciation of police abuses. There, the British government’s policy of protecting police discretion to question a suspect in private for extensive periods without the intrusion of the courts, lawyers, or any other independent person, together with the relaxation of the rule governing the admissibility of confessions in court, encouraged the abuse of detainees. Government ministers and senior police officers, furthermore, failed to investigate and discipline interrogators who assaulted and illegally coerced detainees.” (See p 87 - 88)

(ii) Comment on discussion paper 92

13.489 The SAPS: Legal Component: Detective Service and Crime Intelligence remarks that the impression is gained that the project committee's idea was to give the detainee access to his or her medical doctor, meaning a medical doctor of his or her choice. The SAPS suggests that in order to avoid any confusion, it should be stated clearly that a detainee is entitled to a medical doctor of his or her choice.

(iii) Evaluation and recommendation

13.490 The committee agrees with the SAPS: Legal Component: Detective Service and Crime Intelligence and recommends that the Bill provide that the witness has the right to communicate and be visited by that person's chosen medical practitioner, unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such communication or visit should be refused.

(q) Communicating with and being visited by the spouse or partner, next of kin and chosen religious counsellor(i) Evaluation contained in discussion paper 92

13.491 The committee was of the view that all the categories of persons that would ordinarily as a constitutional right be entitled to have access to a detainee need to be addressed in the Bill, their exclusion need to be justified and if it is capable of justification, then there surely must be a mechanism for a judge relaxing the prohibition. The committee considered that the original clause 16(5) would seem to be unconstitutional *per se* merely because it does not contain any mechanism to escape by discretion or otherwise the consequences of the prohibition to access to the detainee. The committee noted that the Bill deals with these issues in clause 16(5) where it says "no person, other than ... or a person authorised by the National Director of Public Prosecutions (NDPP), or a Director of Public Prosecutions (DPP) may have access to a person kept in custody under subsection(1)". The committee pointed out that what this clause does is that it says unless the NDPP or DPP says the detainee may see his or her spouse or partner, next of kin or chosen religious counsellor, the detainee will not see or communicate with those people. There is thus a prohibition on access to spouses, partners, next of kin and chosen religious counsellors. The committee noted that once again the debate is about justification and one of the

questions to be answered is whether it is justifiable to allow the NDPP or DPPs to have a veto over the right to receive visits from and communicate with the spouse or partner, next of kin and chosen religious counsellor.

13.492 The project committee noted that one option would be to say that there is not evidence before the committee to justify the exclusion of these parties. The committee noted further that one of the terrible instances of abuse in the past has been the denial of access to spouses or even to children. The committee thought it cannot allow this to go by without commenting on it. The committee noted as clause 16(5) was originally drafted, the NDPP or DPPs can grant access to anybody and that the access to and communication with the spouse, partner, next of kin, chosen religious counsellor is in the gift of the NDPP. The project committee did not want the NDPP or a DPP to have that say. On the question whether it should be possible to prevent access to the detainee, the committee remarked that it would in any case always be open to a DPP to say to a court that he or she has information about a particular attorney or whoever and that he or she does not want the lawyer or other person to have access to the detainee, although, in the case of a lawyer, the detainee can have access to any other attorney. The committee noted that the Constitution says “to communicate with and be visited by” and stated that to be visited by particular people does not mean the detainee can be visited by any of these people at any time of the day or night but that it obviously means subject to reasonable conditions imposed for example by the prison authorities. The committee therefore considered that it ought to be provided in clause 16(6)(c) that a detainee has a right to communicate with and be visited by his or her spouse or partner, next of kin and chosen religious counsellor unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such visitation or communication should be refused. The committee pointed out that it is really saying that the detainee has the rights set out in section 35(2) provided that a judge may refuse access and communication on sufficient grounds.

(ii) Comment on discussion paper 92

13.493 The SAPS: Legal Component: Detective Service and Crime Intelligence notes that it should be remembered that the detention is for a specific purpose, namely interrogation. They explain that during investigations the detained person might be taken to point out persons or places, or investigators may be busy to interrogate him or her. The SAPS suggests that if access to the detained person is allowed, it must be strictly controlled and limited, in order not to defeat the purpose of his or her detention.

(iii) Evaluation and recommendation

13.494 The committee considers as was provisionally proposed in the discussion paper that the Bill ought to provide that the witness has a right to communicate with and be visited by his or her spouse or partner, next of kin and chosen religious counsellor unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such visitation or communication should be refused. The committee is of the view that the witness has the rights set out in section 35(2) of the Constitution provided that a judge may refuse access and communication on sufficient grounds. The Commission agrees with the recommendation.

(r) Admissibility of evidence against detainee in subsequent criminal proceedings

(i) Evaluation contained in discussion paper 92

13.495 The project committee noted that originally the proposed Bill did not address the admissibility of the detainee's evidence. The committee also noted that under section 29 of the *Internal Security Act* the detainee was not entitled to a copy of his or her statement. The committee took into account the following criticism raised in regard to section 29:⁴

The [Rabie] Commission recommends that s 335 of the Criminal Procedure Act 51 of 1977, which provides that written statements made to a policeman shall be furnished to the person making such a statement if he is subsequently charged in connection with that matter, shall be amended to exclude statements made by a section 6 detainee during his detention. The Commission justifies this recommendation on the ground that information obtained from a detainee may be of such a nature that its disclosure could hamper the combating of terrorist activities. This recommendation is, however, made subject to the qualification that if any part of such a statement is put to the accused (ex-detainee) in cross-examination, he shall be entitled to secure a copy of this statement (10.84).

The effect of this recommendation is to overrule the decisions of the Natal Provincial Division in *S v Hassim* 1971 (4) SA 120 (N) and of the Transvaal Provincial Division in *S v Ffrench-Beytagh* 1971 (4) SA 333 (T) (overruling *S v Ndou* 1970 (2) SA 15 (T)), in which it was held that s 6(6) of the Terrorism Act, which provides that no-one other than an official in the service of the state shall be entitled to any official information obtained from the detainee, does not deprive the detainee of the right to obtain a copy of the statement he made to the police.

The seminar found this recommendation unacceptable. To deny an accused and his counsel access to a statement made in detention, places the defence at a serious disadvantage which cannot be rectified by later making the statement available if the accused is cross-examined on the statement. The effect of this recommendation is that, whereas a State witness will be allowed to refresh his memory from a statement made to the police before giving evidence, the accused will not be permitted to do so. It may also hamper the handling of the defence case as the accused may make disclosures under the pressure and disorientation of detention which he fails to make to his own counsel at the time of trial.

In essence the recommendation undermines the adversary nature of the criminal trial

⁴ *The Report on the Rabie Report: An examination of Security Legislation in South Africa* at p 54.

as it means that the prosecution will have access to information from the accused obtained in a pre-trial inquisition which is not made available to the defence. In many respects it is tantamount to denying the defence access to a statement made by an undefended accused at a preparatory examination. It is surprising that the Commission should make such a recommendation without consideration of the judicial decisions it overrules or of the important principles it overrides.

13.496 The committee posed the question what happens if a person is charged after he or she was detained at an earlier stage under clause 16. The committee considered if the purpose of the proposed clause 16 is to break the silence would it not be a safeguard to provide that the statements given in response to interrogation under the Bill could not be used against the detainee.⁵ The committee noted that this brings section 35(3) of the Constitution squarely into focus, the decisions under section 417 of the *Companies Act* and the use of derivative evidence. The committee pointed out that clause 16 could also be used for the detention of witnesses and

⁵ See *The Report on the Rabie Report: An examination of Security Legislation in South Africa* at p 51 - 56: "The [Rabie] Report does not, however, say why the courts should approach the confessions of section 6 detainees with the greatest circumspection, or indeed with any greater circumspection than they would approach the confession of any other accused. It is particularly strange that the courts should adopt this attitude if, as the Rabie Commission found, the police are aware that any form of pressure is useless.

The obvious answer as to why such evidence must be approached 'with the greatest circumspection' is not stated by the Rabie Report (nor by the courts in *Hassim* and *Christie's* case) but it must surely be this: indefinite detention in solitary confinement is in itself, and without more, an awesome form of pressure inducing the detainee to confess or to speak. This view is strongly supported by psychologists. ...

The decisions in *S v Ismail* 1965 (1) SA 446 (N) at 448 -9 and *Rv Kumbana* 1945 NPD 146 afford examples of judicial acknowledgements that solitary confinement is in itself an extreme form of punishment or pressure. Similarly, the recent decision in *S v Chretien* (supra) contains an interesting observation by the court that if the State had tried to tender in evidence a statement made by the accused during an all-night interrogation in which he stood for 11 hours, the court 'may have looked on an all-night interrogation with jaundiced eyes and may well have excluded the statement' (at 479). One only has to pose the question 'Would the normal person, given the choice, choose to stand all night for 11 hours or to be incarcerated in solitary confinement for an indefinite period', in order to realise which is the lesser of the two evils. If an all-night interrogation renders a confession inadmissible, is not solitary confinement an *a fortiori* case?

The Commission also fails to deal with the fact that when the confession or admission has been reduced to writing in front of a magistrate, there is a presumption ... that such a statement was freely and voluntarily made and that the onus is on the accused to demonstrate otherwise. It is difficult enough for an accused in normal circumstances to rebut the onus. How is an accused to do this when he has been in solitary confinement for long periods of time and during which time pressure was brought to bear on him? ...

These difficulties may be considered irrelevant when the security of the State is involved and may have been so considered by the [Rabie] Commission. If so, the Commission ought to have said why. There should have been some attempt at least to reconcile a system based on the extensive use of statements obtained from detainees in solitary confinement with the words of Holmes, JA in *S v Lwane*, 1966 (2) SA 433 (A) at 444:

... the pragmatist may say that the guilty should be punished and that if the accused has previously confessed as a witness it is in the interests of society that he be convicted. The answer is that between the individual and the day of judicial reckoning, there are interposed certain checks and balances in the interests of a fair trial and the due administration of justice. ..."

potentially accused persons. The committee noted if the purpose of the clause is to compel the detainee to talk as it obviously is intended, and the detainee subsequently becomes an accused, that then implicates other constitutional rights under section 35(3), such as the fair trial provisions,⁶ the right to silence, the prohibition on self-

⁶ See also *S v Soci* 1998 2 SACR 275 (E) where Erasmus J said:
 "In *S v Zuma and Others* 1995 (2) SA 642 (CC) at 651J-653B Kentridge AJ stated that the right to a fair trial conferred by s 25(3) of the interim Constitution embraces a concept of substantive fairness, but at the same time one should not neglect the language of the Constitution. A Constitution embodying fundamental rights should be given a broad construction, but only as far as its language permits.
 The general approach in determining what constitutes a fair trial is explained by Kriegler J in *Key v Attorney - General, Cape Provincial Division, and Another* 1996 (2) SACR 113 (CC) (1996 (4) SA 187) at paras [13] and [14], and endorsed by Howie JA in *Khan's case* (supra at 619b-f (SACR) and 441c-f (All SA)), as follows:

'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which I would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin* fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence albeit obtained unconstitutionally, nevertheless be admitted.'

'If the admission of that evidence would otherwise be detrimental to the administration of justice' Here the court will have regard to the nature and extent of the violation. The conduct of the public officials will come under particular scrutiny. ... Section 24(2) thereof specifically directs the court to exclude the tainted evidence if it is established that the admission of it in the proceedings will bring the administration of justice into disrepute. ... As to the relevance of public opinion in the context of a fair trial in our law, I refer to *S v Nombewu* (supra at 422i-423b (SACR) and 648a-c (All SA):

'Public opinion will no doubt be affected by the nature and seriousness of the infringement, as well as the nature and seriousness of the crime

involved

...

seen in the light of the state of lawlessness prevailing in the country

...

The Constitution operates in a particular society with immediate needs.

...

consideration of the public mood lends flexibility to the

appl
icati
on
of
cha
p 3:
it
allo
ws
the
cou
rt to
hav
e
reg
ard
to
pre
vaili
ng
circ
ums
tanc
es,
as
well
as
to
the
publ
ic
acc
ept
anc
e of
con
stitu
tion
al
valu
es
whi
ch
one
hop
es
will
incr
eas
e in
time
. ...
The
cou
rt
sho
uld
in
fact

end
eav
our
to
edu
cate
the
publ
ic to
acc
ept
that
a
fair
trial
me
ans
a
con
stitu
tion
al
trial,
and
vice
vers
a.
... It
is
ther
efor
e
the
duty
of
the
cou
rts
in
thei
r
eve
ryd
ay
acti
vity
to
carr
y
the
mes
sag
e to
the
publ
ic
that
the
Con

stitution is not a set of high-minded values designed to protect criminals from their just deserts ; but is in fact a shield which protects all citizens from official abuse. They must understand that for the cou

rights to tolerate invasion of the rights of even the most heinous criminal would diminish their constitutional rights.

... the courts should not merely have regard to public opinion, but should mould people's thinking

incrimination etc. The committee considered that one of the safeguards to the detainee could possibly be that the statements cannot be used against the detainee.⁷

to
acc
ept
con
stitu
tion
al
nor
ms
usin
g
plai
n
lang
uage
e
und
erst
and
able
to
the
com
mo
n
ma
n.'

7

See the recommendations made in Don Foster, Diane Sandler and Dennis Davis *A study of Detention and Torture in South Africa: Preliminary Report* 1985 published by the Institute of Criminology of the University of Cape Town p 52 - 23 that all evidence should be disregarded made by detainees who remain within the then existing closed system of detention:

"4. It is recommended that the current position whereby a confession placed in writing before a magistrate, is deemed to be made freely and voluntarily unless the accused can prove otherwise, be abolished as far as any accused who has been detained in terms of the security legislation or emergency regulations are concerned. Such evidence should not be admissible unless the State can prove that all the procedural safeguards outlined above have been complied with. ...

6. In the light of evidence presented in this report, it is recommended that psychological coercion, apart from physical coercion, be regarded by courts of law as sufficient grounds upon which to challenge admissibility of confessions or admissions, and to challenge the reliability of evidence by witnesses subjected to such coercion. ...

8. ... it is further recommended that until provision is made for adequate safeguards as outlined above, South African courts of law should disregard all evidence, admissions or confessions made by detainees who remain within the closed system of detention. Our findings, together with other psychological research, allow us to conclude that there can be no guarantee of the reliability of such evidence."

See further Julian Riekert "The Silent Scream: Detention without Trial, Solitary Confinement and Evidence in South African 'Security Law' Trials" 1985 *SAJHR* 245 - 250 at p 246 *et seq*: "In a few cases there has been expert evidence concerning the effects of solitary confinement on the reliability of evidence obtained under it. *Gwala* is probably the best example. In that case the defence called an American professor of psychiatry and expert on 'brainwashing' techniques, Dr LJ West. His evidence, which was accepted by both the trial and appeal courts, briefly stated, was that individual reactions to solitary confinement for extended periods are idiosyncratic. However, if solitary confinement took place under circumstance

13.497 The committee recommended above that interrogation may proceed only during detention if it takes place in the presence of a lawyer. The committee suggested in order to eliminate the possibility of the lawyer advising the detainee to use the right to remain silent and to say nothing during questioning, provision could be made for the exclusion of the evidence against the detainee. The committee pointed out that as important as these fundamental rights are, they cannot be considered in isolation - one cannot therefore focus on the right of the detainee only, a balance must be created and there must be safeguards.

13.498 The committee considered whether an inducement for the detainee to speak during interrogation would be if a detainee were to be warned that an inference might be drawn against him or her if the detainee decides not to speak. The committee also took into account Judge RW Nugent's remarks on the right to silence.⁸ The committee was of the view that it should not be possible to draw an

where the detainee was debilitated by his treatment, dependent upon his captors for every need and fearful for his life and safety, then the DDD (debility, dependency and dread) syndrome could come into operation. This syndrome was first detected during the debriefing of United States airmen who were captured in Korea and 'brainwashed' by the Communist Chinese. The DDD syndrome is highly effective in inducing compliant behaviour. In Dr West's view, detention under s 6 of the Terrorist Act (the precursor of s 29 of the current Internal Security Act) *could*, given uncertainty about the ultimate duration of the confinement, a total dependence on the captor and no significant contact with outside sources of support, produce the effects of the DDD syndrome. ...

Despite their general acceptance of Dr West's evidence, both the trial court and the appeal court in *Gwala* seem to have had some difficulty in accepting (a) that the DDD syndrome could be produced by interrogation during solitary confinement without additional ill-treatment or pressure; and (b) that solitary confinement was in itself a form of stressful, if not cruel treatment. They also appear to have thought it highly improbable that the security police would use 'third degree' methods in order to obtain information from the detainee.

The long-term effects of such judicial attitudes in cases involving detention without trial and solitary confinement are likely to be serious, as the chasm between judicial and public perceptions of this issue widens. ...

Would it really be such a grave or novel step for our courts to deny probative value to evidence which, given accepted expert opinion like that of Dr West in the *Gwala* case, is irredeemably tainted?"

⁸ "Self-incrimination in perspective" *SALJ* 1999 501 - 520 at p 519 *et seq*: "Professor Ian Dennis has recently sought to identify the underlying rationale for shielding the accused against the potential for self-incrimination by examining what he refers to as 'four leading accounts of the underlying purposes and values of the privilege (against self-incrimination)': protection of the innocent against wrongful conviction; presumption of innocence; protection of privacy; protection from cruel choices. His careful analysis leads him to the following conclusion: "These accounts are defective because they all fail, for different reasons, to provide us with a cogent theory of the proper scope and justification of the privilege". Perhaps that is so because the privilege is not as wide as the author assumes it to be, but this does not detract from the conclusion, which is that there is no rational explanation for an entitlement to conceal the truth.

The various examples I gave at the beginning of this article all pose, in my view, an important question in relation to what has at times been referred to as the right of silence: Is an accused's silence, itself, deserving of protection? In other words, does the accused have an entitlement to conceal guilt; or is he or she immune only from an obligation to disclose it?

It is my contention that there is no support in the heritage of the early common law for an

inference against the detainee's silence because the detainee is not under trial when interrogated. The committee also took into account that it has not been decided yet in South Africa whether the drawing of an inference infringes the right to silence. The committee noted cases such as *Gottschalk* and *Rossouw*, the combined effect of which was the open sesame to breaking detainees.

13.499 The committee considered the insightful decision by the then Chief Justice of Transkei in the case of *S v Wanna and Others*⁹ where he said in 1993:

Each of the accused, after arrest, was held in detention in terms of the provisions of s 47 of the Public Security Act 30 of 1977. That section confers on commissioned police officers extraordinary powers of arrest and detention for interrogation of persons believed to have committed an offence under the Act, or to intend to commit any such offence, or to possess information relating to the commission or the intended commission of any such offence. Persons so detained have no right of access to legal advisers, nor to family or friends. Indeed, no person other than the Minister of Justice, or a State official acting in the performance of his official duties, shall have access to any such detainee, or shall even be entitled to any official information relating to or obtained from the detainee. Such detainees are thus kept incommunicado and in solitary confinement at some place unknown to family, friends or legal advisers, and they may be kept thus until the Commissioner of Police is satisfied that the detainee has satisfactorily replied to all questions put to him, subject to the right of the Minister of Justice to receive written representations from the detainee and to order his release. At the time when these accused persons were thus detained it was the practice of the police to continue to hold the person in detention even after interrogation of him was concluded if they were of the opinion that he should not be released pending the procurement of further information from any other person or source, or the finalisation of the investigations relating to the offence in connection with which the detainee was detained. That practice was later legitimised, with retrospective effect, by Decree No 14 of 1991, which the President signed on 15 July 1991.

...
In *S v Ismail and Others* (1) 1965 (1) SA 446 (N) Milne JP, speaking of a similar, but less drastic, provision contained in s 17 of Act 37 of 1963, said:

'To contemplate being detained for 90 days in solitary confinement without being able to see one's relatives or friends, is in its nature a grievous thing. . . .

entitlement to conceal the truth, or, in other words, for protecting silence per se. The accused was not permitted to assert innocence, and not obliged to disclose guilt, with the result that silence was imposed upon the innocent, and it was permitted to the guilty, but in both cases the accused's silence was a consequence of preserving the integrity of 'proof'. Because of a fundamental change in the approach to the assessment of guilt, the reason for imposing silence upon the accused has fallen away. The only legacy that remains from the early common law is that even the guilty may remain silent where it serves to preserve the integrity of proof.

The consideration does not arise where a proper inference is drawn from silence in the face of incriminating evidence; nor where the accused is constrained to disclose incriminating evidence in order to avoid bail being refused. In none of those cases is there the potential for false self-incrimination, and in none a threat at all to the innocent. What the accused's argument seeks to protect is no more than the concealment of guilt. There is no support to be had from the early common law for affording the accused that protection, and nor is there an evident reason of principle for doing so. Where there is no risk that the truth may be compromised, there is no legitimate reason for the law to step in so as to subvert it."

⁹ 1993 1 SACR 582 (TK).

Does the fact that the procedure was authorised by Parliament make it necessary to say that so long as there was no violence or other unlawful inducement, any statement made by a person under 90-day detention was made freely and voluntarily, especially when regard is had to the consideration which I think is manifest here, that the police would not regard a statement by him as satisfactory unless it included an admission of his own complicity? I think there is much to be said for Mr Thirion's submission that the mere authorisation of this machinery by Parliament for obtaining the desired information cannot be treated as rendering the making of a statement free and voluntary when it is made in order to avoid the 90-day detention. Having regard to all the evidence I find myself not persuaded that it was not a fear of further detention that induced the accused to make the confession.'

. . . there can be no possible doubt that, as a matter of general principle, a threat of detention unless the suspect confessed - particularly detention incommunicado - would constitute undue influence . . .

. . . a case on which the Attorney-General relies, *S v Hlekani* 1964 (4) SA 429 (E). . . . *Hlekani's* case was wrongly decided, and if this Court were to be rigidly bound to follow it in this case the accused, who are facing capital charges, would not be fairly tried.

Wynne J, . . . held that s 17 of Act 37 of 1963 'required' a suspect under interrogation to incriminate himself, and he placed reliance on the principle of statutory compulsion as satisfying the conditions for admissibility. However, neither s 17 of Act 37 of 1963, nor s 47 of the Transkei Public Security Act, 'require' or 'compel' a suspect to incriminate himself. The suspect is entirely within his rights to adhere to the common law principle of '*nemo tenetur se ipsum accusare*', and he commits no offence if he chooses so to do. What the sections in fact do is to bring to bear upon a suspect the most cogent inducement to choose not to adhere to his right of silence, but to forgo it in order to secure, or hasten, his release from incommunicado detention for purposes of interrogation. It is clearly therefore not a case of statutory compulsion, such as may occur when a statute compels answers to be given to questions put in the course of a judicial or quasi-judicial proceeding, or perhaps when it is made a criminal offence not to answer questions but by an authorised enquirer, and when such answers may afterwards be given in evidence against him in a criminal trial.

In *Mpetha's* case supra, Williamson J found himself 'quite unable to agree either with (the conclusion reached in *Hlekane's* case) or with the reasoning by means of which it reached its conclusion.' . . .

I respectfully associate myself with these observations by Williamson J. Section 47 has nothing whatsoever to do with questions of admissibility of confessions in criminal trials. It has to do with 'powers of arrest and detention of persons for interrogation' and it is indeed designed, as the South African Appellate Division said of the equivalent section in that country, 'to induce the detainee to speak'. Having spoken, the question of whether what he says may later be used in evidence against him has to be determined according to the law of evidence and with specific regard to the provisions of s 222 of the Criminal Procedure Act. To hold otherwise, as the Attorney-General has urged me to do, would undermine our system of justice. In this connection it is helpful to pay regard to the following passage from the judgment of Macdonald AJA in *Hackwell's* case supra at 400E-H: ...

I hold therefore that the fact that the Legislature has sanctioned detention and interrogation in the manner and to the extent that is provided for by s 47 of the Public Security Act, does not protect a confession obtained pursuant to such detention and interrogation from being challenged as inadmissible in evidence by reason of undue influence having been brought to bear upon the suspect to speak.

I must now consider what the consequences may be of the election of the accused not to testify in his trial-within-a-trial. The Attorney-General submits that in the absence of their own evidence the Court cannot know whether the inducement to speak to which

they were subjected by means of s 47 detention was the cause or one of the causes why they made confessions.

As pointed out in *S v Christie* 1982 (1) SA 464 (A) at 485D there are two questions of fact that fall to be decided in cases such as this: Was the detainee induced to speak? If so, why did he speak? It is important to note that the detention with which the Court was concerned in *Christie's* case was detention under s 22 of the General Law Amendment Act 62 of 1966. Detention under that section is but a pale shadow of detention under s 47 of our Public Security Act. Section 22 provided for only limited detention for 14 days and the detention was not made to depend on the detainee's refusal to answer questions. . . .

When it is s 47 detention that is involved however, it would be a gross understatement to say that 'there may be an element of inducement in the sense that the detainee may think that by speaking he may secure his early release'. Under s 47 there very definitely is an inducement and in this case the police testified that the detainees were expressly made to understand that if they chose not to speak there would be no question of an early release.

The first question of fact therefore, namely was the detainee induced to speak, assumes a rhetorical quality when it is s 47 detention that is under consideration. Of course he was - that is the very purpose for which the section is designed.

...

It hardly needs a psychiatrist to tell one that the mere threat, let alone the actual experience, of indefinite detention in solitary confinement and at a place unknown to and unreachable by family, friends and legal advisers, all in consequence of not speaking, would be a most frightening thing for the overwhelming majority of people, and would exert a most powerful influence on their minds to speak in the hope of ending such misery as soon as possible. When therefore, someone who is in so parlous a predicament does speak, the obvious and natural probability is that he has done so because his freedom of volition to maintain silence has been impaired, and I fail to understand how this probability is lessened by the fact that others seemingly did not yield to such pressure. There will always be those who are made of sterner stuff than their weaker brethren, even to the extent at time of embracing death rather than reveal information required by the interrogators.

In my opinion therefore, it is clear that the State has not succeeded in discharging the onus it bears in relation to accused Nos 8, 12, 15 and 16. . . .

In the instant case the State has not proved that the 'violence' (meaning thereby the pressures created by s 47 detention) that was brought to bear on the accused before their statements were made, did not induce their statements. The inducing tendency of s 47 detention is manifest, and that tendency did not cease to operate before the statements were made.

...

The evidence has shown that s 47 is calculated to have, and undoubtedly has a strong inducing effect upon any detainee to speak. It has shown that while that inducement was held over the heads of these accused confessions were made. That being the case, evidence from the accused that the inducement operated on their minds would have done no more than confirm the natural assumption that if the inducement was there, as it was, it operated. The omission of such evidence therefore subtracts nothing from the premises upon which the conclusion rests, as a matter of probability, that the confessions were in fact evoked, wholly or partially, by the inducement, and no further enquiry is necessary as to whether the inducement was in fact present to the minds of the accused. Such an enquiry would have become necessary if the accused had chosen to testify and, with their minds specifically directed to the question, if they had then claimed that their confessions were evoked by other factors without including among those factors that of detention under s 47. In *Mpetha's* case that is what some of the accused did, and it led to the admission into evidence of their statements.

13.490 In the case of *Dlamini*¹⁰ the court set out the right to silence in the context of bail and subsequent proceedings as follows:

[94] Litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices. That is an inevitable consequence of the high degree of autonomy afforded the prosecution and the defence in our largely adversary system of criminal justice. An accused, ideally assisted by competent counsel, conducts the defence substantially independently and has to take many key decisions whether to speak or to keep silent: Does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral and/or written evidence and if so by whom? Does one for the purposes of obtaining bail disclose the defence (if any) and in what terms? Later, at the trial, does one disclose the basis of the defence under s 115 of the CPA? Does one adduce evidence, one's own or that of others? Each and every one of those choices can have decisive consequences and therefore poses difficult decisions. As was pointed out in *Osman's* case 137 '(t)he choice remains that of the accused. The important point is that the choice cannot be forced upon him or her.' It goes without saying that an election cannot be a choice unless it is made with proper appreciation of what it entails. It is particularly important in this country to remember that an uninformed choice is indeed no choice. The responsibility resting upon judicial officers to ensure the requisite knowledge on the part of the unrepresented accused need hardly be repeated.

[95] In effect the reasoning in *Botha* wishes to give the accused the best of both alternatives or, as it was put bluntly in *Dlamini*, the right to lie: one can advance any version of the facts without any risk of a come-back at the trial; and there one can choose another version with impunity. However, the protection of an arrestee provided under the right to remain silent in the Constitution - or the right not to be compelled to confess or make admissions - offers no blanket protection against having to make a choice. It is true, the principal objective of the Bill of Rights is to protect the individual against abuse of State power; and it does so, among others, by shielding the individual faced with a criminal charge against having to help prove that charge. That shield against compulsion does not mean, however, that an applicant for bail can choose to speak but not to be quoted. As a matter of policy the prosecution must prove its case without the accused being compelled to furnish supporting evidence. But if the accused, acting freely and in the exercise of an informed choice, elects to testify in support of a bail application, the right to silence is in no way impaired. Nor is it impaired, retrospectively as it were, if the testimony voluntarily given is subsequently held against the accused.

...

[98] Although there are differences between the wording of the relevant protections in the interim Constitution and the Constitution, the differences are immaterial with regard to the point now under discussion. The principle remains the same. The question to be asked in *Dlamini* and in *Schietekat* is therefore still not whether, somehow or other, the right to silence was imperilled by the accused having on advice elected to speak. Under the Constitution the more pervasive and important question is whether the admission of the resultant evidentiary material would impair the fairness of the trial. If it would, the evidence ought generally to be excluded. If not, there is no basis for excluding it. There is no warrant for creating a general rule which would exclude cogent evidence against which no just objection can be levelled. The trial court must decide whether it is a valid objection, based on all the peculiar circumstances of the particular case, not according to a blanket rule that would throw out good and fair evidence together with the bad. Thus, in *Dlamini* there can be no conceivable objection to the trial Court having taken into account what the accused had said when pressing his bail application. Then again, if the case against *Schietekat* should ever be reinstituted, the trial court will have to decide whether it would render the trial unfair to include the transcript of the bail application. The mere fact that such

¹⁰ *S v Dlamini, S v Dladla and others, S v Joubert, S v Schietekat* 1999 2 SACR 51 (CC).

evidence might cogently corroborate a single identifying State witness would not be decisive in deciding fairness, but the fact that the prosecutor was allowed to range unchecked may.

[99] Provided trial courts remain alert to their duty to exclude evidence that would impair the fairness of the proceedings before them, there can be no risk that evidence unfairly elicited at bail hearings could be used to undermine accused persons' rights to be tried fairly. It follows that there is no inevitable conflict between s 60(11B)(c) of the CPA and any provision of the Constitution. Subsection (11B)(c) must, of course, be used subject to the accused's right to a fair trial and the corresponding obligation on the judicial officer presiding at the trial to exclude evidence, the admission of which would render the trial unfair. But it is not only trial courts that are under a statutory and constitutional duty to ensure that fairness prevails in judicial proceedings. The command that the presiding judicial officer ensure that justice is done applies with equal force to a bail hearing. There the presiding officer is duty bound to ensure that an accused who elects to testify does so knowing and understanding that any evidence he or she gives may be admissible at trial.

13.501 The project committee took into account the criticism raised against evidence obtained from detainees in the past. These concerns were aimed at security legislation which contained hardly any safeguards. The project committee was therefore of the view that should the legal representative of the detainee's choice not be permitted to consult with the detainee and be present at all times during interrogation, any information or evidence given to the police under interrogation, should be inadmissible against the detainee. However, the project committee recommended that the legal representative of the detainee should be entitled to consult with and remain present throughout interrogation. The committee therefore considered that the admissibility of evidence obtained during interrogation from the detainee should be left to the trial court to decide whether there has been a breach and whether the fairness of the trial has been impaired.

(ii) Comment on discussion paper 92

13.502 The SAPS: Legal Component: Detective Service and Crime Intelligence states that it agrees with the project committee's proposal. The Defence Secretariat comments that no provision is made in the Bill in respect of what or how the information obtained in these interrogations will be used, and that it is unclear whether in fact the information will be used against the detainee in any subsequent proceedings preferred against the detainee. The Secretariat suggests that the Bill be clarified in this respect.

13.503 The LRC says that it is very hard to imagine any criminal defence lawyer who will allow or advise his client to incriminate himself on a count of terrorism. The LRC notes that in Northern Ireland the right of access to a legal representative could

be delayed for a period of 48 hours if the detective superintendent has a reason to believe that such access would interfere with the gathering of information. The LRC points out that this provision also tends to undermine the attorney-client relationship because it exposes the legal advisor to a situation where s/he might have to advise a client not to answer certain questions but when the issue, for argument sake, gets to trial and the question is asked why did the detainee not answer any question, and s/he might say "I was advised by my lawyer not to answer any question".

13.504 Mr JHS Hiemstra, Deputy Director of Public Prosecutions in the Free State, remarks that it would be surprising if a legal practitioner were to advise his client to speak and to incriminate himself. Messrs Fick and Luyt of the Office of the Director of Prosecutions: Transvaal ask what will the powers of the legal representative be during the interrogations (can he or she, for instance, advise the detainee to refuse to answer any questions, in which case the whole purpose of the clause 16 would be defused).

(iii) Evaluation and recommendation

13.505 Respondents posed the question what would the purpose of the envisaged provision be if the witness were to use the right to silence. The committee is of the view that a witness should only be able to refuse to answer questions put to him or her in the examination if he or she can rely on privilege. The judge should rule on this question if it arises. No answer given or thing produced shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act of 1955, ie for making conflicting statements¹¹ or on a charge of perjury; and no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act of 1955 or on a charge of perjury. The committee and Commission recommend that the Bill should provide that a person named in an order shall answer questions put to the person by the National Director of Public Prosecutions or the National Director of Public Prosecutions'

¹¹ 319 Charges for giving false evidence

(3) If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such firstmentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.

representative, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege. The Bill should also provide that the presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing. Furthermore, no person shall be excused from answering a question or producing a thing on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

- (a) no answer given or thing produced shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act (Act No 56 of 1955)¹² or on a charge of perjury; and
- (b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act (Act No 56 of 1955) or on a charge of perjury.

(s) **Criteria for detention or continued detention**

- (i) Evaluation contained in discussion paper 92

13.506 The project committee noted that the Bill contains a number of factors for motivating the need for detention or further detention of a detainee such as - to compare fingerprints; to do forensic tests and verify answers provided by the detainee; to explore new avenues of interrogation; through interrogation to determine accomplices; to correlate information provided by the person in custody with relevant information provided by other

¹² 319 Charges for giving false evidence

(3) If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such firstmentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.

persons in custody; to find and consult other witnesses identified through interrogation; to hold an identification parade; to obtain an interpreter and to continue interrogation by means of an interpreter; to communicate with any other police services and agencies; to evaluate documents which have to be translated; or any other purpose relating to the investigation of the case approved by the judge.

13.507 The project committee considered whether it could be argued that the reasons for the detention of the person suspected of withholding information are not only for interrogation but for a host of other reasons as well. The committee noted that clause 16(7)(g) makes provision for the continued detention of a person to obtain an interpreter. The committee wondered whether this means that the police can isolate someone, then wait for days and then inform a judge that they need a further seven days, for example, as they haven't succeeded yet in tracking down and securing the services of a relevant interpreter. The committee noted that if law enforcement officials detain a foreigner and they aren't able to find an interpreter capable of speaking the language concerned, the judge will have to deal with this and will make a determination whether he or she is going to allow this to affect continued detention. The committee also supposed that the question of an interpreter may very well be dealt with by the judge as one of the conditions of detention when considering the warrant of detention at the application phase. The committee also posed the question whether it would be a valid interpretation to argue that there may be other reasons why a detainee needs to be detained once interrogation comes to an end. The committee however noted that the reason for detention should be based on reasonable grounds for believing that the person concerned is withholding information. The committee suggested as is discussed under the next heading, that upon expiry of the period of detention a detainee should be released immediately.

13.508 The committee was of the view that the words "The need for detention or continued detention must be motivated in relation to one or other of the following purposes" should be substituted for the words "The need for the custody of a person arrested and kept in custody in terms of this section must be motivated with relation to the following purposes". The project committee further suggested that clause 16(7)(b) should read "to explore new avenues of interrogation" instead of "to interrogate or explore new avenues of interrogation" since the clause already provides for interrogation and that the words "to communicate with any other police services and agencies" in clause 16(7)(h) should be substituted for the words "to communicate with other police services and agencies, especially in other time zones".

13.509 Amnesty International notes that the Bill elaborates on the possible reasons for detaining a person or continuing their detention. AI points out that the list contains some unusual items and that it indicates an underlying purpose behind clause 16 of the Bill which distinguishes it from reasons typically invoked by states as the basis for the suspension of certain fundamental rights in, say, a declared state of emergency. AI remarks that these purposes relate to standard tasks undertaken by police or other investigation agencies in the course of investigating specific crimes. AI considers that taken together or separately as justification for detention or for extending the period of detention without being charged, they are neither necessary nor reasonable and may allow opportunity for the police to proceed inefficiently or in bad faith, while still having legal grounds to continue with the detention. AI comments that unless there are compelling reasons which would normally be reviewed by a bail court for keeping an arrested person in pre-trial custody,¹ **police investigators would be expected to undertake these tasks without resorting to drastic procedures in relation to witnesses or others with information bearing on the case under investigation.**

13.510 AI notes that the underlying purpose for allowing prolonged detention without charge or trial under these circumstances must be, it seems, to place the detained person under psychological pressure to ensure “co-operation” with the investigation process. AI remarks that the likely result is to place in jeopardy the human rights of suspects or other individuals who may be assumed to have relevant information for the investigation. AI points out that during the South African Human Rights Commission seminar in Cape Town on 6 November 2000 the Deputy Minister of Safety and Security, Joe Matthews, when responding to concerns about the proposed length of detention without charge, reportedly stated that “we are not in a state of emergency”, rather it is that the police want the time for detention and interrogation to be extended beyond 48 hours. Amnesty International points out that it is concerned, however, that the proposed legislation will grant the authorities what are in effect emergency powers, particularly in relation to detention without charge or

¹ In the view of the UN Human Rights Committee, pre-trial detention must not only be lawful, but must also be necessary and reasonable in the circumstances. It has held that suspicion that a person has committed a crime is not sufficient to justify detention pending investigation and indictment, but may be necessary to prevent flight, avert interference with witnesses and other evidence, prevent the commission of other offences, or where the suspect poses a clear and serious risk to others which cannot be contained by less restrictive means. Where a person is held in detention pending trial, the authorities must keep the necessity of continuing such detention under regular review (*Van Alphen v. the Netherlands*, 305/1988, 23 July 1990, Report of the HRC Vol II(A/45/40), 1990, at 115, Article 9(3) of the ICCPR and, similarly, Principle 39 of the UN Body of Principles and Rule 6 of the UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules).

trial, without any of the safeguards provided for under national and international law with a formal declaration of a state of emergency.² AI notes that under South Africa's international human rights obligations, derogations from certain guaranteed rights are only permitted in a state of emergency that has been declared in accordance with international standards.³ In conclusion, Amnesty International urges the sponsors of the Bill to ensure that the resulting legislation is consistent with South Africa's regional and international human rights obligations.

13.511 **The SAPS: Legal Component: Detective Service and Crime Intelligence** notes that it should be kept in mind that the other purposes set out above may directly influence the motivation for the detention, it might be possible that some key pointers in the investigation or even some of the replies of the detained person have to be followed up, before interrogation may continue. The SAPS considers that the factors set out in the proposed clause are typically the type of matter which will guide interrogation, it is accepted that the main purpose of detention is to obtain information allegedly withheld. The SAPS suggests that police officers should however be allowed to follow up related information which could assist in the interrogation. The Chief: Military Legal Services suggests that the word *detainee* be substituted for the word *person in custody* in clause 16(7)(d).

13.512 **Prof Michael Cowling** notes that the actual motives for detention are spelled out in far greater detail than was the case under the repealed section 29 of the *Internal Security Act*, and that under the latter all that needed to be shown was a subjectively formed opinion that detention for interrogation was necessary, in contrast clause 16(7) spells out a series of specific purposes for the detention and it appears that if one or other of these is not satisfied the detention will not be justified.⁴ He considers that this could prove to be a particularly useful safeguard because it can be assumed that, when making an application for detention, the DPP would have to motivate in terms of one of these purposes, and this should narrow down the ambit of the enquiry considerably and give the prospective detainee an opportunity to answer

² See section 37 of the Constitution and the State of Emergency Act of 1997 for the requirements under South African law, and "Fair trial rights during states of emergency" in Amnesty International, *Fair Trials Manual* (Pol 30/02/98, December 1998), chapter 31.

³ See Article 4 of the ICCPR, which South Africa ratified in 1998, which includes the requirement for States to report in detail on measures taken when derogating from their obligations under the Covenant to other States parties through the intermediary of the UN Secretary General.

⁴ "The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" 2000 *South African Journal of Criminal Justice* Vol 13 (3) at 351.

these specific allegations. Prof Cowling also suggests that it should effectively counter one of the main criticisms of the repealed section 29 of the *Internal Security Act* where persons were detained for lengthy periods without knowing the purpose of such detention or without even being interrogated. He states that the only problem in regard to these purposes that could undermine their effectivity as a safeguard is that it is possible that an application for detention could be made in respect of a number of different purposes and in addition, the clause contains an *omnibus* purpose in the form of any purpose relating to the investigation of the case approved by the judge. Ms Esther Steyn notes that an objective consideration of the factors set out in clause 16(7)(a) to (j) shows that they are not sufficiently just to curtail the right to liberty and freedom, and that put differently, the factors listed cannot be considered to be in accordance with basic tenets of a fair legal process.⁵ She considers that for these reasons clause 16 is likely to be found unconstitutional.

(iii) Evaluation and recommendation

13.513 The grounds proposed in the discussion paper which were to be taken into account by a court in determining the detention or further detention of the person being interrogated were — to compare fingerprints, do forensic tests and verify answers provided by the detainee; to-explore new avenues of interrogation; through interrogation to determine accomplices; to correlate information provided by the person in custody with relevant information provided by other persons in custody; to find and consult other witnesses identified through interrogation; to hold an identification parade; to obtain an interpreter and to continue interrogation by means of an interpreter; to communicate with any other police services and agencies; to evaluate documents which have to be translated; or any other purpose relating to the investigation of the case approved by the judge. The committee is of the view that the grounds set out in the discussion paper deal squarely with further investigation to be conducted by the police. As such they do not constitute justification why the witness providing information should be detained. The committee is therefore of the view that the provision setting out the grounds for detention or further detention proposed in the discussion paper should be deleted. The Commission agrees with this recommendation.

⁵ "The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?" 2001 SACJ Vol 14 179 - 194 at 193.

(t) **Upon expiry of the period of 14 days a detainee shall be released immediately**

(i) Evaluation contained in discussion paper 92

13.514 The committee noted that it was suggested in the original clause 16(7) that where the period of detention expires, the detainee remains in custody until he or she is brought before a court on the first day following the day of the expiry of his or her detention. The committee questioned the suggestion that once the period of detention has expired the detainee is nevertheless further detained and then has to be brought before a court. The project committee was of the view that further detention for the purpose of an appearance in court does not make sense once the period of detention has expired. The committee posed the question what would the purpose of the appearance in court be unless the detainee is going to be charged. The project committee remarked that if it is sought to charge a person detained in terms of the clause 16 he or she can in any case be brought before a court under the *Criminal Procedure Act* the moment the detention has expired. The project committee was of the view that unless the detainee is charged, he or se must be released upon expiry of the period of detention. The project committee recommended that clause 16(8) should provide as follows, namely "Upon expiry of the period referred to in subsection (4) a detainee shall be released immediately".

13.515 The committee also considered the wording of the original clause 16(8) which sought to provide that if a judge denies the further detention of a detainee, he or she remains in custody until the first following court day and such detainee must appear in court on that day. The project committee was of the view that the original clause 16(8) should be deleted in view of the committee's reformulated clause 16(8) in terms of which a detainee must be released immediately upon expiry of the detention period.

(ii) Comment on discussion paper 92

13.516 Messrs Fick and Luyt state that certainly, if it is decided that the detainee is to be prosecuted, he should not be released at the expiry of the 14 days, and suggest that the word "or charged" should be added to clause 16(8).

(iii) Evaluation and recommendation

13.517 In view of the reformulated provision dealing with the procedure to bring witnesses before a high court judge for questioning, the committee decided that this clause should not be retained. The Commission agrees with this recommendation.

(u) **No bail may be granted to a detainee, nor is such detainee entitled to appear in court to apply for bail**

(i) Evaluation contained in discussion paper 92

13.518 The project committee was further of the view that clause 16(9) should be reformulated to provide that no bail may be granted to a detainee, nor such detainee entitled to appear in court to apply for bail. The original clause 16(9) provided that no bail may be granted nor is a person entitled to appear in court to apply for bail, if a judge has ordered his or her custody in terms of clause 16.

(ii) Comment on discussion paper 92

13.519 The SAPS: Legal Component: Detective Service and Crime Intelligence agrees that if the detention expires, then it should not be necessary for the detainee to appear before court, before he or she is released. The SAPS considers that what should be effected is only that a detainee shall not be released at the expiration of the initial period of detention for 48 hours, if an application for his or her further detention has been made, but is not finalized yet. The SAPS refers in this regard to the provision in the British Terrorism Act 2000, to that effect.

13.520 Ms Esther Steyn also notes the European Court of Human Rights case of *Fox, Campbell and Hartley v UK* where the court refused to accept that the *exigencies of dealing with terrorist crime* could justify impairing the safeguards of Article 5(1). She suggests that the Bill by limiting a court's power to set the detainee free in terms of clause 16(9), which declares that no bail may be granted to a detainee nor is such detainee entitled in court to apply for bail, contravenes Article 5(3) of the European Convention. She suggests that the Bill does therefore not meet recognised international human rights standards. She also remarks that the denial in terms of the proposed legislation of the opportunity to approach a court for bail or any other release conflicts with the individual's rights contained in section 12 of the Constitution.

(iii) Evaluation and recommendation

13.521 The committee considers that it should be possible to release on bail or on conditions a witness who is brought before a court for an examination. The redrafted provision therefore makes provision for bail being granted to the witness. The Commission agrees with this recommendation.

V. APPLICATIONS FOR IMPOSITION OF CONDITIONS TO PREVENT TERRORIST ACTS

13.522 It was noted above that the recently enacted Canadian legislation provides for a procedure whereby a police officer may bring an application before a judge if the law enforcement officer believes on reasonable grounds that a terrorist act will be carried out, and suspects on reasonable grounds that the imposition of a release on warning with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist act. The committee is of the view that the Bill should also make provision for such a preventative procedure. In its pure form it is still detention without trial but it is very different from the original provision on detention for interrogation. In a sense a condition precedent for this process is something akin that the person is suspected of what would be an offence under the Act namely the withholding of knowledge or information. Under the investigative provision one is balancing the gathering of information against the interests of public safety and the detainee's interests not to be detained. Provision is made that he or she must be brought before a judge without delay. With preventative detention there is a stronger case for justification. The authorities are not waiting to see what happens after there has been a terrorist attack, an attempt is made to stop another attack. One could argue that there is a stronger counterbalance here. The judge has to be satisfied that the suspicion is founded and the person is going to be involved in a terrorist act which can be prevented. If the police considers the person is going to be involved in a terrorist act, he or she would be arrested and told to keep the peace. It is considered that the detention as provided for in these provisions is not arbitrary as the detainee is allowed recourse to the safeguards of the criminal justice system.

13.523 The consent of the National Director of Public Prosecutions should be required before a police officer may bring such an ex parte application. A judge who receives an application may cause the person to appear before him or her or another judge. If either of the grounds for bringing an application exist but, by reason of exigent circumstances, it would be impracticable to bring an application, or an application has been brought and a summons has been issued, and the police officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist act, the police officer may arrest the person without warrant and cause the person to be detained in custody, to be taken before a judge. The Bill should provide that if a police officer arrests a person without warrant, the police officer shall take that person without delay before a judge, and bring an application or release the person, and promptly inform the person of the reason for being arrested and detained.

13.524 A person detained in custody must be taken before a judge without delay, unless, at any time before taking the person before a judge, the police officer is satisfied that the person should be released from custody unconditionally, and so releases the person. When a person is taken before a judge if an application has not been brought, the judge shall order that the person be released. If an application has been brought the judge shall order that the person be released unless the police officer who brought the application shows cause why the detention of the person in custody is justified. One or more of the following grounds will be taken into account, namely that — the detention is necessary to ensure the person's appearance before a judge for a hearing; the detention is necessary for the protection or safety of the public, including any witness; having regard to all the circumstances including the likelihood that, if the person is released from custody, a terrorist act will be carried out; any substantial likelihood that the person will, if released from custody, interfere with the administration of justice, and any other just cause; the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the police officer's grounds; and the gravity of any terrorist act that may be carried out. The judge may adjourn the matter for a hearing but, if the person is not released, the adjournment may not exceed forty-eight hours.

13.525 The provisions set out above in respect of investigative hearings making provision for legal representation and visits by the spouse or partner, next of kin, chosen religious counsellor; and chosen medical practitioner should also apply here . The judge before whom the person appears for a hearing, may, if satisfied by the evidence adduced that the police officer has reasonable grounds for the suspicion, order that the person enter into an undertaking to keep the peace and be of good behaviour for any period that does not exceed twelve months and to comply with any other reasonable conditions that the judge considers desirable for preventing the carrying out of a terrorist act. If the person was not released the judge must order that the person be released, subject to any undertaking given. The judge may commit the person to prison for a period not exceeding twelve months if the person fails or refuses to enter into the undertaking.

13.526 Before making an order the judge must consider whether it is desirable, in the interests of the safety of the person or of any other person, to include as a condition of the undertaking that the person be prohibited from possessing any weapon or explosive for any period specified in the undertaking, and where the judge decides that it is so desirable, the judge must add such a condition to the undertaking. It is also recommended that if the judge adds a condition to an undertaking, the judge must specify in the undertaking the manner

and method by which the things that are in the possession of the person must be surrendered, disposed of, detained, stored or dealt with, and the authorizations, licences and registration certificates held by the person must be surrendered. If the judge does not add a condition to an undertaking, he or she must include in the record a statement of the reasons for not adding the condition. The judge may, on application of the police officer, the National Director of Public Prosecutions or the person, vary the conditions fixed in the undertaking.

W. IDENTIFICATION OF SPECIAL OFFENCES BY A DPP

(a) Evaluation contained in discussion paper 92

13.527 The project committee noted in the discussion paper that irrespective of the charge with which someone is charged, if a Director of Public Prosecutions (DPP) considers that an offence constitutes terrorism then it is regarded a special offence. The committee questioned the fact that the DPP might deem an offence as something that it is not. The committee suggested that where someone has committed malicious injury to property but the DPP is of the opinion that it is not malicious injury to property but a terrorist act then before the accused pleads to that charge, the DPP issues a certificate certifying that the malicious injury to property is an offence in terms of the Act. The committee explained that it has too readily read clause 17 to mean that all the offences under the Act are special offences and that there are special procedures for such offences. The committee however realised that other offences might very well be elevated to special offences by a DPP. The committee also noted that the deeming of offences as “special offences” affects also the entitlement to bail. The committee considered that it would have been easy enough to use the wording “all offences under this Act” instead of allowing a DPP to designate offences as “special offences”.

13.528 The committee also noted that once an offence is categorised as a special offence it becomes permissible to draw an adverse inference if the accused fails to indicate the basis of his or her defence. The committee appreciated that one of the aims of the clause might be to provide for a fast-tracking or expediting of cases which will obviously be subject to the requirements of a fair trial. It however seemed to the committee that one of the inevitable consequences of an offence being categorised as a special offence is that clause 19(4)(b) is triggered. The project committee considered that clause 19(4)(b) might very well infringe the constitutional right to silence. The committee noted the article written by Judge Nugent and that he seems to say that one should not encourage the concealment of the truth. The committee remarked that Judge Nugent may very well be right but that this issue hasn't been decided yet in South Africa. The project committee recommended that

clause 17 should be deleted.

(b) Comment on discussion paper 92

13.529 The SAHRC supports the deletion of clause 17, since there is no need for deeming an offence as something it is not, particularly in the light of the special provisions contained in the Bill relating to the granting of bail and the possibility that a negative inferences can be drawn if an accused under the Bill fails to indicate the basis of his or her defence.

(c) Evaluation and recommendation

13.530 The committee considers that the Bill should not make provision for offences to be labelled special offences by the DPP and that this clause not be included in the Bill. The Commission agrees with this recommendation.

X. POWERS OF COURT IN RESPECT OF OFFENCES UNDER THE ACT

(a) Evaluation contained in discussion paper 92

13.531 The project committee had no objections to the suggestion that a court should have the power in relation to terrorist offences to determine when it should sit and the orders to be made by it when the state or accused is not ready to commence with its case. The committee considered that the heading to clause 18 contained in the discussion paper should read "powers of court in respect of offences under this Act" instead of "powers of court in respect of special offences". The committee recommended also that clause 18(1) should provide that "a court that tries an offence under this Act, may, in order to ensure that the trial be concluded as soon as possible, sit on any day". The project committee further considered that in clauses 18 and 19 the words "special offence" should be substituted with "offence under this Act". The committee also proposed that the words "preferring of a charge" be substituted in clause 18(2) for the words "issue of the certificate". It was hence recommended that clause 18(2) should provide that if the State is not ready to commence with the presentation of its case within 60 days of preferring a charge under the Bill, and if the court is satisfied that the State has failed to take all reasonable steps to commence with the presentation of its case, the court must (a) strike the case from the roll and release the accused, or (b) if the accused has already pleaded to the charge, release the accused on bail or on warning. The project committee also proposed that the words "period referred to in subsection (1)" be substituted for the words "of the date of the issue of the certificate" in

order to provide in clause 18(3) that if the State is ready to commence with the presentation of its case within the 60 day period referred to in subclause (2), but the accused is not ready to commence, the court must order that the trial be proceeded with at the earliest opportunity, but on a date not later than 90 days after preferring the charge.

(b) Comment on discussion paper 92

13.532 The SAPS: Legal Component: Detective Service and Crime Intelligence remarks that the provision relating to the limitation on the State to bring charges within 60 days, comes from the Second Criminal Law Amendment Act, 1992, and it is closely related to special offences. The SAPS proposes that if the special offences part is deleted, that the limitation be deleted as well. The SAPS remarks that since “special offences” are not catered for in the Bill, the time limitation in clause 18(2) should be deleted. The SAPS explains that it was linked to the fact that if special offences are created that it could be expected that cases may be disposed of more expediently, and that the limitation is unnecessarily restrictive. The Chief: Military Legal Services suggests that the words *offender for any offence* be substituted for the word *offence* in clause 18(1) as a court normally tries an offender allegedly having been committed by the offender.

13.533 Messrs Fick and Luyt of the Director of Prosecutions: Transvaal note that clause 18 be deleted *in toto*. They say that in view of the current situation of the court rolls (which seems unlikely to improve in the immediate future due to the high crime rate) and the availability of legal representatives, it is practically impossible to adhere to the time restraints set out in this clause. They consider that there is also no basis in law or general fairness to afford preference to prosecutions in terms of this Bill while the prosecution of many other serious offences where similar serious sentences are prescribed must be subject to the normal course of justice.

(c) Evaluation and recommendation

13.534 The committee agrees with the comments made by the SAPS and Messrs Fick and Luyt that the provisions setting out when court should sit and the orders to be made by it when the state or accused is not ready to commence with its case should be deleted. The committee agrees for the following reasons listed by them: the provision relating to the limitation on the State to bring charges within 60 days, was contained in the *Second Criminal Law Amendment Act*, 1992, and it is closely related to special offences; if the special offences part contained in the Bill is deleted, then the limitation should be deleted as well; and in view of the current situation of the court rolls (which seems unlikely to improve in the

immediate future due to the high crime rate) and the availability of legal representatives, it is practically impossible to adhere to the time restraints set out in this clause. The Commission agrees with the deletion of this clause.

Y. PLEA AT TRIAL OF OFFENCES UNDER THE ACT

(a) Evaluation contained in discussion paper 92

13.535 The project committee had no objections to clause 19(1) subject to the reference to “a special offence” which the committee considered should be substituted with “an offence under this Act”. This clause provided that if an accused stands trial on an offence under the Bill, the charge sheet or indictment, as the case may be, must be accompanied by a summary of the substantial facts on which the State relies. The committee noted that the language used in clause 19(2) would be the language normally used to empower a court to bring in a competent verdict. The committee remarked that where the State charges someone with a terrorist act in terms of the Bill or with an alternative charge such as, for example, malicious damage to property then that would be an offence for which that accused can be convicted. The committee was of the view that this issue is sufficiently covered by the Criminal Procedure Act and that there is no need for this subclause. The committee also considered clause 19(3) which provided that if a court at any stage of the proceedings and before sentence is passed, is in doubt whether the accused is in law guilty of an offence to which he or she has pleaded guilty, or is satisfied that a plea of guilty should not have been tendered by the accused, the court must record a plea of not guilty. The committee noted that clause 19(3) covered those aspects dealt with sufficiently by section 113 of the Criminal Procedure Act, that it did not say anything more than the Criminal Procedure Act does and considered that there was no need for the clause.

13.536 The committee further considered clause 19(4)(a)(i) which dealt with the aspects governed by section 115 of the Criminal Procedure Act and considered that there was also no need for clause 19(4)(a). The project committee was of the view that clause 19(4)(b) posed a potential problem in the use of the wording which stated that the court may *at will* in respect of his or her credibility or conduct, draw an inference if the accused fails to indicate what the basis for his or her defence is and to what extent he or she disputes or does not dispute the facts set out in a summary of substantial facts. The committee noted that the Criminal Procedure Act does not deal with this issue. The committee considered that put as boldly as the clause was drafted, it might in fact be an infringement of the right to silence. The committee noted that under the Constitution an accused has the right to remain silent but that under the Bill an adverse inference might be drawn from his or her silence.

The committee wondered whether the clause was not saying that a court has a discretion to draw an inference and that it must be exercised judicially. The committee was however of the view that the real question is whether the discretion to draw an inference infringes the right to silence and noted that this issue has not yet been decided in South Africa.¹

13.537 The project committee noted that if it were constitutionally permissible to draw an inference in these circumstances then one can understand that the accused must be informed of such an inference in advance. The committee also took into account that if a court has to inform the accused that an inference may be drawn, this might perhaps confuse the accused into thinking that although the court also informs him or her about a right to silence perhaps he or she should say something to the court. The committee noted that unless it is explained at length it is going to be confusing and it might be better just to emphasise the right to silence. The committee also considered that in the end it might not be a derogation of the right to silence, but simply that a prima facie case which has not been answered by the accused, where

¹ The committee noted that the European Court of Human Rights remarked in *Murray v United Kingdom* that it must consider whether the drawing of inferences against the applicant under Articles 4 and 6 of the Order rendered the criminal proceedings against him - and especially his conviction - unfair within the meaning of Article 6 of the Convention. The Court pointed out that it is its role to examine whether, in general, the drawing of inferences under the scheme contained in the Order is compatible with the notion of a fair hearing under Article 6. The Court stated that although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6. The committee also noted that the Court said in *Murray v United Kingdom* that it did not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context "improper compulsion". The Court noted that what was at stake in the case is whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as "improper compulsion". The Court considered that, on the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deemed it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. The Court remarked that wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative. The Court pointed out in *Murray v United Kingdom* that it cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. In particular, as the Government have pointed out, established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point. Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.

there is ultimately proof beyond a reasonable doubt. The committee considered that it is unnecessary to include this clause in the Bill, it will perhaps encourage fruitless debate and in due course the Constitutional Court may very well determine this issue. The committee noted that what the drafters are trying to discourage is the practise used by some accused whose only defence is that the State must prove their case beyond reasonable doubt and if the State doesn't, then they rely on their entitlement to an acquittal. The committee considered that the clause derogates from the accused's constitutional right to silence but at the same time the prosecution's ability to prove its case will not be derogated from if the committee were to delete the proposed clause. The project committee also considered that it shouldn't encourage the statutorily drawing of inferences which the facts of a case do not really warrant.

13.538 The committee noted that clause 19(5) deals with those aspects sufficiently governed by section 115(2)(b) of the Criminal Procedure Act and considered that there is no need for its inclusion in the Bill.

(b) Comment on discussion paper 92

13.539 The SAHRC agrees with the deletion of clause 19(4)(b). The SAHRC notes that the issue of negative inferences has not been decided by the Constitutional Court and there is a real possibility that such a provision will be found to be unconstitutional.

(c) Evaluation and recommendation

13.540 The committee is of the view that there is no need to retain the original clause 19 which dealt with providing a summary of the substantial facts on which the State relies, empowering a court to bring in a competent verdict, the court recording a plea of not guilty if in doubt about the accused admitting the allegations in the charge to which he or she has pleaded guilty, or that the accused should not have tendered a guilty plea, the court requesting the accused to indicate the basis of his or her defence to a charge, and the court recording admissions made by the accused. The committee considers that these provisions do not provide in more clarity than the Criminal Procedure Act presently does and therefore considers that there is no need for this clause. The committee also remains of the point of view that it should not include the proposed provision on the drawing of inferences when an accused fails to indicate the basis of his or her defence. The Commission agrees with these recommendations.

Z. BAIL IN RESPECT OF OFFENCES UNDER THE BILL

(a) Evaluation contained in discussion paper 92

13.541 The committee suggested that the words “an offence under this Act” be substituted for “which a Director of Prosecutions has issued a certificate” in order to provide that notwithstanding any provision to the contrary, where an accused stands trial on a charge under the Act, the provisions relating to bail in the Criminal Procedure Act apply as if the accused is charged with an offence referred to in Schedule 6 of that Act. Section 60(11) provides that notwithstanding any provision of the Criminal Procedure Act, where an accused is charged with an offence referred to-

- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
- (b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

(b) Evaluation and recommendation

13.542 In view of the lack of comment on this issue, it seems as if respondents were in agreement with the committee’s preliminary proposal. The committee therefore recommends that where an accused stands trial on a charge under the Bill, the provisions relating to bail in the Criminal Procedure Act apply as if the accused is charged with an offence referred to in Schedule 6 of that Act. The Commission agrees with the recommendation.

Aa DUTY TO REPORT INFORMATION

(a) Evaluation contained in discussion paper 92

13.543 The committee noted that the Bill imposes a duty on people having information which may be essential in order to investigate any terrorist act to report such information. The committee noted the utility of the clause and supposed that in the end it is a question of policy whether somebody like a Director of Public Prosecutions (DPP) should have the power to grant an indemnity where ordinarily the exercise of such power is the function of a court. The committee appreciated that the possibility of obtaining indemnity will serve as an incentive to report information but as a policy matter it means that an individual as opposed to a court is actually indemnifying someone from prosecution. The committee also noted that it is in the gift of a DPP to decide on the requirement in clause 21(2) “that it is

in his view in the interests of justice that a such person be indemnified against prosecution". (The original wording stated "and that it is in general in the interests of justice that a such person be indemnified against prosecution".)

13.544 The committee suggested that the clause be retained in the Bill. The committee however considered that it should be emphasised that the clause raises important questions of policy although the committee can certainly see the merit in providing an incentive for people possessing information on terrorist acts to convey such information to a police officer, public prosecutor or a Director of Public Prosecutions and to testify on such information.¹

(b) Comment on discussion paper 92

¹ See on the issue of testifying in court and possible protection of witnesses the Irish case of *In re Josephine Devine* [1999] NIEHC 7; [1999] NIJB 128 (26th March, 1999) at <http://www.bailii.org/cgi-bailii/>:

"22. In the context of the sustained and unrelenting campaign of violence to which those institutions that seek to uphold the rule of law in Northern Ireland have been submitted by various terrorist organisations, it is hardly surprising that, in recent times, the principle of "open justice" has been a fairly frequent topic of judicial discussion in this jurisdiction. The subject was fully discussed by Kelly LJ in *R v Murphy & Maguire* [1990] NI 306 and, in the course of that judgment, at page 333 he cited the well known passage from the speech of Lord Diplock in *Attorney General v Leveller Magazine* [1979] AC 440 at 449H. The current practice in Northern Ireland was summarised by the then Lord Chief Justice in *Doherty v Ministry of Defence* [1991] 1 NI JB 68 when he observed, at page 91:

In conclusion I add that for many years the courts in Northern Ireland have permitted military witnesses and other witnesses, who would be at risk from terrorist attack if their names were given in open court, not to be named and to give their evidence as soldier A or witness B: see, for example, the report of Farrells case in the House of Lords [1980] NI 78. If there should be any information in relation to the witness which would be discreditable to him or helpful to the other party, counsel who calls that witness furnishes the information to counsel for the other party. This is an entirely proper practice and counsel for the plaintiff in this case made it clear that he had no objection to the names of the military witnesses not being given in open court but being described by letter.

23. The equivalent considerations to be observed by a judge in a criminal trial were discussed in some detail by Evans LJ in the course of giving the judgment of the Court of Appeal in *R v Taylor* [1994] TLR 484. In *Re Jordan* [1996] (unreported) MacDermott LJ dealt with the relevant common law background in the following terms:

It is a fundamental aspect of jurisprudence throughout the United Kingdom that courts should conduct their business openly and in public. In recent years largely because there have been so many terrorist related cases it has been quite common for applications to be made that witnesses be granted anonymity or be screened when giving evidence. Such applications are founded in the fear of the witness that they or their families might be endangered if they were seen or known to give evidence adverse to some person who has often an allegedly terrorist background. Such fear is understandable and the courts recognise that it is not in the public interest that a suspected terrorist should escape conviction because a witness may be deterred by fear from giving evidence or by giving evidence to be exposed to hostile action or the fear of such action. In every case a judge faced with an application for anonymity (and it is also an aspect of the wider concept of screening) will have to balance between an adherence to the primary requirement for justice to be open and the fears and anxieties of a witness involved in the criminal process."

13.545 Amnesty International comments that clause 21(1) makes it an offence for any person “who knowingly possesses any information which may be essential in order to investigate any terrorist act” which is being or has been committed, or is being planned, to “intentionally” withhold such information from a law enforcement officer or public prosecutor. AI remarks that the implementation of this section, in view of the breadth of the definition of a “terrorist act” in the Bill, could result in abusive prosecutions, and the provision may, in addition, be in breach of the right not to incriminate oneself, which is enshrined in international standards as well as in South Africa’s Constitution (Section 35 (1)(c) of the Constitution of the Republic of South Africa; Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR); Principle 21 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles); Article 21(4)(g) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (Yugoslavia Statute); Article 20(4)(g) of the Statute of the International Criminal Tribunal for Rwanda (Rwanda Statute); Article 67(1)(g) of the Statute of the International Criminal Court (ICC Statute)).

13.546 The SAPS: Legal Component: Detective Service and Crime Intelligence points out on the policy question raised in the discussion paper that clause 21 will only be applicable in respect of persons who were themselves involved in the commission of a crime, but who are afraid to convey information on terrorism or cooperate with investigators for fear of prosecution. The SAPS states that it is a common practice that a Director of Public Prosecutions enters into an agreement with a co-accused, to use him/her as a State witness and then undertake not to prosecute the person. The SAPS notes that although only the court can technically indemnify the person after he or she has testified fully and truthfully, to the satisfaction of the Court, the discretion to actually prosecute a person after the refusal of a court to indemnify him/her in terms of section 204, remains with the director of public prosecutions, and that the State is actually bound by such a pretrial agreement, is evident from the recent report on the case of *North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape)* 1999(2) SACR 669 (CPD). The SAPS points out that the Court held that “*plea bargaining*”, (although not expressly mentioned in South African law), is in fact entrenched, accepted and an acceptable part of South African law. The SAPS says that accordingly, in this case, the court held that where a solemn agreement is concluded between an accused and the prosecuting authorities, the latter is bound by it and cannot afterwards institute a prosecution (on the same facts) and the prosecution authorities cannot therefore go back on their word.

13.547 The SAPS: Legal Component: Detective Service and Crime Intelligence

notes that the clause will formally endow a power, which the director of public prosecutions already has, with concomitant legal certainty, and as the discussion paper pointed out, this will promote the conveyance of information on terrorist acts and cooperation with investigative and prosecution authorities and be an incentive to testify in court. The SAPS notes that the only question which might arise, is whether the provision of indemnity before the hearing of the case might not have an impact on the incentive to testify fully and to the satisfaction of the court before indemnity is considered by the court, and that the same question, however, arises from a pretrial agreement which is binding on the prosecution. The SAPS considers that the court will always maintain the power to assess the truthfulness of the witness, and the weight to be lent to his testimony. The SAPS foresees that in respect of terrorism, the provision would normally find application, not so much in respect of co-perpetrators, but rather persons "used" by terrorists to logistically, financially and otherwise support them, sometimes unknowingly, and in the process commits a crime. The SAPS explains that a typical example is a person (a common criminal) selling a weapon to a terrorist, without knowing that it will be used for terrorism, or providing a false passport to a terrorist, without knowing that it is a terrorist. The SAPS says it welcomes the retention of clause 21 in the Bill, and strongly supports it.

13.548 The SAHRC comments that it is opposed to the granting of indemnity by the Director of Public Prosecutions. The SAHRC notes that such a power is a function of the judiciary, which is independent, and in the best position to decide whether an indemnity should be granted. The SAHRC remarks that extending this power to a member of the Executive Authority would be contrary to the doctrine of separation of powers and cannot be supported.

13.549 Mr JHS Hiemstra, Deputy Director of Public Prosecutions in the Free State, suggests that the words *if he or she is willing to testify in court in accordance with such information* should be deleted. He considers that the willingness of a witness to testify in accordance with the information is no guarantee that the witness will confirm that evidence in court. He suggests that indemnity should be given after testimony in court, not at the stage envisaged by clause 21(2) and that section 204 of the Criminal Procedure Act would then be applicable.

13.550 Messrs Fick and Luyt of the Director of Prosecutions: Transvaal note that the mere willingness to testify is not sufficient grounds upon which a person can be indemnified. They consider that information tendered should be essential to prevent an offence under the act or to institute criminal proceedings, and suggest that the "or" between "such information" and "in the view of" should thus be substituted with "and". They pose the question what will

happen if the certificate referred to in sub-clause (3) is issued and the person does in fact testify in court, but not in accordance with the information initially tendered? They suggest that sub-clauses (1) and (2) be retained with the change suggested above, but that sub-clause (3) should be amended and a sub-clause (4) be added providing as follows:

(3) Subject to the provisions of sub-clause (4), a certificate issued by a Director of Public Prosecutions in which the prerequisites referred to in sub-section (2) are certified, is conclusive that such a person may not be prosecuted in respect of the relevant offences.

(4) If a person as meant by sub-section (2) in the event of a prosecution of offences under this Act in fact testifies in court, the provisions of section 204 of the Criminal Procedure Act (Act 51 of 1977) are mutatis mutandis applicable. Should the court not indemnify the person as is meant in subsection 204(2) of the Criminal Procedure Act (Act 51 of 1977), the certificate as meant in sub-section (3) above will cease to have any force and must be withdrawn by the relevant Director of Public Prosecutions.

(c) Evaluation and recommendation

13.551 The committee has taken into account the views expressed in regard to section 204 of the Criminal Procedure Act and that those provisions should rather be applicable.² **The committee considers, particularly in view of the reservations it already**

² 204 Incriminating evidence by witness for prosecution
(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-

- (i) that he is obliged to give evidence at the proceedings in question;
- (ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;

- (iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

- (iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(a) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him-

(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the

expressed in the discussion paper on the policy issue of the prosecutorial authority granting indemnity instead of the judiciary, that the procedure created by section 204 would be more preferable. The committee does not consider the argument of plea bargaining to be entirely applicable. In the case of plea bargaining the issue really deals with bargaining and agreements being reached in respect of charges and sentences to be passed in respect thereof and it is not a total indemnity against prosecution which is agreed upon. The committee was initially of the view that the justification for the provision proposed in the discussion paper becomes doubtful in view of the recommended provision enabling police officers to bring witnesses before a court for the purpose of an examination to ascertain the information which the person holds. The committee nevertheless considers that it should retain this provision imposing a duty on persons holding information to disclose it to a prosecutor DPP or police officer.³ The Commission agrees with this recommendation.

offence so specified; and

(b) the court shall cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

(4)(a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

³ The committee noted the following provision in the English *Terrorism Act* of 2000:

"38B Information about acts of terrorism

(1) This section applies where a person has information which he knows or believes might be of material assistance-

(a) in preventing the commission by another person of an act of terrorism, or

(a) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism.

(2) The person commits an offence if he does not disclose the information as soon as reasonably practicable in accordance with subsection (3).

(3) Disclosure is in accordance with this subsection if it is made-

(a) in England and Wales, to a constable,
in Scotland, to a constable, or

(b) in Northern Ireland, to a constable or a member of Her Majesty's forces.

(4) It is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure.

(5) A person guilty of an offence under this section shall be liable-

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or to a fine or to both, or

-
- (b) on summary conviction, to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum or to both.
- (6) Proceedings for an offence under this section may be taken, and the offence may for the purposes of those proceedings be treated as having been committed, in any place where the person to be charged is or has at any time been since he first knew or believed that the information might be of material assistance as mentioned in subsection (1)."

BB. POWERS TO STOP AND SEARCH VEHICLES AND PERSONS

(a) Evaluation contained in discussion paper 92

13.552 The project committee noted that clause 22 originally only dealt with the power to stop and search pedestrians.¹ **The committee considered that the clause seem to be unnecessarily restrictive and suggested that it should apply to vehicles and their occupants as well. The committee also noted that the clause states that “where it appears to a police officer of the South African Police Service of or above the rank of Director” meaning that the police officer does not need to have reasonable grounds “that it is expedient to do so and in order to prevent terrorism” then he can authorise that the powers to stop and search are exercisable at any place specified in the authorisation. The committee considered that the belief of the police officer should be on a reasonable basis as it is entirely subjective presently. The committee suggested that the words “it is expedient to do so” be deleted and substituted with “there are reasonable grounds to do so”. The committee recommended that clause 22(1) should read as follows: “Where it appears to a police officer of the South African Police Service of or above the rank of Director that there are reasonable grounds to do so in order to prevent acts of terrorism, he or she may authorise that the powers conferred by this section be exercisable at any place within his or her area of authority which is specified in the authorization”.**

13.553 The project committee considered whether clause 22(3)² provides adequately on the official’s view or motivation and whether it should be left as subjective as it is drafted. The committee supposed that the officer has the power to search and the officer does not know with what he is going to come up with. The committee considered that the functionary is performing a mechanical task but the real point is the prior authorisation and the crucial aspect is once again justification or not therefore. The committee noted that this is a preventive measure, and asked what would happen if an act of terrorism were committed and there are grounds for believing that the perpetrator is for example in a building, in a stadium etc, taking it outside the realm of prevention and whether the officer will have the same powers as well. The committee considered that the officers will be subject to other Acts as well

¹ The committee requested that this be clarified by the drafters. The drafters were also of the opinion that it would be expedient if the clause were to apply to vehicle and their occupants as well.

² 22(3) A police official may exercise his or her powers under this section whether or not he or she has any grounds for suspecting the presence of articles of that kind.

such as the *Criminal Procedure Act* requiring reasonable grounds founding the basis of the suspicion.

13.554 The committee noted a suggestion that since the legislation is meant to govern terrorism in its entirety, it may be useful to make it as comprehensive in its scope as possible, and that the police powers should not be confined to searches of vehicles and persons.³ It was also suggested that there need to be a more comprehensive review of the police powers to cover areas such as tracing of assets, confiscation powers, interception of communications as well as access to computers and other electronic data. The committee was of the view that these issues are sufficiently catered for in the Criminal Procedure Act and other Acts which govern the search of buildings and rooms, and tracing and confiscation of property etc.

13.555 The committee considered clause 22(9) which provides that if a person is stopped by a police official he or she is entitled to a written statement reflecting the fact that he or she was stopped. The committee pointed out that if the search turns out to be unjustified one has an easier case for proof, one of the essentials for a case for wrongful detention. The committee also noted that in many cases where the police have gone into the townships to conduct a operation in the past one might have found that there is no record of the incidence and the police could subsequently deny that they were ever involved in such a search. The committee therefore noted that this provision presents a safeguard for the person being searched. The committee considered that the clause should make provision for being “stopped and searched” whereas the clause presently only refers to “stopped”. The committee noted that if the clause extends to the benefit of the citizen it should be retained in the Bill. The committee was of the view that it may be in the interests of the citizen but at the same time it will cause unnecessary administrative paperwork on an already hard-pressed police force.

13.556 The committee questioned the rationale for the 28 day period under clause 22(8)(c) for which the authority continues in force.⁴ The committee asked whether it

³ By Prof Medard Rwelamira at the time of the Department of Justice’s Policy Unit.

⁴ The committee suggested before the discussion paper was published that the drafters be asked to explain the 28 day period. Section 13A of the PTA, give senior police officers in England powers to authorise that powers to stop and search vehicles and their occupants, and pedestrians, be exercisable, in order to prevent acts of terrorism. Authorisations extend to a specified area and may be made for up to 28 days, although that period may be renewed. Clauses 42-45 of the English *Terrorism Bill* are based on these provisions, with the additional requirement that authorisations be confirmed by a Secretary of State within 48 hours of their being made. If the authorisation is not confirmed by the Secretary of State it will cease to have effect.

means that the power to search continues and may be carried on for 28 days. The committee thought that type of activity would be a sort of once-off incidence. On the question why the proposed period should last up to 28 days, the drafters pointed out that they do not feel strongly about the period and suggest it could be 7 or 14 days. They explained what they have in mind is cases such as in Richmond where daily shootings occur and where such search authority might be needed for a period longer than 48 hours whilst one would not want to resort to ordering an emergency.

(b) Comment on discussion paper 92

13.557 The SAPS: Legal Component: Detective Service and Crime Intelligence comments that it is in agreement with the proposed clauses and supports the amended wording. They say that the SAPS strongly supports the proposal that the Bill should provide where it appears to a police officer of the South African Police Service of or above the rank of Director that there are reasonable grounds to do so in order to prevent acts of terrorism, he or she may authorise that stop and search powers of vehicles and persons be exercisable at any place within his or her area of authority which is specified in the authorization. The SAPS comments on the issue whether there is a need for a more comprehensive review of the police powers to cover areas such as tracing of assets, confiscation powers, interception of communications as well as access to computers and other electronic data, that the British *Terrorism Act 2000* contains provisions on money-laundering of terrorist assets. The SAPS suggests that one should only ensure that the money-laundering provision in our present law is adequate. On the question of a written statement being given to a person searched, the SAPS says that it is in agreement with the part on paperwork, especially if the period is drastically reduced. However, the benefit of a written statement is so limited, that the opinion is held that the provision could be deleted.

13.558 The SAPS: Legal Component: Detective Service and Crime Intelligence remarks on the period governing a cordoned off area, that a designation made in terms of the British *Terrorism Act 2000*, for the cordoning of an area may be made for a period not exceeding 14 days, unless extended and the total period, extension included may not exceed 28 days. The SAPS explains that the 28 -days period proposed, was on the basis of the British legislation. In terms of the *South African Police Service Act, 1995* (section13(7)), an area may be cordoned off:

“The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, in writing authorise that the particular area or any part thereof be cordoned off.

The written authorisation referred to in paragraph (a) shall specify the period, which shall not exceed 24 hours, during which the said area may be cordoned off, the area or part thereof to be cordoned off and the object of the proposed action.”.

13.559 The SAPS: Legal Component: Detective Service and Crime Intelligence considers that to only extend the already allowed period of 24 hours in the South African Police Service Act, 1995, to 48 hours would not be of much assistance. The SAPS comments that it is expected that a longer period of cordoning off could become necessary where a high rate of terrorist incidences occur over a period and that it is obvious that weapons, explosives, etc. are smuggled to or from a specific area, or that terrorists may hide in or operate from a certain area, and that a sort of access control and random searches has to be exercised over a longer period of time. The SAPS suggests that a period of 10 days seems realistic and sustainable from an operational point of view.

13.560 The Media Review Network notes that the powers conferred by clause 22(1) on police officers to stop and search vehicles and persons and the provisions of section 16 (1) relating to the detention for interrogation of persons suspected of being in possession of or withholding information relating to a terrorists act, are frightening and reminiscent of the monstrous dictatorial and repressive regime prior to 1994.

13.561 The Human Rights Committee points out that clause 22 provides for a police officer at or above the rank of Director to designate a place within the area of his or her jurisdiction as an area in which searches are authorised if "there are reasonable grounds to do so in order to prevent a terrorist act" and there is a further check in that the Minister of Safety and Security is to be informed and may cancel the order. The HRC says that once this condition is met, any police official in uniform in that place may stop and search any vehicles or persons for items that could be connected with terrorist acts, although the police official "may exercise his or her powers under this section *whether or not* he or she has any grounds for suspecting the presence of such articles", in other words, the police become empowered to search anyone at will. The HRC considers that these search powers go beyond those outlined in the Criminal Procedure Act 51 of 1977 since the powers in that Act are generally limited to searches with a warrant based on reasonable grounds for finding an article related to an offence (see sections 20 and 21 of that Act). In a situation of urgency, there may be a search without a warrant, but it is to be based on the same kind of reasonable grounds (section 22). There may also be a search incident to arrest that does not face these same requirements. But the basic principles require judicial pre-authorisation in the form of a warrant and reasonable grounds for finding items linked to an offence on a particular person. The HRC says that the search powers in the draft Bill thus rely indirectly on section 19 of the

Criminal Procedure Act, which allows other laws to provide for search powers that are more extensive and intrusive.

13.562 The HRC notes that section 14 of the Constitution guarantees that everyone has the right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized, or the privacy of their communications infringed. This is of course subject to the limitation clause in section 36, as intrusions on privacy may well be needed to protect other elements of an open and democratic society based on human dignity, equality and freedom. They note that as Ackermann J has eloquently explained, the right to privacy is “crystallised by mutual limitations” (*Bernstein v. Bester* NO 1996 (2) SA 751 (CC) at para. 79). They say that protection for privacy interests extends to a legitimate expectation of privacy, similarly to in Canadian and American jurisprudence and that this means that privacy extends as far as an individual subjectively expects privacy, and it is objectively reasonable for society to uphold that expectation of privacy.

13.563 The Human Rights Committee notes that in South Africa, it is common for a patron of a restaurant to have a metal detector waved over his or her bag and a concert-goer may be frisked. They note that the question is one of how far expectations of being searched do or should go. The Human Rights Committee is concerned that the draft Bill will effectively normalise a state where, based on the reasonable grounds of a police official, the police in an area have the right to search anyone arbitrarily. The Human Rights Committee states that the Constitutional Court *per* Sachs J has expressed a related concern with wide discretionary powers insofar as they threaten the rule of law in *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) at par 29. They say that one official will apply a discretionary power quite differently from another and consider that clause 22(3) specifically denies the need for a police officer to have any grounds for a search once a zone has been designated, and it thus allows for arbitrariness.

13.564 The HRC notes that the United States has a doctrine known as “stop and frisk” in terms of which police essentially have the right to stop people on the street and frisk them to see if they might have weapons, and that the effect of such a doctrine allowing arbitrary search in the United States is that the police use of it shows a racial bias. They consider that living in a society where racial tensions are even stronger, South Africans must worry about excessive police discretion and the possible implications this will have for equality rights. Normalising arbitrary police searches risks enforcing hidden prejudices. The HRC remarks that proponents of the clause might, of course, argue that there is a check on arbitrariness insofar as clause 22(1) requires that there be reasonable grounds for

establishing the search zone to help prevent a terrorist act. Notably, a police official makes this determination, subject to modification by a government minister responsible for crime prevention. They consider that this means that there is a lesser check on the establishment of a zone for arbitrary searches than on an individual search with a warrant, which requires judicial pre-authorisation.

13.565 Referring to *Hunter v. Southam* (1985), 11 D.L.R. (4th) 641 (S.C.C.) the HRC points out that the Supreme Court of Canada has emphasised the importance of having an independent pre-authorisation granted by a trained judicial officer rather than by a police official with a potential conflict of interest insofar as he or she wants to catch criminals and has less concern for human freedoms. They note that authorisation by an independent authority is also a general requirement in South Africa, and suggest that if there is to be such a clause, there is no reason why a judicial authorisation instead of an authorisation by a police officer (with an exception for situations where there is not time to get a warrant) could not be required. They consider that this would be far more consistent with South African law on warrants in other situations and with the seriousness of this clause's effects. The HRC points out that some will say that the draft Bill's search power is consistent with that in England, noting that the discussion paper explains that the *Prevention of Terrorism (Temporary Provisions) Act, 1989* and *Northern Ireland (Emergency Provisions) Act, 1996* gave senior police officers the right to authorise constables to exercise searches with or without any grounds to suspect anyone of carrying terrorist materials, that these powers entered English law in temporary and emergency legislation that needed annual renewal,⁵ **and that Amnesty International considers that English legislation on terrorism has been in violation of international human rights law. The HRC considers that it may not be much of an example in any case.**⁶ They point out that South Africa's response to a full-fledged emergency situation is governed by section 37 of the Constitution, which allows for special derogation from rights, and that the Constitution has no provision for senior police officers to have effectively an ongoing right to declare states of emergencies in defined zones where there are then special search powers. The HRC notes that this clause is deficient from a human rights perspective insofar as it allows for arbitrary searches, and, it allows for the establishment of an area of arbitrary searches based on a non-independent evaluation. The HRC considers that the rationale for the clause needs to be better explored and brought into the context of a constitutional State.

⁵ They note that the fact that the English thought of keeping the power in their *Terrorism Bill* was evidence of how easily freedom can be permanently eroded.

⁶ Amnesty International, United Kingdom: Briefing on the Terrorism Bill EUR 45/043/2000, 25/04/2000.

13.566 The SAHRC also considers that the proposed Bill gives wide powers to police to stop and search vehicles and persons for articles that could be used in connection with a terrorist act. They say there simply have to be reasonable grounds to do so in order to prevent a terrorist act, irrespective of whether there are grounds for suspecting the presence of such articles. The SAHRC explains that the question that arises is whether current legislation is not sufficient in this regard. They note that the provisions of the *Criminal Procedure Act* 51 of 1977 in particular grant police wide powers in respect of the search of person and property and the seizure of property and articles connected with offences, and the SA Police Service Act allows additionally under appropriate circumstances the cordoning off of designated areas and the searching of all persons and property within such an area. The SAHRC notes that it is not clear what additional powers the provisions in the proposed Bill provide that do not already exist.

13.567 The Ministry of Community Safety of the Western Cape suggests that the powers conferred in the proposed clause 22 should also include powers of seizure. The Defence Secretariat notes that the Bill refers to police officials only and suggests that members of the Defence Force be included in order when such members are deployed with police officials they have the same powers in respect of stopping and searching vehicles. The Chief: Military Legal Services remarks that their views mentioned on the constitutionality of clause 16 are repeated here and that it is suggested that the words *stop and search vehicles and persons* be substituted for the words *do so* in line 2 of clause 22(1) in order to prevent the ambiguity created by the words. They also suggest that the words *acts of terrorism* be substituted for the words *a terrorist act* in clause 22(1) in order to correspond with the plural form of the words *grounds, vehicles and persons* used in the clause. They also reiterate that the powers given to police officers should also be granted to the SANDF where they cooperate with the SAPS. They also point out that the Minister of Defence should be consulted timeously that authorisation will be granted if there is a need for involving SANDF members as it will enable the SANDF to take the required steps to render the necessary services to the SAPS on request.

13.568 Messrs Fick and Luyt of the Director of Prosecutions: Transvaal ask why does section 22 only refer to the prevention of a terrorist act and consider that it certainly should also apply to the investigation of these acts. They point out a situation where a bombing takes place and consider that if there are reasonable grounds to believe that the perpetrators are fleeing from the area, certainly the police should have the

powers afforded by this clause to apprehend the perpetrators. They say that regarding sub-clause (2), it is impractical to require that the police official should be in uniform and that in most cases of this nature specialized units which do not operate in uniform, like dog units and the bomb squad, will most likely be involved. They suggest that in view of what was said above the words, "or have been used", should be added after the words, "could be used."

13.569 Messrs Fick and Luyt consider further that the specific description in sub-clause (4) is unnecessary and suggest that it would suffice to state that the provisions of section 29 of the Criminal Procedure Act of 1977 are mutatis mutandis applicable to the powers conferred upon police officials in terms of this clause.⁷ They ask also whether sub-clause (7) would only be applicable to the National Minister of Safety and Security, and whether the provincial Member of the Executive Council for Safety and Security should also be included? They consider that adherence to the provisions of sub-clause (9) is totally impossible. They note that in the event of hundreds of vehicles being searched in terms of this clause, there is just no way in which the police will be able to keep exact record of everything that was done pertaining to the search. They say they cannot appreciate the purpose of such a provision, and suggest that this sub-clause be deleted.

(c) **Evaluation and recommendation**

13.570 The committee notes that clause 17 gives the power as it were to conduct a moving roadblock and is concerned about the provision. It notes that if one had a reasonable suspicion the urgency seems to be the license to invade for example a motorist's privacy. If there is credible evidence that there are people on their way to commit a terrorist act it is probably the kind of measure to set up roadblocks, whereas once an act of terrorism has happened one is dealing with search and seizure which is already dealt with by the *Criminal Procedure Act*. The clause is concerned with an anticipatory special situation. The committee considers that the proposed clause is quite invasive. It therefore recommends that applications should be made to a judge of the High Court for exercising these powers. The committee considers the reasoning by the SAPS why the suggested period of cordoning off should be 10 days persuasive. (They said that it could become necessary where a high rate of terrorist incidences occur over a period where it is obvious that weapons, explosives,

⁷ 29 Search to be conducted in decent and orderly manner
A search of any person or premises shall be conducted with strict regard to decency and order, and a woman shall be searched by a woman only, and if no female police official is available, the search shall be made by any woman designated for the purpose by a police official.

etc. are smuggled to or from a specific area, or that terrorists hide in or operate from a certain area, that access control and random searches has to be exercised over a longer period of time, and that 10 days seems to them to be realistic and sustainable.) The committee considers that the Bill should provide that a judge may on application ex parte by a police officer of the South African Police Service of or above the rank of Director, if it appears to the judge that there are reasonable grounds to do so in order to prevent acts of terrorism, grant authority to stop and search vehicles and persons with a view to prevent such acts, and such authorization shall apply for a period not exceeding ten days. The Bill should further provide that under such authorisation any police officer who identifies himself or herself as such may stop and search any vehicle or person for articles which could be used or have been used for or in connection with the commission, preparation or instigation of any terrorist act.

13.571 The committee also shares the view that it would be impractical to require that the police official should be in uniform as in most cases of this nature specialized units which do not operate in uniform, like dog units and the bomb squad, will most likely be involved. The committee recommends that the words *in uniform* should be substituted with the words *who identifies himself or herself as such*. The committee agrees with the comment by the Human Rights Committee that if any police official in uniform may stop and search any vehicles or persons for items that could be connected with terrorist acts, *whether or not* he or she has any grounds for suspecting the presence of such articles, the police become empowered to search anyone at will. The committee also considers that these search powers go beyond those set out in the *Criminal Procedure Act* 51 of 1977 since the powers in that Act are generally limited to searches with a warrant based on reasonable grounds for finding an article related to an offence. The committee therefore recommends the deletion of this subsection.

13.572 The committee also agrees with the suggestion that the original subclause (4) which provided that nothing in the clause authorizes a police official to require a person to undress in public other than to remove any headgear, footwear, outer coat, jacket or gloves should be deleted and that the Bill should provide that the provisions of section 29 of the *Criminal Procedure Act*, 1977 must apply, with the necessary changes, in respect of the powers conferred upon police officers in terms of this clause. The committee recommends the adoption as subclause (4) of the provision which provides that any person who fails to stop when required to do so by a police officer in the exercise of the powers under this section or wilfully obstructs a police officer in the exercise of those powers, commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding six months. The committee further recommends that an authorization under the clause may be given in

writing or orally, but if given orally must be confirmed in writing by the person giving it as soon as is reasonably practicable.

13.573 The committee shares the point of view expressed by the SAPS on the provision whereby a person stopped and searched under the section, is entitled to obtain a written statement, that the benefit of such a written statement is severely limited, especially after a lengthy period. The committee considers the comment on the difficulty of keeping exact record of everything that was done pertaining to the search persuasive. The committee agrees that the provision should be deleted. The committee also agrees with the suggestion that where members of the SANFD cooperate with the SAPS the powers of stop and search should also be given SANDF members. The committee therefore recommends that police officer should be defined as a member of the South African Police Service as defined in the *South African Police Service Act*, 1995 (Act No. 68 of 1995), and a member of the South African Defence Force while deployed in the Republic on police functions as contemplated in section 3(2) of the *Defence Act*, 1957 (Act No. 44 of 1957). The committee further recommends the deletion of the clause setting out that the police officer giving an authorization must cause the Minister for Safety and Security to be informed, as soon as is reasonably practicable, that such an authorization was given, and on an authorisation being confirmed or not by the Minister or it ceasing to have effect when it is cancelled by the Minister for Safety and Security. The Commission agrees with the project committee on these recommendations.

CC. CLAUSE 24: AMENDMENT AND REPEAL OF LAWS

13.574 The committee suggested that in stead of dealing with the amendment of section 2 of the *Civil Aviation Offences Act* this section should be dealt with in the schedule as part of the laws repealed or amended and that clause 24 should read “the laws are amended or repealed to the extent as set out in the Schedule”.

EE. CLAUSE 64: INTERPRETATION CLAUSE

(a) Evaluation contained in discussion paper 92

13.575 The project committee was concerned about the interpretation clause. The committee noted that one has a definitions clause in the Bill, but in the event of a dispute one must also look at the provisions of international law. The committee pointed out that what the interpretation clause does is to probably address the problem of non-extradition for

political offences⁸ and what the clause is really saying is that one should not be fooled by the label “political offence”, if the act concerned is an act of terrorism and if it is in conformity with international instruments then extradition of the person who committed the act in question, is possible.⁹

⁸ See *Rapholo v State President and Others* 1993 1 SA 680 (T) at 683G - 684H: “The State President on 2 February 1990 in a historic speech announced the demise of the apartheid policy and the legitimisation of the ANC. In order to normalise matters, bring about reconciliation and further constitutional development, liberal use of the prerogative of pardon and a general indemnification were needed to enable expatriate ANC members to return to South Africa and convicted members to go free. Obviously this was to be effected in respect of political crimes, about the meaning of which term there now seems to be a sharp difference of opinion amongst politicians. On 2, 3 and 4 May 1990 at Groote Schuur, Cape Town, a delegation of the ANC met the State President and some of his Ministers and officials. It was agreed that a working group would be constituted charged with making recommendations on a definition of political offences in the South African context.

...

The aforementioned working group met on a number of occasions and attempted to define 'political offences'. It concluded that there is no generally accepted definition of 'political offence' and 'political prisoner' in international law. What is generally accepted, however, is that principles developed in the field of extradition law are relevant in distinguishing between 'political offences' and 'common crimes'.

The working group stated a number of aspects of the law and practice of extradition which to it appeared to provide valuable guidance. These principles were later published in Government Notice R2625 . . . The working group endorsed these principles. Its report was completed on 21 May 1990 and accepted by the ANC and Government during discussions in the Presidency, Pretoria, on 6 August 1990. The 'Pretoria minute' states that the

'meeting has instructed the working group to draw up a plan for the release of ANC related prisoners and the granting of indemnity to people in a phased manner . . . '.

This working group decided that consultative committees be established to provide the Executive with 'wise advice' when dealing with particular offences.

On 7 November 1990 by Notice R2625 the principles ... were published in Government Gazette 12834 for general information. This Government Notice dealt with four matters:

- A. Guidelines for defining political offences in South Africa.
- B. Process of granting pardon or indemnity.
- C. Temporary immunity.
- D. Entry into the Republic.

The Government Notice refers to the Groote Schuur minute and the agreement there reached and the recommendations of the working group. It is stated that there is no generally accepted definition of political offence or political prisoner in international law but that it is generally accepted that the principles developed in the field of extradition law are relevant in distinguishing between political offences and common crimes. It sets out that in pursuance to the above a set of guidelines was adopted to be applied to all organisations, groupings, institutions, governmental or otherwise, and individuals. ...

⁹ See also <http://www.coe.fr/cp/98/777a%2898%29.htm> for the following press statement on the Ocalan and Pinochet cases:

“The Council of Europe Parliamentary Assembly's Political Affairs Committee . . . considered the decision of the Italian court ruling against the extradition of Abdullah Ocalan to Turkey and the denial of immunity of Augusto Pinochet by the British House of Lords as an important recognition of the rule of law in international relations, which is one of the Council of Europe fundamental principles.

As long as death penalty is enforced in Turkey, the extradition of the Kurdistan Workers Party (PKK) leader would contravene the Italian Constitution. The decision was fully in line with the European Convention on extradition, to which both countries are parties to.

The Assembly has consistently called for the abolition of the death penalty through the ratification of Protocol 6 to the European Human Rights Convention. The Committee expressed its support for the

13.576 The committee also raised concern about the issue that if the interpretation clause deals with extradition whether the Bill should not need to cross-refer to the *Extradition Act*. The committee noted that it is a well-settled principle of extradition law that there is no extradition for political offences and there is a growing body of case-law as to what constitutes a political offence.¹⁰ The committee also noted that if

motion to abolish the death penalty, which is on the agenda of the Turkish parliament. It also recalled the Assembly's repeated condemnation of violence and terrorist acts perpetrated by the PKK. . . .

Concerning the former Chilean President, the Committee welcomed the fact that immunity was not recognised in case of a person charged with crimes against humanity. ..."

And also See <http://www.amnesty.org/news/1999/48dec99.htm> "Mengistu - failure to respect international human rights obligations": "Amnesty International expresses dismay at South Africa's failure to ensure that Mengistu Haile-Mariam, former Ethiopian head of state, remained in South Africa pending the outcome of an investigation into his alleged human rights crimes.

'The South African government has singularly failed in its obligations under both its national constitution and international law," Amnesty International said. "Its lack of clarity regarding its intentions during Mengistu Haile-Mariam's presence in the country is disturbing.'

'The government, at the very least, should have ensured that Mengistu Haile-Mariam remained in the country until the National Director of Public Prosecutions had undertaken an investigation into his possible prosecution in South Africa or extradition to another state.' South African government officials stated on 7 December that Mengistu Haile-Mariam had left the country apparently prior to the receipt by the government of a formal request for his extradition to Ethiopia. . . .

Under its constitution, which incorporates customary international law, South Africa had an obligation to investigate the alleged crimes of Mengistu Haile-Mariam, with a view to prosecuting him in South Africa or extraditing him to a state which would try him in proceedings which meet international standards of fairness. Amnesty International stressed that these proceedings should also not include application of the death penalty.

'This obligation was also assumed by South Africa when it ratified the Convention against Torture and the Genocide Convention on 10 December last year.' . . ."

¹⁰

See "Uitleveringen aan turkije in de jaren tachtig: wie eenmaal liegt.." www.ozgurluk.org/nl/uitlbrd.html

"De Duitse regering wil honderden Koerdische activisten die gearresteerd werden n.a.v. protestakties, uitwijzen naar Turkije. Volkenrechtelijke en asielrechtelijke argumenten dat Turkse en Koerdische oppositionelen onmogelijk naar een land uitgewezen kunnen worden waar ze niet alleen bedreigd worden met politieke vervolging en marteling, maar ook met de doodstraf, probeert de Bondsregering met een truc te omzeilen: korte verklaringen van de Turkse regering dat ze zich aan het internationaal recht zullen houden en een briefwisseling tussen de ministeries van de beide landen m.b.t. de behandeling van de uit te leveren mensen zouden het volgens de officiële propaganda moeten garanderen dat de uitgewezen Koerden en uitgeleverde Turken correct behandeld worden - deze truc van de Bondsregering bleek echter al tijdens de golf van uitleveringen van Turkse oppositionelen in het begin van de jaren tachtig leugenachtig. Na de militaire staatsgreep van 12 september 1980 probeerden de Turkse generaals in meer dan 150 gevallen Turkse oppositionelen overhandigd te krijgen. 28 Turkse mensen werden ook daadwerkelijk aan de fascistische militaire junta uitgeleverd. 21 van hen waren asielaanvragers. 15 Turken werden aan het Turkse leger overgedragen, nog voordat over hun asielaanvraag in de BRD een besluit was genomen. Het bekendst is zeker de asiel- en uitleveringszaak van Cemal Kemal Altun. Altun vluchtte enige maanden na de staatsgreep naar de BRD en had een verzoek tot politiek asiel ingediend. . . . Altun was in de pers in verband gebracht met de moord op de vice-voorzitter van de fascistische "Nationale Aktiepartij" (MHP), Güün Sazak, in mei 1980 en openlijk afgeschilderd als 'terrorist'. Daarop besloot Cemal te vluchten.

the intention is to exclude terrorist acts from what is traditionally a political offence, then it seems that the *Extradition Act* need very well be amended, although that should be considered carefully.

In december 1982 verklaarde de rechtbank in Berlijn (net als later het Constitutioneel Hof) dat de uitlevering rechtmatig was. Gevaar voor politieke vervolging zou in Turkije niet bestaan. . . . Het Europees Hof voor de Mensenrechten bekrachtigde de uitleveringsverzoeken van de Turkse generaals omdat de Turkse regering een specialiteitsverklaring zou hebben afgegeven. Ondertussen was Cemal Altun echter door verantwoordelijke dienstkerkend als asielzoeker. De Bondsregering gaf opdracht om in beroep te gaan. In deze situatie, waarin de BRD tot elke prijs de uitlevering van Altun probeerde te bereiken, maakte deze - in panische angst voor een overhandiging aan de Turkse folterknechten - met een sprong uit het raam van de rechtbank een eind aan zijn leven.

In de gevallen waarin het ook daadwerkelijk kwam tot een uitlevering aan de Turkse militaire junta, brak Turkije niet alleen regelmatig geldend internationaal recht, maar ook alle met de BRD-regering gemaakte speciale afspraken. ...

... De huidige plannen van de Bondsregering om Koerdische activisten en Turkse oppositionelen uit te wijzen naar de folterstaat Turkije met de verwijzing naar verzekeringen van de Turkse regering voor politieke vervolging, folter en de dood, zijn bedriegelijk en ze bouwen op een kort geheugen van links. Verklaringen van de Turkse regering zijn het papier niet waard waarop ze geschreven zijn! De ervaringen van de jaren '80 hebben getoond dat Turkije tot elke leugen bereid is om oppositionelen in handen te krijgen. In elke individuele bovengenoemde zaak heeft Turkije niet alleen geldend internationaal recht geschonden, maar ook systematisch alle met de Bondsregering gemaakte afspraken. . . .

Uitlevering is alleen toegestaan wanneer de uitgeleverde na zijn uitlevering ook aangeklaagd wordt wegens de strafbare feiten op grond waarvan de uitlevering werd bewilligd. Wanneer de om uitlevering verzochte staat bij. politieke delicten uitsluit bij de uitlevering, dan mag de verzoekende staat de uitleveringskandidaat achteraf niet wegens deze of andere politieke delicten aanklagen." (Rote Hilfe)

13.577 The *Extradition Act* provides that persons may be extradited if the offence concerned is an “extraditable” one. *Extraditable offence* is defined as meaning any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State. Section 12 sets out that the Minister of Justice may order or refuse surrendering someone to a foreign State:

The Minister may-

- (a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or
- (b) order that a person shall not be surrendered-
 - (i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
 - (ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
 - (iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or
 - (iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion.

13.578 The project committee also took into account the European Convention on Extradition of 1957, the Additional Protocol to the European Convention on Extradition of 1975 and the Second Additional Protocol to the European Convention on Extradition of 1978:¹

“The European Convention on Extradition provides for the extradition, between contracting States, of persons wanted for criminal prosecution or for sentence. The Convention does not apply to political or military offences and any State can refuse to extradite its own citizens to a foreign country. As to fiscal offences (taxes, duties, customs) extradition shall only be granted if the contracting parties have decided so in respect of any such offence or category of offences. Extradition may also be refused if the person claimed risks the death penalty under the law of the requesting state, when the death penalty is not provided for in the law of the other.”²

¹ See [http://www.coe.fr/cp/2000/200a\(2000\).htm](http://www.coe.fr/cp/2000/200a(2000).htm)

² The Convention is in force in all Council of Europe member states except in Andorra and San Marino and it is also in force in Israel.

The Additional Protocol adds some provisions designed to strengthen the protection of individuals and of mankind as a whole. War crimes and crimes against humanity are accordingly excluded from the category of non-extraditable political offences.³ The Protocol also specifies certain cases in which extradition may be refused.⁴

³ For the application of Article 3 of the Convention, political offences shall not be considered to include the following:

- (a) the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;
- (b) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;
- (c) any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions.

⁴ It is so far in force in Albania, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Hungary, Iceland, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine. It has also been signed by Greece and Luxembourg.

The purpose of the Second Additional Protocol is to facilitate the application of the Convention. It adds fiscal offences to those giving rise to extradition under the Convention. It also contains provisions on judgments in absentia and amnesty.”⁵

⁵ This Protocol is in force in Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Iceland, Italy, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom. It has also been signed by Greece and Moldova.

13.579 The committee further considered how the European Convention Relating to Extradition Between the Member States of the European Union¹ deals with political offences, terrorism and extradition in particular. Clause 5 of the Convention is explained as follows in the explanatory report to the Convention:²

Member States' common commitment to preventing and combating terrorism, often stressed by the European Council, and the consequential need to improve judicial cooperation for the purpose of precluding the risk of such conduct escaping punishment, led to a review of the question of political offences in relation to extradition.

... Article 5 reflects a dual approach: on the one hand, paragraph 1 provides that for the purpose of extradition no offence may be regarded as a political offence; on the other hand, in paragraph 2, when admitting that a derogation may be made to this principle by means of a reservation, it specifies that a reservation concerning terrorist offences cannot be made. The aforesaid principle thus remains unprejudiced in this area.

Article 3 of the European Convention on Extradition and Article 3 of the Benelux Treaty exclude extradition for political offences. The European Convention on the Suppression of Terrorism contains in its Article 1 an exception to those rules, by providing for an obligation that an offence listed in that Article cannot be regarded as a political offence, or as an offence connected with a political offence or as an offence inspired by political motives. Furthermore the latter convention allows in Article 2 a State party to decide not to regard as such type of offences any serious offence involving an act of violence, other than one covered in Article 1, against the life, physical integrity or liberty of a person or a serious offence involving an act against property if the act created a collective danger for persons as well as in cases of an attempt to commit any of the foregoing offences or of participation as an accomplice of a person who commits or attempts to commit such an offence. Paragraph 1 of this Article envisages the complete removal of the possibility of invoking the political offence exception. Paragraph 1 takes up the wording of Article 1 of the European Convention on the Suppression of Terrorism, but the provision is no longer restricted to a list of offences. Paragraph 1 of this Convention thus prevails over Article 3 (1) of the European Convention on Extradition and Article 3 (1) of the Benelux Treaty, as well as over Articles 1 and 2 of the European Convention on the Suppression of Terrorism. As stated in paragraph 3, paragraph 1 of this Article does not amend in any way the provisions of Article 3 (2) of the European Convention on Extradition or those of Article 5 of the European Convention on the Suppression of Terrorism. Under those provisions, which may therefore be fully applied, the requested Member State may continue to refuse extradition if it has been requested for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or if that person's position may be prejudiced for any of these reasons. The possibility that these circumstances will apply between the Member States of the European Union in the course of an extradition procedure is probably academic. However, since respect for fundamental rights and liberties is an absolute principle of the European Union and, as already said, lies behind the progress which the Union intends to accomplish this Convention, it was considered that the text should not depart from the aforesaid traditional rule of protecting persons against criminal proceedings affected by political discrimination and that the validity of that rule had to be explicitly stressed. Paragraph 3 is also mentioned in the Declaration, annexed to the Convention, in which the Hellenic Republic specifies that from the standpoint of the provisions of that paragraph, it is possible to interpret the whole Article in compliance with the

¹ The European Council approved the text of the Convention (97/C 191/03) on 26 May 1997.

² See http://europa.eu.int/eur-lex/en/lif/dat/1997/en_497Y0623_01.html

conditions of the Greek constitution. Paragraph 2, as stated before, provides that each Member State may make a reservation limiting the application of paragraph 1 to two categories of offences: (a) those specified in Articles 1 and 2 of the European Convention on the Suppression of Terrorism (which cover the most serious offences, such as the taking of hostages, the use of firearms and explosives, acts of violence against the life of liberty of persons or which create a collective danger for persons); (b) the offences of conspiracy or criminal association to commit one or more of the offences referred to in the preceding paragraph (a). With regard to these last mentioned categories, this Convention goes beyond the scope of Article 1 (f) of the European Convention on the Suppression of Terrorism which is limited to an attempt to commit any of the offences of Article 1 or participation as an accomplice of a person committing or attempting to commit them. Contrary to what is contained in Article 3 (1) of this Convention, the conspiracy and association referred to in paragraph 2 (b) of this Article are considered only in so far as they constitute behaviour corresponding to the description contained in Article 3 (4). Finally, paragraph 4 completes the provisions of the Article providing that the reservations made under Article 13 of the European Convention on the Suppression of Terrorism shall no longer apply. Paragraph 4 is valid both for Member States which fully apply the principle specified in paragraph 1 as well as for those that make the declaration under paragraph 2.³

3

Jelle van Buuren "Politieke uitleveringen binnen europa..." *Kleintje Muurkrant* nr 305, January 1997 see www.contrast.org/eurostop/articles/uitlever.html

. . . Eind september 1996 sloten de Europese lidstaten de "overeenkomst betreffende de uitlevering tussen de lidstaten van de Unie" af. Artikel 5 van dit verdrag stelt enigszins plompverloren: Geen enkele strafbaar feit zal worden beschouwd als een politiek delict, een met een politiek delict samenhangend feit of een feit ingegeven door politieke motieven. . . ., de Spaanse minister Belloch de portee van het Verdrag kort en krachtig samen: "Politieke delicten zijn niet gerechtvaardigd in de Europese Unie." Daarmee lijkt een einde te komen aan een lange strafrechtelijke traditie waarin staten verdachten van politieke delicten niet uitleveren. Een traditie die teruggaat tot de Franse revolutie. De opkomende liberale democratieën waren niet bereid politieke geestverwanten uit te leveren aan autoritaire regimes - al was het alleen maar omdat men vreesde dat er geen eerlijk proces zou plaatsvinden. Een onderliggend idee was dat staten op die manier ook een zekere neutraliteit konden handhaven tegenover de politieke conflicten in andere staten.

Maar van meet af aan was onduidelijk wat nu wel en niet als 'politek delict' werd gezien. De definitie wisselde voortdurend al naar gelang de relaties tussen nationale staten zich ontwikkelden. Tijdens de Koude Oorlog rekten de Westerse staten de reikwijdte van het begrip bijvoorbeeld flink op om uitleveringsverzoeken van de Sovjet-Unie te kunnen torpederen. Omgekeerd vertoonden de Sovjet-autoriteiten een zeldzame flexibiliteit als het er om ging oud-nazi's berecht te krijgen. Of een staat iets als een politiek delict wenste te zien en op basis daarvan wel of niet tot uitlevering overging, bleek in hoge mate afhankelijk van politieke constellaties en doeleinden.

Zo sloten de Europese staten in 1977, als reactie op het sterk opkomend internationale terrorisme, het Verdrag ter bestrijding van terrorisme af. Een hele serie - enigszins vaag omschreven - delicten werd expliciet van hun mogelijk politiek karakter ontdaan. Toch bleef er een principieel ruimte in het Verdrag. Het bleef het soevereine recht van een staat om uiteindelijk te bepalen of er wel of niet van een politiek delict sprake was. Deze opening wordt met het nieuwe verdrag vrijwel dichtgetimmerd. De drijvende kracht achter de totstandkoming van het verdrag is Frankrijk. Opgeschrikt door de metro-bommen van vorig jaar (een geschiedenis die zich inmiddels aan het herhalen is) heeft Frankrijk inmiddels Duitsland opgevolgd als drijvende kracht achter de Europese bestrijding van terrorisme. . . .

Een essentieel element in het verdrag is het in feite onvoorwaardelijke vertrouwen dat de Europese lidstaten uitspreken in elkaars rechtsorde en democratie. Sorgdrager schreef de Kamer dat de regering principieel achter het verdrag staat. Wie met elkaar een politieke Unie organiseert, moet ook elkaars politieke systeem respecteren, luidt haar redenering: 'Je zult elkaar op dat punt moeten vertrouwen'.

Dat onvoorwaardelijke vertrouwen lijkt enigszins misplaatst. Een korte rondgang leert dat de Europese rechtsstaten eerder toe zijn aan een flinke opknopbeurt. . . . En in maart van het

net afgelopen jaar, stelde de Raad van Europa in een rapport vast dat de Spaanse politie stelselmatig al dan niet vermeende ETA-leden martelt. Het enige lichtpuntje was dat het minder wreed gebeurde dan ten tijde van de Franco-dictatuur.

...” (see also Jelle van Buuren “De donkere kamers van Europa : D’66 en de democratie in Europa” see www.xs4all.nl/~konfront/europa/jelle0397.html)

13.580 The project committee also noted how extradition and political offences are dealt with in the Australian *Extradition Act* of 1988. The Act defines political act as follows:

"political offence" , in relation to a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include:

- (a) an offence that is constituted by conduct of a kind referred to in:
 - (i) Article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, being the convention a copy of the English text of which is set out in Schedule 1 to the Crimes (Aviation) Act 1991; or
 - (ii) Article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, being the convention a copy of the English text of which is set out in Schedule 2 to the Crimes (Aviation) Act 1991; or
 - (iii) paragraph 1 of Article 2 of the Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, being the convention a copy of the English text of which is set out in the Schedule to the Crimes (Internationally Protected Persons) Act 1976 ; or
 - (iv) Article III of the Convention on the Prevention and Punishment of the Crime of Genocide, being the convention a copy of the English text of which is set out in the Genocide Convention Act 1949 ; or
 - (v) Article 1 of the International Convention against the Taking of Hostages, being the convention of that title that was adopted by the General Assembly of the United Nations on 17 December 1979; or
 - (vi) Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, being the convention of that title that was adopted by the General Assembly of the United Nations on 10 December 1984; or
 - (vii) Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, a copy of the English text of which is set out in Schedule 1 to the Crimes (Ships and Fixed Platforms) Act 1992 ; or
 - (viii) Article 2 of the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, a copy of the English text of which is set out in Schedule 2 to the Crimes (Ships and Fixed Platforms) Act 1992 ;
- (b) an offence constituted by conduct that, by an extradition treaty (not being a bilateral treaty) in relation to the country or any country, is required to be treated as an offence for which a person is permitted to be surrendered or tried, being an offence declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country or all countries;
- (c) an offence constituted by:
 - (i) the murder, kidnapping or other attack on the person or liberty; or
 - (ii) a threat or attempt to commit, or participation as an accomplice in, a murder, kidnapping or other attack on the person or liberty; of the head of state or head of government of the country or a member of the family of either such person, being an offence declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country; or
- (d) an offence constituted by taking or endangering, attempting to take or endanger or participating in the taking or endangering of, the life of a person, being an offence:
 - (i) committed in circumstances in which such conduct creates a collective danger, whether direct or indirect, to the lives of other persons; and

- (ii) declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country.

13.581 Section 6 of the Australian *Extradition Act* sets out the meaning of extraditable person as follows:

- Where:
- (a) either:
 - (i) a warrant is or warrants are in force for the arrest of a person in relation to an offence or offences against the law of a country that the person is accused of having committed either before or after the commencement of this Act; or
 - (ii) a person has been convicted of an offence or offences against the law of a country either before or after the commencement of this Act and:
 - (A) there is an intention to impose a sentence on the person as a consequence of the conviction; or
 - (B) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served;
 - (b) the offence or any of the offences is an extradition offence in relation to the country; and
 - (c) the person is believed to be outside the country;
- the person is, for the purposes of this Act, an extraditable person in relation to the country.

13.582 The Australian *Extradition Act* also makes provision for “extradition objection” as follows:

For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:

- (a) the extradition offence is a political offence in relation to the extradition country;
- (b) the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country;
- (c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions;
- (d) assuming that the conduct constituting the extradition offence, or equivalent conduct, had taken place in Australia at the time at which the extradition request for the surrender of the person was received, that conduct or equivalent conduct would have constituted an offence under the military law, but not also under the ordinary criminal law, of Australia; or
- (e) the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or has undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence.

13.583 It was noted above that the committee posed the question whether the Bill ought not cross-refer to the *Extradition Act* and if the intention is to exclude terrorist

acts from what are traditionally regarded political offences, whether the *Extradition Act* should not be amended as well. The committee also noted a suggestion that firstly the committee ought to highlight a possible need to review the *Extradition Act* and *International Cooperation in Criminal Matters Act* and, secondly that it may in particular be necessary to restrict the scope of “political offence” so as to ensure that what would normally be prosecutable offences, do not slip through on the pretext that they are political offences. The committee considered whether it would not be sufficient to delete in the originally proposed clause¹ the first three lines of the clause down to the word “government”. The committee noted that if the clause is not amended as it proposed, what the clause would be doing is to restrict the interpretation of the definition of “terrorist act” only to requests for mutual assistance and extradition. The committee considered that this wording will import where appropriate the ability of the accused to say that under international law he or she is engaged in a legitimate struggle and therefore the acts which he or she is performing or has performed, are not terrorist acts. The committee further considered that the reworded clause 25 (namely that the definition of “terrorist act” shall be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles) and its definition of “terrorist act” cover this aspect sufficiently to determine whether a particular act constitutes a terrorist act or not.² The committee however considered that the words “terrorist activities” should be deleted in clause 25.

(b) Comment on discussion paper 92

13.584 Ms Schneeberger comments that they favour the amendment of the clause as follows: “The provisions of this Act shall be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles”. She notes that amending the clause in the manner suggested would

¹ 25. In respect of requests for mutual legal assistance and extradition from any State or Government relating to any terrorist act or terrorist activity committed in the territory of the requesting State or the territory of any other foreign State or Government, the definition of “terrorist act” and “terrorist activity” shall be interpreted against the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles.

² See also the Preamble to the Bill where the committee suggested that terrorist acts should under any circumstances be unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.

also have the added advantage of ensuring that the entire Bill, and not just the definition of terrorist act, are consistent with South Africa's international obligations.³

13.585 The SAPS: Legal Component: Detective Service and Crime Intelligence comments that the idea is to ensure extradition of terrorists and that they do not enjoy a special status or hide behind the fact that their acts are politically inspired or motivated, and that most extradition treaties provide for an exception in respect of political offences. Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal say that clause 25 makes no sense at all, is vague and the need for such a clause seems to be superfluous in view of the definitions and prescriptions of the Bill.

(c) Evaluation and recommendation

³ See also the case of *S v Mahomed* 2001 (7) BCLR 685 (CC). The summary explains the case as follows:

Mr Mohamed, a Tanzanian, is on trial in New York on numerous capital charges arising out of the bombing of the United States embassy in Dar es Salaam in 1998. The FBI traced him to Cape Town where he was living under an assumed name and with a false passport. He was arrested and interrogated by South African immigration authorities as an illegal immigrant and handed over to the FBI for removal to the United States where the court told him he was facing the death penalty.

The Cape High Court later ordered the government to give Mohamed and the second applicant, his former employer/landlord in Athlone, the official information relating to the arrest and handing over. They then applied to that Court for an order invalidating as unconstitutional the removal to the United States without a condition that Mohamed would not be executed and that the government direct a corresponding request to the Secretary of State and the Attorney-General of the United States. The application failed and leave to appeal directly to this Court was urgently sought.

In this Court the applicants (supported by the Society for the Abolition of the Death Penalty and the Human Rights Committee Trust) argued that the handing over and subsequent removal were a disguised extradition without a safeguard against the death sentence. The South African officials were said also to have breached the law relating to deportation (under the Aliens Control Act 96 of 1991 and its regulations). This infringed Mohamed's constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment. The government argued that Mohamed had been liable to deportation for illegally entering the country, had lawfully been arrested and at his request had properly been deported to the United States and not Tanzania.

The Court found that whether the removal was a deportation or an extradition, the ruling in *S v Makwanyane and Another* that capital punishment was inconsistent with the values and provisions of the interim Constitution applied with even greater force to the final Constitution. South Africa cannot expose a person to the risk of execution, whether by deportation or extradition and regardless of consent. Also, the Act did not permit deportation of Mohamed to the US. In any event, assuming Mohamed to have consented, he could not validly do so: he was unaware of his right under the Act to appeal against deportation and the right to insist that the South African authorities make his deportation/extradition subject to an undertaking that he would not be executed, while he was without legal advice.

The Court upheld the appeal, declaring the handing over unlawful in that (a) the absence of an undertaking that Mohamed would not be executed infringed his constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment; (b) it breached the Aliens Control Act. The Director of the Court was authorised and directed to draw the judgment to the attention of the trial court in New York as a matter of urgency.

13.586 The project committee agrees with Ms Schneeberger that the interpretation clause should be amended to say: “The provisions of this Act shall be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles”. The committee also shares the view that amending clause 25 in the manner suggested would have the added advantage of ensuring that the entire Bill, and not just the definition of terrorist act, is consistent with South African international obligations. The committee therefore recommends that the clause be amended as she suggested. The Commission agrees with this recommendation.

EE. COMBATING THE FINANCING OF TERRORISM

(a) Evaluation

13.587 The discussion paper contained only one provision which dealt with providing material support in respect of offences under the proposed Bill. It provided in clause 3 (see annexure B) that any person who — (a) provides material, logistical or organisational support¹ **or any resources;² or (b) conceals or disguises the nature, location, source, or ownership of such support or resources, knowing or intending that such support or resources are to be used (i) in the commission of an offence under the provisions of the Bill; or (ii) in the concealment or an escape from the commission of an offence under the provisions of the Bill; or (c) participates in the activities of a terrorist organisation, commits an offence and is liable on conviction to imprisonment for a period not exceeding 10 years, without the option of a fine.**

13.588 Upon reflection it became clear to the project committee, particularly when taking into account the international obligations with which South Africa has to

¹ Taken from section 2339A Title 18 Crimes and Criminal Procedure of the USA which provides as follows:

“(a) Whoever, within the United States, provides material support or resources or conceals or distinguishes the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or carrying out, a violation of section 32, 37, 81, 175, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332c, or 2340A of this title or section 46502 of title 49, or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Definition. In this section, the term ‘material support or resources’ means currency or other financial securities, financial services, lodging, training, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”

² See the definition in clause 1 of this Bill regarding “material support or resources”.

comply that more detailed provisions are required in the Bill to effectively combat the financing of terrorism.³ At present, South Africa does not have legislation relating

³ Particularly in terms of the UN Suppression of the Financing of Terrorism Convention and Resolution 1373 of the Security Council of the UN. The Council decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. Funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists must also be frozen without delay. See chapter 4 at par 4.7 - 4.11 above for more information on Resolution 1373. Note also that at an extraordinary Plenary on the Financing of Terrorism held in Washington, D.C. on 29 and 30 October 2001, the Financial Action Task Force (FATF) expanded its mission beyond money laundering. It will now also focus its energy and expertise on the world-wide effort to combat terrorist financing. During the extraordinary Plenary, the FATF agreed to and issued new international standards to combat terrorist financing, which it calls on all countries to adopt and implement. Implementing these Special Recommendations will deny terrorists and their supporters access to the international financial system. The agreement on the Special Recommendations commits members to:

- (a) Take immediate steps to ratify and implement the relevant United Nations instruments.
- (b) Criminalise the financing of terrorism, terrorist acts and terrorist organisations.
- (c) Freeze and confiscate terrorist assets.
- (d) Report suspicious transactions linked to terrorism.
- (e) Provide the widest possible range of assistance to other countries' law enforcement and regulatory authorities for terrorist financing investigations.
- (f) Impose anti-money laundering requirements on alternative remittance systems.
- (g) Strengthen customer identification measures in international and domestic wire transfers.
- (h) Ensure that entities, in particular non-profit organisations, cannot be misused to finance terrorism.

In order to secure the swift and effective implementation of these new standards, FATF agreed to the following comprehensive Plan of Action:

- (a) By 31 December 2001, self-assessment by all FATF members against the Special Recommendations. This will include a commitment to come into compliance with the Special Recommendations by June 2002 and action plans addressing the implementation of Recommendations not already in place. All countries around the world were invited to participate on the same terms as FATF members.
- (b) By February 2002, the development of additional guidance for financial institutions on the techniques and mechanisms used in the financing of terrorism.
- (c) In June 2002, the initiation of a process to identify jurisdictions that lack appropriate measures to combat terrorist financing and discussion of next steps, including the possibility of counter-measures, for jurisdictions that do not counter terrorist financing.
- (d) Regular publication by its members of the amount of suspected terrorist assets frozen, in accordance with the appropriate United Nations Security Council Resolutions.
- (e) The provision by FATF members of technical assistance to non-members, as necessary, to assist them in complying with the Special Recommendations.

specifically to the financing of terrorism. The following legislative procedures for freezing accounts and assets at banks and financial institutions exist: In terms of *Exchange Control Regulations*, 1961, promulgated in terms of section 9 of the *Currency and Exchange Act*, the control over South Africa's foreign currency reserves, as well as the accrual and spending thereof, is vested in the Treasury. The Regulations define the Treasury as the Minister of Finance or an officer in the Department of Finance who, by virtue of the division of work in that Department deals with the matter on the authority of the Minister of Finance. The Minister of Finance, in terms of the Regulations, has appointed the Exchange Control Department of the South African Reserve Bank to carry out certain functions assigned to the Treasury, and as such the Department is responsible for the day-to-day administration of exchange control. The Minister of Finance has also appointed certain banks to act as Authorised Dealers in foreign exchange. These appointments give Authorised Dealers the right to buy and sell foreign currency, but under the conditions and within the limits prescribed by the Exchange Control Department to the Authorised Dealers through Exchange Control Circulars. The Act empowers the Minister of Finance to instruct Authorised Dealers to freeze funds and financial resources and block accounts held in South Africa and to prohibit the movement of capital into and out of South Africa. Regulation 3 of the *Exchange Control Regulations* provides for the restriction on the export of currency, gold, securities etc. and import of South African Bank notes. In particular, Regulation 3(1)(c) provides as follows:

- “3. (1) Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose –
- (a) make any payment to, or in favour, or on behalf of a person resident outside the Republic, or place any sum to the credit of such person;”

13.589 The Exchange Control Department of the South African Reserve Bank may, therefore, through the issuing of an *Exchange Control Circular*, grant or withdraw a specific exemption. The Treasury may also in terms of a Notice under Regulation 4 (3) of the *Exchange Control Regulations* direct that all sums due by any other person to persons resident in a particular country or any particular person whom the Treasury has reasonable grounds to suspect of having contravened any provision of

In taking forward its Plan of Action against terrorist financing, the FATF will intensify its co-operation with the FATF-style regional bodies and international organisations and bodies, such as the United Nations, the Egmont Group of Financial Intelligence Units, the G-20, and International Financial Institutions, that support and contribute to the international effort against money laundering and terrorist financing. (See http://www1.oecd.org/fatf/TerFinance_en.htm)

the *Exchange Control Regulations* relating to foreign exchange be paid into a blocked account. The South African Reserve Bank has circulated seven *Exchange Control Circulars* advising all authorised dealers that, due to UN sanctions, they are not allowed to make any funds and/or financial or economic resources available to the Taliban, as well as to Usama bin Laden and individuals associated with him. The Exchange Control Circulars have also requested all authorised dealers to report any facilities or assets of this nature that might have been in place before the sanctions were imposed, as well as any future attempts by the private sector to enter into transactions with the prohibited parties and persons. The Exchange Control Circulars contained the details of the individuals and entities that were listed by the Security Council Committee on Afghanistan in March 2001, October 2001 and November 2001. *Exchange Control Regulation 22* provides that every person who contravenes or fails to comply with any provision of the *Exchange Control Regulations* shall be guilty of an offence and liable upon conviction to imprisonment for a period not exceeding 5 years and/or a fine not exceeding the monetary value of the transaction or R250 000-00 whichever the greater.

13.590 The South African Reserve Bank issued a list of individuals and organisations believed to be involved in the terror attacks in the USA (as provided in the US Executive Order of 23 September 2001) to all banking institutions in the country. In a letter dated 28 September 2001 the Registrar of Banks directed banks in terms of section 7 (1) (a) of the *Banks Act* (Act 94 of 1990) to search their records in order to identify any relationship or involvement with any individuals or organisations whose names appear on these lists. All information obtained in this way regarding accounts of the said individuals or organisations must be supplied to the Registrar of Banks, who will appoint inspectors to perform preliminary forensic investigations on the transactions and counterparties. The results of these investigations will be reported to the relevant authorities. In addition, the South African Government published a Notice in the Government Gazette No 22752 (Notice Number R 1036) on 12 October 2001. The Notice contains the details of the individuals and entities that were listed in the US Executive Order of 23 September 2001 (that was endorsed by the United Nations on 8 October 2001). The South African Reserve Bank issued *Exchange Control Circular* No D 340 on 12 October 2001 informing all authorised dealers of the contents of the Government Notice. This list was further updated on 2 November 2001 when the SA Reserve Bank issued *Exchange Control Circular* No D 343, which adds the names of those organisations and individuals identified by the United Nations (UN) on 19 October 2001.

13.591 The *Prevention of Organised Crime Act*, 1998 (Act No 121 of 1998) ("*POCA*") was passed to deal with crime syndicates operating in South Africa.⁴ **Any person who participates in the activities of a criminal enterprise (even if there is no evidence linking that person to a specific crime) could be acting in contravention of this Act. An accused convicted under *POCA* faces a maximum fine of one billion Rand or life imprisonment. *POCA* also contains the offences of money laundering and related activities. *POCA* compels businesses to report all transactions of a suspicious nature. *POCA* repealed the *Proceeds of Crime Act* of 1996 and incorporated provisions relating to the confiscation of the proceeds of crime. *POCA* now empowers the courts to order that the benefit that an offender had derived from an offence, of which he or she had been convicted, may be confiscated. Upon application by the Office of the National Director of Public Prosecutions to a High Court, property of persons implicated under the Act may be forfeited to the State. Finances generated through the forfeiture of assets will be used to assist law enforcement agencies fighting crime as well as victims of crime.**

13.592 The *Financial Intelligence Act* ("*FIC Act*")⁵ was adopted by the South African Parliament on 6 November 2001. It entered into force when assented to by the President on 28 November 2001. The Bill draws extensively on international best practice and provides the South African Government with the tools to combat money laundering activities. The object of the *FIC Act* is to introduce mechanisms and measures aimed at preventing and combating a wide range of money laundering activities. It sets up an anti-money laundering regime which encourages voluntary compliance and self-regulation by institutions which otherwise may be exploited for money laundering purposes. To this extent, the *FIC Act* complements the *POCA*.

⁴ See *National Director of Public Prosecutions v Bathgate* 2000 (1) SA 535 (C) at 561:
 . . . measures such as restraint and confiscation, although encroaching upon protected fundamental rights, are both equitable and morally justified. I am of the view that such remedies are indispensable in any community which prides itself on being a proponent of justice, fairness, reasonableness, good faith and good (public) morals. Public policy indeed dictates the need to establish and develop measures and remedies of this nature with a view to resisting the ever-increasing criminal onslaught. The analogous provisions found in other national and domestic legislation, such as the Criminal Procedure Act 51 of 1977 and the Insolvency Act 24 of 1936, are useful, but clearly do not go far enough for present purposes. The inexorable increase in the incidence of drug-related crime . . . requires robust and effective resistance.
 The nature and extent of the limitation
 [91] . . . I cannot agree with Mr Heunis that the Act as a whole, or even the individual sections thereof which are being attacked as unconstitutional, should be regarded as draconian. In my view, the Act, including the said sections, is lucid and distinguished by a reasonable, rather than an oppressive or draconian, character.

⁵ Act No. 38 of 2000.

13.593 The *POCA* provides for two types of orders. The first type is aimed at the so-called freezing of property. The second type is aimed at the confiscation of an amount of money or the forfeiture of property to the State. Property, by definition in the Act, includes money. The orders aimed at the freezing of property for which the Act provides are restraint orders and preservation of property orders. The purpose of a restraint order as well as a preservation of property order is to obtain temporary control over property (ie. "freezing" the property) pending the finalisation of further proceedings for the final confiscation of money or forfeiture of property. A restraint order can be applied for when a person is to be charged with an offence or when a prosecution for an offence has been instituted against a person. The Court may grant a restraint order if it appears likely that a trial court will, subsequent to a conviction, find that a person has benefited from criminal activity and make a confiscation order against that person.⁶ The restraint order will apply to the property of the person whose benefit from criminal activity will be considered as well as the property of persons to whom he or she has made certain gifts.

13.594 A preservation of property order can be obtained in respect of any property which was concerned in the commission of an offence referred to in Schedule 1 to the

⁶ *National Director of Public Prosecutions v Basson* 2002 (2) SA 419 (SCA) concerned an appeal against a provisional restraint order made in terms of the *POCA*. The appellant applied, ex parte, for a restraint order to be made in relation to property under the respondent's control. The court noted that the Act deals with restraint orders, which are designed to ensure that property is preserved so that it can be realised in satisfaction of a confiscation order. Section 26(1) authorises the National Director to apply to a High Court, ex parte, for an order prohibiting any person from dealing in any manner with any property to which the order relates. The Act confers wide powers upon the court as to the terms of any such restraint order, and in particular, it may appoint a curator bonis to take charge of the property that has been placed under restraint, order any person to surrender the property to the curator bonis, authorise the police to seize the property, and place restrictions upon encumbering or transferring immovable property. It may also make a provisional restraint order having immediate effect and simultaneously grant a rule nisi calling upon the defendant to show cause why the order should not be made final. The circumstances in which a restraint order may be made in terms of s 25(1) was noted. Section 25(1) of the Act does not permit a court to grant a restraint order upon nothing more than a summary of the allegations made against the defendant concerned, and an expression of opinion by members of the appellant's staff that a confiscation order will be granted (which is all that was before the Court in the case). The section requires that it should appear to the court itself, not merely to the appellant or his staff, that there are *reasonable grounds* for such a belief, which requires at least that the nature and tenor of the available evidence needs to be disclosed. Where an order is sought ex parte it is well established that the utmost good faith must be observed, all material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide*.

See also *National Director of Public Prosecutions v Bathgate* 2000 (1) SA 535 (C) at 562:

[94] . . . The concept of reasonableness plays a significant role in these cases where the Court, in exercising its discretion whether or not to grant a restraint order, is enjoined to consider whether there are 'reasonable grounds for believing' that a confiscation order may be granted.

Act and to the proceeds of any unlawful activity. It is not a requirement for the granting of a preservation of property order that criminal proceedings have been instituted, or are even envisaged, against any person.⁷ Orders for the "freezing" of property in terms of the Act can therefore be obtained, on the one hand, if the property concerned belongs to a person who has probably benefited from criminal activity in respect of which criminal charges are envisaged or have been instituted or, on the other hand, if the property itself was concerned in the commission of certain offences or is the proceeds of unlawful activity.

13.595 The orders aimed at permanently dispossessing a person of money or assets for which the Act provides are confiscation orders and forfeiture orders. A confiscation order may be made after a conviction and subsequent to an enquiry into the value of the benefit which a person has derived from the relevant offence. The order is an order for the payment of an amount of money equal to the value which the court places on the person's benefit. The order may be executed by the realisation of the property (ie. converting the property into money) over which a restraint order was obtained. A forfeiture order may be made if a preservation of property order is in force in respect of certain property and the court finds that the property was probably concerned in the commission of a certain offence or that it is the proceeds of any unlawful activity.⁸ In the case of a forfeiture order the specific property that is linked to the relevant offence or unlawful activity is forfeited to the State.

⁷ See *National Director of Public Prosecutions v Alexander* 2001 (2) SACR 1 (T) at 7 - 8: Obviously a conviction is a sine qua non for a confiscation order. However, the purpose of s 25 and s 26 is to secure property to ensure that a confiscation order which may later follow a conviction (in terms of s 18) can be executed. Naturally it will not be easy for a court adjudicating on ss 25 and 26 to know whether a conviction will later follow and whether a confiscation order will be made by the trial court. Whether and to what extent a lengthy charge-sheet with numerous counts of fraud and related offences would assist a court to form an opinion as to the likelihood of a later conviction and confiscation order, may depend on the nature and facts of each case. Even if a charge-sheet contains considerable detail, charges still have to be proved beyond reasonable doubt in the trial court, of course. The limitations of the court hearing the application for a restraint order regarding the possible future findings of a trial court are indeed recognised in the Act. Firstly, s 25(1) provides for two possibilities, namely when a prosecution for an offence has been instituted against the defendant concerned (in (a)), or when the court is satisfied that a person is to be charged with an offence (in (b)). Secondly, a court may make a restraint order when a confiscation order has been made against the defendant, or when it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant (in terms of s 25(1)(a)(ii) and (b)(ii)).

It must therefore appear to the court that there are reasonable grounds, obviously at the time of the application, to believe that a confiscation order following a conviction may - and not will - be made. Naturally the law of evidence applies. However, the court hearing the restraint order application clearly does not have to be convinced in terms of any particular burden of proof that a conviction and confiscation will follow. The court has to form an opinion based on appearance and reasonableness as to future possibilities.

See also *National Director of Public Prosecutions v Rebuzzi* 2002 (2) SA 1 (SCA).

⁸ See *Levy v National Director of Public Prosecutions* 2002 (1) SACR 162 (W) at 164 *et seq*:

13.596 The *International Co-operation in Criminal Matters Act*, 1996, provides that orders for the freezing and forfeiture of assets granted by foreign courts may be sent to the Director-General of the Department of Justice and Constitutional Development with a request for assistance in executing those orders. Such an order may subsequently be registered with the appropriate court in South Africa upon which it will have the effect of an order of that court. The order can then be executed as if it was granted in South Africa in terms of the relevant provisions of the Act. If the authorities in a foreign jurisdiction are unable to obtain an order in their courts which can be executed in South Africa they will have to place the South African authorities in possession of sufficient information to prove the facts referred to in the paragraphs above upon which a South African court may be convinced to grant an order.

13.597 The provisions of the *POCA* are aimed at removing the profit from criminal activity and discouraging persons to use their property, or allow their property to be used, for the commission of crime.⁹ A link with unlawful activity must therefore

[4] The application provided for in s 48 was filed with the Registrar of this Court on 28 August 2001 and served upon the applicant by its delivery to his attorney on 31 August 2001. It follows that the application was filed with the Registrar within the 90-day period reflected in s 40 but that it was served upon the applicant's attorney 91 days after the date of the publication in the Gazette in terms of s 39(1)(b). . . .

At best for the National Director the word 'pending' is ambiguous and thus may be interpreted as requiring service of the application on a respondent or not doing so. Where a statute makes serious inroads on the rights of an individual the Court ought to lean in favour of a construction which will result in such inroads being as limited as possible. . . . It follows that service of the application is necessary to make it pending. I find support for this view in the consideration that, if it were to be held that service on the Registrar is sufficient to render an application pending, the person bound by the preservation order would have no knowledge that he was bound before service on him occurred, since there is no obligation on a prospective respondent to enquire at the Registrar's office whether an application has been delivered there . . . Furthermore there is no time limit within which service must occur after an application is filed with the Registrar. If the application were to be held to be pending from the time of filing with the Registrar the National Director could by the stratagem of so filing the application render the preservation order operative for an indefinite period. This would be an absurd result and could not have been contemplated by the Legislature.

[10] It follows that by the time the application for a forfeiture order was brought the preservation order had ceased to operate and thus that in terms of s 48 of the Act the National Director was not entitled to bring it.

[11] Counsel who appeared for the National Director argued that Rule 30 was inapplicable. I disagree. Rule 30(1) reads:

'A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.'

The application for forfeiture in terms of s 48 is clearly such an irregular step since it is not sanctioned by such section. In terms of s 62(2) 2 of the Act the Rules of this Court are applicable to the present proceedings, no rules having been made in terms of s 62(1).

⁹ See *National Director of Public Prosecutions v Bathgate* 2000 (1) SA 535 (C) at 566, inter alia, for a discussion of the constitutionality of the *POCA* provisions:

On consideration of the impugned provisions in the context of the Proceeds Act as a whole, I am quite satisfied that the means do justify the end. No suggestion was made by the respondent as to any other means, legislative or otherwise, which might achieve the purpose

always be present for the provisions of the Act to be applicable. This link can be either between the person to whom the property belongs and an unlawful activity or between the relevant property itself and an unlawful activity. "Unlawful activity" as defined in the Act is a wide concept and includes any conduct which constitutes a crime whether the conduct occurred in South Africa or elsewhere. The *POCA* was not developed with combating terrorism in mind. The provisions of the Act can therefore not be applied to property merely because the property belongs to a certain person or organisation, without proof of that person's or organisation's involvement in unlawful activity. These provisions can also not be applied to property which may in future be used to facilitate certain activities or be placed at the disposal of certain persons or organisations. Provision must therefore be made to provide for the freezing and forfeiture of terrorist funds and property in the *Anti-Terrorism Bill*.

13.598 The *POCA* provides in section 7 for a duty to report certain information. The reporting duty under the Act applies to any person who carries on a business, or is in charge of, or employed by, a business or who manages a business. Reports in terms of these provisions are currently made to the Commercial Branch of the South African Police Detective Service. The duty deals with three different scenarios where reporting must take place. The first is where property comes into the possession of the person or business concerned. In this case a suspicion that the property is the proceeds of unlawful activities must be reported. The second is where a specific

of the Act. If there were indeed alternative means, there is no indication that they would be less restrictive than the provisions embodied in the Proceeds Act. The Act as a whole has a pragmatic approach and its provisions are, generally speaking, fair, reasonable, logical and practicable.

The proportionality test

[111] . . . the acid test for justification consists in weighing up the competing values or interests on the basis of proportionality. To a large extent this exercise has already been completed in the discussion of the relevant factors requiring consideration in terms of s 36(1)(a)-(e). Nevertheless a final assessment is still called for . . . the interests to be balanced are, on the one hand, the nature and importance of the curtailed right in an open and democratic society based on human dignity, freedom and equality, and, on the other hand, the nature, extent, importance and purpose of the limitation.

[112] When this test is applied to the present matter, I have no hesitation in coming to the conclusion that the limitations contained in the impugned provisions of the Proceeds Act are eminently justified. The interests represented by the limitations are, in my view, proportionate to those contained in the curtailed rights of the respondent. I am quite satisfied that such limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the factors enumerated in s 36(1)(a)-(e) of the Constitution.

[113] It follows from the above that I am satisfied that the applicant has discharged the onus of proving that the limitations aforesaid are justified. The respondent's attack on the constitutionality of ss 16, 17, 18, 22 and 23 of the Proceeds Act is, in my view, without substance. The constitutional argument raised by the respondent must, therefore, be rejected. See also L Jordaan "Confiscation of the proceeds of crime and the fair-trial rights of an accused person" 2002 15 *South African Journal of Criminal Justice* 41 - 60.

transaction involving the person or business concerned takes place. In this case the duty is to report a suspicion that the transaction will facilitate the transfer of the proceeds of unlawful activities. The third is where a transaction that involves the person or business concerned has been discontinued. In this case a suspicion that the transaction, had it been concluded, may either have brought the proceeds of unlawful activities into the possession of the person or business, or have facilitated the transfer of those proceeds, must be reported. The term "proceeds of unlawful activities" is defined in the *POCA* to include any property which was derived, received or retained in the Republic or elsewhere as a result of any unlawful activity. "Unlawful activity" is defined in the same Act to include any conduct that constitutes a crime or contravenes a law whether it occurred in the Republic or elsewhere. When all of this is read together it means that persons engaged in a businesses have to report suspicions that they are dealing with property that was derived anywhere in the world from an offence that took place anywhere in the world.

13.599 The *FIC Act* contains a number of duties to report information. These include a duty under section 28 to report cash transactions exceeding a certain threshold and a duty under section 29 to report so-called suspicious and unusual transactions.¹⁰

¹⁰ See Sarah Toyne and Jeremy Scott-Joynt "Following the money trail" BBC News 7 November 2001 http://news.bbc.co.uk/1/hi/english/business/newsid_1553000/1553153.stm who report that financial authorities around the world are stepping up their efforts to trace illegal money flows in the wake of the attacks inflicted on New York and Washington DC on 11 September. They note that law enforcement agencies in the US are well aware that one of the best ways to prove a case against Osama Bin Laden, who has been identified as the chief suspect, is to follow the money:

"How were the hijackers supported? And how did the money make it into their hands in the US and elsewhere without being traced? No-one is under any illusion that the task will be an easy one. Tracing the flow of illicit money is a complicated, time-consuming business, and the cards are stacked against investigators. To help boost the chances of finding a paper trail that could lead back to the perpetrator, regulators are planning to upgrade their systems for uncovering the laundering of dirty money. . . .

And setting aside the question of just how much money is involved, the practical problem remains. How do authorities trace the money in the first place? Suspicious transaction reports (STRs) are hardly reliable, many experts fear. Some banks are less than diligent about filing them, and not only the "correspondent banks" which sometimes consist of little more than a brass plate on a door and a nominated director in a house down the road. Even if the reports are filed, usually a required practice for any sum over about £10,000, the regulators may be too snowed under to pay attention. The US Financial Crimes Enforcement Network (FinCEN), which oversees anti-money laundering efforts at the moment, is notorious in US banking circles for having a huge backlog of STRs. And banks complain about being forced to be policemen.

"Banks don't have the people or those with enough experience to play Sherlock Holmes," said one senior UK banking executive. "The processes are very skilled - they are run through 'legitimate' companies. How can you possibly detect all of them?" And the weight of STRs, "know your customer" rules and other regulations is too much of a burden, he says. "If we were to implement all the regulations, bankers would be doing nothing else. And the regulations are now so tight in some of the offshore places, you might have a better chance getting money into a retail bank in New York and London rather than Jersey." That has certainly been proved in recent money laundering cases. When regulators probed the money

These provisions have not yet taken effect. Once it takes effect this latter duty will replace the current reporting duty under the *POCA*. This duty will apply to so-called accountable institutions and reporting institutions. Accountable institutions are listed in Schedule 1 to the *FIC Act* and include all financial and investment service providers. Reporting institutions are listed in Schedule 2 to the *FIC Act* and include only dealers in motor vehicles and Kruger Rands. This duty will arise when the institution concerned concludes a transaction with a client in terms of which an amount of cash exceeding the threshold is paid to the client or received from the client. Cash in, this provision, means South African coin and paper money, coin and paper money of another country and travellers' cheques. The threshold will be prescribed by regulation.

13.600 The duty under the *FIC Act* to report suspicious and unusual transactions will apply to the same category of persons as the current duty under the *POCA*. This is any person who carries on a business, or is in charge of, or employed by, a business or who manages a business. Reports made under the duty in the *FIC Act* will be made to the Financial Intelligence Centre, which is established by the same Act. The duty under the *FIC Act* to report suspicious and unusual transactions will apply in the same three scenarios referred to above, but will also be somewhat wider. In addition the duty under the *FIC Act* will also deal with four other scenarios. The first scenario is where there is a suspicion that a transaction or series of transactions in which the business is a party has no apparent business or lawful purpose. There can be numerous examples of such transactions but this will generally include transactions which appear unnecessarily complex compared to their apparent purpose, transactions which involve unusual amounts given the client profile or transactions

stolen from Nigeria by former dictator Sani Abacha, they found much of it had passed through London institutions.

The regulators have to ensure bankers police themselves because the money flows through the major banking centres are now so huge that keeping track is near impossible. . . .

In the UK, Chancellor of the Exchequer Gordon Brown told the BBC's Today programme that banks needed to tighten their rules on oversight of suspicious transactions.

The reporting of suspicious transactions is seen as a cornerstone of compliance with the global anti-money laundering effort, spearheaded by an international Paris-based group, the Financial Action Task Force (FATF), affiliated to the OECD. "It's necessary to create that wider (reporting) obligation on international institutions," Mr Brown said. "But equally it's necessary to have a system of reporting so that there's not only no safe haven (for terrorists) but no hiding place for terrorist money." One bank account supposedly connected to the US terrorists, at a Barclays Bank branch in Notting Hill in London, has already been closed. Switzerland, a country whose reputation for banking secrecy has often made its banks a prime suspect in money laundering investigations, says its task force is "working at high speed" to see if any terrorist-linked funds had flowed through Swiss institutions. And other European countries are following suit.

which does not seem to be aimed at achieving a profit or avoiding a loss. The second is where there is a suspicion that a transaction or series of transactions to which the business is a party is conducted to avoid giving rise to any of the other reporting obligation under the *FIC Act*. An example of this may be that cash transactions are structured in order to remain below the amount which will trigger the cash threshold reporting duty. The third is where there is a suspicion that a transaction or series of transactions to which the business is a party is conducted to evade tax. The fourth is where there is a suspicion that the business is used for money laundering purposes.

13.601 The *FIC Act* provides in section 35 for monitoring orders to be issued by a judge. These will be issued if there is reason to suspect that a person is using an institution or an account or facility at an institution for money laundering purposes. In terms of a monitoring order the institution will have to report all transactions conducted by a specific person or all transactions involving a specific account or facility. The term "money laundering" in terms of the *FIC Act* refers to activities which have the effect of concealing the nature, source or movement of the proceeds of unlawful activities or any person's interest in such proceeds. The concepts of "proceeds of unlawful activities" and "unlawful activity" have the same meaning in the *FIC Act* as in the *POCA*.

13.602 The provisions of the *POCA* and the *FIC Act* have been developed to counter money laundering in its traditional sense and are not specifically designed to apply to terrorism or terrorist activities. These provisions may nevertheless be applicable to transactions involving funds or assets associated with terrorism or terrorist groups. In the case of the current reporting duty under the *POCA* the element of the proceeds of unlawful activities have to be present for a transaction to be reportable. This will include transactions involving funds or assets associated terrorist groups if the activity from which the funds or assets have been derived constitutes an offence in the place where it was carried out. In this sense funds or assets derived from crime which are intended to finance future terrorist activities and funds or assets derived from terrorist activities which constitute offences will all fall within the scope of this duty. In the case of the *FIC Act* the same argument will apply with regard to many suspicious or unusual transactions. There are furthermore a number of instances where the element of the proceeds of unlawful activities is not required to make a transaction reportable. These are transactions involving cash amounts exceeding the prescribed threshold, transactions that have no apparent business or lawful purpose, transactions that are aimed at avoiding another reporting duty and transactions aimed at evading tax. It is likely that transactions aimed at making funds or assets available

to terrorist groups or facilitating future terrorist activities will fall within one of these categories. The provisions of the *POCA* cannot be used to monitor transactions by a specific person or organisation. These provisions do furthermore not apply to transactions that do not involve a suspicion concerning the proceeds of unlawful activities. The provisions of the *FIC Act* will in future allow for the monitoring of specific persons or organisations if there is a suspicion that they are involved in laundering the proceeds of unlawful activities.

13.603 The project committee noted that the Canadian *Anti-Terrorism Act* provides as follows on the combating of the financing of terrorism:

- 83.08** (1) No person in Canada and no Canadian outside Canada shall knowingly
- (a) deal directly or indirectly in any property that is owned or controlled by or on behalf of a terrorist group;
 - (a) enter into or facilitate, directly or indirectly, any transaction in respect of property referred to in paragraph (a); or
 - (b) provide any financial or other related services in respect of property referred to in paragraph (a) to, for the benefit of or at the direction of a terrorist group.

83.09 (1) The Solicitor General of Canada or a person designated by the Solicitor General may authorize any person in Canada or any Canadian outside Canada to carry out a specified activity or transaction that is prohibited by section 83.08, or a class of such activities or transactions.

Ministerial authorization

(2) The Solicitor General or a person designated by the Solicitor General may make the authorization subject to any terms and conditions that are required in their opinion, and may amend, suspend, revoke or reinstate it.

Existing equities maintained

(3) All secured and unsecured rights and interests in the frozen property that are held by persons, other than terrorist groups or their agents, are entitled to the same ranking that they would have been entitled to had the property not been frozen.

Third party involvement

(4) If a person has obtained an authorization under subsection (1), any other person involved in carrying out the activity or transaction, or class of activities or transactions, to which the authorization relates is not subject to sections 83.08, 83.1 and 83.11 if the terms or conditions of the authorization that are imposed under subsection (2), if any, are met.

Disclosure

83.1 (1) Every person in Canada and every Canadian outside Canada shall disclose forthwith to the Commissioner of the Royal Canadian Mounted Police and to the Director of the Canadian Security Intelligence Service

- (a) the existence of property in their possession or control that they know is owned or controlled by or on behalf of a terrorist group; and
- (b) information about a transaction or proposed transaction in respect of property referred to in paragraph (a).

Immunity

(2) No criminal or civil proceedings lie against a person for disclosure made in good faith under subsection (1).

Audit

83.11(1) The following entities must determine on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a listed entity:

- (a) authorized foreign banks within the meaning of section 2 of the *Bank Act* in respect of their business in Canada, or banks to which that Act applies;
- (b) cooperative credit societies, savings and credit unions and caisses populaires regulated by a provincial Act and associations regulated by the *Cooperative Credit Associations Act*;
- (c) foreign companies within the meaning of subsection 2(1) of the *Insurance Companies Act* in respect of their insurance business in Canada;
- (c.1) companies, provincial companies and societies within the meaning of subsection 2(1) of the *Insurance Companies Act*;
- (c.2) fraternal benefit societies regulated by a provincial Act in respect of their insurance activities, and insurance companies and other entities engaged in the business of insuring risks that are regulated by a provincial Act;
- (d) companies to which the *Trust and Loan Companies Act* applies;
- (e) trust companies regulated by a provincial Act;
- (a) loan companies regulated by a provincial Act; and
- (b) entities authorized under provincial legislation to engage in the business of dealing in securities, or to provide portfolio management or investment counselling services.

Monthly report

(2) Subject to the regulations, every entity referred to in paragraphs (1)(a) to (g) must report, within the period specified by regulation or, if no period is specified, monthly, to the principal agency or body that supervises or regulates it under federal or provincial law either

- (a) that it is not in possession or control of any property referred to in subsection (1), or
- (b) that it is in possession or control of such property, in which case it must also report the number of persons, contracts or accounts involved and the total value of the property.¹

¹ The Federation of Law Societies of Canada and the Attorney General of Canada have reached an agreement for a test case in the BC Supreme Court to resolve the constitutionality of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (see http://www.lsuc.on.ca/news/updates/money_launder.jsp)

“The spirit of cooperation between the Federation and Attorney General Martin Cauchon that is evidenced by this agreement will streamline the constitutional challenge and will put an end to costly litigation in other provinces and territories.” The Federation launched the constitutional challenge last year because the *PC(ML)TF Act* will prevent Canadians from obtaining confidential legal advice from their lawyers.

“The legislation has nothing to do with money laundering or terrorist financing – it has to do with compromising the rights of any Canadian in need of a lawyer,” Mr. Laprairie said. “The legislation requires lawyers to submit details of their clients’ confidential financial affairs to the federal government, contrary to our profession’s ethical rules and contrary to the basic rights of all Canadians. Lawyers cannot be secret agents for the government.”

Prior to signing the May 14th agreement, the Federation was forced to file a constitutional challenge in each province and territory. The Federation along with the Law Society of British Columbia launched the first constitutional challenge in the BC Supreme Court last year and obtained a temporary injunction from Madam Justice Marion Allan on Nov. 20, 2001 exempting lawyers from the *PC(ML)TF Act* until the case could be heard by the court. Courts in several other provinces adopted Madam Justice Allan’s decision. Courts in Alberta, Ontario, Nova Scotia and Saskatchewan granted similar injunctions. At the time of the agreement lawsuits had also been commenced in Quebec, New Brunswick and Newfoundland and Labrador.

The new agreement gives national recognition to Madam Justice Allan’s decision which will remain in effect across Canada until the constitutional challenge is resolved by the Supreme

Seizure and restraint of assets

83.13 (1) Where a judge of the Federal Court, on an *ex parte* application by the Attorney General, after examining the application in private, is satisfied that there are reasonable grounds to believe that there is in any building, receptacle or place any property in respect of which an order of forfeiture may be made under subsection 83.14(5), the judge may issue

- (a) if the property is situated in Canada, a warrant authorizing a person named therein or a peace officer to search the building, receptacle or place for that property and to seize that property and any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made under that subsection; or
- (b) if the property is situated in or outside Canada, a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in, that property other than as may be specified in the order.

Contents of application

(1.1) An affidavit in support of an application under subsection (1) may be sworn on information and belief, and, notwithstanding the *Federal Court Rules, 1998*, no adverse inference shall be drawn from a failure to provide evidence of persons having personal knowledge of material facts.

Appointment of manager

(2) On an application under subsection (1), at the request of the Attorney General, if a judge is of the opinion that the circumstances so require, the judge may

- (a) appoint a person to take control of, and to manage or otherwise deal with, all or part of the property in accordance with the directions of the judge; and
- (b) require any person having possession of that property to give possession of the property to the person appointed under paragraph (a). . . .

Power to manage

(4) The power to manage or otherwise deal with property under subsection (2) includes

- (a) in the case of perishable or rapidly depreciating property, the power to sell that property; and
- (b) in the case of property that has little or no value, the power to destroy that property.

Application for destruction order

(5) Before a person appointed under subsection (2) destroys property referred to in paragraph (4)(b), he or she shall apply to a judge of the Federal Court for a destruction order.

Notice

(6) Before making a destruction order in relation to any property, a judge shall require notice in accordance with subsection (7) to be given to, and may hear, any person who, in the opinion of the judge, appears to have a valid interest in the property.

Court of Canada if necessary. Laprairie said: "The new agreement brings certainty to all Canadians and ensures that all Canadians regardless of where they live will enjoy the same degree of protection of their confidential information with their lawyer pending the final decision in the test case."

The Federation/Law Society of B.C. constitutional challenge was scheduled to be heard in the BC Supreme Court on June 24, 2002 but was adjourned to allow the parties to prepare to argue the case as a national test case. A date for hearing has not been set yet.

Manner of giving notice

(7) A notice under subsection (6) shall be given in the manner that the judge directs or as provided in the rules of the Federal Court.

Order

(8) A judge may order that property be destroyed if he or she is satisfied that the property has little or no financial or other value.

When management order ceases to have effect

(9) A management order ceases to have effect when the property that is the subject of the management order is returned to an applicant in accordance with the law or forfeited to Her Majesty.

Application to vary

(10) The Attorney General may at any time apply to a judge of the Federal Court to cancel or vary an order or warrant made under this section, other than an appointment made under subsection (3).

Procedure

(11) Subsections 462.32(4) and (6), sections 462.34 to 462.35 and 462.4, subsections 487(3) and (4) and section 488 apply, with such modifications as the circumstances require, to a warrant issued under paragraph (1)(a)

Application for order of forfeiture

83.14(1) The Attorney General may make an application to a judge of the Federal Court for an order of forfeiture in respect of

- (a) property owned or controlled by or on behalf of a terrorist group; or
- (b) property that has been or will be used, in whole or in part, to facilitate or carry out a terrorist activity.

Contents of application

(2) An affidavit in support of an application by the Attorney General under subsection (1) may be sworn on information and belief, and, notwithstanding the *Federal Court Rules, 1998*, no adverse inference shall be drawn from a failure to provide evidence of persons having personal knowledge of material facts.

Respondents

(3) The Attorney General is required to name as a respondent to an application under subsection (1) only those persons who are known to own or control the property that is the subject of the application.

Notice

(4) The Attorney General shall give notice of an application under subsection (1) to named respondents in such a manner as the judge directs or as provided in the rules of the Federal Court.

Granting of forfeiture order

(5) If a judge is satisfied on a balance of probabilities that property is property referred to in paragraph (1)(a) or (b), the judge shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

Use of proceeds

(5.1) Any proceeds that arise from the disposal of property under subsection (5) may be used to compensate victims of terrorist activities and to fund anti-terrorist initiatives in accordance with any regulations made by the Governor in Council under subsection (5.2).

Regulations

(5.2) The Governor in Council may make regulations for the purposes of specifying how the proceeds referred to in subsection (5.1) are to be distributed.

Order refusing forfeiture

(6) Where a judge refuses an application under subsection (1) in respect of any property, the judge shall make an order that describes the property and declares that it is not property referred to in that subsection.

Notice

(7) On an application under subsection (1), a judge may require notice to be given to any person who, in the opinion of the Court, appears to have an interest in the property, and any such person shall be entitled to be added as a respondent to the application.

Third party interests

(8) If a judge is satisfied that a person referred to in subsection (7) has an interest in property that is subject to an application, has exercised reasonable care to ensure that the property would not be used to facilitate or carry out a terrorist activity, and is not a member of a terrorist group, the judge shall order that the interest is not affected by the forfeiture. Such an order shall declare the nature and extent of the interest in question.

Dwelling-house

(9) Where all or part of property that is the subject of an application under subsection (1) is a dwelling-house, the judge shall also consider

- (a) the impact of an order of forfeiture on any member of the immediate family of the person who owns or controls the dwelling-house, if the dwelling-house was the member's principal residence at the time the dwelling-house was ordered restrained or at the time the forfeiture application was made and continues to be the member's principal residence; and
- (b) whether the member appears innocent of any complicity or collusion in the terrorist activity.

Motion to vary or set aside

(10) A person who claims an interest in property that was forfeited and who did not receive notice under subsection (7) may bring a motion to the Federal Court to vary or set aside an order made under subsection (5) not later than 60 days after the day on which the forfeiture order was made.

No extension of time

(11) The Court may not extend the period set out in subsection (10).

Disposition of property

83.15 Subsection 462.42(6) and sections 462.43 and 462.46 apply, with such modifications as the circumstances require, to property subject to a warrant or restraint order issued under subsection 83.13(1) or ordered forfeited under subsection 83.14(5).

Interim preservation rights

83.16 (1) Pending any appeal of an order made under section 83.14, property restrained under an order issued under section 83.13 shall continue to be restrained, property seized under a warrant issued under that section shall continue to be detained, and any person appointed to manage, control or otherwise deal with that property under that section shall continue in that capacity.

Appeal of refusal to grant order

(2) Section 462.34 applies, with such modifications as the circumstances require, to an appeal taken in respect of a refusal to grant an order under subsection 83.14(5).

Other forfeiture provisions unaffected

83.17 (1) This Part does not affect the operation of any other provision of this or any other Act of Parliament respecting the forfeiture of property.

Priority for restitution to victims of crime

(2) Property is subject to forfeiture under subsection 83.14(5) only to the extent that it is not required to satisfy the operation of any other provision of this or any other Act of Parliament respecting restitution to, or compensation of, persons affected by the commission of offences.

13.604 The committee also took into account the following provisions contained in the New Zealand *Terrorism (Bombings and Financing) Suppression Bill*:

17W Direction that Official Assignee take control of property

(1) The Prime Minister may, if satisfied that it is desirable to do so, direct the Official Assignee to take custody and control of property in New Zealand, if an entity is subject to a designation under section 17C and the Prime Minister believes on reasonable grounds that the property is—

- (a) property owned or controlled, directly or indirectly, by the entity; or
- (b) property derived or generated from property of the kind referred to in paragraph (a).

(2) The direction—

- (a) must be in writing signed by the Prime Minister; and
- (b) must specify the property concerned; and

- (c) may be subject to any terms and conditions the Prime Minister specifies.

17X Notice of direction

- (1) Notice of the making of a direction under section 17W must be given—
 - (a) with all reasonable speed to the designated entity concerned, if practicable, where that entity or a representative of it is in New Zealand; and
 - (a) to any other person that the Prime Minister has reason to believe may have an interest in the property concerned.
- (2) No direction under section 17W is invalid just because notice of the making of it has not been given in the manner required by subsection (1)(a) or (b).

17Y Variation, revocation, or expiry of direction

- (1) Having made a direction under section 17W, the Prime Minister may—
 - (b) make another direction varying—
 - (i) the property to which the direction relates:
 - (ii) terms and conditions to which the direction is subject:
 - (b) revoke the direction under section 17W.
- (2) The powers given by subsection (1)(a) and (b) are exercisable at any time after the making of the direction, and either on the Prime Minister's own initiative or on an application for the purpose in writing by or on behalf of the Official Assignee or a person who claims an interest in the property concerned.
- (3) If not earlier revoked, a direction under section 17W in relation to property of an entity expires—
 - (b) on the entity ceasing to be subject to the designation under section 17C; or
 - (c) on a forfeiture order being made under section 18D in relation to the property concerned, in which case section 54 of the Proceeds of Crime Act 1991 (as modified and applied by section 18F(c) of this Act) applies.

17Z Further provisions on management of property subject to section 10A

The following sections of the Proceeds of Crime Act 1991 apply, with the following (and all other necessary) modifications, to property that is the subject of a direction under section 17W, as if that direction were a restraining order and a direction under section 42(1) of that Act:

- (a) section 50 (which relates to powers of the Official Assignee to preserve the property):
- (b) sections 57 and 58 (which relate to registration of directions, and make it an offence to dispose of or deal with the property in contravention of a direction, knowing that the direction has been made in respect of the property):
- (c) section 59 (which relates to applications to the High Court for orders that certain dispositions or dealings be set aside, except that the applications must be made by the Attorney-General, not by the Solicitor-General):
- (d) section 61 (which relates to the Official Assignee's liability for payment of rates, etc, on the property):
- (e) section 62 (which relates to an indemnity for the Official Assignee, except that the indemnity must relate only to the exercise or performance, or purported exercise or performance, or omission to exercise or perform, functions, duties, and powers of the Official Assignee under this Act):
- (f) section 63, except subsection (1)(b)(i) (which section relates to costs recoverable by the Official Assignee, and any regulations made under that Act for the purposes of that section apply, with all necessary modifications, accordingly):
- (g) sections 86 and 87 (which relate to the Official Assignee making and revoking delegations, except that the delegations must relate only to functions, duties, and powers of the Official Assignee under this Act).

Relief for third parties if property is subject to section 10A¹ or application for forfeiture, or is forfeited

18A Third parties may apply for relief

(1) A person who claims an interest in specified property that is subject to the prohibition in section 10A (not being property to which subsection (2) applies) may apply to the High Court for an order under section 18C.

(2) A person who claims an interest in specified property that is the subject of an application, under section 18D(1), for an order under section 18D (an order that the property is forfeited to the Crown) may, before the order under section 18D is made, apply to the High Court for an order under section 18C.

(3) If not prevented by section 18B, a person who claims an interest in specified property forfeited to the Crown under an order under section 18D may apply to the High Court for an order under section 18C—

(b) within 6 months after the date on which the order under section 18D is made; or

(c) within any further time the Court allows on an application for that purpose made before or after the end of that 6-month period.

(4) No entity who is the subject of the designation concerned may make an application under this section.

(5) A person who makes an application under this section must serve notice of the application on the Attorney-General, who is a party to any proceedings on the application.

18B Limits on applications under section 18A(3)

(1) A person on whom notice of the application for an order under section 18D, or of any amendment to the application, was served, or who appeared at the hearing of the application, may apply under section 18A(3) only with the leave of the Court.

(2) The Court must not grant leave unless there are special reasons for doing so.

¹ 10A Prohibition on dealing with property of, or derived or generated from property of, terrorist and associated entities

(1) A person commits an offence who, without lawful justification or reasonable excuse, deals with any property knowing that the property is—

(a) property owned or controlled, directly or indirectly, by an entity for the time being designated under this Act as a terrorist entity or as an associated entity; or

(b) property derived or generated from any property of the kind specified in paragraph (a).

(c) An example of dealing with property with a reasonable excuse, for the purposes of paragraph (a), is where the dealing with the property occurs in an act that does no more than satisfy essential human needs of (or of a dependant of) an individual designated under this Act.

(3) Without limiting the generality of subsection (2), the Court may grant leave if it is satisfied—

- (b) that the applicant had good reason for failing to attend the hearing of the application for an order under section 18D; or
- (c) that evidence proposed to be adduced by the applicant in connection with the application under section 18A(3) was not reasonably available to the applicant at the time of the hearing of the application for the order under section 18D.

18C Court may grant relief to third party

(1) Subsection (2) applies where—

- (b) a person applies to the High Court under section 18A(1) or (2) or (3) in respect of an interest in property; and
- (c) the Court is satisfied that the applicant's claim to that interest is valid.

(2) The Court must, subject to subsection (3), make an order declaring the nature, extent, and value of the applicant's interest in the property and,—

- (b) if the application is under section 18A(1), declaring that the interest is no longer subject to the prohibition in section 10A;
- (c) if the application is under section 18A(2),—
 - (i) directing that the interest must not be included in an order under section 18D made in respect of the proceedings that gave rise to the application; and
 - (ii) declaring that the interest is no longer subject to the prohibition in section 10A;
- (d) if the application is under section 18A(3), either—
 - (i) directing the Crown to transfer the interest to the applicant; or
 - (ii) declaring that there is payable by the Crown to the applicant an amount equal to the value of the interest declared by the Court.

(3) The Court may, if it thinks fit, refuse to make an order under subsection (2), because it is satisfied that—

- (b) the applicant was knowingly involved in any way in the carrying out of the terrorist acts that are the basis of the designation of the entity concerned, or is wholly owned or effectively controlled, directly or indirectly, by that entity; or
- (c) if the applicant acquired the interest at the time of or after the designation of the entity concerned, the applicant did not acquire the interest in the property in good faith and for value, without knowing or having reason to believe that the property was, at the time of the acquisition, property subject to the prohibition in section 10A;

(4) However, nothing in subsection (3) requires a refusal to make an order under subsection (2), or limits the circumstances in which the Court may refuse to make an order of that kind.

Forfeiture

18D Forfeiture of property by order of High Court

(1) The High Court may, on an application by the Attorney-General for the purpose, order that specified property is forfeited to the Crown if it is in New Zealand and is—

- (b) property owned or controlled, directly or indirectly, by an entity who is the subject of a designation under section 17C; or
- (c) property derived or generated from property of the kind referred to in paragraph (a).

(2) However, an order of that kind may only be made if—

(a) the Court is satisfied that—

- (i) an order has been made under section 17M(2) extending the designation concerned; and
- (ii) that order was made on a ground stated in section 17N(b) or (c) or (d); and

- (b) the Court considers it appropriate that the specified property not remain subject to the prohibition in section 10A, but instead be forfeited to the Crown.

- (3) In considering whether to make an order under this section in respect of particular property, the Court may have regard to—
- (b) any undue hardship that is reasonably likely to be caused to any person by the operation of such an order:
 - (c) the nature and extent of the entity's interest in the property, and the nature and extent of other interests in it (if any).

18E Notice of application under section 18D

- (1) The Attorney-General is required to name as a respondent to an application under section 18D only those persons who are known to the Attorney-General to have an interest in the property that is the subject of the application.
- (2) The Attorney-General must serve notice of an application under section 18D (in any manner, and within any time, the High Court may direct) on any person—
- (a) who there is reason to believe may have an interest in the property; and
 - (b) that the High Court directs.
- (3) Any person who claims an interest in the property is entitled to appear and to adduce evidence at the hearing of the application.
- (4) Subsection (3) is subject to section 17O.

18F Further provisions relating to orders under section 18D

The following sections of the Proceeds of Crime Act 1991 apply, with the following (and all other necessary) modifications, to the making, effect, operation, and discharge of an order under section 18D, as if the order were a forfeiture order under section 15(1) of that Act:

- (b) section 15(3)(a) and (4) to (7) (which relate to the terms of the order and to any directions that are necessary and convenient for giving effect to it, including the issue of warrants authorising officers of Court to enter and search any place or thing and to seize any document required to effect the transfer of the property):
- (c) section 16 (which relates to the effect of the order, except that the reference in subsection (4)(b) to the Minister must be read as a reference to the Attorney-General, and references in subsections (5) and (6) to the making of a forfeiture order or the entering of a person's conviction must be read as references to the making of an order under section 18D and to the making of an order under section 17M(2):
- (d) section 54 (which relates to the Official Assignee discharging the order, except that—
 - (i) the reference to a restraining order must be read as a reference to a direction under section 17W:
 - (ii) the direction to discharge must be given by the Attorney-General, not by the Minister:
 - (iii) in determining the relevant appeal period referred to in section 16 of that Act, references in section 16(5) and (6) of that Act to the making of a forfeiture order or the entering of a person's conviction must be read as references to the making of an order under section 18D and to the making of an order under section 17M(2):
 - (iv) the reference to sections 17 to 23 of that Act must be read as a reference to sections 18A to 18J of this Act).

18G Appeal against decision on application under section 18D

- (1) A party to an application under section 18D may appeal to the Court of Appeal against the decision of the High Court.
- (2) Subject to sections 17O to 17OB, the procedure for the appeal must be in accordance with rules of Court.

18H Discharge of order under section 18D on appeal or by quashing of related order under section 17M(2)

(1) If the High Court makes an order under 18D against property in respect of an entity the subject of an order under section 17M(2), and the order under section 17M(2) is later quashed on appeal, the quashing of that order operates to discharge the order under section 18D.

(2) The revocation, under section 17L, of a designation that has been extended by an order made under section 17M(2), does not discharge any order made under section 18D against property of the entity who was the subject of the designation.

(3) If an order under section 18D in respect of any property is discharged as provided in subsection (1) or by a Court hearing an appeal, under section 18G, against the making of the order, the Attorney-General must,—

(b) as soon as practicable after the discharge of the order, serve notice of the discharge of the order under section 18D (in any manner, and within any time, the Court may direct) on any person who the Attorney-General has reason to believe may have had an interest in the property immediately before the making of the order; and

(c) if required to do so by a Court, serve notice of the discharge of the order under section 18D (in any manner, and within any time, the Court may direct) on such persons as the Court may specify.

(4) Every notice under subsection (3) must include a statement that a person claiming an interest in the property may apply under subsection (5) for the transfer of the interest to that person.

(5) If an order under section 18D is discharged in either of the ways referred to in subsection (3), any person claiming an interest in the property immediately before the making of the order may apply to the Attorney-General, in writing, for the transfer of the interest to that person.

(6) If the Attorney-General is satisfied that any claim made under subsection (5) in respect of any interest in property is valid, the Attorney-General must,—

(a) if the interest is still vested in the Crown, arrange for the interest to be transferred to the claimant; or

(b) (b) in any other case, and subject to section 18I, arrange for payment to the claimant of an amount equal to the value of the interest.

18I Attorney-General may apply for directions

(1) In any case where there is any question as to the validity of any claim made under section 18H(5),—

(b) the Attorney-General may apply to the High Court for directions concerning the claim; and

(c) the Court may give any directions in the matter it thinks just.

(2) If an application is made under subsection (1),—

(b) the Attorney-General must serve notice of the application (in any manner, and within any time, the Court may direct) on every person that the Attorney-General has reason to believe may have an interest in the application:

(c) the Court may, at any time before the final determination of the application, direct the Attorney-General to serve notice of the application (in any manner, and within any time, the Court may direct) on such persons as the Court may specify:

(d) every person who claims an interest in the application is entitled to appear and to adduce evidence at the hearing of the application.

18J Double benefit not permitted

If, on an application made under section 18A(3) in respect of any interest in any property, the Court has made an order under section 18C(2)(c) declaring that there is payable by the Crown to the applicant an amount equal to the value of the interest declared by the Court, an amount equal to the amount so declared must be deducted from any amount required to be paid, under section 18H(6)(b), to that applicant in respect of that interest.

13.605 The project committee considers that existing procedures should, with the necessary changes being effected, be used for the search, seizure and forfeiture of alleged terrorist property such as exist under the *Criminal Procedure Act*, the *POCA*, the *FIC Act* and the *Drug Trafficking Act* of 1992 (Act No 140 of 1992).

13.606 The project committee also considers that the Bill should provide for preservation and forfeiture orders based on sections 37 to 57 of the *Prevention of Organised Crime Act (POCA)*. Section 38(1) of the *POCA* provides that the National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property. Section 38(2) provides that the High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned (a) is an instrumentality of an offence referred to in Schedule 1; or (b) is the proceeds of unlawful activities. In terms of subsection (3) a High Court making a preservation of property order¹ shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order. Subsection (4) provides that property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.

13.607 In *National Director of Public Prosecutions and Others v Mohamed No and Others* the constitutional validity of section 38 of the *POCA* was in issue.² On 19 March 2002 Cloete J, sitting in the Witwatersrand High Court declared the section to be constitutionally invalid³ “to the extent that it requires the National Director of

¹ In terms of section 1 of the *POCA* a “preservation of property order” means “an order referred to in section 38”.

² See <http://www.concourt.gov.za/date2002.html>

³ In *Mohamed and Others v The National Director of Public Prosecutions* Case 2002 (2) SACR 93 (W) Court Judge Cloete said the following:

[9] Section 38(1), . . . vests a discretion in the NDPP to apply for a preservation of property order but requires such an application to be brought *ex parte*. If the Legislature had intended that the *ex parte* procedure would only be used in an appropriate case — for example, where the giving of notice might defeat the purpose of the application — it would not have inserted the phrase ‘*by way of ex parte application*’. The hearing must not only be *ex parte* but also in private; . . .

[11] Neither section 36 nor any other section forming part of Chapter 6 of the Act empowers a court to grant a provisional preservation of property order coupled with a rule *nisi*, to enable persons who have an interest in the property to be heard before a final order for preservation is given. The omission on the part of the legislature can only have been deliberate. In this respect too, section 38 stands in stark contrast to section 26 of the

Public Prosecutions (NDPP) to bring an application for a preservation of property order *ex parte* in every case and makes no provision for a rule *nisi* calling upon interested parties to show cause why a preservation of property and seizure order should not be made.”⁴ The Constitutional Court noted that section 34 of the Constitution provides, to the extent relevant for the case, that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court . The High Court found that the section infringed (limited) the fair hearing component of the section 34 right and that such limitation was not justifiable under section 36 of the Constitution. The case arose from the granting of a preservation of property order under section 38 of the Act. The order was made by the High Court on 4 October 2000 on the *ex parte* application of the

preceding Chapter of the Act. . . . I am unable to avoid the conclusion that the preservation and seizure provisions of Chapter 6 were deliberately formulated so as to exclude the possibility of a rule *nisi* being granted by a court which makes such orders. . . .

[17] . . . There is simply no provision in Chapter 6 for a full reconsideration of a preservation of property order, and the concomitant and compulsory order for seizure of the property, at the suit of a person affected thereby; and the effect of section 38(1) is, that notice will not be given to such a person in the first place nor, because of the provisions of section 74(1)(a), should he or she ever get to hear of it until it is either served or gazetted.

[18] It is cornerstone of our jurisprudence, both at common law in terms of the maxim *audi alterem partem* . . .and in terms of section 34 of the Constitution, that in general a party should be heard before an order is given which may adversely affect that party's rights.

[23] I can find no legitimate reason why the legislature could not have chosen less restrictive means to achieve its purpose. I cannot accept that it was necessary for the Legislature to prescribe that an application for a preservation (and therefore a seizure) order should be made *ex parte* in all cases, and to make no provision for a rule *nisi* having the effect of a temporary order in those cases where an *ex parte* order can be justified. . . .

4

The High Court's full order reads as follows:

“1.1 Section 38 of Act 121 of 1998 is (subject to the confirmation of the Constitutional Court) declared unconstitutional with effect from the date of this judgment to the extent that it requires the NDPP to bring an application for a preservation of property order *ex parte* in every case and makes no provision for a rule *nisi* calling upon interested parties to show cause why a preservation of property and seizure order should not be made.

1.2 In terms of section 172(1)(b) of the Constitution (and again, subject to the confirmation of the Constitutional Court) it is ordered that the declaration of invalidity made in paragraph 1.1 shall invalidate:

1.2.1 any preservation of property order and concomitant seizure order made in terms of section 38 of Act 121 of 1998 which as at the date of this judgment either has not yet been superseded by a forfeiture order made in terms of part 3 of chapter 6 of that Act or which is still in force in terms of section 55 of the Act pending an appeal against a forfeiture order; and also

1.2.2 any forfeiture order made under part 3 of chapter 6 of Act 121 of 1998 which has not yet taken effect in terms of the provisions of section 50(6) of that Act, where the preservation order or seizure order (in the case of 1.2.2, which preceded the forfeiture order) was granted *ex parte* and where no rule *nisi* was issued calling upon interested parties to show cause why such an order should not be made.

2. The orders contained in paragraph 1 are referred to the Constitutional Court for confirmation.

3. These proceedings are postponed pending the decision of the Constitutional Court and the costs to date are reserved.”

National Director. The order was published in the Government Gazette of 13 October 2000 in terms of section 39(1) of the Act and served, amongst others, on the first to third respondents. On 11 January 2001, the National Director launched an application in terms of section 48 of the *POCA* for the forfeiture of the immovable property that had been the subject of the preservation of property order.⁵

13.608 The Constitutional Court pointed out that *POCA* (and particularly Chapters 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes. The *POCA* uses two mechanisms to ensure that property derived from crime or used in the commission of crime is forfeited to the state and they are set forth in Chapter 5 (comprising sections 12 to 36) and Chapter 6 (comprising sections 37 to 62). Chapter 5 provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the "defendant" is convicted of an offence. The Court pointed out that Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction based; it may be invoked even when there is no prosecution. The court stated that section 38 forms part of a complex, two-stage procedure whereby property which is the instrumentality of a criminal offence or the proceeds of unlawful activities is forfeited. That procedure is set out in great detail in sections 37 to 62 of the Act. Chapter 6 provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted. In this respect, chapter 6 needs to

⁵ The Constitutional Court explained that the *POCA*'s overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem, because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the *POCA*. The court remarked that it is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. These problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs, various international instruments deal with the problem of international crime in this regard and it is widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by the legislature in the *POCA*.

be understood in contradistinction to chapter 5 of the Act. Chapter 6 is therefore focussed, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings. There is, however, a defence at the second stage of the proceedings, when forfeiture is being sought by the state. An owner can at that stage claim that he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence (“the innocent owner” defence). The forfeiture process provided for in chapter 6 of the Act commences when the National Director applies ex parte in terms of section 38 of the Act to a High Court for a preservation order.

13.609 The Constitutional Court noted that once the preservation order is granted, notice must be given to “all persons known to the National Director to have an interest in the property”; and a notice of the preservation order must be published in the Gazette in terms of section 39(1). Thereafter, within 14 days of notice of the order, an affected party who wishes to oppose the grant of a final forfeiture order must enter an appearance of his or her intention to oppose that order. The National Director must then within 90 days of the grant of the preservation order apply for the forfeiture of the property. At that stage, affected parties are entitled to a full hearing to determine whether the property should be forfeited or not. Chapter 6 also provides other opportunities to affected parties to have preservation orders set aside or varied. So, section 47(3) provides that a person who is affected by a preservation order made in respect of immovable property may apply for the order to be rescinded and the High Court shall rescind the order “if it deems it necessary in the interests of justice” to do so. Section 47(1) provides, in respect of movable property, that a High Court may, on the application of an affected party, vary or rescind the preservation order “if it is satisfied” that the order will “deprive the applicant of . . . reasonable living expenses and cause undue hardship for the applicant; and . . . the hardship . . . outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred”. Similarly, section 44 of the Act provides that in making a preservation of property order a High Court may make provision for reasonable living and legal expenses for persons whose property is subject to the preservation order. Such a provision, however, will not be made unless the High Court is satisfied that the relevant person cannot meet the living or legal expenses out of his or her property not subject to a preservation order and that the person has disclosed on oath all her property.

13.610 The Constitutional Court pointed out that the provisions of chapter 6 are therefore complex and tightly intertwined, both as a matter of process and substance. At the initial stage of the proceedings, when the National Director launches an *ex parte* application for a preservation of property order, a Court must grant the order if it is satisfied that there are reasonable grounds to believe that the property is the proceeds of unlawful activities or the instrumentality in a crime. Thereafter, the preservation order may be varied or rescinded in terms of sections 44 and 47. If the preservation of property order remains in force, then – within 90 days – the National Director must apply for an order of forfeiture. In the absence of such application the preservation of property order will lapse.

13.611 The Court stated that the issue before it the Court is a narrow one, namely with the scope of the fair hearing component of section 34 of the Constitution right in a court of law or simply referred to as *the s 34 fair hearing right*. The question is whether section 38 unjustifiably limits (infringes) such right. The Constitutional Court pointed out that after argument, however, an issue arose during the Court's deliberations which strikes at the heart of the order made by the High Court and which, if resolved in a particular manner, would either preclude the Court from hearing the narrow issue presented or make it highly undesirable – and contrary to the interests of justice – to do so. Although the relief sought by the respondents in the High Court was the striking down of the entire Chapter 6 of the Act, the relief granted to it related to but one aspect of a single section in the Chapter, namely a procedural aspect of section 38, which had not been specifically raised by the respondents in the High Court. In the Court's view the High Court was not entitled, given the broad attack on Chapter 6 of the Act, to consider only this procedural aspect of section 38 and to make the order declaring this section to be constitutionally invalid – “to the extent that it requires the NDPP [the National Director of Public Prosecutions] to bring an application for a preservation of property order *ex parte* in every case and makes no provision for a rule *nisi* calling upon interested parties to show cause why a preservation of property and seizure order should not be made.”

13.612 The Constitutional Court said that it followed from the High Court's construction of section 38, and its consequent finding that the section was inconsistent with section 34 of the Constitution because it precluded an application under section 38 being made on notice, and further precluded the High Court hearing the matter from granting a rule *nisi* and ordering such rule *nisi* to act as an interim

property preservation and seizure order under the section. The defect in the section which the High Court sought to remedy was accordingly an omission from the section, namely the failure to provide for the above procedure and remedy. The Constitutional Court was of the view that in these circumstances the High Court's order was not a competent one. The High Court attempted to do something that the Constitutional Court has held cannot be done, namely to remedy, by notional severance formulation, a constitutional invalidity caused by an omission. The Constitutional Court explained that on the High Court's finding that section 38 was constitutionally invalid, because of the absence of a rule *nisi* provision in section 38, there were only two remedial options open to it: declaring the whole of section 38 to be invalid or reading in provisions to cure such invalidity. The Constitutional Court noted that it does not emerge from the judgment why the High Court did not consider reading in as an appropriate remedy to cure the constitutional inconsistency in question.⁶ Of the two available remedies referred to the reading in option was the indicated one in the case before the High Court, because it would have intruded less on the legislative domain and conformed better with the legislative scheme of the Act in general and section 38 in particular. A new sub-section or paragraph, employing wording similar to that used in section 26, could have been read in. The challenge to the whole of Chapter 6 was a live issue before the High Court and it could not assume, in favour of the National Director and the Minister, that the other provisions of the Chapter were constitutionally valid. The High Court was obliged to deal with them. The Constitutional Court said that the High Court did not consider the extensive relief sought by the respondents, and the only notional basis on which a court could have decided the issues presented solely on the narrow section 38 procedural issue, is if such decision somehow disposed entirely of the case against the respondents. This was not the position. On the High Court's invalidity finding and in the light of the only remedial order it could have made, namely a reading in, the other issues were not resolved. It follows that the High Court erred in attempting to decide the matter on the narrow basis it did and in not deciding the constitutionality of Chapter 6 of the Act.

13.613 The Constitutional Court pointed out that consideration should be given to an appropriate order limiting the retrospectivity of the order, or suspending its operation

⁶ The Constitutional Court explained that the remedial powers of a High Court under section 172(1) of the Constitution – when deciding a constitutional matter within its power – are the same as those of the Constitutional Court. The Constitutional Court noted that a High Court has the same competence as the Constitutional Court to “read in”, as a remedy for the constitutional invalidity of a statutory provision, but that this may only be done in circumstances appropriate to such a remedy and will have no force unless and until confirmed by the Constitutional Court.

– or both – should the Court be of the view that, by virtue of the provisions of section 172(1)(b) of the Constitution, justice and equity require it. The Constitutional Court noted that it was strenuously argued, in the alternative, that section 38 was reasonably capable of a construction compatible with section 34 of the Constitution. The Constitutional Court stated that on the hypothetical assumption that the High Court was entitled to consider only the procedural issue; that its construction of section 38 was correct; and that on such construction section 38 was constitutionally invalid; the remedy ought to have been one of reading in along the lines indicated above. The reading in, with no limitation on its retrospectivity, would have the following effect: Section 38, from its inception, permitted the granting of a rule *nisi* acting as a temporary property preservation and seizure order. Those cases in the past where no such rule *nisi* had been granted, despite the fact that section 38 – because of the reading in – permitted it, would simply have been dealt with by the courts on the same basis as the courts would deal with similar matters where rules *nisi* could have been – but were not in fact – granted.

13.614 The Constitutional Court noted that the validity of Chapter 6 was not before it; it has heard no argument thereon and it can make no order on the Chapter's substantive validity. The Constitutional Court said it would serve no purpose for it to decide only the narrow procedural issue in isolation, and assuming that it could have interpreted the section in isolation, whatever construction were to be placed on section 38 and whatever conclusion reached regarding its constitutional validity, no effective relief could have been granted to the respondents.⁷ It also said that the only course for the Court to adopt was to set aside that Court's order and to refer the matter back to it to decide on the relief sought by the respondents, namely the constitutional invalidity of Chapter 6. Given the nature of the *POCA* and the way its

⁷ The Constitutional Court noted that it would seem that there are only three possible options, none of which could afford effective relief:

- the High Court's construction of and conclusion on the constitutional invalidity of section 38 is correct, in which event the only appropriate order is the reading in order;
- the High Court's construction is correct as well as its conclusion that, on such construction, section 38 limits (infringes) the fair-hearing component of section 34; but such limitation is justified under section 36 of the Constitution;
- section 38 is capable of being construed in conformity with the Constitution, namely, that properly construed it permits the High Court, under section 38, to grant a *rule nisi* acting as a temporary property preservation and seizure order pending the return day of the rule.

The Constitutional Court remarked that none of these options would provide the respondents with any effective relief at all, because the Court cannot and will not decide – because of the narrow issue before it – the constitutional invalidity of the other aspects of Chapter 6 of the Act.

procedural provisions are interwoven with the substantive, the Court held, it was undesirable to deal with them separately or piecemeal.

(b) Recommendation

13.615 The committee is of the view that an offence based on Canadian and New Zealand legislation should be created to criminalise the dealing in property for terrorist purposes and for facilitating terrorism. The Bill should make provision for the duty that anyone should report forthwith to the Financial Intelligence Centre the existence of property in their possession or control that they know is owned or controlled by or on behalf of a terrorist organisation, and information about a transaction or proposed transaction in respect of such property. The Bill must also create a duty for any person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or series of transactions to which the business is a party is related to an terrorist financing offence to report, within the prescribed period after the knowledge was acquired or the suspicion arose, to the Financial Intelligence Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions. The terrorist financing offences proposed in the Bill are: the dealing in property for terrorist purposes; collecting, providing or making available, directly or indirectly, property or inviting a person to provide, facilitate or make available property or financial or other related services, intending that they be used to carry out a terrorist act; using property, directly or indirectly, for the purpose of facilitating or carrying out a terrorist act; and possessing property intending that it be used, directly or indirectly for the purpose of facilitating or carrying out a terrorist act.

13.616 The Bill should also impose a duty on accountable institutions to determine on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a proscribed organisation: The *FIC Act* makes provision in Schedule 1 for a list of institutions.¹ **It was considered that the Bill should also use the term**

¹ 1. An attorney as defined in the Attorneys Act, 1979 (Act 53 of 1979). (Treasury has received submissions from attorneys requesting that it should not be individual attorneys but rather the firm that should report.)

- (b) A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988 (Act 57 of 1988).
- (c) An estate agent as defined in the Estate Agents Act, 1976 (Act 112 of 1976).
- (d) A financial instrument trader as defined in the Financial Markets Control Act, 1989 (Act 55 of 1989).
- (e) A management company registered in terms of the Unit Trusts Control Act, 1981 (Act 54 of 1981).
- (f) A person who carries on the 'business of a bank' as defined in the Banks Act, 1990 (Act 94 of 1990).

“accountable institution”. The Bill therefore provides that “accountable institution” means a person referred to in Schedule 1 of the *Financial Intelligence Centre Act, 2001* (Act No 38 of 2001). The question arose whether this list of institutions should be reflected in full in the Bill as well. It was considered that should the list in the *FIC Act* be amended and the proposed legislation be adopted as proposed, it would mean that this legislation would then need to be amended as well. Provision would also need to be made for ministerial powers for the Minister administering the proposed legislation to amend the list of institutions. In terms of the *FIC Act* the Minister of Finance is the responsible Minister and another Minister will in all probability be responsible for administering the *Anti-Terrorism Act*. This would seem to be an unnecessary duplication.² For these reasons it would seem as if the approach to be

-
- (g) A mutual bank as defined in the Mutual Banks Act, 1993 (Act 124 of 1993).
 - (h) A person who carries on a 'long-term insurance business' as defined in the Long-Term Insurance Act, 1998 (Act 52 of 1998), including an insurance broker and an agent of an insurer.
 - (i) A person who carries on a business in respect of which a gambling licence is required to be issued by a provincial licensing authority.
 - (j) A person who carries on the business of dealing in foreign exchange.
 - (k) A person who carries on the business of lending money against the security of securities.
 - (l) A person who carries on the business of rendering investment advice or investment broking services, including a public accountant as defined in the Public Accountants and Auditors Act, 1991 (Act 80 of 1991), who carries on such a business.
 - (m) A person who issues, sells or redeems travellers' cheques, money orders or similar instruments.
 - (n) The Postbank referred to in section 51 of the Postal Services Act, 1998 (Act 124 of 1998).
 - (o) A member of a stock exchange licensed under the Stock Exchanges Control Act, 1985 (Act 1 of 1985).
 - (p) The Ithala Development Finance Corporation Limited.
 - (q) A person who has been approved or who falls within a category of persons approved by the Registrar of Stock Exchanges in terms of section 4 (1) (a) of the Stock Exchanges Control Act, 1985 (Act 1 of 1985).
 - (r) A person who has been approved or who falls within a category of persons approved by the Registrar of Financial Markets in terms of section 5 (1) (a) of the Financial Markets Control Act, 1989 (Act 55 of 1989).
 - (s) A person who carries on the business of a money remitter.

² See also Bert Bester “Negotiating the Financial Intelligence Act ” *De Rebus* June 2002 at 22 - 25 who comments on the *FIC Act*. He notes that according to the Centre for the Study of Economic Crime (CenSec), research results have shown that it is professional people, most notably attorneys and policemen, who help criminals in South Africa launder their money. He states that it is not surprising then, that attorneys are accorded no special treatment in the *FIC Act*. He considers that the extraordinary demands of the *FIC Act* will compel attorneys to walk an intimidating tightrope between the *FIC Act* duties, their personal interests and their clients' interests, the latter including the right to legal professional privilege and attorney-client confidentiality. He considers that it could be unwise to attempt to negotiate the hazards posed by the *FIC Act* and the *POCA* on an *ad hoc* basis only if and when faced by a potential money laundering, suspicious and unusual transaction or suspicious funds and other suspicious activity types of situations. He remarks that it could be equally unwise to navigate these hazards with the *FIC Act* prescribed internal rules as the only navigation tool. He notes that those rules were intended only to promote compliance with the *FIC Act* and were not

followed should be to make a cross-reference to accountable institutions as contained in Schedule 1 of the *FIC Act*. It is considered that the duty of institutions to ascertain whether they are in possession or control of property should be in respect of proscribed organisations. They would need to establish whether there are proscribed organisations and whether they have any dealings with such organisations. These reports must be submitted within the period specified by regulation or, if no period is specified, monthly, to the Financial Intelligence Centre either that it is not in possession or control of any property referred to in the Bill, or that it is in possession or control of such property. The particulars concerning the property to be reported must be in accordance with regulations to be drafted in future. (The Canadian legislation provides that the number of persons, contracts or accounts involved and the total value of the property must be reported. It is, however, considered that the particulars to be reported should be determined by regulation.) It is also envisaged that regulations may very well determine that nil returns must be submitted quarterly.

13.617 The Bill provides, as the *FIC Act* does,³ that no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution or any other person with the reporting duty. This does not apply to the common law right to legal professional privilege as between an attorney and client in respect of communications made in confidence between the attorney and client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or a third party and an attorney

designed to protect the interests of attorneys and their clients. He suggests that attorneys should devise rules that are broad enough also to safeguard their interests and those of their clients. He also states that it might be necessary, as was the case in other jurisdictions, for attorneys to challenge the constitutionality of the legislation or to seek an exemption from its operation. (See the remark above that in Canada the Attorney General of Canada have reached an agreement for a test case in the B.C. Supreme Court to resolve the constitutionality of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act where a date for hearing has not been set yet.)

³ 37(1) Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of this Part.

(2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client in respect of communications made in confidence between —

- (b) the attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or
- (c) a third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced.

for the purposes of litigation which is pending or contemplated or has commenced. The Bill also makes provision, as the *FIC Act* does,⁴ that no action, whether criminal or civil, lies against an accountable institution or any other person complying in good faith with the reporting duty, and that a person who has made, initiated or contributed to a report or the grounds for such a report, is competent, but not compellable, to give evidence in criminal proceedings arising from the report. No evidence concerning the identity of a person who has made, initiated or contributed to a report or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of the Act, or the contents or nature of such additional information or grounds, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings.⁵

13.618 The project committee considers that the penalty contained in the *FIC Act* for failure to report in terms of the Act, should also apply for a failure to report under the *Anti-Terrorism Bill*. It is therefore considered that any accountable institution or person who fails, within the prescribed period, to report to the Financial Intelligence Centre the prescribed information in respect of property in accordance with the Bill is guilty of an offence and liable on conviction to imprisonment for a period not exceeding ten years or to a fine not exceeding R10 000 000.

13.619 The procedure for search warrants for searching property should be based on that contained in the *Criminal Procedure Act*, although it is considered that the application should be made to a judge of the High Court and not a magistrate. It is therefore recommended that where a police officer believes on reasonable grounds that there is in any building, receptacle or place any terrorist property (as referred to in clauses 3(3)(c) to (e) or 32 of the Bill) he or she may apply to a judge for a search warrant to be issued for the seizure of such property. If it appears to the judge from information on oath contained in the application that there are reasonable grounds for believing that there is in any building, receptacle or place

⁴ 38(1) No action, whether criminal or civil, lies against an accountable institution, reporting institution, supervisory body, the South African Revenue Service or any other person complying in good faith with a provision of this Part, including any director, employee or other person acting on behalf of such accountable institution, reporting institution, supervisory body, the South African Revenue Service or such other person.

(2) A person who has made, initiated or contributed to a report in terms of section 28, 29 or 31 or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Part is competent, but not compellable, to give evidence in criminal proceedings arising from the report.

⁵ 38(3) No evidence concerning the identity of a person who has made, initiated or contributed to a report in terms of section 28, 29 or 31 or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Part, or the contents or nature of such additional information or grounds, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings.

any such property in the possession or under the control of or upon any person or upon or at any premises the judge may issue a search warrant. The following conditions are to be met for the issue of a search warrant—

- that there are reasonable grounds for suspecting that the property is intended to be used for the purposes referred to in clauses 3(3)(c) to (e) or 32 and that either —
 - its continued seizure is justified while its derivation or its intended use is further investigated or consideration is given to bringing (in the Republic or elsewhere) proceedings against any person for an offence with which the property is connected, or
 - proceedings against any person for an offence with which the property is connected have been started and have not been concluded; or
- that there are reasonable grounds for suspecting that the property consists of resources of an organisation which is proscribed and that either —
 - its continued seizure is justified while investigation is made into whether or not it consists of such resources or consideration is given to bringing (in the Republic or elsewhere) proceedings against any person for an offence with which the property is connected, or
 - proceedings against any person for an offence with which the property is connected have been started and have not been concluded.

13.620 It is recommended that a search warrant shall require a police officer to seize the property in question and shall to that end authorize such police officer to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person or thing found on or at such premises. If the property seized consists of cash or funds standing to the credit of a bank account, the police officer shall pay such cash or funds into a banking account which shall be opened with any bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990) and the police officer shall forthwith report to the Financial Intelligence Centre the fact of the seizure of the cash or funds and the opening of the account.¹ **The Bill must also provide that a judge may direct the release of the**

¹ The UK Anti-terrorism, Crime and Security Act of 2001 provides in Schedule 1 as follows:

Payment of detained cash into an account

4 (1) If cash is detained under this Schedule for more than 48 hours, it is to be held in an interest-bearing account and the interest accruing on it is to be added to it on its forfeiture or release.

(2) In the case of cash seized under paragraph 2(2), the authorised officer must, on paying it into the account, release so much of the cash then held in the account as is not attributable to terrorist cash.

whole or any part of the property if satisfied, on an application by the person from whom it was seized, that the conditions for the detention of property are no longer met in relation to the property. Property should not to be released —

- if a declaration for its forfeiture, or an application to determine interests of third parties, is made, until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded,
- if (in the Republic or elsewhere) proceedings are started against any person for an offence with which the property is connected, until the proceedings are concluded.

13.621 The Bill contains provisions on declarations of forfeiture on conviction which are based on the *Drug Trafficking Act* of 1992. Whenever any person is convicted of an offence under the terrorist property offences set out in clauses 3(3)(c) to (e) and 32, the court in passing sentence shall, in addition to any punishment which that court may impose in respect of the offence, declare any property — by means of which the offence was committed; which was used in the commission of the offence; or which was found in the possession of the convicted person and which was seized or is in the possession or custody or under the control of the convicted person, to be forfeited to the State.¹

¹ 25 Declarations of forfeiture
 (1) Whenever any person is convicted of an offence under this Act, the court convicting him shall, in addition to any punishment which that court may impose in respect of the offence, declare—
 (a) any scheduled substance, drug or property—
 (i) by means of which the offence was committed;
 (ii) which was used in the commission of the offence; or
 (iii) which was found in the possession of the convicted person;
 (b) any animal, vehicle, vessel, aircraft, container or other article which was used—

- for the purpose of or in connection with the commission of the offence; or
 (ii) for the storage, conveyance, removal or concealment of any scheduled substance, drug or property by means of which the offence was committed or which was used in the commission of the offence;
- in the case of an offence referred to in section 13 (e) or (f), any immovable property which was used for the purpose of or in connection with the commission of that offence, and which was seized under section 11 (1) (g) or is in the possession or custody or under the control of the convicted person, to be forfeited to the State.

13.622 The Bill must provide for notice to be given to interested parties of a declaration of forfeiture. The court which makes a declaration of forfeiture of property must therefore order the registrar of the High Court concerned or clerk of the Magistrate's Court for the district concerned to forthwith publish such declaration calling upon interested parties through the media and by notice in the Gazette.² Anything forfeited must, if it was seized, be kept or, if it is in the possession or custody or under the control of the convicted person, be seized and kept for a period of 90³ days after the date of the notice published in the Gazette or if any third party has within the 90 day period made an application to the court concerned regarding his or her interest in such thing, until a final decision has been rendered in respect of any such application.⁴ The Bill must provide, as the *Drug Trafficking Act* does, that a

² The Drug Trafficking Act does not contain such a provision but it is considered that the Bill should address the question of publication in the press of the forfeiture order calling on interested parties.

³ The Drug Trafficking Act provides in section 25(2) for "30 days from the date of the declaration of forfeiture". 25(2) Anything forfeited under subsection (1) shall, if it was seized under section 11 (1) (g), be kept or, if it is in the possession or custody or under the control of the convicted person, be seized and kept-

(a) for a period of 30 days from the date of the declaration of forfeiture; or
 .. if any person referred to in section 26 (1) has within the period contemplated in paragraph (a) made an application to the court concerned regarding his interest in such thing, until a final decision has been rendered in respect of any such application.

⁴ 26 Interests of third parties
 (1) A declaration of forfeiture shall not affect any interest which any person other than the convicted person may have in the property, animal, vehicle, vessel, aircraft, container, article or immovable property in question, if he proves-

(a) in the case of any property referred to in paragraph (a) of section 25 (1)-
 .. that he acquired the interest in that property
 .. in good faith and for consideration, whether in cash or otherwise; and
 .. that the circumstances under which he acquired the interest in that property were not of such a nature that he could reasonably have been expected to have suspected that it was the proceeds of a defined crime;

.. in the case of any animal, vehicle, vessel, aircraft, container, article or immovable property referred to in paragraph (b) or (c) of section 25 (1)-

.. that he did not know that the animal, vehicle, vessel, aircraft, container or article in question was used or would be used as contemplated in the said paragraph (b), or that the immovable property in question was used or would be used as contemplated in the said paragraph (c), as the case may be; or
 (ii) that he could not prevent such use.

(b) If a court referred to in paragraph (a) finds-

.. that the property, animal, vehicle, vessel, aircraft, container, article or immovable property is wholly owned by the applicant, the court shall set aside the declaration of forfeiture in question and direct that the property, animal, vehicle, vessel, aircraft, container, article or immovable property, as

declaration of forfeiture shall not affect any interest which any person other than the convicted person may have in the property in question, if the former person proves that he or she acquired the interest in that property in good faith and for consideration, whether in cash or otherwise, and that the circumstances under which he or she acquired the interest in that property were not of such a nature that he or she could reasonably have been expected to have suspected that it was property as referred to in clauses 3(3)(c) to (e) or 32 or that he or she could not prevent such use.

13.623 The Bill should also provide that the court concerned or, if the judge or judicial officer concerned is not available, any judge or judicial officer of that court may at any time within a period of three years from the date of the declaration of forfeiture, on the application of any person other than the convicted person who claims that he or she has any interest in the property in question, inquire into and determine any such interest. If a court finds that the property is wholly owned by the applicant, the court shall set aside the declaration of forfeiture in question and direct that the property be returned to the applicant or, if the State has disposed of it, direct that the applicant be compensated by the State.⁵ The Bill should provide further that the applicant has an interest in the property the court shall direct that the property be sold by public auction and that the applicant be paid out of the proceeds of the sale an amount equal to the value of his interest therein, but not exceeding the proceeds of the sale; or if the State has disposed of the property the court shall direct that the applicant be compensated by the State in an amount equal to the value of his interest therein.⁶

the case may be, be returned to the applicant or, if the State has disposed of it, direct that the applicant be compensated by the State to the extent to which the State has been enriched by the disposal;

- (ii) that the applicant has an interest in the property, animal, vehicle, vessel, aircraft, container, article or immovable property-
 - (aa) the court shall direct that the property, animal, vehicle, vessel, aircraft, container, article or immovable property, as the case may be, be sold by public auction and that the applicant be paid out of the proceeds of the sale an amount equal to the value of his interest therein, but not exceeding the proceeds of the sale; or
 - (bb) if the State has disposed of the property, animal, vehicle, vessel, aircraft, container, article or immovable property in question, the court shall direct that the applicant be compensated by the State in an amount equal to the value of his interest therein, but not exceeding the enrichment of the State by the disposal.

⁵ The Drug Trafficking Act provides “to the extent to which the State has been enriched”. The question raised was why should it not be to the extent of the value thereof and whether this is could be because there might be storage costs involved.

⁶ The question was here also was why should it not to be the extent of the value and not “but not exceeding the enrichment of the State by the disposal” as the Drug Trafficking Act provides. It was considered that this might be because there might be storage costs involved.

Any person aggrieved by a determination made by the court may appeal against the determination as if it were a conviction by the court making the determination.⁷ Such appeal may be heard either separately or jointly with an appeal against the conviction as a result of which the declaration of forfeiture was made, or against a sentence imposed as a result of such conviction. In order to make a declaration of forfeiture or to determine any interest the court may refer to the evidence and proceedings at the trial or hear such further evidence, either orally or by affidavit, as it may deem fit.⁸

13.624 The project committee also considers that the Bill should provide for preservation and forfeiture orders based on sections 37 to 57 of the *Prevention of Organised Crime Act (POCA)*. The Bill should empower the National Director to apply *ex parte* to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property contemplated in clauses 3(3)(c) to (e) or 32. The corresponding section 38(1) of the *POCA* provides that the National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property. In order to overcome the issues highlighted in the *Mohamed* case, it is recommended that the following powers be given to courts in making provisional preservation orders: “The High Court after examining the application in private, and being satisfied that there are reasonable grounds to believe that there is in any building, receptacle or place any property contemplated in sections 3(3)(c) to (e) or 32, may make a provisional preservation order which has immediate effect and may simultaneously grant a rule *nisi* calling upon all interested parties⁹ upon a day mentioned in the rule to appear and to show

⁷ The wording of section 26(3) of the *Drug Trafficking Act* was used here.

⁸ The wording of section 27 of the *Drug Trafficking Act* was also used here.

⁹ See *Mohamed and Others v The National Director of Public Prosecutions* 2002 (2) SACR 93: [11] Neither section 36 nor any other section forming part of Chapter 6 of the Act empowers a court to grant a provisional preservation of property order coupled with a rule *nisi*, to enable persons who have an interest in the property to be heard before a final order for preservation is given. The omission on the part of the legislature can only have been deliberate. In this respect too, section 38 stands in stark contrast to section 26 of the preceding Chapter of the Act. . . . I am unable to avoid the conclusion that the preservation and seizure provisions of Chapter 6 were deliberately formulated so as to exclude the possibility of a rule *nisi* being granted by a court which makes such orders. . . . [17] . . . There is simply no provision in Chapter 6 for a full reconsideration of a preservation of property order, and the concomitant and compulsory order for seizure of the property, at the suit of a person affected thereby; and the effect of section 38(1) is, that notice will not be given to such a person in the first place nor, because of the provisions of section 74(1)(a), should he or she ever get to hear of it until it is either served or gazetted. [18] It is cornerstone of our jurisprudence, both at common law in terms of the maxim *audi alterem partem* . . . and in terms of section 34 of the Constitution, that in general a party should be heard before an order is given which may adversely affect that party's rights.

cause why the preservation order should not be made final". The Bill should also provide that a High Court making a provisional preservation of property order may¹⁰ include in the order an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers on reasonable grounds¹¹ appropriate for the proper, fair and effective execution of the order. It should also be provided that property seized shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order (as the *POCA* also provides in section 38(4)) .

13.625 The Bill must provide for notice of preservation of property orders to be given. Therefore, if a High Court makes a preservation of property order, the National Director shall, as soon as practicable after the making of the order give notice of the order to all persons known to the National Director to have an interest in property which is subject to the order; and publish a notice of the order in the Gazette; and the court may require publication in the media of the fact of the application. The third requirement is not contained in the *POCA*. The project committee is of the view that such publication might enhance notification to interested parties. The Bill should also provide (as section 39(2) of the *POCA* does) that a notice shall be served in the manner in which a summons, commencing civil proceedings in the High Court is served. The Bill should also provide that any person who has an interest in the property which is subject to the preservation of property order may give notice of his or her intention to oppose¹² the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof. A notice of intention to oppose shall be delivered to the National Director within, in the case of a person upon whom a notice has been served by the NDPP, two weeks after such service, and where there was publication in the Gazette or in the media, two weeks after the date of such publication. The Bill should also require, as section 39(5) of the *POCA* does, that a notice of intention to oppose shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings and shall be accompanied by an affidavit stating — full particulars of the identity of the person opposing; the nature and extent of his or her interest in the property

¹⁰ Judge Cloete said in *Mohamed and Others v The National Director of Public Prosecutions*: [10]. . . In addition section 38(3) obliges a court to issue an order authorising seizure of the property concerned 'at the same time' it makes a preservation of property order — thereby infringing the right to privacy which includes the right not to have possessions seized and which is embodied in section 14(c) of the Constitution.

¹¹ The Prevention of Organised Crime Act does not require "on reasonable grounds".

¹² Section 38(3) of the *POCA* provides "may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order".

concerned; and the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof.

13.626 The Bill must also set out the duration of preservation of property orders. A preservation of property order shall expire 90 days after the date on which notice of the making of the order is published in the Gazette unless there is an application for a forfeiture order pending before the High Court in respect of the property subject to the preservation of property order; there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation of property order; or the order is rescinded before the expiry of that period.¹³ The Bill should also deal with seizure of property subject to preservation of property orders. It is considered that POCA addresses this issue adequately in sections 41 and the same wording was therefore used in the corresponding clauses. In order to prevent property subject to a preservation of property order from being disposed of or removed contrary to that order, any police officer may seize any such property if he or she has reasonable grounds to believe that such property will be so disposed of or removed, and property seized shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.

13.627 The Bill should also deal with the appointment of curator bonis in respect of property subject to preservation of property order and should provide that where a High Court has made a preservation of property order, the Court shall, if it deems it appropriate, at the time of the making of the order or at a later time appoint a curator bonis to do, subject to the directions of the Court, any one or more of the following on behalf of the person against whom the preservation of property order has been made, namely to assume control over the property; to take care of the property; to administer the property and to do any act necessary for that purpose; and where the property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and order any person holding property subject to the preservation of property order to surrender forthwith, or within such period as that Court may determine, any such property into the custody of the curator bonis. The Bill should also provide that the Court may make such order relating to the fees and expenditure of the curator bonis as it deems fit, including an order for the payment of the fees of the curator bonis from the forfeited property if a forfeiture order is made; or by the State if no forfeiture order is made.

¹³ This clause contains the exact wording of section 40 of *POCA*.

13.628 The Bill should also deal with orders in respect of immovable property subject to preservation of property order, such as the registrar of deeds concerned being ordered to endorse restrictions on the title deed of the immovable property, the custody of immovable property, and applications for the rescission of these orders (as the *POCA* does in section 43). The Bill must make provision for expenses such as the reasonable living expenses of a person holding an interest in property subject to a preservation of property order and his or her family or household and reasonable legal expenses of such a person in connection with any proceedings instituted against him or her in terms of this Act or any other related criminal proceedings (as the *POCA* does in section 44). The Bill should also govern the issue of maximum legal expenses that can be met from preserved property and the taxation of legal expenses as the *POCA* does in sections 45 and 46.

13.629 The Bill should also deal with variation and rescission of orders. The Bill should provide that a High Court which made a preservation of property order may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order, if such order was erroneously sought or erroneously granted in the absence of any party affected thereby; in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; granted as a result of a mistake common to the parties;¹⁴ and the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation of property order concerned. The party desiring any relief shall make application therefor upon notice to all parties whose interests may be affected by any variance sought. The court shall not make any order rescinding or varying any preservation order or an order authorising the seizure of the property concerned or other ancillary order unless satisfied — that all parties whose interests

¹⁴ Rule 43 of the Uniform Rules of the High Court provides as follows:
42(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

- An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
 - an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (c) an order or judgment granted as the result of a mistake common to the parties.
- (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
- (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

may be affected have notice of the order proposed; that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.¹⁵ The court which made the preservation order shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded. When a court orders the rescission of an order authorising the seizure of property the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation of property order concerned.¹⁶ Any person affected by an order for the appointment of a curator bonis may at any time apply for the variation or rescission of the order; for the variation of the terms of the appointment of the curator bonis concerned; or for the discharge of the curator bonis.¹⁷ A High Court which made an order for the appointment of a curator bonis may, if it deems it necessary in the interests of justice, at any time vary or rescind the order; vary the terms of the appointment of the curator bonis concerned; or discharge that curator bonis; shall rescind the order and discharge the curator bonis concerned if the relevant preservation of property order is rescinded.¹⁸ Any person affected by an order in respect of immovable property may at any time apply for the rescission of the order.¹⁹ A High Court which made an order in respect of immovable property may, if it deems it necessary in the interests of justice, at any time rescind the order; or shall rescind the order if the relevant preservation of property order is rescinded.²⁰ If an order in respect of immovable property is rescinded, the High Court shall direct the

¹⁵ The *POCA* provides in section 47as follows: (1) A High Court which made a preservation of property order —

- may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied-
- that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
- that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
- shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded.

¹⁶ Same wording as in section 47(1A) of *POCA*.

¹⁷ Same wording as in section 47(2)(a) of *POCA*.

¹⁸ Same wording as in section 47(2)(b) of *POCA*.

¹⁹ Same wording as in section 47(3)(a) of *POCA*

²⁰ Same wording as in section 47(3)(b) of *POCA*.

registrar of deeds concerned to cancel any restriction endorsed by virtue of that order on the title deed of immovable property, and that registrar of deeds shall give effect to any such direction.²¹

13.630 POCA provides in section 47(4) that the noting of an appeal against a decision to vary or rescind any order referred to section 47 shall suspend such a variation or rescission pending the outcome of the appeal. The project committee was of the view that Rule 49(11) of the High Court Rules of Court should apply,²² that the remedies of the Rule should be available and that section 47(4) should not be included in the Bill. The project committee noted that section 47(4) was inserted into the *POCA* by Parliament in 1999 by the *Prevention of Organised Crime Second Amendment Bill*. The explanatory memorandum on the Bill explained that the aim of the Bill was, inter alia, to regulate further the seizure of certain property in order to ensure that the provisions of the *Prevention of Organised Crime Act* are not frustrated by disposing of such property or diminishing its value, and that preservation of property orders and restraint orders will remain in force pending the outcome of appeals against certain orders.

13.631 The Bill should also deal with forfeiture of property. It is recommended that if a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property contemplated in sections 3(3)(c) to (e) or 32 that is subject to the preservation of property order. The National Director must give 14 days notice of an application to every person who opposed the application for a preservation order. A notice must be served in the manner in which a summons commencing civil proceedings in the High Court, is served. Any person who opposed the application for a preservation order may appear at the application — (a) to oppose the making of the order; or (b) to apply for an order— (i) excluding his or her interest in that property from the operation of the order; or (ii) varying the operation of the order in respect of that property, and may adduce evidence at the hearing of the application.

13.632 The Bill should also deal with late notice of opposition (as the POCA does in section 49). Any person who, for any reason, did not give notice of intention to oppose may, within

²¹ Same wording as in section 47(3)(c) of *POCA*.

²² It provides that where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.

two weeks of becoming aware of the existence of a preservation of property order, apply to the High Court for leave to give such notice. An application may be made before or after the date on which an application for a forfeiture order is made but must be made before judgment is given in respect of such an application for a forfeiture order. The High Court may grant an applicant leave to give notice of intention to oppose within the period which the Court deems appropriate, if the Court is satisfied on good cause shown that such applicant has for sufficient reason failed to give notice of intention to oppose; and has an interest in the property which is subject to the preservation of property order. When a High Court grants an applicant leave to oppose, the Court — shall make any order as to costs against the applicant; and may make any order to regulate the further participation of the applicant in proceedings concerning an application for a forfeiture order, which it deems appropriate. Notice to oppose after leave has been obtained must contain full particulars of the chosen address of the person who enters such appearance for the delivery of documents concerning further proceedings and shall be accompanied by an affidavit.

13.633 The Bill must also set out the procedure for the making of forfeiture orders based on section 50 of the *POCA*. The Bill must provide that the High Court shall, subject to a subsequent application for exclusion of interests in forfeited property, make an order applied for by the NDPP if the Court finds on a balance of probabilities that the property concerned is property as contemplated in sections 3(3)(c) to (e) or 31. The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such an order. The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the High Court from making the order. The validity of an order is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated. The Registrar of the Court issuing a forfeiture order must publish a notice thereof in the Gazette as soon as practicable after the order is made. A forfeiture order shall not take effect before the period allowed for a subsequent application for the exclusion of interests in forfeited property or an appeal against a forfeiture order has expired; or before such an application or appeal has been disposed of.

13.634 The Bill should also govern notice of reasonable grounds that property is concerned in terrorist offences based on section 51 of the *POCA*. The National Director may apply to a judge for an order notifying a person having an interest in or control over property that there are reasonable grounds to believe that such property is property referred to in clauses 3(3)(c) to (e) or 32 of the Bill. The judge shall make an order if the judge is satisfied that

there are reasonable grounds to believe that the property concerned is property referred to in clauses 3(3)(c) to (e) or 32 of the Bill. When a judge makes an order the registrar of the High Court concerned shall issue a notice in the prescribed form to the person referred to in the order, informing him or her that there are reasonable grounds to believe that property in which he or she has an interest or over which he or she has control, is property referred to in clauses 3(3)(c) to (e) or 32. A notice shall be served on the person concerned in the manner in which a summons commencing civil proceedings in the High Court is served.

13.635 The Bill should also deal with exclusion of interests in property based on section 52 of the *POCA*. The High Court may, on application by every person who opposed the application for a preservation order, or who is applying for an order excluding his or her interest in that property from the operation of the order or varying the operation of the order in respect of that property, or who gives late notice to oppose and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof. The National Director or the curator bonis concerned, or a person authorised in writing thereto by them, may present evidence and witnesses in rebuttal and in defence of their claim to the property and may cross-examine a witness who appears at the hearing. In addition to the testimony and evidence presented at the hearing, the High Court may, upon application by the National Director or the curator bonis concerned, or a person authorised in writing thereto by them, order that the testimony of any witness relating to the property forfeited, be taken on commission and that any book, paper, document, record, recording, or other material not privileged be produced at the hearing of such testimony on commission.

13.636 The High Court may make an order if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is property referred to in clauses 3(3)(c) to (e) or 32; or where the applicant had acquired the interest before the commencement of the Act, that the applicant has since the commencement of the Act taken all reasonable steps to prevent the use of the property concerned as property referred to in clauses 3(3)(c) to (e) or 32. A person who testifies under this clause and fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or gives false evidence knowing that evidence to be false or not believing it to be true, shall be guilty of an offence. A person who furnishes an affidavit and makes a false statement in the affidavit knowing that statement to be false or not believing it

to be true, shall also be guilty of an offence. A person convicted of an offence shall be liable to the penalty prescribed by law for perjury.

13.637 If an applicant adduces evidence to show that he or she did not know or did not have reasonable grounds to suspect that the property in which the interest is held, is property referred to in clauses 3(3)(c) to (e) or 32, the State may submit a return of the service on the applicant of a notice issued in rebuttal of that evidence in respect of the period since the date of such service. If the State submits a return of the service on the applicant of a notice issued, the applicant must, also prove on a balance of probabilities that, since such service, he or she has taken all reasonable steps to prevent the further use of the property concerned as an property referred to in clauses 3(3)(c) to (e) or 32. A High Court making an order for the exclusion of an interest in property may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the Court deems appropriate including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the Court may determine, to prevent the future use of the property as property contemplated in clauses 3(3)(c) to (e) or 32.

13.638 The Bill must also provide for forfeiture orders by default based on section 53 of the *POCA*. If the National Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application by the NDPP for forfeiture is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who gave notice of intention to oppose have knowledge of notices given, the Court may make any order by default which the Court could have made for forfeiture, make such order as the Court may consider appropriate in the circumstances, or make no order. The High Court may, before making an order call upon the National Director to adduce such further evidence, either in writing or orally, in support of his or her application as the Court may consider necessary. Any person whose interest in the property concerned is affected by the forfeiture order or other order made by the Court may, within 60 days²³ **after he or she has acquired knowledge of such order or direction, set the matter down for variation or rescission by the court. The court may, upon good cause shown, vary or rescind the default order or give some other direction on such terms as it deems appropriate.**

²³

Section 53(3) of POCA provides for 20 days. The project committee questioned the different periods provided for by the Act. Section 54(3) of POCA provides that the hearing of the application shall, to the extent practicable and consistent with the interests of justice be held within 30 days of the filing of the application. The project committee questioned the different periods provided for by the Act, being 20, 30 and 45 days. The project committee considers it ought to be 30 or 60 days as the case may require. It was therefore decided that the period should be 60 days.

13.639 The Bill should also provide for subsequent applications for exclusion of interests in forfeited property based on section 54 of the *POCA*. Any person affected by a forfeiture order who was entitled to receive notice of the application, but did not receive such notice, may, within 60 days²⁴ after the notice of the forfeiture order is published in the Gazette, apply for an order excluding his or her interest in the property concerned from the operation of the order, or varying the operation of the order in respect of such property. The application shall be accompanied by an affidavit setting forth the nature and extent of the applicant's right, title or interest in the property concerned; the time and circumstances of the applicant's acquisition of the right, title, or interest in the property; any additional facts supporting the application; and the relief sought. The hearing of the application shall, to the extent practicable and consistent with the interests of justice be held within 60 days²⁵ of the filing of the application. The High Court may consolidate the hearing of the application with a hearing of any other application filed by a person under this clause. At the hearing, the applicant may testify and present evidence and witnesses on his or her own behalf, and may cross-examine any witness who appears at the hearing. The National Director or the curator bonis concerned, or a person authorised in writing thereto by them, may present evidence and witnesses in rebuttal and in defence of their claim to the property and may cross-examine a witness who appears at the hearing. In addition to the testimony and evidence presented at the hearing, the High Court may, upon application by the National Director or the curator bonis concerned, or a person authorised in writing thereto by them, order that the testimony of any witness relating to the property forfeited, be taken on commission and that any book, paper, document, record, recording, or other material not privileged be produced at the hearing of such testimony on commission.

13.640 The High Court may make an order in relation to the forfeiture of the property, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and where the applicant had acquired the interest concerned after the commencement of the Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is property referred to in clauses 3(3)(c) to (e) or 32; or where the applicant had

²⁴ Section 54(1) of POCA provides for 45 days. The project committee questioned the different periods provided for by the Act. It also considers that it should be 30 or 60 days as the case may require.

²⁵ Section 54(3) of POCA provides for 30 days. The project committee questioned the different periods provided for by the Act. It also considers that it should be 30 or 60 days as the case may require.

acquired the interest before the commencement of this Act, that the applicant has since the commencement of the Act taken all reasonable steps to prevent the use of the property concerned as property referred to in clauses 3(3)(c) to (e) or 32. A person who testifies under this clause and fails to answer fully and to the best of his or her ability any question lawfully put to him or her or gives false evidence knowing that evidence to be false or not believing it to be true, shall be guilty of an offence. A person who furnishes an affidavit and makes a false statement in the affidavit knowing that statement to be false or not believing it to be true, shall be guilty of an offence. A person convicted of an offence under this clause shall be liable to the penalty prescribed by law for perjury.

13.641 Section 55 of the *POCA* which deals with appeal against forfeiture order was noted. It provides that any preservation of property order and any order authorising the seizure of the property concerned or other ancillary order which is in force at the time of any decision regarding the making of a forfeiture order shall remain in force pending the outcome of any appeal against the decision concerned.²⁶ The remedies

²⁶ Note that prior to amendment in 1999 by Act 38 of 1999 the Prevention of Organised Crime Act provided as follows:

55.(1) Any person affected by a forfeiture order who appeared at the hearing of the application for a forfeiture order under section 48 may, within 30 days after the making thereof, appeal against such order.

granted by Rule 49(11) of the High Court Rules of Court should be available.²⁷ The wording of section 55 of the *POCA* should therefore not be included in the Bill.

13.642 The Bill should also deal with the effect of forfeiture orders based on section 56 of the *POCA*. Where a High Court has made a forfeiture order and a curator bonis has not been appointed in respect of any of the property concerned, the High Court may appoint a curator bonis to perform any of the functions referred to in clause 61 (see next paragraph) in respect of such property. On the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the curator bonis on behalf of the State. Upon a forfeiture order taking effect the curator

(2) Any person affected by a forfeiture order who appeared at the hearing of an application for the exclusion of interests in forfeited property under section 54 may, within 30 days after such application is dismissed, appeal against such dismissal.

(3) On appeal such court may make such order in the matter as it deems fit.

(4) The provisions of the Supreme Court Act, 1959 (Act 59 of 1959), and the rules made under section 43 of that Act shall, with the necessary changes, apply to an appeal made in terms of this section.

The explanatory memorandum on the Prevention of Organised Crime Second Amendment Bill, 1999 explained that the Bill also aimed to amend the Act to regulate the seizure of certain property in order to ensure that its provisions are not frustrated by disposing of such property or diminishing its value, and to amend the Act to provide that preservation of property orders and restraint orders will remain in force pending the outcome of appeals against certain orders.

²⁷

Rule 49(11) provides as follows: Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.

bonis may take possession of that property on behalf of the State from any person in possession, or entitled to possession, of the property.

13.643 The Bill should also deal with fulfilment of forfeiture orders as section of the *POCA* does. The curator bonis must, subject to any order for the exclusion of interests in forfeited property and in accordance with the directions of the Criminal Assets Recovery Committee as contemplated in the *POCA* — deposit any moneys declared forfeited into the Criminal Assets Recovery Account as contemplated in section 63¹ and 64² of the *POCA*; deliver property declared forfeited to the Account; or dispose of property declared forfeited by sale or any other means and deposit the proceeds of the sale or disposition into the Account. Any right or interest in forfeited property not exercisable by or transferable to the State, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect.

13.644 The Bill must also provide that no person who has possession, or was entitled to possession, of forfeited property immediately before the forfeiture order took effect, or any person acting in concert with, or on behalf of that person, shall be eligible to purchase forfeited property at any sale held by the curator bonis. The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs shall be defrayed out of moneys appropriated by Parliament for that purpose.

¹ 63 Establishment of Criminal Assets Recovery Account
There is hereby established in the National Revenue Fund a separate account to be known as the Criminal Assets Recovery Account.

² 64 Finances of Account
The Account shall consist of —

- 44. all moneys derived from the fulfilment of confiscation and forfeiture orders contemplated in Chapters 5 and 6;
- (aA) all property derived from the fulfilment of forfeiture orders as contemplated in section 57;
- 44. the balance of all moneys derived from the execution of foreign confiscation orders as defined in the International Co-Operation in Criminal Matters Act, 1996 (Act 75 of 1996), after payments have been made to requesting States in terms of that Act;
- 45. any property or moneys appropriated by Parliament, or paid into, or allocated to, the Account in terms of any other Act;
- 46. domestic and foreign grants;
- 47. any property or amount of money received or acquired from any source; and
- 48. all property or moneys transferred to the Account in terms of this Act.

13.645 The Bill should also empower the Minister to make, repeal and amend regulations concerning — any matter that may be prescribed in terms of the Act; and any other matter which is necessary or expedient to prescribe to promote the objectives of this Act. Regulations may include — specifying the reporting by accountable institutions and specifying how the proceeds of property forfeited are to be distributed.

13.646 The project committee also recommends the following amendments to the *Financial Intelligence Centre Act*:

1. The long Title of the Financial Intelligence Centre Act, 2001 (Act No 38 of 2001), (the Act) is substituted for the following:

To establish a Financial Intelligence Centre and a Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist acts; to impose certain duties on institutions and other persons who might be used for money laundering purposes and terrorist act financing offences; to amend the Prevention of Organised Crime Act, 1998, and the Promotion of Access to Information Act, 2000; and to provide for matters connected therewith.

2. The following definition is inserted in the Act after the definition of “supervisory body”:

“Terrorist act financing offence “ means an offence under section 3(3)(c) to (e) or 32 of the Anti-Terrorism Act.

3. The following subsection is substituted for subsection (1) of section 3 of the Act:

(1) The principal objective of the Centre is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities and terrorist act financing offences.

4. Subparagraph (i) of section 18(1)(a) is substituted for the following subparagraph:
(xiv) policies and best practices to identify the proceeds of unlawful activities and to combat money laundering activities and terrorist act financing offences; and

5. The heading to Chapter 3 of the Act is substituted for the following:

MONEY LAUNDERING AND FINANCING OF TERRORIST ACTS CONTROL MEASURES

6. The following subsection is substituted for section 35 of the Act:

(1) A judge designated by the Minister of Justice for the purposes of the Interception and Monitoring Prohibition Act, 1992 (Act 127 of 1992), may, upon written application by the Centre, order an accountable institution to report to the Centre, on such terms and in such confidential manner as may be specified in the order, all transactions concluded by a specified person with the accountable institution or all transactions conducted in respect of a specified account or facility at the accountable institution, if there are reasonable grounds to suspect that —

- (a) that person has transferred or may transfer the proceeds of unlawful activities to the accountable institution or is using or may use the accountable institution for money laundering purposes or for terrorist act financing offences or for the purpose of any transaction contemplated in section 29(1)(b); or**
- (b) that account or other facility has received or may receive the proceeds of unlawful activities or is being or may be used for money laundering purposes or for terrorist act financing offences or for the purpose of any transaction contemplated in section 29(1)(b).**

REPUBLIC OF SOUTH AFRICA

ANTI-TERRORISM BILL, 2002

(THE MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT)

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP ANTI-TERRORISME, 2002

(DIE MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

GENERAL EXPLANATORY NOTE

[] Words in bold type in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments

BILL

To give effect within the Republic of South Africa to the relevant international instruments, principles, and requirements relating to terrorism; to provide for certain offences related to terrorist acts in order to ensure the security of the Republic and the safety of the public against threats and acts of terrorism; to combat terrorist acts; to prohibit support and harbouring of proscribed organisations; and to provide for matters connected therewith.

PREAMBLE

WHEREAS there is a world-wide persistence of acts of terrorism in all its forms and manifestations;

AND WHEREAS terrorism is an international problem which can only be eradicated with the full and committed cooperation of all member states of the United Nations and the African Union;

AND WHEREAS the States members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed;

AND WHEREAS terrorist acts are under any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them;

AND WHEREAS terrorism is condemned in a number of international instruments which places an obligation on States to adopt legislation to give effect to those instruments;

AND WHEREAS South Africa supports the efforts of the international and regional communities to eliminate terrorism;

AND WHEREAS South Africa recognises its obligation to prevent its territory becoming a stage for the planning, organisation or execution of terrorist acts or the initiation or participation in any form of terrorist acts including the prevention of terrorist elements from infiltration or residence on its soil, by either individuals or groups or to receive them, harbour them, train them, or fund them, or offer any kind of help or facilities to them;

AND WHEREAS terrorism presents a serious threat to the security of the Republic and the safety of the public;

AND WHEREAS the United Nations General Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations;

AND WHEREAS the United Nations urged all States to enact appropriate domestic legislation necessary to implement the provisions of relevant conventions and protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts and to co-operate with and provide support and assistance to other States and relevant international and regional organizations to that end;

AND WHEREAS South Africa shares the commitment to prevent and combat terrorism with the African Union and the Non-Aligned Movement expressed in various resolutions, as well as the Organisation for African Unity's Convention on the Prevention and Combating of Terrorism;

AND MINDFUL that the Republic of South Africa, has, since 1994, become an integral and accepted member of the community of nations and is committed to bringing to justice persons who commit such acts; and carrying out its obligations in terms of the international Conventions on terrorism;

AND WHEREAS legislation is necessary in South Africa to prevent and combat terrorism, to criminalise terrorist acts, the financing of terrorist acts, the giving of support to terrorists, and to ensure that the jurisdiction of South African courts enables it to bring to trial the perpetrators of terrorist acts,

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1.(1) In this Act, unless the context otherwise indicates-

'accountable institution' means a person referred to in Schedule 1 of the Financial Intelligence Centre Act, 2001 (Act No 38 of 2001);

"Constitution", means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

“Criminal Procedure Act” means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

“continental shelf” means the continental shelf as referred to in section 8 of the Maritime Zones Act, 1994 (Act No. 15 of 1994);

“combating terrorism” means all activities related to the prevention, uncovering or halting of terrorist acts as well as those related to the minimising of losses caused by the same;

“Director” means a Director of Public Prosecutions appointed under the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), as well as any investigating director or special director appointed under the said Act;

“device” with reference to section 11, means -

- (a) any nuclear explosive device; or
- (b) any radio-active material dispersal or radiation emitting device which may, owing to its radiological properties cause death, serious bodily injury or substantial damage to property or the environment;

“explosive” means any explosive as defined in section 1 of the Explosives Act, 1956 (Act No. 26 of 1956);

“Financial Intelligence Centre” means the Financial Intelligence Centre as referred to in section 2 of the Financial Intelligence Centre Act, 2001 (Act No 38 of 2001);

‘firearm’ means any device as defined in section 1 of the Firearm Control Act, 2000 (Act No 60 of 2000) and includes a machine gun or machine rifle as defined in the Arms and Ammunition Act, 1969 (Act No 75 of 1969);

“fixed platform” means any installation as defined in section 1 of the Maritime Zones Act, 1994 (Act No.15 of 1994), and which is fixed to the seabed;

“internationally protected person” means any person who enjoys immunities and privileges in terms of sections 2 to 6 of the Diplomatic Immunities and Privileges Act, 2001 (Act No.37 of 2001), or on whom such immunities and privileges have been conferred in terms of section 7 of the said Act;

“judge” means a Judge of the High Court, functioning as such;

“lethal device” with reference to section 13 means —

- (a) an explosive or incendiary weapon or device which is designed or manufactured, or has the capability, to cause death, serious bodily injury or substantial material damage; or
- (b) a weapon or device which is designed or manufactured, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material;

“military forces of the State” means the armed forces of the State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security, and persons acting in support of those armed forces who are under their formal command, control and responsibility;

“Minister” means the Minister to whom the administration of this Act has been assigned in terms of section 63;

“National Director” means the National Director of Public Prosecutions appointed in terms of section 179(1) of the Constitution;

“place of public use” means those parts of any building, land, street, waterway or other location that are at any time accessible or open to members of the public, whether continuously, periodically or occasionally;

“police officer” means a member of the South African Police Service as defined in the South African Police Service Act, 1995 (Act No. 68 of 1995), and a member of the South African Defence Force while deployed in the Republic on police functions as contemplated in section 3(2) of the Defence Act, 1957 (Act No. 44 of 1957).

“property” —

- (a) means real or personal property of any description, and whether tangible or intangible; and
- (b) includes an interest in any real or personal property; and
- (c) includes funds, cash, assets or any other property, tangible or intangible, however acquired; and notably any type of financial resource, including cash or the currency of any State, bank credits, traveller’s cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit or any other negotiable instrument in any form, including electronic or digital form;

“radio-active material” means any radio-active material as defined in section 1 of the Nuclear Energy Act, 1999 (Act No. 46 of 1999);

“Republic” means the Republic of South Africa;

“State or government facility” includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or the Republic or by employees or officials of an intergovernmental organization in connection with their official duties;

“terrorist act” means an act, in or outside the Republic,

- (a) that is committed —
 - (i) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (ii) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside the Republic, and
- (b) that —
 - (i) causes death or serious bodily harm to a person by the use of violence,
 - (ii) endangers a person's life,
 - (iii) causes a serious risk to the health or safety of the public or any segment of the public,
 - (iv) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of subparagraphs (i) to (iii), or

- (v) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, including, but not limited to: an information system; or a telecommunications system; or a financial system; or a system used for the delivery of essential government services; or a system used for, or by, an essential public utility; or a system used for, or by, a transport system, other than as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in any of subparagraphs (i) to (iii),

but, for greater certainty, does not include conventional military action in accordance with customary international law or conventional international law.

“terrorist organisation” means an organisation that has as one of its purposes or activities facilitating or carrying out any terrorist act, which has carried out, or plans carrying out a terrorist act.

“weapon of mass destruction” means any weapon designed to kill, harm or infect people, animals or plants through the effects of a nuclear explosion or the toxic properties of a chemical warfare agent or the infectious or toxic properties of a biological warfare agent, and includes a delivery system exclusively designed, adapted or intended to deliver such weapons as contemplated in the Non-proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993).

- (2) For the purposes of this Act a person has knowledge of a fact if-
 - (a) the person has actual knowledge of that fact; or
 - (b) the court is satisfied that —
 - (i) the person believes that there is a reasonable possibility of the existence of that fact; and
 - (ii) the person fails to obtain information to confirm or refute the existence of that fact.
- (3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached, are those which would have been reached by a reasonably diligent and vigilant person having both —
 - (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
 - (b) the general knowledge, skill, training and experience that he or she in fact has.

Chapter 1

GENERAL PROVISIONS ss 2 - 19

2. Terrorist Offences

Any person who commits a terrorist act shall be guilty of an offence and shall be liable on conviction to imprisonment for life.

2. Participation in and facilitation of terrorist act and harbouring and concealing

- (1) Any person who knowingly participates in, or contributes to, the activities of a terrorist organisation or does anything which will, or is likely to, enhance the ability of any terrorist organisation to facilitate or carry out a terrorist act is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

- (2) An offence may be committed under subsection (1) whether or not —
- (a) a terrorist organisation actually facilitates or carries out a terrorist act;
 - (b) the participation or contribution of the accused actually enhances the ability of a terrorist organisation to facilitate or carry out a terrorist act; or
 - (c) the accused knows the specific nature of any terrorist act that may be facilitated or carried out by a terrorist organisation.
- (3) Without limiting the generality of subsection (1), participating in or contributing to the activities of a terrorist organisation includes —
- (c) providing, receiving or recruiting a person to receive training;
 - (d) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist organisation;
 - (e) collecting, providing or making available, directly or indirectly, property or inviting a person to provide, facilitate or make available property or financial or other related services on behalf of such an organisation;
 - (f) using property, directly or indirectly on behalf of such an organisation;
 - (g) possessing property intending that it be used, directly or indirectly on behalf of such an organisation;
 - (h) recruiting a person in order to facilitate or commit —
 - (i) a terrorist act, or
 - (ii) an act or omission outside the Republic that, if committed in the Republic, would be a terrorist act;
 - (g) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist organisation; and
 - (h) making oneself, in response to instructions from any of the persons who constitute a terrorist organisation, available to facilitate or commit —
 - (i) a terrorist act, or
 - (ii) an act or omission outside the Republic that, if committed in the Republic, would be a terrorist act.
- (4) Nothing in subsection (3) makes it an offence to provide or collect funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights.
- (5) In determining whether an accused participates in or contributes to any act of a terrorist organisation, the court may consider, among other factors, whether the accused—
- (a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist organisation;
 - (b) frequently associates with any of the persons who constitute the terrorist organisation;
 - (c) receives any benefit from the terrorist organisation; or
 - (d) repeatedly engages in acts at the instruction of any of the persons who constitute the terrorist organisation.
- (6) Any person who knowingly facilitates a terrorist act is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.
- (7) A terrorist act is facilitated whether or not —
- (a) the facilitator knows that a particular terrorist act is facilitated;

- (b) any particular terrorist act was foreseen or planned at the time it was facilitated; or
- (c) any terrorist act was actually carried out.

(8) Any person who commits an offence under any Act or the common law for the benefit of, at the direction of or in association with a terrorist organisation is guilty of an offence and liable on conviction to imprisonment for life.

(9) Any person who knowingly instructs, directly or indirectly, any person to carry out any act for the benefit of, at the direction of or in association with a terrorist organisation, for the purpose of enhancing the ability of any terrorist organisation to facilitate or carry out a terrorist act, is guilty of an offence and liable on conviction to imprisonment for life.

- (10) An offence may be committed under subsection (9) whether or not —
- (a) the activity that the accused instructs to be carried out is actually carried out;
 - (b) the accused instructs a particular person to carry out the activity referred to in paragraph (a);
 - (c) the accused knows the identity of the person whom the accused instructs to carry out the activity referred to in paragraph (a);
 - (d) the person whom the accused instructs to carry out the activity referred to in paragraph (a) knows that it is to be carried out for the benefit of, at the direction of or in association with a terrorist organisation;
 - (e) a terrorist organisation actually facilitates or carries out a terrorist act;
 - (f) the activity referred to in paragraph (a) actually enhances the ability of a terrorist organisation to facilitate or carry out a terrorist activity; or
 - (g) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist organisation.

(11) Any person who knowingly instructs, directly or indirectly, any person to carry out a terrorist act is guilty of an offence and liable on conviction to imprisonment for life.

- (12) An offence may be committed under subsection (11) whether or not —
- (a) the terrorist act is actually carried out;
 - (b) the accused instructs a particular person to carry out the terrorist act;
 - (c) the accused knows the identity of the person whom the accused instructs to carry out the terrorist act; or
 - (d) the person whom the accused instructs to carry out the terrorist act knows that it is a terrorist act.

(13) Any person who knowingly harbours or conceals any person whom he or she knows to be a person who has carried out or is likely to carry out a terrorist act, for the purpose of enabling the person to facilitate or carry out any terrorist act, is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

1. Membership of terrorist organisation and proscription

(1) Any person commits an offence if he belongs or professes to belong to a proscribed organisation.

(2) A person guilty of an offence under this section shall be liable on conviction to imprisonment for a period not exceeding 10 years, to a fine or to both.

(3) For purposes of this section —

- (a) *member* of an organisation includes:
 - (i) a person who is an informal member of the organisation; and
 - (ii) a person who has taken steps to become a member of the organisation;
- (a) *proscribed organisation* means an organisation in relation to which a declaration by the Minister under subsection (4) is in force.

(4) The Minister may by notice in the *Gazette* declare an organisation to be a proscribed organisation, if he or she is satisfied on reasonable grounds that one or more of the following paragraphs apply in relation to the organisation:

- (a) the organisation has committed, or is committing, a terrorist act (whether or not the organisation has been charged with, or convicted of, the terrorist act);
- (b) a member of the organisation has committed, or is committing, a terrorist act on behalf of the organisation (whether or not the member has been charged with, or convicted of, the act);
- (c) the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation;
- (d) the organisation has endangered, or is likely to endanger, the security or integrity of the Republic or another country.

(5) A declaration comes into force at the time it is published in the *Gazette* and stays in force until:

- (a) it is revoked; or
- (b) the beginning of a day (if any) specified in the declaration as the day the declaration ceases to be in force.

(6) The Minister must by notice in the *Gazette* revoke a declaration made under subsection (4) in relation to an organisation if the Minister is satisfied on reasonable grounds that none of the paragraphs in subsection (4) applies in relation to the organisation.

(7) A revocation comes into force at the time it is published in the *Gazette*.

(8) If a proscribed organisation makes an application in writing to the Minister alleging that there are reasonable grounds why its declaration should be revoked, the Minister must without delay decide the application and notify the applicant accordingly.

(9) The applicant may apply to a High Court for judicial review of the Minister's decision.

(10) When an application is made under subsection (9), the judge shall, without delay —

- (a) examine, in private, any security or criminal intelligence reports considered in proscribing the organisation and making the Minister's decision and hear any other evidence or information that may be presented by or on

behalf of the National Director and may, at the request of the National Director, hear all or part of that evidence or information in the absence of the applicant and any counsel representing the applicant, if the judge is of the opinion on reasonable grounds that the disclosure of the information would injure national security or endanger the safety of any person;

- (b) provide the applicant with a statement summarizing the information available to the judge so as to enable the applicant to be reasonably informed of the reasons for the Minister's decision, without disclosing any information the disclosure of which would, in the judge's opinion, on reasonable grounds, injure national security or endanger the safety of any person;
- (c) provide the applicant with a reasonable opportunity to be heard; and
- (d) determine whether the Minister's decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, order that the applicant no longer be a proscribed organisation.

(11) The Minister shall cause to be published, without delay, in the *Gazette* notice of a final order of a court that the applicant no longer be a proscribed organisation.

(12) A proscribed organisation may not make another application under subsection (8), except if there has been a material change in its circumstances since the time when the organisation made its last application.

5. Hijacking of an aircraft

Any person who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft with the intent to -

- (a) cause any person on board the aircraft to be detained against his or her will;
- (b) cause any person on board the aircraft to be transported against his or her will to any place other than the next scheduled place of landing of the aircraft;
- (c) hold any person on board the aircraft for ransom or to service against his or her will; or
- (d) cause that aircraft to deviate from its flight plan,

commits an offence, and is liable on conviction to imprisonment for life.

5. Endangering the Safety of Maritime Navigation

Any person who, in respect of a ship registered in the Republic or within the territorial waters of the Republic or maritime navigational facilities, unlawfully and intentionally -

- (a) seizes or exercises control over such a ship by force or threat thereof or any other form of intimidation;
- (b) performs any act of violence against a person on board such ship if that act is likely to endanger the safe navigation of that ship;

- (c) destroys such a ship or causes damage to such ship or to its cargo which is likely to endanger the safe navigation of that ship;
- (d) places or causes to be placed on such ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of such ship; or
- (f) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of such ship;

commits an offence and is liable on conviction -

- (i) to imprisonment for a period not exceeding 20 years; or
- (ii) if the death of any person results from any act prohibited by this section, to imprisonment for life.

7. Bombing offences

(1) Any person who unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transport facility, a public transportation system, or an infrastructure facility —

- (a) with the intent to cause death or serious bodily injury; or
- (b) with the intent to cause extensive damage to, or destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss,

commits an offence, and is liable upon conviction to imprisonment for life.

(2) This section does not apply to the military forces of a State -

- (a) during an armed conflict; or
- (b) in respect of activities undertaken in the exercise of their official duties.

8. Taking of hostages

Any person, who, in the Republic -

- (a) detains any other person, hereinafter referred to as a hostage; and
- (b) in order to compel a State, international governmental organisation or a natural or juristic person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage,

commits an offence, and is liable on conviction to imprisonment for life.

8. **Protection of internationally protected persons**

(1) A person who murders or kidnaps an internationally protected person is guilty of an offence and is liable on conviction to imprisonment for life.

(2) A person who commits any other attack upon the person or liberty of an internationally protected person is guilty of an offence and is liable on conviction:

- (a) where the attack causes death—to imprisonment for life;
- (b) where the attack causes grievous bodily harm—to imprisonment for a period not exceeding 20 years; or
- (c) in any other case—to imprisonment for a period not exceeding 10 years.

(3) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):

- (c) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (d) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;
- is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 10 years.

(4) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):

- (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;
- with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 20 years.

(5) A person who intentionally destroys or damages by means of fire or explosive:

- (c) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (d) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;
- is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 15 years.

(6) A person who intentionally destroys or damages by means of fire or explosive:

- (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;
- with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 25 years.

(7) A person who threatens to do anything that would constitute an offence against subsections (1) to (6) is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 10 years.

(8) For the purposes of this section kidnapping a person consists of leading, taking or enticing the person away, or detaining the person, with intent to hold the

person for ransom or as a hostage or otherwise for the purpose of inducing compliance with any demand or obtaining any advantage.

- (9) Any person who -
- (a) wilfully and unlawfully, with intent to intimidate, coerce, threaten or harass, enters or attempts to enter any building or premises which is used or occupied for official business or for diplomatic, consular, or residential purposes by an internationally protected person within the Republic; or
 - (b) refuses to depart from such building or premises after a request by an employee of a foreign government or an international organisation, if such employee is authorised to make such request,

commits an offence, and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.

10. Offences relating to fixed platforms

- (1) Any person who unlawfully and intentionally -
- (a) seizes or exercises control over a fixed platform on the continental shelf, or the exclusive economic zone or any fixed platform on the High Seas while it is located on the continental shelf of the Republic, by force or threat thereof or by any other form of intimidation;
 - (b) performs an act of violence against a person on board such a fixed platform if that act is likely to endanger the platform's safety;
 - (c) destroys such a fixed platform or causes damage to it which is likely to endanger its safety;
 - (d) places or causes to be placed on such a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety;
 - (e) injures or kills any person in connection with the commission or the attempted commission of any of the offences referred to in paragraphs (a) to (d); or
 - (f) damages or destroys any off-shore installation referred to in section 1 of the Maritime Traffic Act, 1981 (Act No. 2 of 1981),

commits an offence.

- (2) A person convicted of an offence referred to in subsection (1) is -
- (a) liable on conviction to a fine or to imprisonment for a period not exceeding 20 years;
 - (b) in the case where death results from the commission of the offence, liable on conviction to imprisonment for life.

10. Offences with regard to nuclear matter or facilities

- (1) Any person who unlawfully and intentionally -
- (a) possesses radioactive material or designs or manufactures or possesses a device, with the intent -
 - (i) to cause death or serious bodily injury; or
 - (ii) to cause substantial damage to property or the environment;
 - (b) uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material with the intent -
 - (i) to cause death or serious bodily injury;
 - (ii) to cause substantial damage to property or the environment; or
 - (iii) to compel a natural or juristic person, an international organization or a State to do or refrain from doing an act,

commits an offence.

- (2) Any person who -
- (a) threatens, under circumstances which indicate the credibility of the threat, to commit an offence referred to in subsection (1)(b); or
 - (b) unlawfully and intentionally demands radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force,

commits an offence.

- (3) A person convicted of an offence in terms of this section is liable on conviction to imprisonment for life.

12. Hoaxes involving noxious substances or things or explosives or other lethal devices or weapons of mass destruction

- (1) A person is guilty of an offence if he or she —
- (c) places any substance or other thing in any place; or
 - (d) sends any substance or other thing from one place to another (by post, rail or any other means whatever);
 - (e) with the intention of inducing in a person anywhere in the world a belief that it is likely to be (or contain) a noxious substance or other noxious thing or a lethal device or a weapon of mass destruction.
- (2) A person is guilty of an offence if he or she communicates any information which he or she knows or believes to be false with the intention of inducing in a person anywhere in the world a belief that a noxious substance or other noxious thing or a lethal device or a weapon of mass destruction is likely to be present (whether at the time the information is communicated or later) in any place.

(3) A person guilty of an offence under this section is liable on conviction to imprisonment for a period not exceeding 10 years or a fine or both.

(4) For the purposes of this section "substance" includes any biological agent and any other natural or artificial substance (whatever its form, origin or method of production).

(5) For a person to be guilty of an offence under this section it is not necessary for him or her to have any particular person in mind as the person in whom he or she intends to induce the belief in question.

(6) The court, in imposing a sentence on a person who has been convicted of an offence under subsection (1), may order that person to reimburse any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses. A person ordered to make reimbursement under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement under this subsection for the same expenses. An order of reimbursement under this subsection shall, for the purposes of enforcement, be treated as a civil judgment.

13. Use of weapons of mass destruction

(1) Any person who, unlawfully and intentionally uses, threatens, or attempts or conspires to use, a weapon of mass destruction —

- (a) against a citizen of the Republic or a person ordinarily resident in the Republic while either such person is outside the Republic;
 - (b) against any person within the Republic; or
 - (c) against any property that is owned, leased or used by the Republic or by any department or agency of the Republic, whether the property is within or outside of the Republic,
- commits an offence and shall be liable on conviction to imprisonment for life.

(2) Any citizen of the Republic or person ordinarily resident within the Republic who, unlawfully and intentionally, uses, or threatens, attempts, or conspires to use, a weapon of mass destruction outside of the Republic commits an offence and shall be liable on conviction to imprisonment for life.

14. Jurisdiction of the Courts of the Republic in respect of any offence referred to in this Act

(1) The Courts of the Republic shall have jurisdiction in respect of any offence referred to in this Act, if -

- (a) the alleged perpetrator of the offence is arrested in the territory of the Republic, in its territorial waters or on board a ship registered in the Republic or an aircraft registered in the Republic; and
- (b) the offence has been or is committed -
 - (i) in the territory of the Republic, or committed elsewhere, if the act is punishable in terms of the domestic laws of the Republic, including this Act or in terms of the obligations of the Republic under international law;

- (ii) on board a vessel or a ship or fixed platform registered in the Republic or an aircraft which is registered under the laws of the Republic at the time the offence is committed;
 - (iii) by a citizen of the Republic or a person ordinarily resident in the Republic;
 - (iv) against a citizen of the Republic or a person ordinarily resident in the Republic;
 - (v) outside of the Republic, and the person who has committed the act is, after the commission of the act, present in the territory of the Republic; or
 - (viii) on board an aircraft in respect of which the operator is licenced in terms of the Air Services Act 1990 (Act No 115 of 1990) or the International Air Services Act 1993 (Act No 60 of 1993); or
 - (c) the evidence reveals any other basis recognised by law.
- (2) Whenever the National Director receives information that there may be present in the Republic a person who is alleged to have committed an offence under the Act, the National Director must—
- (a) order an investigation to be carried out in respect of that allegation;
 - (b) inform any other foreign State which might also have jurisdiction over the alleged offence promptly of the findings of the investigation; and
 - (c) indicate promptly to other foreign States which might also have jurisdiction over the alleged offence whether he or she intends to prosecute.
- (3) In deciding whether prosecute, the National Director shall take into account —
- (a) considerations of international law, practice and comity;
 - (b) international relations,
 - (c) prosecution action that is being or might be taken by a foreign State; and
 - (d) other public interest considerations.
- (4) If a person has been taken into custody to ensure the person's presence for the purpose of prosecution or surrender to a foreign State in terms of section 15, the National Director must, immediately after the person is taken into custody, notify any foreign State which might have jurisdiction over the offence concerned, and any other State the National Director considers it advisable to inform or notify either directly or through the Secretary-General of the United Nations, of —
- (a) the fact that the person is in custody; and
 - (b) the circumstances that justify the person's detention.
- (5) When the National Director declines to prosecute, and another foreign State has jurisdiction over the offence concerned, he or she must inform such foreign State, accordingly with the view to the surrender of such person to such foreign State for prosecution by that State.

15. Extradition from the Republic

- (1) The provisions of the Extradition Act, 1962 (Act No 16 of 1962) shall apply (with the necessary changes) in respect of any surrender referred to in section 14.

- (2) Promptly after being detained as contemplated in section 7 or 9 of the Extradition Act, 1962, a person who is not —
- (a) a South African citizen;
 - (b) a person ordinarily resident in the Republic; or
 - (c) a citizen of any State
- must be informed that he or she is entitled, and must be permitted—
- (i) to communicate without delay with the nearest appropriate representative of —
 - (aa) the State of which the person is a citizen;
 - (bb) if the person is not a citizen of any State, the State in whose territory the person ordinarily resides; or
 - (cc) the State, if any that is otherwise entitled to protect the person's rights; and
 - (ii) to be visited by such representative.

16. Bail in respect of offences under this Act

Notwithstanding any provision to the contrary, where an accused stands trial on a charge under this Act, the provisions relating to bail in the Criminal Procedure Act apply as if the accused is charged with an offence referred to in Schedule 6 of that Act.

17. Duty to report information on terrorist acts

Any person who knowingly possesses any information which may be essential in order to investigate any terrorist act which is being committed, has been committed, or is being planned, and who intentionally withholds such information from a police officer, public prosecutor or a Director, commits an offence, and is liable on conviction to imprisonment for a period not exceeding five years without the option of a fine.

18. Powers to stop and search vehicles and persons

(1) A judge may on application ex parte by a police officer of the South African Police Service of or above the rank of Director if it appears to the judge that there are reasonable grounds to do so in order to prevent acts of terrorism, grant authority to stop and search vehicles and persons with a view to prevent such acts, and such authorization shall apply for a period not exceeding 10 days.

(2) Under such authorisation any police officer who identifies himself or herself as such may stop and search any vehicle or person for articles which could be used or have been used for or in connection with the commission, preparation or instigation of any terrorist act.

(3) The provisions of section 29 of the Criminal Procedure Act apply, with the necessary changes, in respect of the powers conferred upon police officers in terms of this section.

(4) Any person who -

- (a) fails to stop when required to do so by a police officer in the exercise of the powers under this section; or
- (b) wilfully obstructs a police officer in the exercise of those powers,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding six months.

19. Consent of the National Director to Institute Proceedings

(1) No prosecution under this Act may be instituted in any court except with the consent of the National Director. Provided that a person alleged to have committed any offence under the Act may be arrested, or a warrant for the person's arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the consent of the National Director has not been obtained.

(2) If a person is prosecuted for an offence under this Act, the National Director must communicate the final outcome of the proceedings promptly to the Secretary-General of the United Nations, so that he or she may transmit the information to other States Parties to the United Nations.

CHAPTER 2

Part 1

INVESTIGATIVE HEARINGS ss 20 - 26

20. Order for gathering evidence

(1) Subject to subsection (3), a police officer may, for the purposes of an investigation of an offence under this Act, apply *ex parte* to a judge for an order for the gathering of information.

(2) A police officer may make an application under subsection (1) only if the prior written consent of the National Director was obtained.

(3) A judge to whom an application is made under subsection (1) may make an order for the gathering of information if the judge is satisfied that the consent of the National Director was obtained as required by subsection (2) and

- (a) that there are reasonable grounds to believe that —
 - (i) an offence under the Act has been committed, and
 - (ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the police officer of having committed the offence, is likely to be obtained as a result of the order; or
- (b) that —
 - (i) there are reasonable grounds to believe that such offence will be committed,
 - (ii) there are reasonable grounds to believe that a person has direct and material information that relates to such an offence, or that may reveal the whereabouts of an individual who the police officer suspects may commit such an offence, and
 - (iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

(4) An order made under subsection (3) may —

- (a) order the examination, on oath or not, of a person named in the order;
 - (b) order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (d), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;
 - (c) order the person to bring to the examination any thing in his or her possession or control, and produce it to the presiding judge;
 - (d) designate another judge as the judge before whom the examination is to take place; and
 - (e) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.
- (5) The judge who made the order under subsection (3), or another judge of the same court, may vary its terms and conditions.

21. Arrest warrant

- (1) The judge who made the order under section 20(3), or another judge of the same court, may issue a warrant for the arrest of the person named in the order if the judge is satisfied, on information in writing and under oath, that the person —
- (a) is evading service of the order;
 - (b) is about to abscond; or
 - (c) did not attend the examination, or did not remain in attendance, as required by the order.
- (2) A warrant issued under subsection (1) may be executed at any place in the Republic by any police officer having jurisdiction in that place.
- (3) A police officer who arrests a person in the execution of a warrant issued under subsection (1) shall, without delay, bring the person, or cause the person to be brought, before the judge who issued the warrant or another judge of the same court, and must promptly inform the person of the reason for being detained in custody.

22. Orders by judge for detention or release on bail or on warning

- (1) The judge in question may, to ensure compliance with the order contemplated in sections 20(3) and (4), order that the person referred to in section 20(1) be detained in custody or released on bail, upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail, or released on warning.
- (2) An order under this subsection may include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order, including the conditions of detention, if detention is ordered.

23. Right to legal practitioner and other visitation rights

A person referred to in section 20 has the right -

- (a) to retain and instruct a legal practitioner at any stage of the proceedings;
- (b) to communicate and be visited by that person's -
 - (i) spouse or partner,

- (ii) next of kin;
- (iii) chosen religious counsellor; and
- (iv) chosen medical practitioner,

unless the National Director or a Director shows on good cause to a judge why such communication or visit in accordance with paragraph (b) should be refused.

24. Obligation to answer questions and produce things

(1) A person named in an order made under section 20 shall answer questions put to the person by the National Director or a person designated by the National Director, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.

(2) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.

(3) No person shall be excused from answering a question or producing a thing under subsection (1) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

- (a) no answer given or thing produced under section 20(4) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act, 1955 (Act No 56 of 1955)¹ or on a charge of perjury; and
- (b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 319 of the Criminal Procedure Act, 1955 (Act No 56 of 1955) or on a charge of perjury.

25. Order for custody of thing

¹ 319 Charges for giving false evidence

(3) If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.

The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any offence under the Act, shall order that the thing be given into the custody of the police officer or someone acting on the police officer's behalf.

26. Powers of court with regard to recalcitrant witness

(1) The provisions of section 189 of the Criminal Procedure Act shall with the necessary changes apply in respect of the person who refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or her or refuses or fails to produce any book, paper or document required to be produced by him or her;

(2) A person referred to in subsection (1) who refuses or fails to give the information contemplated in section 20(3) and (4), shall not be sentenced to imprisonment as contemplated in section 189 of the Criminal Procedure Act unless the judge is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

Part 2

IMPOSING CONDITIONS TO PREVENT TERRORIST ACTS ss 27 - 31

27. Application for imposition of conditions to prevent terrorist acts

(1) Subject to subsection (2), a police officer may bring an application ex parte before a judge if the police officer —

- (a) believes on reasonable grounds that a terrorist act will be carried out; and
- (b) suspects on reasonable grounds that the imposition of a release on warning with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist act.

(2) The consent of the National Director is required before a police officer may bring an application under subsection (1).

(3) A judge who receives an application under subsection (1) may cause the person to appear before him or her or another judge.

(4) Notwithstanding subsections (1) and (2), if —

- (a) either —
 - (i) the grounds for bringing an application referred to in subsection (1)(a) and (b) exist but, by reason of exigent circumstances, it would be impracticable to bring an application under subsection (1), or
 - (ii) an application has been brought under subsection (1) and a summons has been issued, and
- (b) the police officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist act,

the police officer may arrest the person without warrant and cause the person to be detained in custody, to be taken before a judge in accordance with section 28.

- (5) If a police officer arrests a person without warrant in the circumstance described in subsection (4)(a)(i), the police officer shall, take that person without delay before a judge, and —
 - (a) bring an application in accordance with subsection (1); or
 - (b) release the person; and
- (c) promptly inform the person of the reason for being arrested and detained.

28. How person is dealt with

- (1) A person detained in custody in accordance with section 27(4) shall be taken before a judge without delay, unless, at any time before taking the person before a judge, the police officer, is satisfied that the person should be released from custody unconditionally, and so releases the person.
- (2) When a person is taken before a judge under subsection (1) —
 - (a) if an application has not been brought under section 27(1), the judge shall order that the person be released; or
 - (b) if an application has been brought under section 27(1) —
 - (i) the judge shall order that the person be released unless the police officer who brought the application shows cause why the detention of the person in custody is justified on one or more of the following grounds:
 - (aa) the detention is necessary to ensure the person's appearance before a judge in order to be dealt with in accordance with section 29,
 - (bb) the detention is necessary for the protection or safety of the public, including any witness, having regard to all the circumstances including —
 - (bbA) the likelihood that, if the person is released from custody, a terrorist act will be carried out, and
 - (bbB) any substantial likelihood that the person will, if released from custody, interfere with the administration of justice, and
 - (cc) any other just cause and, without limiting the generality of the foregoing, that the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the police officer's grounds under section 27(1), and the gravity of any terrorist act that may be carried out, and
 - (ii) the judge may adjourn the matter for a hearing under section 29 but, if the person is not released under subparagraph (i), the adjournment may not exceed forty-eight hours.

29. Hearing before judge

- (1) The judge before whom the person appears pursuant to section 27(1) —
 - (a) may, if satisfied by the evidence adduced that the police officer has reasonable grounds for the suspicion, order that the person enter into an undertaking to keep the peace and be of good behaviour for any period that does not exceed twelve months and to comply with any other reasonable conditions prescribed in the undertaking, including the conditions set out in section 22(2), that the judge considers desirable for preventing the carrying out of a terrorist act; and

- (b) if the person was not released under section 28(2)(b)(i), shall order that the person be released, subject to the undertaking given, if any, ordered under paragraph (a).

(2) The judge may commit the person to prison for a period not exceeding twelve months if the person fails or refuses to enter into the undertaking in accordance with subsection (1).

30. Right to legal practitioner and other visitation rights

In this Part the provisions as to legal representation and visits referred to in section 23 shall apply.

31. Conditions - firearms

- (1) Before making an order under section 29(1)(a), the judge shall consider whether it is desirable, in the interests of the safety of the person or of any other person, to include as a condition of the undertaking that the person be prohibited from possessing any weapon or explosive for any period specified in the undertaking, and where the judge decides that it is so desirable, the judge shall add such a condition to the undertaking.
- (2) If the judge adds a condition described in subsection (1) to an undertaking, the judge shall specify in the undertaking the manner and method by which —
 - (b) the things referred to in that subsection that are in the possession of the person shall be surrendered, disposed of, detained, stored or dealt with; and
 - (c) the authorizations, licences and registration certificates held by the person shall be surrendered.
- (3) If the judge does not add a condition described in subsection (1) to an undertaking, the judge shall include in the record a statement of the reasons for not adding the condition.
- (4) The judge may, on application of the police officer, the National Director or the person, vary the conditions fixed in the undertaking.

Chapter 3

COMBATING FINANCING OF TERRORISM ss 32 - 37

Part 1

32. Dealing in property for terrorist purposes and facilitating

Any person whether within or outside the Republic who knowingly —

- (a) deals directly or indirectly in any property that is owned or controlled by or on behalf of a terrorist organisation;
- (b) enters into or facilitates, directly or indirectly, any transaction in respect of property referred to in paragraph (a); or

- (c) provides any financial or other related services in respect of property referred to in paragraph (a) to, for the benefit of or at the direction of a terrorist organisation,
is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 15 years.

33. Reporting

- (1) Any person shall report forthwith to the Financial Intelligence Centre —
 - (a) the existence of property in their possession or control that they know is owned or controlled by or on behalf of a terrorist organisation; and
 - (b) information about a transaction or proposed transaction in respect of property referred to in paragraph (a).

(2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or series of transactions to which the business is a party is related to an offence referred to in section 3(3)(c) to (e) or 32 must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Financial Intelligence Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

34. Audit

An accountable institution must determine on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a proscribed organisation.

35. Monthly report

Subject to the regulations, every accountable institution must report, within the period specified by regulation or, if no period is specified, monthly, to the Financial Intelligence Centre either —

- (a) that it is not in possession or control of any property referred to in section 34,¹ or
- (b) that it is in possession or control of such property, and the prescribed particulars concerning the property.

36. Reporting duty and obligations to provide information not affected by confidentiality rules

(1) Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution or any other person with a provision of section 33 or 35.

(2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and client in respect of communications made in confidence between-

¹ It is envisaged that the regulations may determine that nil returns be reported quarterly.

- (c) the attorney and client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or
- (c) a third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced.

37. Protection of persons making reports

- (1) No action, whether criminal or civil, lies against an accountable institution or any other person complying in good faith with the provisions of section 33 and 35, including any director, employee or other person acting on behalf of such accountable institution or such other person.
- (1) A person who has made, initiated or contributed to a report in terms of section 33 or 35 or the grounds for such a report, is competent, but not compellable, to give evidence in criminal proceedings arising from the report.
- (1) No evidence concerning the identity of a person who has made, initiated or contributed to a report in terms of section 33 or 35 or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Act, or the contents or nature of such additional information or grounds, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings.

38. Failure to report possession or control of property or suspicion

Any accountable institution or person who fails, within the prescribed period, to report to the Financial Intelligence Centre the prescribed information in respect of property in accordance with section 33 or 35 is guilty of an offence and liable on conviction to imprisonment for a period not exceeding ten years or to a fine not exceeding R10000000.

PART 2

SEARCH, SEIZURE AND FORFEITURE OF TERRORIST PROPERTY ss 39 - 42

39. Search warrant

- (1) Where a police officer believes on reasonable grounds that there is in any building, receptacle or place any property as referred to in section 3(3)(c) to (e) or 32 he or she may apply to a judge for a search warrant to be issued for the seizure of such property.
- (2) If it appears to the judge from information on oath contained in the application referred to in subsection (1) that there are reasonable grounds for believing that there is in any building, receptacle or place any property referred to in subsection (1) in the possession or under the control of or upon any person or upon or at any premises the judge may issue a search warrant if the following conditions are met —

- (c) that there are reasonable grounds for suspecting that the property is intended to be used for the purposes referred to in section 3(3)(c) to (e) or 32 and that either —
 - (ii) its continued seizure is justified while its derivation or its intended use is further investigated or consideration is given to bringing (in the Republic or elsewhere) proceedings against any person for an offence with which the property is connected, or
 - (iii) proceedings against any person for an offence with which the property is connected have been started and have not been concluded; or
- (d) that there are reasonable grounds for suspecting that the property consists of resources of an organisation which is a proscribed organisation and that either —
 - (ii) its continued seizure is justified while investigation is made into whether or not it consists of such resources or consideration is given to bringing (in the Republic or elsewhere) proceedings against any person for an offence with which the property is connected, or
 - (iii) proceedings against any person for an offence with which the property is connected have been started and have not been concluded.

(3) A search warrant issued under subsection (2) shall require a police officer to seize the property in question and shall to that end authorize such police officer to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person or thing found on or at such premises.

(4) If the property seized consists of cash or funds standing to the credit of a bank account, the police officer shall pay such cash or funds into a banking account which shall be opened with any bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990) and the police officer shall forthwith report to the Financial Intelligence Centre the fact of the seizure of the cash or funds and the opening of the account.

(5) A judge may direct the release of the whole or any part of the property if satisfied, on an application by the person from whom it was seized, that the conditions in subsection (2) for the detention of property are no longer met in relation to the property.

- (6) Property is not to be released as referred to in subclause (5) —
 - (c) if a declaration for its forfeiture under section 39, or an application to determine interests of third parties under section 41, is made, until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded,
 - (d) if (in the Republic or elsewhere) proceedings are started against any person for an offence with which the property is connected, until the proceedings are concluded.

40. Declarations of forfeiture on conviction

(1) Whenever any person is convicted of an offence under sections 3(3)(c) to (e) or section 32, the court in passing sentence shall, in addition to any punishment which that court may impose in respect of the offence, declare-

(a) any property-

- (i) by means of which the offence was committed;
- (ii) which was used in the commission of the offence; or
- (iii) which was found in the possession of the convicted person;

and which was seized under section 39 or is in the possession or custody or under the control of the convicted person, to be forfeited to the State.

(2) The court which makes a declaration of forfeiture of property referred to in subsection (1), shall order the registrar of the High Court concerned or clerk of the Magistrate's Court for the district concerned to forthwith publish such declaration calling upon interested parties through the media and by notice in the Gazette.

(3) Anything forfeited under subsection (1) shall, if it was seized under section 39, be kept or, if it is in the possession or custody or under the control of the convicted person, be seized and kept-

- (a) for a period of 90 days after the date of the notice published in the Gazette; or
- (b) if any person referred to in section 36(1) has within the period contemplated in paragraph (a) made an application to the court concerned regarding his or her interest in such thing, until a final decision has been rendered in respect of any such application.

41. Interests of third parties

(1) A declaration of forfeiture shall not affect any interest which any person other than the convicted person may have in the property in question, if the former person proves —

- (c) that he or she acquired the interest in that property in good faith and for consideration, whether in cash or otherwise; and
- (c) that the circumstances under which he or she acquired the interest in that property were not of such a nature that he or she could reasonably have been expected to have suspected that it was property as referred to in sections 3(3)(c) to (e) or 32; or
- (c) that he or she could not prevent such use.

(2)(a) Subject to the provisions of subsection (1), the court concerned or, if the judge or judicial officer concerned is not available, any judge or judicial officer of that court may at any time within a period of three years from the date of the declaration of forfeiture, on the application of any person other than the convicted person who claims that he or she has any interest in the property in question, inquire into and determine any such interest.

- (b) If a court referred to in paragraph (a) finds —
 - (iii) that the property is wholly owned by the applicant, the court shall set aside the declaration of forfeiture in question and direct that the property be returned to the applicant or, if the State has disposed of it, direct that the applicant be compensated by the State in an amount equal to the value of the property disposed of;
 - (iv) that the applicant has an interest in the property —

- (aa) the court shall direct that the property be sold by public auction and that the applicant be paid out of the proceeds of the sale an amount equal to the value of his interest therein, but not exceeding the proceeds of the sale; or
- (bb) if the State has disposed of the property the court shall direct that the applicant be compensated by the State in an amount equal to the value of his interest therein.

(3) Any person aggrieved by a determination made by the court under subsection (2), may appeal against the determination as if it were a conviction by the court making the determination, and such appeal may be heard either separately or jointly with an appeal against the conviction as a result of which the declaration of forfeiture was made, or against a sentence imposed as a result of such conviction.

42. Evidence in respect of declarations of forfeiture and certain interests

In order to make a declaration of forfeiture or to determine any interest under section 41(2), the court may refer to the evidence and proceedings at the trial or hear such further evidence, either orally or by affidavit, as it may deem fit.

Part 2

PRESERVATION AND FORFEITURE OF PROPERTY ORDERS ss 43 - 52

43. Preservation of property orders

(1) The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property contemplated in sections 3(3)(c) to (e) or 32.

(2) The High Court after examining the application in private, and being satisfied that there are reasonable grounds to believe that there is in any building, receptacle or place any property contemplated in sections 3(3)(c) to (e) or 32, may make a provisional preservation order which has immediate effect and may simultaneously grant a rule nisi calling upon all interested parties upon a day mentioned in the rule to appear and to show cause why the preservation order should not be made final.

(3) A High Court making a provisional preservation of property order may include in the order an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers on reasonable grounds appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.

44. Notice of preservation of property orders

(1) If a High Court makes a preservation of property order referred to in section 43, the National Director shall, as soon as practicable after the making of the order-

- (a) give notice of the order to all persons known to the National Director to have an interest in property which is subject to the order; and
- (b) publish a notice of the order in the Gazette; and
- (c) the court may require publication in the media of the fact of the application.

(2) A notice under subsection (1)(a) shall be served in the manner in which a summons, commencing civil proceedings in the High Court is served.

(3) Any person who has an interest in the property which is subject to the preservation of property order may give notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof.

(4) A notice of intention to oppose under subsection (1) shall be delivered to the National Director within, in the case of —

- (b) a person upon whom a notice has been served under subsection (1)(a), two weeks after such service; or
- (b) any other person, two weeks after the date upon which a notice under subsection (1) (b) was published in the Gazette or the publication in the media of the fact of the application.

(5) A notice of intention to oppose under subsection (3) shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Part and shall be accompanied by an affidavit stating —

- (a) full particulars of the identity of the person opposing;
 - (b) the nature and extent of his or her interest in the property concerned;
- and
- (c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof.

45. Duration of preservation of property orders

(1) A preservation of property order shall expire 90 days after the date on which notice of the making of the order is published in the Gazette unless-

- (b) there is an application for a forfeiture order pending before the High Court in respect of the property subject to the preservation of property order;
- (c) there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation of property order; or
- (d) the order is rescinded before the expiry of that period.

46. Seizure of property subject to preservation of property order

(1) In order to prevent property subject to a preservation of property order from being disposed of or removed contrary to that order, any police officer may seize any such property if he or she has reasonable grounds to believe that such property will be so disposed of or removed.

(2) Property seized under subsection (1) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.

47. Appointment of curator bonis in respect of property subject to preservation of property order

(1) Where a High Court has made a preservation of property order, the Court shall, if it deems it appropriate, at the time of the making of the order or at a later time-

- (c) appoint a curator bonis to do, subject to the directions of the Court, any one or more of the following on behalf of the person against whom the preservation of property order has been made, namely-
 - (i) to assume control over the property;
 - (ii) to take care of the said property;
 - (iii) to administer the said property and to do any act necessary for that purpose; and
 - (iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and
- (b) order any person holding property subject to the preservation of property order to surrender forthwith, or within such period as that Court may determine, any such property into the custody of the curator bonis.

(2) The Court which made an order under subsection (1) may make such order relating to the fees and expenditure of the curator bonis as it deems fit, including an order for the payment of the fees of the curator bonis —

- (a) from the forfeited property if a forfeiture order is made; or
- (b) by the State if no forfeiture order is made.

48. Orders in respect of immovable property subject to preservation of property order

(1) A High Court which has made a preservation of property order in respect of immovable property may at any time, with a view to ensuring the effective execution of a subsequent order, order the registrar of deeds concerned to endorse any one or more of the restrictions referred to in subsection (2) on the title deed of the immovable property.

(2) An order under subsection (1) may be made in respect of the following restrictions, namely-

- (b) that the immovable property shall not without the consent of the High Court be mortgaged or otherwise encumbered;
- (c) that the immovable property shall not without the consent of the High Court be attached or sold in execution; and

- (d) that the immovable property shall not without the consent of the High Court-
 - (iii) vest in the Master of the High Court or trustee concerned, as the case may be, when the estate of the owner of that immovable property is sequestrated; or
 - (iv) where the owner of that immovable property is a company or other corporate body which is being wound up, form part of the assets of such company or corporate body.
- (3) In order to give effect to subsection (1), the registrar of deeds concerned shall-
 - (a) make the necessary entries in his or her registers and the necessary endorsement on the office copy of the title deed, and thereupon any such restriction shall be effective against all persons except, in the case of a restriction contemplated in subsection (2)(b), against any person in whose favour a mortgage bond or other charge was registered against the title deed of immovable property prior to the endorsement of the restriction on the title deed of the immovable property, but shall lapse on the transfer of ownership of the immovable property concerned;
 - (b) when the original of the title deed is produced to him or her, make the necessary endorsement thereon.
- (4) Unless the High Court directs otherwise, the custody of immovable property on the title deed of which a restriction contemplated in subsection (2)(c) was endorsed shall vest as from the date on which-
 - (c) the estate of the owner of the immovable property is sequestrated; or
 - (d) where the owner of the immovable property is a company or other corporate body, such company or corporate body is being wound up,
 in the person in whom the said custody would have vested if such a restriction were not so endorsed.
- (5) Where the High Court granted its consent in respect of a restriction contemplated in subsection (2)(c) and endorsed on the title deed of immovable property, the immovable property shall be deemed-
 - (a) if the estate of the owner of the immovable property was sequestrated, to have vested in the Master of the High Court or trustee concerned, as the case may be, as if such a restriction were not so endorsed; or
 - (b) if the owner of the immovable property is a company or other juristic person which is being wound up, to have formed part of the assets of such company or juristic person as if such a restriction were not so endorsed.
- (6) Any person affected by an order contemplated in subsection (1) may at any time apply for the rescission of the order.

49. Provision for expenses

- (1) A preservation of property order may make provision as the High Court deems fit for —

- (c) reasonable living expenses of a person holding an interest in property subject to a preservation of property order and his or her family or household; and
- (d) reasonable legal expenses of such a person in connection with any proceedings instituted against him or her in terms of this Act or any other related criminal proceedings.

(2) A High Court shall not make provision for any expenses under subsection (1) unless it is satisfied that-

- (a) the person cannot meet the expenses concerned out of his or her property which is not subject to the preservation of property order; and
- (b) the person has disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities.

50. Maximum legal expenses that can be met from preserved property

(1) Despite provision in a preservation of property order for the meeting of legal expenses out of any property to which the order applies, a legal expense is not to be met out of that property to the extent that the amount payable for any legal service concerned exceeds any prescribed maximum allowable cost for that service.

(2) This section operates only to limit the amount of the legal expenses that a High Court may provide for under section 49 to be met out of property that is subject to a preservation of property order and does not limit or otherwise affect any entitlement of a legal practitioner to be paid or to recover for a legal service any amount that exceeds any applicable maximum.

51. Taxation of legal expenses

(1) If a High Court granting a preservation of property order makes provision for a person's reasonable legal expenses-

- (a) the National Director; or
- (b) the curator bonis,

may apply to the High Court for an order under this section.

(2) The curator bonis or the National Director must give notice of an application under this section to the person concerned.

(3) On an application under this section, the High Court must order that the expenses be taxed as provided in the order.

(4) After an application is made for an order under this section, the curator bonis need not, unless ordered by the Court to do so, take any steps for the purpose of meeting the expenses as provided by the preservation of property order unless and until-

- (a) an order under this section in relation to the expenses is complied with; or

- (b) the application, and any appeal arising out of it, are finally determined, or otherwise disposed of, other than by the making of such an order.

52. Variation and rescission of orders

(1) A High Court which made a preservation of property order may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order, if such order was —

- (c) erroneously sought or erroneously granted in the absence of any party affected thereby;
 - (d) in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (e) granted as a result of a mistake common to the parties;
- and the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation of property order concerned.

(2) The party desiring any relief under subsection(1) shall make application therefor upon notice to all parties whose interests may be affected by any variance sought.

(3) The court shall not make any order rescinding or varying any preservation order or an order authorising the seizure of the property concerned or other ancillary order unless satisfied —

- (a) that all parties whose interests may be affected have notice of the order proposed;
- (b) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
- (c) that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred;

(4) The court which made the preservation order shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded.

(5) When a court orders the rescission of an order authorising the seizure of property under paragraph (a) of subsection (1) the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation of property order concerned.

(6) Any person affected by an order for the appointment of a curator bonis may at any time apply-

- (c) for the variation or rescission of the order;
- (d) for the variation of the terms of the appointment of the curator bonis concerned; or
- (e) for the discharge of the curator bonis.

(7) A High Court which made an order for the appointment of a curator bonis —

- (a) may, if it deems it necessary in the interests of justice, at any time-

- (ii) vary or rescind the order;
- (iii) vary the terms of the appointment of the curator bonis concerned; or
- (iv) discharge that curator bonis;

(b) shall rescind the order and discharge the curator bonis concerned if the relevant preservation of property order is rescinded.

(8)(a) Any person affected by an order in respect of immovable property may at any time apply for the rescission of the order.

(b) A High Court which made an order in respect of immovable property-

- (i) may, if it deems it necessary in the interests of justice, at any time rescind the order; or
- (ii) shall rescind the order if the relevant preservation of property order is rescinded.

(c) If an order in respect of immovable property is rescinded, the High Court shall direct the registrar of deeds concerned to cancel any restriction endorsed by virtue of that order on the title deed of immovable property, and that registrar of deeds shall give effect to any such direction.

Part 3

Forfeiture of property (ss 53 - 62)

53. Application by National Director for forfeiture order

(1) If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property contemplated in sections 3(3)(c) to (e) or 32 that is subject to the preservation of property order.

(2) The National Director shall give 14 days notice of an application under subsection (1) to every person who opposed the application for a preservation order.

(3) A notice under subsection (1) shall be served in the manner in which a summons commencing civil proceedings in the High Court, is served.

(4) Any person who is referred to in subsection (2) may appear at the application under subsection (1) —

- (a) to oppose the making of the order; or
- (b) to apply for an order-
 - (i) excluding his or her interest in that property from the operation of the order; or
 - (ii) varying the operation of the order in respect of that property,

and may adduce evidence at the hearing of the application.

54. Late notice of opposition

(1) Any person who, for any reason, did not give notice of intention to oppose may, within two weeks of becoming aware of the existence of a preservation of property order, apply to the High Court for leave to give such notice.

(2) An application in terms of subsection (1) may be made before or after the date on which an application for a forfeiture order is made under section 53, but shall be made before judgment is given in respect of such an application for a forfeiture order.

(3) The High Court may grant an applicant referred to in subsection (1) leave to give notice of intention to oppose within the period which the Court deems appropriate, if the Court is satisfied on good cause shown that such applicant-

(a) has for sufficient reason failed to give notice of intention to oppose; and

(b) has an interest in the property which is subject to the preservation of property order.

(4) When a High Court grants an applicant leave to oppose, the Court —

(b) shall make any order as to costs against the applicant; and

(c) may make any order to regulate the further participation of the applicant in proceedings concerning an application for a forfeiture order,

which it deems appropriate.

(5) Notice to oppose after leave has been obtained under subsection (1) shall contain full particulars of the chosen address of the person who enters such appearance for the delivery of documents concerning further proceedings and shall be accompanied by an affidavit referred to in section 44(5).

55. Making of forfeiture order

(1) The High Court shall, subject to section 59, make an order applied for under section 54 if the Court finds on a balance of probabilities that the property concerned is property as contemplated in sections 3(3)(c) to (e) or 32.

(2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such an order.

(2) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the High Court from making the order.

(2) The validity of an order under paragraph (a) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.

(2) The Registrar of the Court issuing a forfeiture order must publish a notice thereof in the Gazette as soon as practicable after the order is made.

(2) A forfeiture order shall not take effect —

- (a) before the period allowed for an application under section 59 or an appeal against a forfeiture order has expired; or
- (b) before such an application or appeal has been disposed of.

56. Notice of reasonable grounds that property is concerned in terrorist offences

- (1) The National Director may apply to a judge for an order notifying a person having an interest in or control over property that there are reasonable grounds to believe that such property is property referred to in sections 3(3)(c) to (e) or 32.
- (2) The judge shall make an order referred to in subsection (1) if the judge is satisfied that there are reasonable grounds to believe that the property concerned is property referred to in sections 3(3)(c) to (e) or 32.
- (3) When a judge makes an order under subsection (1), the registrar of the High Court concerned shall issue a notice in the prescribed form to the person referred to in the order, informing him or her that there are reasonable grounds to believe that property in which he or she has an interest or over which he or she has control, is property referred to in sections 3(3)(c) to (e) or 32.
- (4) A notice issued under subsection (3) shall be served on the person concerned in the manner in which a summons commencing civil proceedings in the High Court is served.

57. Exclusion of interests in property

- (1) The High Court may, on application-
 - (i) under section 53(4); or
 - (ii) by a person referred to in section 54(1),

and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

- (2) The National Director or the curator bonis concerned, or a person authorised in writing thereto by them, may present evidence and witnesses in rebuttal and in defence of their claim to the property and may cross-examine a witness who appears at the hearing.

- (3) In addition to the testimony and evidence presented at the hearing, the High Court may, upon application by the National Director or the curator bonis concerned, or a person authorised in writing thereto by them, order that the testimony of any witness relating to the property forfeited, be taken on commission and that any book, paper, document, record, recording, or other material not privileged be produced at the hearing of such testimony on commission.

- (4) The High Court may make an order under subsection (1), in relation to the forfeiture of the property referred to in sections 3(3)(c) to (e) or 32, if it finds on a balance of probabilities that the applicant for the order-

- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and

- (b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is property referred to in sections 3(3)(c) to (e) or 32; or
- (c) where the applicant had acquired the interest before the commencement of this Act, that the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as property referred to in sections 3(3)(c) to (e) or 32.

(5)(a) A person who testifies under this section and —

- (i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or
- (i) gives false evidence knowing that evidence to be false or not believing it to be true,

shall be guilty of an offence.

(b) A person who furnishes an affidavit under subsection (2) and makes a false statement in the affidavit knowing that statement to be false or not believing it to be true, shall be guilty of an offence.

(c) A person convicted of an offence under this subsection shall be liable to the penalty prescribed by law for perjury.

(6)(a) If an applicant for an order under subsection (1) adduces evidence to show that he or she did not know or did not have reasonable grounds to suspect that the property in which the interest is held, is property referred to in sections 3(3)(c) to (e) or 32, the State may submit a return of the service on the applicant of a notice issued under section 56(3) in rebuttal of that evidence in respect of the period since the date of such service.

(b) If the State submits a return of the service on the applicant of a notice issued under section 56(3) as contemplated in paragraph (a), the applicant for an order under subsection (1) must, in addition to the facts referred to in subsection (3)(a) to (3)(c), also prove on a balance of probabilities that, since such service, he or she has taken all reasonable steps to prevent the further use of the property concerned as a property referred to in sections 3(3)(c) to (e) or 32.

(c) A High Court making an order for the exclusion of an interest in property under paragraph (a) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the Court deems appropriate including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the Court may determine, to prevent the future use of the property as property contemplated in sections 3(3)(c) to (e) or 32.

58. Forfeiture order by default

(1) If the National Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application under section 53(1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who gave notice of intention to oppose in terms of section 43(3) have knowledge of notices given under section 53(2), the Court may-

(a) make any order by default which the Court could have made under sections 55(1) and (2);

(a) make such order as the Court may consider appropriate in the circumstances; or

(c) make no order.

(2) The High Court may, before making an order in terms of subsection (1), call upon the National Director to adduce such further evidence, either in writing or orally, in support of his or her application as the Court may consider necessary.

(3) Any person whose interest in the property concerned is affected by the forfeiture order or other order made by the Court under subsection (1) may, within 60 days after he or she has acquired knowledge of such order or direction, set the matter down for variation or rescission by the court.

(4) The court may, upon good cause shown, vary or rescind the default order or give some other direction on such terms as it deems appropriate.

59. Subsequent application for exclusion of interests in forfeited property

(1) Any person affected by a forfeiture order who was entitled to receive notice of the application, but did not receive such notice, may, within 60 days after the notice of the forfeiture order is published in the Gazette, apply for an order excluding his or her interest in the property concerned from the operation of the order, or varying the operation of the order in respect of such property.

(2) The application shall be accompanied by an affidavit setting forth-

- (c) the nature and extent of the applicant's right, title or interest in the property concerned;
- (d) the time and circumstances of the applicant's acquisition of the right, title, or interest in the property;
- (c) any additional facts supporting the application; and
- (d) the relief sought.

(3) The hearing of the application shall, to the extent practicable and consistent with the interests of justice be held within 60 days of the filing of the application.

(4) The High Court may consolidate the hearing of the application with a hearing of any other application filed by a person under this section.

(5) At the hearing, the applicant may testify and present evidence and witnesses on his or her own behalf, and may cross-examine any witness who appears at the hearing.

(6) The National Director or the curator bonis concerned, or a person authorised in writing thereto by them, may present evidence and witnesses in rebuttal and in defence of their claim to the property and may cross-examine a witness who appears at the hearing.

(7) In addition to the testimony and evidence presented at the hearing, the High Court may, upon application by the National Director or the curator bonis concerned,

or a person authorised in writing thereto by them, order that the testimony of any witness relating to the property forfeited, be taken on commission and that any book, paper, document, record, recording, or other material not privileged be produced at the hearing of such testimony on commission.

(8) The High Court may make an order under subsection (1), in relation to the forfeiture of the property referred to in sections 3(3)(c) to (e) or 32, if it finds on a balance of probabilities that the applicant for the order-

- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
- (b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is property referred to in sections 3(3)(c) to (e) or 32; or
- (c) where the applicant had acquired the interest before the commencement of this Act, that the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as property referred to in sections 3(3)(c) to (e) or 32.

(9)(a) A person who testifies under this section and —

- (i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or
- (i) gives false evidence knowing that evidence to be false or not believing it to be true,

shall be guilty of an offence.

(b) A person who furnishes an affidavit under subsection (2) and makes a false statement in the affidavit knowing that statement to be false or not believing it to be true, shall be guilty of an offence.

(c) A person convicted of an offence under this subsection shall be liable to the penalty prescribed by law for perjury.

60. Effect of forfeiture order

(1)(a) Where a High Court has made a forfeiture order and a curator bonis has not been appointed in respect of any of the property concerned, the High Court may appoint a curator bonis to perform any of the functions referred to in section 61 in respect of such property.

(b) On the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the curator bonis on behalf of the State.

(c) Upon a forfeiture order taking effect the curator bonis may take possession of that property on behalf of the State from any person in possession, or entitled to possession, of the property.

61. Fulfilment of forfeiture order

(1) The curator bonis must, subject to any order for the exclusion of interests in forfeited property under sections 57(2)(a) or 59(8) and in accordance with the directions of the Criminal Assets Recovery Committee as contemplated in the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998)-

- (c) deposit any moneys declared forfeited under section 57 into the Criminal Assets Recovery Account as contemplated in section 63 and 64 of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998);
- (d) deliver property declared forfeited under section 57 to the Account; or
- (e) dispose of property declared forfeited under section 57 by sale or any other means and deposit the proceeds of the sale or disposition into the Account.

(2) Any right or interest in forfeited property not exercisable by or transferable to the State, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect.

(3) No person who has possession, or was entitled to possession, of forfeited property immediately before the forfeiture order took effect, or any person acting in concert with, or on behalf of that person, shall be eligible to purchase forfeited property at any sale held by the curator bonis.

(4) The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs shall be defrayed out of moneys appropriated by Parliament for that purpose.

62. Regulations

(1) The Minister may make, repeal and amend regulations concerning-

- (a) any matter that may be prescribed in terms of this Act; and
- (a) any other matter which is necessary or expedient to prescribe to promote the objectives of this Act.

(2) Regulations in terms of subsection (1) may include -

- (b) specifying the reporting by accountable institutions in terms of section 35; and
- (b) specifying how the proceeds referred to in section 61 are to be distributed.

Part 4

MISCELLANEOUS ss 63 - 66

63. Administration of Act

The President may by proclamation in the Gazette assign the administration of this Act to any Minister, and may determine that any power or duty conferred or imposed by this Act on such Minister, shall be exercised or carried out by that Minister after consultation with one or more other Ministers.

64. Amendment and repeal of laws

The laws in the Schedule are hereby amended or repealed to the extent indicated.

65. Interpretation

The provisions of this Act shall be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles.

66. Short title and commencement

This Act is called the Anti-Terrorism Act, 2002, and comes into operation on a date determined by the President in the **Gazette**.

SCHEDULE

SCHEDULE OF LEGISLATION REPEALED: SECTION 62

Act No	Year	Title	Extent of amendment or repeal
10	1972	Civil Aviation Offences Act	Section 2 of the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972), is hereby amended by inserting in subsection (1) the following paragraph after paragraph (g): “(h) unlawfully and intentionally uses any device, substance or weapon and performs an act of violence against a person at a designated airport, airport, heliport or navigational facility.”
74	1982	Internal Security Act	The whole Act is repealed
72	1982	Intimidation Act	Section 1A is repealed
126	1992	Criminal Law Second Amendment Act	Chapter 5 is repealed

38	2001	Financial Intelligence Centre Act	<p>1. The long Title of the Financial Intelligence Centre Act, 2001 (Act No 38 of 2001), (the Act) is substituted for the following:</p> <p>To establish a Financial Intelligence Centre and a Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist acts; to impose certain duties on institutions and other persons who might be used for money laundering purposes <u>and terrorist act financing offences</u>; to amend the Prevention of Organised Crime Act, 1998, and the Promotion of Access to Information Act, 2000; and to provide for matters connected therewith.</p> <p>2. The following definition is inserted in the Act after the definition of “supervisory body”:</p> <p><u>“Terrorist act financing offence “ means an offence under section 3(3)(c) to (e) or 32 of the Anti-Terrorism Act.</u></p> <p>3. The following subsection is substituted for subsection (1) of section 3 of the Act:</p> <p>(1) The principal objective of the Centre is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities <u>and terrorist act financing offences</u>.</p> <p>4. Subparagraph (i) of section 18(1)(a) is substituted for the following subparagraph:</p> <p>(i) policies and best practices to identify the proceeds of unlawful activities and to combat money laundering activities <u>and terrorist act financing offences</u>; and</p> <p>5. The heading to Chapter 3 of the Act is substituted for the following: <u>MONEY LAUNDERING AND FINANCING OF TERRORIST ACTS CONTROL MEASURES</u></p>
----	------	-----------------------------------	---

			<p>6. The following subsection is substituted for section 35 of the Act:</p> <p>(1) A judge designated by the Minister of Justice for the purposes of the Interception and Monitoring Prohibition Act, 1992 (Act 127 of 1992), may, upon written application by the Centre, order an accountable institution to report to the Centre, on such terms and in such confidential manner as may be specified in the order, all transactions concluded by a specified person with the accountable institution or all transactions conducted in respect of a specified account or facility at the accountable institution, if there are reasonable grounds to suspect that-</p> <p>(a) that person has transferred or may transfer the proceeds of unlawful activities to the accountable institution or is using or may use the accountable institution for money laundering purposes <u>or for terrorist act financing offences</u> or for the purpose of any transaction contemplated in section 29(1)(b); or</p> <p>(b) that account or other facility has received or may receive the proceeds of unlawful activities or is being or may be used for money laundering purposes <u>or for terrorist act financing offences</u> or for the purpose of any transaction contemplated in section 29(1)(b).</p> <p>(c)</p>
--	--	--	--

ANNEXURE B

DRAFT ANTI-TERRORISM BILL AS PROPOSED IN *DISCUSSION PAPER 92*

REPUBLIC OF SOUTH AFRICA

ANTI-TERRORISM BILL, 2000

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP ANTI-TERRORISME, 2000

GENERAL EXPLANATORY NOTE

[] Words in bold type in square brackets indicate omissions from existing enactments
 _____ Words underlined with a solid line indicate insertions in existing enactments
~~terrorism~~ Words struck out indicate omissions recommended by the project and working committee

BILL

To give effect within the Republic of South Africa to the relevant international instruments, principles, and requirements relating to terrorism; to provide for certain offences related to terrorist acts ~~or activities~~, in order to ensure the security of the Republic and the safety of the public against threats and acts of terrorism; to effectively combat terrorist acts ~~and terrorist activities~~; to prohibit material assistance to terrorist organisations; and to provide for matters connected therewith.

PREAMBLE

WHEREAS there is a world-wide persistence of acts of terrorism in all its forms and manifestations;

AND WHEREAS terrorism is an international problem which can only be eradicated with the full and committed cooperation of all member states of the United Nations;

AND WHEREAS the States members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardise the friendly relations among States and peoples and threaten the integrity and security of States;

AND WHEREAS ~~criminal acts intended or calculated to provoke a state of terror in the general public, any group of persons or particular persons for political purposes~~ terrorist acts are under any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them;¹

¹ See the Interpretation clause in this Bill, clause 25 below and Articles 3(2) and 22(1) of the OAU Convention in Annexure B below.

AND WHEREAS terrorism is condemned in a number of international instruments which places an obligation on States to adopt legislation to give effect to those instruments;²

AND WHEREAS South Africa supports the efforts of the international and regional communities to eliminate terrorism;

AND WHEREAS South Africa recognises its obligation to prevent its territory becoming a stage for the planning, organisation or execution of terrorist acts ~~or activities~~ or the initiation or participation in any form of terrorist acts ~~or activities~~ including the prevention of terrorist elements from infiltration or residence on its soil, by either individuals or groups or to receive them, harbour them, train them, or fund them, or offer any kind of help or facilities to them;

AND WHEREAS terrorism, especially in the form of urban terrorism presents a serious threat to the security of the Republic and the safety of the public;

AND WHEREAS the United Nations General Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations;³

AND WHEREAS the United Nations urged all States to enact appropriate domestic legislation necessary to implement the provisions of relevant conventions and protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts ~~and activities~~ and to co-operate with and provide support and assistance to other States and relevant international and regional organizations to that end;⁴

AND WHEREAS South Africa shares the commitment to prevent and combat terrorism with the Organisation for African Unity and the Non-Aligned Movement expressed in various resolutions, as well as the Organisation for African Unity's Convention on the Prevention and Combating of Terrorism;

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates-

² In respect of the first five paragraphs of the Preamble, see AC./6/53/L.20 Rev.1 (United Nations General Assembly), dated 23 November 1998. See also the Preamble of the *International Convention on the Suppression of Terrorist Bombings*, 1998 (see Annexure I below) and the *United Nations Declaration on Measures to Eliminate International Terrorism*, annexed to General Assembly resolution 49/60 of 9 December 1994.

³ See United Nations General Assembly Resolution 51/210 of 17 December 1996, par 3(f) which calls upon States - "to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations, whether such funding is direct or indirect through organisations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulating measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes, without impeding in any way the freedom of legitimate capital movements and intensify the exchange of information concerning international movements of such funds".

⁴ AC.6/53/L.20. Rev. 1 (United Nations General Assembly) dated 23 November 1998.

“arm”, means any arm, as defined in section 1 of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969)⁵;

“constitution”, means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

“Criminal Procedure Act”, means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

“continental shelf”, means the continental shelf, as referred to in section 8 of the Maritime Zones Act, 1994 (Act No. 15 of 1994);

“combating terrorism”, means all activities related to the prevention, uncovering and halting of terrorist activities **acts** as well as those related to the minimising of losses caused by the same;

“Director of Public Prosecutions”, means a Director of Public Prosecutions appointed under the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), as well as any investigating director or special director appointed under the said Act;

“device”, with reference to section 14, means -

- (a) any nuclear explosive device; or
- (b) any radio-active material dispersal or radiation emitting device which may, owing to its radiological properties cause death, serious bodily injury or substantial damage to property or the environment;

“explosive”, means any explosive as defined in section 1 of the Explosives Act, 1956 (Act No. 26 of 1956);

“explosive or other lethal device”, means -

- (a) an explosive or incendiary weapon or device which is designed or manufactured, or has the capability, to cause death, serious bodily injury or substantial material damage; or
- (b) a weapon or device which is designed or manufactured, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material;⁶

“fixed platform”, means any installation as defined in section 1 of the Maritime Zones Act, 1994 (Act No. 15 of 1994), and which is fixed to the seabed;⁷

~~**“financing”** means the transfer or reception of funds;~~

“funds” means cash, assets or any other property, tangible or intangible, however acquired; and notably any type of financial resource, including cash or the currency of any State, bank credits, traveller’s cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit or any other negotiable instrument in any form, including electronic or digital form;

⁵ Take into account the definition of “firearm” in the Firearms Control Bill, 1999, already approved by Cabinet, once adopted by Parliament.

⁶ Definition from Article 1, par 3 of the *International Convention for the Suppression of Terrorist Bombings*, 1998 (see Annexure I below).

⁷ See also Article 2281 of section 60019: Offenses of Violence against Maritime Navigation or Fixed Platforms, (United States).

“internationally protected person”, means any person who enjoys immunities and privileges in terms of subsections (1), (2),(3),(4) and (5) of section 3 of the Diplomatic Immunities and Privileges Act, 1989 (Act No. 74 of 1989), or to whom such immunities and privileges had have been conferred in terms of section 5 of the said Act;⁸

“law enforcement officer” means a member of the South African Police Service as defined in the South African Police Service Act, 1995 (Act No. 68 of 1995), an immigration officer appointed under section 3 of the Alien Control Act, 1991 (Act No. 96 of 1991) and a customs officer as defined in section 1 (1) of the Customs and Excise Act, 1964 (Act 91 of 1964);

“material support or resources”, means funds or financing, financial services, lodging, training, safe houses, false documentation, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, funds or financing;⁹

“military forces of the State”, means the armed forces of the State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security, and persons acting in support of those armed forces who are under their formal command, control and responsibility;¹⁰

“National Director of Public Prosecutions”, means the National Director of Public Prosecutions appointed in terms of section 179(1) of the Constitution;

“place of public use”, means those parts of any building, land, street, waterway or other location that are at any time accessible or open to members of the public, ~~whether continuously, periodically or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place which is so accessible or open to the public, as well as any dwelling or place of residence~~;¹¹

“radio-active material”, means any radio-active material as defined in section 1 of the Nuclear Energy Act, 1999 (Act No. 46 of 1999);

“Republic”, means the Republic of South Africa;

“State or government facility”, includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties;¹²

“terrorist act”, means -

- (a) ~~any act which is a violation of the criminal laws of the Republic and which does or may endanger the life, physical integrity or freedom of or cause serious injury or death to any~~

⁸ See also Article 1116 Chapter 50, Title 18, United States Code.

⁹ Adopted from the definition of “material support or resources” in section 2339A of Title 18 Chapter 113B of the United States which regulates providing material support to terrorists. See the footnote to clause 3 of this Bill.

¹⁰ See Article 22 of the *International Convention for the Suppression of Terrorist Bombings*, 1998.

¹¹ See Article 22 of the *International Convention for the Suppression of Terrorist Bombings*, 1998.

¹² See Article 1(1) of the *International Convention for the Suppression of Terrorist Bombings*, 1998.

person or persons, ~~any number or group of persons~~ or causes or may cause damage to ~~public or private property, natural resources, environmental or cultural heritage~~ and is calculated or intended to -

(i) ~~intimidate, instill fear put fear in, force, coerce or induce any government or persons, body, institution, office bearer, the general public or any segment section thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or~~

(ii) ~~disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or~~

(iii) ~~create unrest or general insurrection in any State; and~~

(b) ~~any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising, or procurement of any person, with the intent to effect any of the acts in paragraph (a)(i), (ii) or (iii);¹³~~

~~“terrorist activities”, means—~~

(a) ~~the organising, planning, preparing and carrying out of terrorist acts;~~

(b) ~~to incite someone to commit a terrorist attack as well as to exert violence against any physical, or juristic person, or to destroy material objects with the purpose of carrying out a terrorist attack;~~

(c) ~~the organising of an illegal armed formation, criminal group, gang or organisation for the purpose of carrying out a terrorist act, as well as partaking in such act;~~

(d) ~~recruiting, arming, training and using terrorists;~~

(e) ~~the funding of a terrorist organisation or group of organisations; or~~

(f) ~~the gathering of information on potential targets for terrorist acts.~~

~~“terrorist organisation”, means (a) an organisation created with the intention to carry which has carried out, is carrying out or plans carrying out terrorist acts or activities or an organisation that approves of the possibility of using terrorism in its activities ; or~~

~~(b) any organisation , of which at least one of its divisions is involved in terrorist acts or activities and at least one governing body is aware of such involvement.¹⁴~~

Offences relating to terrorist acts under this Act

2. Subject to the provisions of this Act, any person who, in the Republic or elsewhere, commits a terrorist act, or any other contravention of this Act ~~if such act falls, in terms of this Act, within the jurisdiction of the courts of the Republic,~~ commits an offence and shall be liable on conviction to imprisonment for life.

Providing material support in respect of terrorist acts offences under this Act

¹³ Definition adopted with the necessary amendments from the *Organization of African Unity Convention on the Prevention and Combatting of Terrorism*, 1999 (see Annexure B below).

¹⁴ The drafters are not opposed to the deletion of this subclause. It was taken from *Federal Law of 25.07.98 No.130, F 3 of the Russian Federation*.

3. (1) Any person who -
- (a) provides material, logistical or organisational support¹⁵ or any resources;¹⁶ or
 - (b) conceals or disguises the nature, location, source, or ownership of such support or resources,
- knowing or intending that such support or resources are to be used -
- (i) in the commission of an offence under the provisions of this Act; or
 - (ii) in the concealment or an escape from the commission of an offence under the provisions of this Act; or
- (c) participates ~~partakes~~ in the activities of a terrorist organisation,
- commits an offence and is liable on conviction to imprisonment for a period not exceeding 10 years, without the option of a fine.
- (2) Any person -
- (a) who knows ~~has reason to suspect~~ that any other person intends to commit or has committed any offence under this Act; and
 - (b) who harbours or conceals that other person,
- commits an offence and is liable on conviction to the penalty ~~to which the person so harboured or concealed would have been liable on conviction of the~~ for the offence which ~~that the last-mentioned~~ person intended to commit or has committed, as the case may be.

Membership of terrorist organisations

4. Any person who becomes or is a member of a terrorist organisation commits an offence, and is liable on conviction to imprisonment for a period not exceeding five years without the option of a fine.¹⁷

¹⁵ Taken from section 2339A Title 18 Crimes and Criminal Procedure of the USA which provides as follows:

“(a) Whoever, within the United States, provides material support or resources or conceals or distinguishes the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or carrying out, a violation of section 32, 37, 81, 175, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332c, or 2340A of this title or section 46502 of title 49, or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Definition. In this section, the term ‘material support or resources’ means currency or other financial securities, financial services, lodging, training, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”

¹⁶ See the definition in clause 1 of this Bill regarding “material support or resources”.

¹⁷ The project committee raised the question what the drafters’ motivation was for not seeking to provide for a mechanism for proscribing or “banning” organisations. The drafters pointed out that in 1996 section 4 of the Internal Security Act 47 of 1982 was repealed which until then provided

Sabotage

5. ~~Any person who, in the Republic or elsewhere—~~

- ~~(a) commits an act;~~
- ~~(b) attempts to commit an act;~~
- ~~(c) conspires with any person to commit such act or to bring about the commission thereof or to aid in the commission or bringing about of the commission thereof; or~~
- ~~(d) incites, instigates, commands, aids, advises, encourages or procures any other person to commit such act,~~

~~with the intent to¹⁸—~~

- ~~(i) endanger the safety, health or interests of the public at any place in the Republic;~~
- ~~(ii) destroy, pollute, or contaminate any water supply in the Republic which is intended for public use;~~
- ~~(iii) interrupt, impede or endanger at any place in the Republic the manufacture, storage, generation, distribution, rendering or supply of fuel, petroleum products, energy, light, power or water, or sanitary, medical, health, educational, police, fire-fighting, ambulance, postal or telecommunications services or radio or television transmitting, broadcasting or receiving services or any other public service;~~
- ~~(iv) endanger, damage, destroy, render useless or unserviceable or put out of action at any place in the Republic any installation for the rendering or supply of any service referred to in paragraph (c), any prohibited place or any public building;~~
- ~~(v) cripple, prejudice, or interrupt at any place in the Republic any industry or undertaking or industries or undertakings generally and the production, supply or distribution of commodities and foodstuffs; or~~
- ~~(vi) impede or endanger at any place in the Republic the free movement of any traffic on land, at sea or in the air,~~

~~commits the offence of sabotage and is liable on conviction to imprisonment for a period not exceeding twenty years, without the option of a fine.¹⁹~~

for the banning of organisations. The thinking at the time seemed to have been that it would be more expedient to target criminal activities than to proscribe or ban organisations since the banning of organisations led in the past only to a proliferation of new organisations being formed and a constant growing list attempting to identify and deal with these organisations.

¹⁸

The project committee raised the question whether “sabotage” should not be part of “terrorist act”. The drafters are of the view that a specific intent is required to constitute the offence of sabotage and that this intent, namely to cause grave consequences can be distinguished from the intent involved in a “terrorist act”. They also questioned whether in view of the definition of “terrorist act” above, and the other offences created in the proposed Bill, section 54(3) of the *Internal Security Act* should be re-enacted.

Hijacking of an aircraft

6. Any person who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft with the intent to -

- (a) cause any person on board the aircraft to be ~~confined or imprisoned~~ **detained** against his or her will;
- (b) cause any person on board the aircraft to be transported against his or her will to any place other than the next scheduled place of landing of the aircraft;
- (c) hold any person on board the aircraft for ransom or to service against his or her will; or
- (d) cause that aircraft to deviate ~~in a material aspect~~ from its flight plan,²⁰

commits an offence, ~~and is liable on conviction to imprisonment for life.~~²¹

Endangering the Safety of Maritime Navigation²²

7. Any person who, in respect of a ship registered in the Republic or within the territorial waters of the Republic or maritime navigational facilities, unlawfully and intentionally -

- (a) seizes or exercises control over such a ship by force or threat thereof or any other form of intimidation;
- (b) performs any act of violence against a person on board such ship if that act is likely to endanger the safe navigation of that ship;
- (c) destroys such a ship or causes damage to such ship or to its cargo which is likely to endanger the safe navigation of that ship;
- (d) places or causes to be placed on such ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of such ship;

¹⁹ This is based on section 54(3) of the *Internal Security Act*, 1982 (Act No. 74 of 1982), a provision which has been criticised in the past for being too widely formulated- see Professor Anthony Mathews, *Freedom, State Security and the Rule of Law*, 1984. The drafters commented that in view of the definition of "terrorist act" above, and the other offences created in the proposed Bill, it should be seriously considered whether section 54(3) should be re-enacted.

²⁰ See *S v Hoare* 1982(4) SA 865 TPD in respect of the offences under the *Civil Aviation Offences Act*, 1972 (particularly 871D - I) and the recommendation that although "any interference" with the navigation of an aircraft is already covered, a specific offence of hijacking of an aircraft be created, in addition to the existing offences under the *Civil Aviation Offences Act*, 1972.

²¹ Provision is already made under clause 2 for the sentence to be imposed namely imprisonment for life.

²² The offence of "piracy" is also included in the draft *Defence Bill*.

- (f) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of such ship;
- (g) injures or kills any person in connection with the commission or the attempted commission of any of the offences referred to in subparagraphs (a) to (f); or
- ~~(h) attempts, conspires or instigates to do any act prohibited under paragraphs (a) to (g),~~²³
commits an offence and is liable on conviction -
 - (i) to a fine or to imprisonment for a period not exceeding 20 years or to both such a fine and to imprisonment; or
 - (ii) if the death of any person results from any act prohibited by this section, to imprisonment for life.

Terrorist bombings²⁴

- 8. (1) Any person who unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transport facility, a public transportation system, or an infrastructure facility, or who conspires, instigates or attempts to commit such act -
 - (a) with the intent to cause death or serious bodily injury; or
 - (b) with the intent to cause extensive damage to, or destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss,
 commits an offence, and is liable upon conviction to imprisonment for life.

²³ The project committee considered that in view of the provisions of the Riotous Assemblies Act there is no need set out separately in clause 7(h) that attempting or conspiring or instigating any act under clause 7 constitutes an offence. Section 18 of the Riotous Assemblies Act provides as follows:

18(1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

18(2) Any person who-

- (a) conspires with any other
person to aid or procure the commission of or to commit; or
- (b) incites, instigates, commands,
or procures any other person to commit,
any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

²⁴ The project committee raised the question whether this offence should not also form part of the offence "terrorist act". The drafters are of the view that also in this case the required intent to constitute the offence of terrorist bombing can be distinguished from the required intent of "terrorist act" as set out under 8(1)(a) and (b) and could be proved much easier than the required intent of "terrorist act".

~~(2) This section does not apply to the military forces of a State²⁵ -~~

~~(a) during an armed conflict; or~~

~~(b) in respect of activities undertaken in the exercise of their official duties.²⁶~~

Taking of hostages

9. Any person, who, in the Republic or elsewhere -

(a) detains any other person, hereinafter referred to as a hostage; and

(b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage,
commits an offence, and is liable on conviction to imprisonment for life.²⁷

Protection of internationally protected persons

10. (1) Any person who ~~assaults, strikes, wounds, imprisons, or perpetrates or threatens offers violence to an internationally protected person or commits any other violent attack upon the person or liberty of an internationally protected person, or, if likely to endanger his or her person or liberty, makes a violent attack upon his or her official premises, private accommodation, or means of transport or attempts to~~ commits an offence and any of the foregoing is liable on conviction to -

(a) a fine or to imprisonment for a period not exceeding ~~three~~ five years or to both such fine and imprisonment; and

(b) in the case where a deadly or dangerous weapon was used in the commission of the offence or conduct, to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.

(2) Any person who -

~~(a) intimidates, coerces, threatens, or harasses an internationally protected person in the performance of his or her duties;~~

~~(b) attempts to intimidate, coerce, threaten, or harass an internationally protected person in the performance of his or her duties; or~~

~~(c) within the Republic and within 100 metres of any building or premises in whole or in part owned, used, or occupied for official business or for diplomatic, consular, or residential purposes by an internationally protected~~

²⁵ The project committee suggested that this savings clause be reconsidered and whether it should not be placed in another clause to be applied in other contexts as well. The drafters point out that under the *Terrorist Bombing Convention* such a savings clause is justified. The drafters further suggest that respondents may raise criticism if the military forces of the State were to be exempted under other clauses of this Bill from causing death or serious bodily injury.

²⁶ See Articles 2 and 19 of the *International Convention for the Suppression of Terrorist Bombings*, 1998.

²⁷ See the *Taking of Hostages Act*, 1982 (United Kingdom) and Article 1203 of the Act for the *Prevention and Punishment of the Crime of Hostage Taking* (United States of America).

person, congregates with two or more other persons with intent to violate any other provision of this section,

commits an offence and is liable on conviction, to a fine or imprisonment for a period not exceeding six months.²⁸

~~Sentences in case of murder or kidnapping of internationally protected persons~~

11. (1) Any person who murders or attempts to murder or kidnaps or attempts to kidnap, an internationally protected person, is liable, ~~in the case of a~~ on conviction -

- (a) of murder or kidnapping, to imprisonment for life; or
- (b) of attempted murder or kidnapping, to imprisonment for a period not exceeding 20 years, without the option of a fine.

~~(2) If the victim of an offence under subsection (1) is an internationally protected person, a court may exercise jurisdiction over the alleged offence if the alleged perpetrator of the offence is present in the Republic, irrespective of the place where the offence was committed or the nationality of the victim or offender.~~

Protection of property occupied by ~~foreign governments~~²⁹ internationally protected persons

12. (1) Any person who -

- (a) wilfully ~~injures, damages or destroys, or attempts to damage or destroy~~ any property, ~~real or personal, located~~ within the Republic, and belonging to or being utilised or occupied by any internationally protected person;
- (b) wilfully, with intent to intimidate, coerce, threaten or harass, ~~forcibly thrusts~~ enters or introduces any part of himself or herself or any object within ~~or upon~~ that portion of any building or premises ~~located~~ within the Republic, which portion is used or occupied for official business or for diplomatic, consular, or residential purposes by an internationally protected person; or
- (c) refuses to depart from such portion of such building or premises after a request by an employee of a foreign government or an international organisation, if such employee is authorised to make such request by the senior official of the unit of such government or organisation which occupies such portion of such building or premises,

commits an offence, and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.³⁰

²⁸ See *Internationally Protected Persons Act*, 1987 (United Kingdom and Article 2 of the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 1979. See also Article 112 of Title 18 *United States Code* (*Protection of Foreign Officials, Official Guests, and Internationally Protected Persons*).

²⁹ See Article 1116 Chapter 50, Title 18, *United States Code*.

³⁰ Article 2 of the *Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 1979. Chapter 45, Title 18 *United States Code*, Article 970 *Protection of Property occupied by Foreign Governments*.

Offences relating to fixed platforms

13. (1) Any person who unlawfully and intentionally -

- (a) seizes or exercises control over a fixed platform on the continental shelf, or the exclusive economic zone or any fixed platform on the High Seas, by force or threat thereof or by any other form of intimidation;
- (b) performs an act of violence against a person on board such a fixed platform if that act is likely to endanger the platform's safety;
- (c) destroys such a fixed platform or causes damage to it which is likely to endanger its safety;
- (d) places or causes to be placed on such a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety;
- (e) injures or kills any person in connection with the commission or the attempted commission of any of the offences referred to in paragraphs (a) to (d); or
- (f) damages or destroys any off-shore installation referred to in section 1 of the Maritime Traffic Act, 1981 (Act No. 2 of 1981),

commits an offence.

(2) Any person who -

- (a) attempts to commit any of the offences referred to in subsection 1;
- (b) aids or abets the commission of any such offence perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
- (c) threatens, with or without a condition aimed at compelling a physical or juristic person to do or refrain from doing any act, to commit any of the offences referred to in paragraphs (a), (b), (c) and (d) of subsection (1), if that threat is likely to endanger the safety of the fixed platform,

commits an offence.

(3) A person convicted of an offence referred to in subsection (1) or (2) is -

- (a) liable on conviction to a fine or to imprisonment for a period not exceeding 20 years;
- (b) in the case where death results from the commission of the offence, liable on conviction to imprisonment for life.³¹

³¹

See Section 60019 *Offences of Violence against Maritime Navigation or Fixed Platforms*. Article 2281 *Violence against Maritime Fixed Platforms*. (United States). See also the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*.

Nuclear terrorism

14. (1) Any person who unlawfully and intentionally -

- (a) possesses radioactive material or designs or manufactures or possesses a device, with the intent -
 - (i) to cause death or serious bodily injury; or
 - (ii) to cause substantial damage to property or the environment;
- (b) uses in any way radioactive material or a device, or uses or damages a nuclear facility in the manner which releases or risks the release of radioactive material with the intent -
 - (i) to cause death or serious bodily injury;
 - (ii) to cause substantial damage to property or the environment; or
 - (iii) to compel a natural or juristic person, an international organization or a State to do or refrain from doing an act,

commits an offence.

(2) Any person who -

- (a) threatens, under circumstances which indicate the credibility of the threat, to commit an offence referred to in subsection (1)(b); or
- (b) unlawfully and intentionally demands radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force,

commits an offence.

(3) Any person who attempts to commit an offence referred to in subsection (1) commits an offence.

(4) Any person who -

- (a) participates as an accomplice in an offence referred to in subsection (1), (2) or (3);
- (b) organizes or directs others to commit an offence referred to in subsection (2) or (3); or
- (c) in any other way contributes to the commission of one or more offences referred to in subsection (1), (2) or (3) by a group of persons acting with a common purpose and where such contribution is intentional and made with the aim of furthering the general criminal activity or purpose of the group or is made in the knowledge of the intention of the group to commit the offence or offences concerned,

commits an offence.

- (5) A person convicted of an offence in terms of this section is liable on conviction to imprisonment for life.

Jurisdiction of the Courts of the Republic in respect of offences in this Act

15. The Courts of the Republic shall have jurisdiction in respect of any offence referred to in this Act, if -

- (a) the perpetrator of the act is arrested in the territory of the Republic, in its ~~internal waters or territorial waters~~ or on board a ship flying the flag of the Republic or an aircraft registered ~~under the laws of~~ in the Republic; and
- (b) the act has been or is committed -
 - (i) in the territory of the Republic and the perpetrator of the act is arrested in the territory of the Republic, or committed elsewhere, if the act is punishable in terms of the domestic laws of the Republic or in terms of the obligations of the Republic under international law;
 - (ii) on board a vessel or a ship or fixed platform flying the flag of the Republic or an aircraft which is registered under the laws of the Republic at the time the offence is committed;
 - (iii) by a national or group of nationals of the Republic;
 - (iv) against a national of the Republic;
 - (v) against the Republic or a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises, or any other property of the Republic;
 - (vi) by a stateless person or refugee who has his or her habitual residence in the territory of the Republic;
 - (vii) on board an aircraft which is operated by any carrier ~~of~~ registered in the Republic;¹ or
 - (viii) against the security of the Republic.²

Custody of persons suspected of committing terrorist acts ~~or terrorist activities~~

¹ The project committee suggested the wording "any carrier based, operating or registered in the Republic" alternatively "any commercial airline of the Republic". The drafters of the Bill suggest the wording "carrier registered in the Republic". The Civil Aviation Offences Act of 1972 refers to "South African aircraft" and describes it as follows: "South African aircraft" means an aircraft registered in the Republic and includes any aircraft that is operated by joint air transport operating organizations or international operating agencies established by the State and any other convention country and that is declared by the Minister of Transport, by notice in the Gazette, to be a South African aircraft.

² See Article 6 of the *International Convention on the Suppression of Terrorist Bombings*, 1998, and Article 6 of the *Organization for African Unity Convention for the Prevention and Combatting of Terrorism*.

16. (1) Whenever it appears to a judge of the high court on the ground of information submitted ~~to him or her~~ under oath by a Director of Public Prosecutions that there is reason to believe that any person possesses or is withholding from a ~~policeman~~ law enforcement officer any information regarding any offence under this Act³ -

- (a) ~~any terrorist act or terrorist activity;~~
- (b) ~~any arm or ammunition or any weaponry referred to in section 32 of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969)⁴;~~
- (c) ~~any explosive, or explosive device; or~~
- (d) ~~any device as defined in section 1,~~

~~he or she~~ the judge may, at the request of a such Director of ~~Public Prosecutions~~, issue a warrant for the ~~arrest and keeping in custody~~ detention of such a person and subject to such conditions as the judge may determine, which conditions may be amplified or amended by such judge or any other judge from time to time.

(2) Notwithstanding anything to the contrary in any law contained, any person ~~arrested~~ detained by virtue of a warrant, under subsection (1), must as soon as possible be-

- (a) taken to the place mentioned in the warrant,
- (b) furnished with the reasons for such detention ~~kept in custody~~, and
- (c) detained there,

for interrogation until-

- (ii) ~~the~~ a judge orders his or her release if ~~he or she is~~ satisfied-
 - (aa) that the ~~person so~~ detainee, has satisfactorily replied to all questions ~~at the said~~ under interrogation; or
 - (bb) that no ~~useful~~ lawful purpose will be served by ~~keeping him or her under arrest~~ further detention; or
- (ii) the detention period referred to in subsection (4) has expired.

(3)(a) Any person ~~arrested~~ detained in terms of a warrant issued under subsection (1), must be brought before a judge within 48 hours of such ~~arrest~~ detention and ~~thereafter not less than once every 7~~ again after a further 5 days.

(b) The judge referred to in paragraph (a) must at ~~every such~~ each appearance of ~~such~~ the detainee ~~before him or her~~ enquire as to-

- (i) the conditions of the detainee's detention and welfare,
- (ii) whether such detainee has satisfactorily replied to all questions ~~put to him or her at his or her~~ under interrogation, and

³ The project committee considered that the scope of the Bill seems to be too limited and considered that this clause should apply to all offences under the proposed Bill.

⁴ Take into account the definitions in the *Firearms Control Bill*, 1999, once finalized.

- (iii) ~~whether it further detention will serve any useful lawful purpose to detain him or her further:~~

provided that the onus in showing reasons for the further detention ~~of the detainee~~ shall be on the Director of Public Prosecutions, failing which the judge shall order the release of the detainee.

- (c) Any person detained under subsection (1), may at any time make representations ~~in writing to the~~ a judge relating to his or her detention or release or conditions of detention.
- (d) The Director of Public Prosecutions in whose area of jurisdiction any person is being detained under subsection(1) may at any time stop the interrogation of such person, and thereupon such person must be released from ~~custody~~ detention immediately.

- (4) ~~No person may in terms of this section be detained for a period in excess of 30¹ days.~~
Detention under a warrant issued in terms of this section shall be for a period no longer than 14 days.

- (5) Subject to the terms of subsection (6), no person, other than a judge of the high court, an officer in the service of the State acting in the performance of ~~his or her~~ official duties, or a person authorised by the National Director of Public Prosecutions, or a Director of Public Prosecutions may have access to a ~~person kept in custody~~ detainee under subsection(1), or is entitled to any official information relating to or obtained from such detainee.

¹ The project committee considered that 30 days is too long and that the period should be reduced. The project committee also said that the proposed 14 day period is a random figure but in principle it ought to be confined to as short a period as can be justified.

(6)(a) A detainee shall be entitled to consult with a legal practitioner of his or her choice and such legal practitioner shall be entitled to be present when the detainee is interrogated.¹

¹

See also section 37(6)(d) of the Constitution which provides in regard to detention in a state of emergency that a detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(b) A detainee shall be entitled to be visited in detention by his or her medical practitioner.¹

(c) A detainee shall have the right to communicate with and be visited by his or her-

- (ii) spouse or partner,
- (i) next of kin, and
- (ii) chosen religious counsellor,

unless the National Director of Public Prosecutions or a Director of Public Prosecutions shows on good cause to a judge why such communication or visit should be refused.

(7) ~~The need for the custody detention or continued custody detention of a person arrested and kept in custody in terms of this section must be motivated with~~ in relation to one or other of the following purposes:

- (a) To compare fingerprints, do forensic tests and verify answers provided by the detainee ~~person in custody~~;
- (b) to ~~interrogate or~~ explore new avenues of interrogation;
- (c) through interrogation to determine accomplices;
- (d) to correlate information provided by the person in custody with relevant information provided by other persons in custody;
- (e) to find and consult other witnesses identified through interrogation;
- (f) to hold an identification parade;
- (g) to obtain an interpreter and to continue interrogation by means of an interpreter;
- (h) to communicate with any other police services and agencies, ~~especially in other time zones~~;
- (i) to evaluate documents which have to be translated; or
- (j) any other purpose relating to the investigation of the case approved by the judge.

(8) ~~A person held in custody in terms of this section must be brought before the relevant court of law on the first court day following the expiry of his or her custody as ordered by the judge, and remains in custody until such appearance in court. Upon expiry of the period referred to in subsection (4) a detainee shall be released immediately.~~

~~(8) If a judge denies the further custody of a person in terms of this section, the person remains in custody until the first following court day and such a person must appear in court on that day.~~

¹

See also section 37(6)(c) of the Constitution which provides in regard to detention in a state of emergency that a detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(9) No bail may be granted to a detainee, nor is a person such detainee be entitled to appear in court to apply for bail, if a judge has ordered his or her custody in terms of this section.

Identification of special offences under this Act by Director of Public Prosecutions

17.(1) If a Director of Public Prosecutions is of the opinion that an offence with which any person is charged, is an offence contemplated in sections 2, 5, 6, 7, 8, 9, 13 and 14, that Director of Public Prosecutions may, irrespective of what the actual charge against such person is, at any time before such a person pleads to the charge, issue a certificate to the effect that such an offence **being an offence in terms of this Act, is regarded a special offence.**

(2) The certificate must be handed in at the court by the public prosecutor and forms part of the record of that court.

(3) The provisions of the Criminal Procedure Act, 1977, apply at the trial of a special offence, except in so far as is otherwise provided in this Act.

Powers of court in respect of special offences¹ under this Act

18. (1) ~~Notwithstanding anything to the contrary in any law contained, a~~ A court that tries a special an offence under this Act may, in order to ensure that the trial be concluded as soon as possible, sit on any day of the week.

(2) If the State is not ready to commence with the presentation of its case within 60 days of the issue of the certificate preferring a charge under this Act, and if the court is satisfied that the State has failed to take all reasonable steps to commence with the presentation of its case, the court must -

- (a) strike the case from the roll and release the accused; or
- (b) if the accused has already pleaded to the charge, release the accused on bail or on warning.

(3) If the State is ready to commence with the presentation of its case within the 60 days of the date of the issue of the certificate period referred to in subsection (2), but the accused is not ready to commence, the court must order that the trial be proceeded with at the earliest opportunity, but on a date not later than 90 days after the issue of the said certificate preferring the charge.

Plea at trial of special offences under this Act

19. (1) If an accused stands trial on a special an offence under this Act, the charge sheet or indictment, as the case may be, must be accompanied by a summary of the substantial facts on which the State relies.

(2) Where the accused at a trial of a special an offence under this Act in any court pleads guilty to a special an offence under this Act, or to an offence for which he or she may be convicted on the charge, and the public prosecutor accepts the plea, the presiding

¹ See the Criminal Law Second Amendment Act 26 of 1992 Chapter 5 which created special offences which came into operation on 31 July 1992 for a period of one year and which was extended by Proclamation R 603 of 30 July 1993 for a further year.

~~judge, regional magistrate or magistrate must enquire from the accused whether he or she accepts the summary of substantial facts and question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty and, if satisfied that the accused is guilty, convict the accused on his or her plea of that offence and impose any competent sentence.~~

~~(3) — If the court at any stage of the proceedings under subsection (2) and before sentence is passed, is in doubt whether the accused is in law guilty of an offence to which he or she has pleaded guilty, or is satisfied that a plea of guilty should not have been tendered by the accused, the court must record a plea of not guilty, after which the procedure contemplated in subsection (4) applies: Provided that any allegation legally admitted by the accused up to the stage at which the court records a plea of not guilty, stands in any court of such allegations.~~

~~(4) — (a) Where any accused at a trial of a special offence in any court pleads not guilty, the presiding judge, regional court magistrate or magistrate must request the accused to indicate—~~

~~(i) — what the basis of his or her defence to the charge is; and~~

~~(ii) — to what extent he or she disputes or does not dispute the facts as set out in the summary of substantial facts referred to in subsection (1).~~

~~(b) — If the accused fails to indicate as contemplated in paragraph (a) —~~

~~(i) — the court may at will in respect of his or her credibility or conduct, draw an unfavourable inference regarding such failure if it is of the opinion that such an inference is justified in the light of all the evidence that was adduced at the trial;² and~~

~~(ii) — the court must inform the accused that it may draw such inference.~~

~~(5) — If an accused indicates in terms of subsection (4) that he or she does not dispute the allegations or some thereof as contained in the summary of substantial facts, the presiding judge, regional court magistrate, or magistrate must enquire from him or her whether he or she consents that the allegations that he or she does not dispute may be recorded as formal admissions, and if the accused so consents, such admissions are deemed to be admissions that have been made in terms of section 220 of the Criminal Procedure Act.~~

Bail in respect of special-offences under this Act

20. Notwithstanding any provision to the contrary, where an accused stands trial on a charge in respect of which a Director of Public Prosecutions has issued a certificate under this Act, the provisions relating to bail in the Criminal Procedure Act apply as if the accused is charged with an offence referred to in Schedule 6 of that Act.

² The project committee considered that clause 19(4)(b) might well also have implications to the constitutional right to silence etc.

Duty to report information on terrorist acts and terrorist activities

21(1) Any person who ~~has~~ knowingly possesses any information which may be essential in order to investigate any terrorist act which is being committed, has been committed, or is being planned, ~~or of any terrorist activity~~, and who ~~fails to convey~~ intentionally withholds such information ~~as soon as reasonably possible to~~ from a ~~police~~ law enforcement officer, public prosecutor or a Director of Public Prosecutions, commits an offence, and is liable on conviction to imprisonment for a period not exceeding five years without the option of a fine.¹

(2) If any person provides information referred to in subsection (1) to the authorities, ~~that~~ such person is not liable for prosecution in respect of any offence by reason of which he or she ~~may have committed through which he or she came to have such knowledge~~ information, if he or she is willing to testify in court ~~on~~ in accordance with such information, or if, in the view of a Director of Public Prosecutions, the information is essential to prevent any ~~crime in~~ offence under this Act, or to institute proceedings in respect of any offence ~~in~~ under this Act, and that it is ~~in general~~ in his or her view in the interests of justice that such a person be indemnified against prosecution.

(3) A certificate issued by a Director of Public Prosecutions in which the prerequisites referred to in subsection (2) ~~is~~ are certified is conclusive to guarantee that such a person may not be prosecuted in respect of the relevant offences.

¹ The English Terrorism Bill also provides for a duty to disclose information about terrorism or terrorist property. See Chapter 6 above.

Powers to stop and search vehicles and persons¹

22(1) Where it appears to a police officer of the South African Police Service of or above the rank of Director that ~~it is expedient~~ there are reasonable grounds to do so in order to prevent ~~acts of terrorism~~ a terrorist act, ~~he or she~~ such officer may authorise that the powers are conferred by this section ~~to stop and search any vehicles and persons~~ be exercisable at any place within his or her area ~~or a locality in his or her area~~ of authority which is specified in the authorization.

(2) ~~This section confers on~~ Under such authorisation any police official in uniform ~~power to~~ may stop and search any vehicle or person ~~and search the vehicle, him or her or anything carried by him or her,~~ for articles of a kind which could be used for ~~a purpose connected~~ or in connection with the commission, preparation or instigation of any terrorist act ~~or activity~~.

(3) A police official may exercise his or her powers under this section whether or not he or she has any grounds for suspecting the presence of such articles ~~of that kind~~.

(4) Nothing in this section authorizes a police official to require a person to ~~remove any of his or her clothing~~ undress in public other than to remove any headgear, footwear, outer coat, jacket or gloves.

(5) Any person who -

¹ Section 13A of the PTA, give senior police officers in England powers to authorise that powers to stop and search vehicles and their occupants, and pedestrians, be exercisable, in order to prevent acts of terrorism. Authorisations extend to a specified area and may be made for up to 28 days, although that period may be renewed. Clauses 42-45 of the English *Terrorism Bill* are based on these provisions, with the additional requirement that authorisations be confirmed by a Secretary of State within 48 hours of their being made. If the authorisation is not confirmed by the Secretary of State it will cease to have effect.

(a) fails to stop when required to do so by a police official in the exercise of ~~his or her~~ the powers under this section; or

(b) wilfully obstructs a police official in the exercise of those powers,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding six months.

(6) An authorization under this section may be given in writing or orally, but if given orally must be confirmed in writing by the person giving it as soon as is reasonably practicable.

(7) A police officer giving an authorization under this section must cause the Minister for Safety and Security to be informed, as soon as is reasonably practicable, that such an authorization was given.

(8) An authorization under this section -

(a) may be cancelled by the Minister for Safety and Security with effect from such time as he or she may direct;

(b) ceases to have effect if it is not confirmed by the Minister for Safety and Security ~~before the end of the period of~~ within 48 hours ~~beginning with the time when~~ after it was given; and

(c) if confirmed, continues in force -

(i) for such period, not exceeding 28 days¹ ~~beginning with the day on which~~ after it was given, as may be specified in the authorization; or

(ii) for such shorter period as the Minister for Safety and Security may direct.

(9) ~~If a~~ A person is stopped and searched by a police official under this section, ~~he or she~~ is entitled to obtain a written statement ~~that he or she was stopped to that effect under the powers conferred by this section if he or she applies for such a statement is applied for not later than the end of the period of~~ within 12 months ~~from the day on which he or she was~~ of being stopped.²

¹ The project committee raised the question why should the period be 28 days. The drafters do not feel strongly about the period and suggest it could be 7 or 14 days. What they have in mind is cases such as in Richmond where daily shootings occur and where such authority might be needed for a period longer than 48 hours whilst one would not want to resort to ordering an emergency.

² The committee noted that if the clause extends to the benefit of the citizen then the committee should retain it in the Bill. The committee was of the view that it may be in the interests of the

Authority of the Director of Public Prosecutions

23. No trial ~~in respect of an offence referred to in~~ under this Act may be commenced without the written authority of a Director of Public Prosecutions.

Amendment and repeal of laws

24. The laws in the Schedule are hereby amended or repealed to the extent indicated.

Interpretation

citizen but at the same time it will cause unnecessary administrative paperwork on an already hard-pressed police force.

25. ~~In respect of requests for mutual legal assistance and extradition from any State or Government relating to any terrorist act or terrorist activity committed in the territory of the requesting State or the territory of any other foreign State or Government, t~~ The definition of “terrorist act” and “terrorist activity” shall be interpreted against in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles.¹

Short title and commencement

26. This Act is called the Anti-Terrorism Act, 2000, and comes into operation on a date determined by the President in the **Gazette**.

SCHEDULE

SCHEDULE OF LEGISLATION REPEALED

Act No	Year	Title	Extent of amendment or repeal
--------	------	-------	-------------------------------

¹ The drafters have a situation in mind where for example a member of the PLO hijacks and causes an explosion on South African soil of an Israeli registered aircraft. The offender who is a member of a liberation movement falling within the ambit of the OAU Convention will in all probability not be extradited to Israel for prosecution but since he committed an offence within South Africa’s jurisdiction, he will in all probability be prosecuted under South African law.

10	1972	Civil Aviation Offences Act	Section 2 of the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972), is hereby amended by inserting in subsection (1) the following paragraph after paragraph (g): “(h) <u>unlawfully and intentionally uses any device, substance or weapon and performs an act of violence against a person at a designated airport, airport, heliport or navigational facility.</u> ” ¹
74	1982	Internal Security Act	The whole Act is repealed
72	1982	Intimidation Act	Section 1A is repealed
126	1992	Criminal Law Second Amendment Act	Chapter 5 is repealed

¹ The offence in section 2 of the *Civil Aviation Offences Act*, 1972 (Act No. 10 of 1972), should be amplified to bring it in line with the provisions of the *Protocol for the Suppression of Violence at Airports serving International Civil Aviation*.

ANNEXURE C**LIST OF RESPONDENTS WHO COMMENTED TO DISCUSSION PAPER 92****JUDICIARY**

1. Mr Justice VEM Tshabalala, Judge President of the Natal Provincial Division of the High Court

MAGISTRACY

2. The Magistrate's office Pretoria North

BAR SOCIETIES

2. The General Council of the Bar of South Africa

SIDE BAR SOCIETIES

2. Law Society of the Cape of Good Hope
3. Transvaal Law Society (currently the Law Society of the Northern Provinces)

NATIONAL PROSECUTING AUTHORITY

2. Mr CDHO Nel: Deputy Director of Public Prosecutions: Port Elizabeth
3. Mr JHS Hiemstra: Deputy Director of Public Prosecutions: Free State
4. Messrs Fick and Luyt: Office of the Director of Public Prosecutions: Transvaal

ATTORNEYS

2. Mr Saber Ahmed Jazbhay

ADVOCATES

2. Mr JEH Wild of the Durban Bar

HUMAN RIGHTS ORGANISATIONS

2. Amnesty International
3. The South African Human Rights Commission
4. The Human Rights Committee of South Africa
5. The Institute for Democracy in South Africa (IDASA)
6. Legal Resources Centre (LRC) Cape Town
7. Ms Mary de Haas of the Natal Monitor
8. Muslims Against Global Oppression (MAGO)

GOVERNMENT DEPARTMENTS

2. The Ministry of Community Safety of the Western Cape
3. Ms JA Schneeberger of the office of the Chief State Law Adviser (International law) of the Department of Foreign Affairs
4. The SAPS: Legal Component: Detective Service and Crime Intelligence
5. The Defence Secretariat: Directorate Legal Support Services
6. The Chief: Military Legal Services.
7. The Special Forces Brigade

8. The South African Civil Aviation Authority

RELIGIOUS ORGANISATIONS

2. The United Ulama Council of South Africa (UUCSA)
3. Sunni Ulama Council of the Cape
4. The Pretoria Muslim Congregation

OTHER ORGANISATIONS

2. Media Review Network
3. Orient Old Boys Club
4. Athlone/Crawford Ratepayers & Residents Association

INDIVIDUALS¹

2. Professor Abdulkader I Tayob
3. Dr Imtiaz Sooliman on behalf of the Gift of the Givers Foundation
4. Ms Mushahida Adhikari
5. Mr Thamsana Mnqadi
6. Mr Zehir Omar
7. Mr F Jeewa
8. Mr Iqbal Sheik
9. Mr Hashim Bobat
10. Mrs B Motala
11. Ms Z Motala
12. Ms S Motala
13. Mr Mahommed
14. Mr Rashid Mohammed
15. Mr Khalick Limalia
16. Mr Ismail Soosiwala
17. Mr Asad Soosiwala
18. Mr Arsad Soosiwala
19. Mrs Sabira Soosiwala
20. Mrs Rehana Dinat
21. Mrs Razia Essack
22. Mr A Dinat
23. Mr R Essack
24. Ms N Essack
25. Ms Z Amod
26. Mr M Amod
27. Mr H Amod
28. Ms A Dinat
29. Mr W Essack
30. Mr Tshepo Matsimela
31. Mr A Dangor
32. Mr Nishaat A Siddiqi
33. Mr RS Gass

¹ The Commission also received petitions signed by hundreds of individuals who did not comment individually. Most of these petitions were attached to extracts of a statement issued by the United Ulama Council of SA and the Media Review Network.