SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 92

PROJECT 105

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

PART 1

JULY 2000

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29 September 2000

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 -

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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:

< Madam Justice YK Mokgoro, of the Constitutional Court and Vice-Chairperson of the Commission;
< Mrs P Jana, a member of Parliament;

- 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 King Williams Town.

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

PREFACE

This Discussion Paper (which reflects information gathered up to the end of April 2000) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The Discussion Paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of he law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by **29 September 2000** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr PA van Wyk. The project leader responsible for the project is the Honourable Mr Justice CT Howie.

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SUMMARY

1. It is explained in Chapter 1 of this discussion paper that the Minister of Safety and Security requested the Commission to conduct an investigation into security legislation. The Commission is indebted to the Police Service who conducted the initial research and drafted a Bill on which this discussion paper and the proposed Bill are based. The reader will therefore find references in this document to "the original Bill" or "the original proposal" meaning the Bill as submitted by the Police Service to the Commission and its project committee. (The words struck out in the Bill (contained in Annexure "A") are those amendments which the project committee and working committee of the Commission considered should be made. The Bill is published in this format to facilitate comment and to reflect the original and the amended wording.) The original Bill was distributed by the SA Police Service 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 on special offences).

2. The current South African statutory and common law provisions criminalising conduct constituting terrorism and related activities are analysed and compared with legislation enacted in foreign jurisdictions to deal with the phenomenon of terrorism. A comparative analysis is made of the South African legislative and common law provisions and the International Conventions relating to terrorism. This discussion paper 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 legislative measures is recommended.

3. Particular attention is given to the laws of Canada and Northern Ireland, because the constitutional legislative framework in South African law is based primarily on the Canadian constitutional human rights provisions. This document also seeks to comply with South Africa's ongoing commitment to harmonise its legislation with international law.

4. 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. The international threat of terrorism is, however, often directed at foreign officials, guests, embassies and the interests of foreign states. The offence of terrorism as it exists in South African law is in this respect deemed inadequate.

5. 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 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.

6. It is imperative that South Africa sign, ratify or accede to the respective instruments relating to terrorism as soon as possible. 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. The other is to draft an omnibus Act addressing the issue of terrorism on a broader basis.

7. The second option is preferred. A draft Anti-Terrorism Bill to that effect, is attached to this paper, for general information and comment (see Annexure A).

8. The draft Anti-Terrorism Bill as drafted originally by the SA Police Service deals with the following matters:

- offences relating to terrorist acts (see clause 2);
- the providing of material support, harbouring and concealing of terrorist acts (see clause 3);
- membership of terrorist organisations (see clause 4);
- sabotage (see clause 5);
- hijacking of aircraft (see clause 6);
- endangering the Safety of Maritime Navigation (see clause 7);
- terrorist bombings (see clause 8);
- taking of hostages (see clause 9);
- sentences in case of murder or kidnapping of internationally protected person (see clause 10);
- protection of internationally protected persons (see clause 11);
- protection of property occupied by internationally protected persons (see clause 12);
- offences relating to fixed platforms (see clause 13);
- nuclear terrorism (see clause 14);

- jurisdiction of the Courts of the Republic in respect of offences under the Bill (see clause 15);
- custody of persons suspected of committing terrorist acts (see clause 16);
- identification of special offences by Directors of Public Prosecutions (see clause 17);
- powers of court in respect of offences under the Act (see clause 18);
- pleas at trial of offences under the Act (see clause 19);
- bail in respect of offences under the Act (see clause 20);
- duty to report information on terrorist acts (see clause 21);
- powers to stop and search vehicles and persons (see clause 22);
- authority of Directors of Public Prosecutions (see clause 23);
- amendment and repeal of laws (see clause 24); and
- interpreting the Bill (see clause 25).

9. The project and working committees have not been told why measures of the sort set out under clause 16 for the detention of persons for interrogation are required and why conventional policing methods are inadequate. It seemed to the committees that since countries such as the United States, Canada or Australia do not have such measures, conventional policing methods seem to be regarded adequate in these countries - even in the USA which also faces serious terrorist incidents from time to time. The committees appreciated that arguments are raised about a lack of resources in the Republic but they remain unconvinced. The committees were therefore of the view that before these detention measures can be considered by the Commission and subsequently in all probability by Parliament, compelling evidence of justification need to be presented.

10. The discussion paper deals mainly with the following issues, namely-

10.1 terrorist acts should under no circumstances be justifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them. The question arose 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 Convention of the Organisation for African Unity on the Prevention and Combating of Terrorism. 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. However,

under clause 25 of the Bill 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 committees felt that this was enough to exclude all acts that have the blessing of international law. (See par 10.12 - 10.15 and 10.20);

10.2 a definition is contained in the Bill stating that "financing" means the transfer or reception of funds. The meaning of the word "financing" is apparent and that there is no need for the definition. (See par 10.17);

10.3 clause 16 provides 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 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 makes provision only for police officers approaching Directors of Public Prosecution and the question was whether the clause is too limited in referring to police officers only. It was considered that provision should be made for customs and immigration officials as well and 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. (See par 10.18 and 10.59);

10.4 "terrorist act", should mean any act which does or may endanger the life, physical integrity or freedom of any person or persons, or causes or may cause damage to property and is calculated or intended to -

(i) intimidate, coerce or induce any government or persons, the general public or any section thereof; 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; (See par 10.18 - 10.21);

10.5 the proposed definition of "terrorist activities" is too wide. There is no reason why section 18 of the Riotous Assembly Act - which still remains in force, and deals, inter alia, with conspiracy, incitement and attempt - does not cover these issues. The definition of "terrorist activities" should therefore be deleted. (See par 10.23);

10.5 "terrorist organisation" should be defined as meaning an organisation which has carried out, is carrying out or plans carrying out terrorist acts. (See par 10.24);

10.6 since the required intent for the act concerned to constitute sabotage is the same as the intent required to constitute a terrorist act, sabotage should also fall under the definition of terrorist act, and clause 5 (setting out the offence of "sabotage") should be deleted.

(See par 10.26);

10.7 any person who, in the Republic or elsewhere, commits a terrorist act or any contravention of the Bill commits an offence and should be liable on conviction to imprisonment for life. (See par 10.27);

10.8 any person who provides material, logistical or organisational support or any resources or 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 in the commission of an offence under the provisions of the Bill or in the concealment or an escape from the commission of an offence under the provisions of the Bill or participates in the activities of a terrorist organisation, commits an offence and should be liable on conviction to imprisonment for a period not exceeding 10 years, without the option of a fine. (See par 10.29 - 10.31);

10.9 any person who knows that any other person intends to commit or has committed any offence under the Bill and who harbours or conceals that other person, commits an offence and should be liable on conviction to the penalty for the offence which that person has committed or intended to commit would be liable, as the case may be. (See par 10.30);

10.10 it is not necessary under clause 4 of the Bill to proscribe organisations. It still has to be proved that the organisation concerned is involved in terrorist acts, that the accused was a member of the organisation at the time when the organisation was involved in terrorist acts and that the accused knew this. The question arises whether there is any reason why there is no provision for proscribing or banning organisations. The drafters pointed out that in 1996 section 4 of the Internal Security Act 47 of 1982 which provided for the banning of organisations was repealed, and that 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. It seems as if the banning of organisations led in the past to a proliferation of new organisations being formed and a constant growing list of structures attempting to identify and deal with these organisations. 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. (See par 10.32 - 10.34);

10.11 although "any interference" with the navigation of an aircraft is already covered in the *Civil Aviation Offences Act* of 1972, a specific offence of hijacking of an aircraft should be created, in addition to the existing offences under the *Civil Aviation Offences Act.* It should be an offence if someone causes an aircraft to *deviate* from its flight-plan. It was originally suggested that it should an offence to cause an aircraft to deviate *materially*

from its course. (See par 10.37);

10.12 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. 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 set out under clause 7 constitutes an offence. (See par 10.38);

10.13 the question arose whether the Bill should be making provision separately for "terrorist bombings". It seems to be covered already by the definition of "terrorist acts". Comment is invited particularly on this issue. (See par 10.39);

10.14 should the Bill provide that it 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? It would seem that if the armed forces act in accordance with the applicable conventions, one of which is the Terrorist Bombing Convention, the savings clause (clause 25) is enough and that there would not be a need for an exemption clause. (Clause 25 provides 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.) (See par 10.40);

10.15 the Bill should provide that any person who perpetrates or threatens any attack upon the person or liberty of an internationally protected person commits an offence and should be liable on conviction to imprisonment for five years. (See par 10.41);

10.16 the Bill should make provision that any person who murders or attempts to murder or kidnaps or attempts to kidnap an internationally protected person, is liable, on conviction

(i) of murder or kidnapping, to imprisonment for life; or

(ii) of attempted murder or kidnapping, to imprisonment for a period not exceeding 20 years, without the option of a fine. (See par 10.42);

10.17 the Bill should make provision that it constitutes an offence to damage or destroy, enter or refuse to depart from property occupied by internationally protected persons. (See par 10.43);

10.18 consideration should be given to incorporating the offences regarding fixed platforms (installations fixed to the seabed) into "terrorism acts" as well. The drafters considered that very specific offences are involved under this heading, that they should be dealt with separately and not as part of "terrorist acts". (See paragraph 10.44);

10.19 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. It should also 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. (See par 10.45);

10.20 South African courts should 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 and 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 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. (See par 10.46 - 10.47);

10.21 compelling evidence needs to be presented to justify detention for interrogation of persons suspected of withholding information relating to terrorist acts. The committee has not received evidence why measures of the sort set out under clause 16 are required and why conventional policing methods are inadequate. It could perhaps be said that the envisaged provisions would be justified provided the necessary safeguards are contained in the Bill. 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. It is an unanswered question at this stage 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. (See par 10.48 - 10.58);

10.22 on the question of the involvement of judges in considering applications for warrants for the detention of suspects for interrogation, for further detention and for determining conditions of detention, independent assessment by a judge seems to be necessary. There are misgivings whether the judiciary should be involved in considering these applications. It was suggested that consideration be given rather to the task being fulfilled by another functionary. There must, however, be independent control. It is a question of who is best suited to provide that independent control. It does not have to be a judge but obviously judges by reason of their training and status offer a significant safeguard. Comment is invited in particular on this issue. (See par 10.60 - 10.64);

10.23 consideration should be given to why provision should be made in clause 16(1) for a Director of Public Prosecutions having to request a judge to authorise a warrant for the detention of a person withholding information on terrorism from the law enforcement officer. Why should a law enforcement officer not be able to apply to a judge for such a warrant? Is it not too limiting if only a DPP 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 will have to satisfy a DPP that there are sufficient grounds to apply for a warrant. (See par 10.65);

10.24 the Bill should empower a judge to impose, amend or amplify conditions of detention at any stage of the detainee's detention. (See par 10.68 - 10.72);

10.25 the question arises whether under clause 16(1) a judge would be facing oral or written evidence. The clause says 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 considered whether the Bill should require written evidence and wondered whether that would not unnecessarily limit Directors of Prosecutions. Comment is invited particularly on the question whether oral evidence or evidence on affidavit should

be envisaged by this clause. (See par 10.73);

10.26 there appears to be no provision contrary to the Constitution for the furnishing of reasons to the detainee. The detainee should be entitled to be informed of the founding reasons why it is believed that the he or she has or possesses information which he or she is allegedly withholding from a law enforcement officer. (See par 10.74 - 10.77);

10.27 a judge who determines whether the detainee has satisfactorily replied to questions and whether the detainee should be released or further detained, should preferably not be the same judge as the one who considers an application for a warrant for the detention for interrogation of the person suspected of withholding information on terrorist acts. (See par 10.78 and 10.80);

10.28 any person detained in terms of a warrant issued for the purpose of detention for interrogation must be brought before a judge within 48 hours of such detention and again after five days. (See par 10.79);

10.29 a judge before whom the detainee appears should not simply only enquire whether the detainee has satisfactorily answered the questions put by the police to him or her but provision should be made that the judge must enquire about the welfare of the detainee and about the conditions of detention at each appearance before him or her. (See par 10.81);

10.30 the onus in satisfying a judge to order 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. (See par 10.82 - 10.83);

10.31 any person detained may at any time make representations to a judge relating to his or her detention or release or conditions of detention. (See par 10.84 - 10.85);

10.32 detention under a warrant issued under clause 16 shall be for a period no longer than 14 days. The original clause provided for detention for a period of up to 30 days. The suggestion that it should be 14 days is a thumb-suck. The suggested 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. (See par 10.86 - 10.90);

10.33 a detainee should 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. 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. There could therefore 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 her. (See paragraph 10.91 - 10.97);

10.34 provision should be made in clause 16(5) that a detainee is entitled to be visited and treated by a medical practitioner of his or her choice. 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 absence of independent medical treatment led to the most terrible abuse in the past. The 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. (See paragraph 10.98 - 10.100);

10.35 it ought to be provided in the Bill that any detainee has a right to communicate with and be visited by the 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. 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 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. (See par 10.101 - 10.102);

10.36 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. The legal representative of the detainee should be entitled to consult with and remain present throughout interrogation. Originally the proposed Bill did not address the admissibility of the detainee's evidence given during interrogation. The criticism raised against evidence obtained from detainees in the past was taken into account. These concerns were aimed at security legislation which contained hardly any safeguards. (See par 10.103 - 10.109);

10.37 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 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. Could it 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 reason for detention should be based on reasonable grounds for believing that the person concerned is withholding information. (See par 10.110 - 10.112);

10.38 once the 14 day detention period has expired or when the judge orders his or her release, the detainee must be released immediately. It was suggested originally that where the detention of a detainee expires, he or she 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. What would the purpose of the appearance in court be unless the detainee is going to be charged? 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. (See par 10.113);

10.39 no bail may be granted to a detainee, nor is such detainee entitled to appear in court to apply for bail. (See par 10.115);

10.40 in terms of the original Bill, irrespective of the charge with which someone is charged, if a Director of Public Prosecutions (DPP) considers that an offence constitutes terrorism then he or she issues a certificate certifying that the offence is a special offence and then the offence is regarded a special one. The committee questioned the fact that the DPP might deem an offence as something that it is not. The committee also noted that the deeming of offences as "special offences" affects also the entitlement to bail. The committee also noted that once an offence is categorised as a special offence it becomes permissible under clause 19(4)(b) to draw an adverse inference if the accused fails to indicate the basis of his or her defence. The project committee recommended that clause 17 should be deleted. (See par 10.116 - 10.117);

10.41 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. 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. If the State

is ready to commence with the presentation of its case within the 60 day period referred to 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.(See par 10.118);

10.42 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. (See par 10.119);

10.43 put as boldly as clause 19(4)(b) is drafted, it might be an infringement of the right to silence in providing 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 on which the State relies. (See paragraph 10.120);

10.44 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. (See par 10.123)

10.45 the Bill imposes a duty on people possessing information which may be essential for investigating any terrorist act to report such information. The Bill also empowers Directors of Public Prosecution to indemnify such persons from being prosecuted in respect of the offences concerned. The committee noted the utility of the clause and appreciated that the possibility of obtaining indemnity will serve as an incentive to report information on terrorist acts. The committee noted that it raises questions of policy whether somebody like a Director of Public Prosecutions should have the power to grant an indemnity where ordinarily this would be the function of the courts. (See par 10.1124 - 10.125);

10.46 clause 22 should empower the police to stop and search vehicles and persons. The original draft dealt only with the power to stop and search pedestrians. The clause seemed to be unnecessarily restrictive. (See paragraph 10.126);

10.47 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. (See par 10.128);

10.48 a proposal was received that since the Bill 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. 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. (See par 10.128);

10.49 the Bill provides that a person stopped and searched under this section, is entitled to obtain a written statement to that effect if such a statement is applied for within 12 months of being stopped. The committee noted that if the clause extends to the benefit of the citizen then it should be retained in the Bill. 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. (See par 10.128 - 10.129)

10.50 concern was raised in relation to the 28 day period which the authority empowering the police to stop and search vehicles and persons continues in force. An 48 hour period seems, however, understandable. (See par 10.130);

10.51 one should not be fooled by the label “political offence”, if the act concerned is an act of terrorism. If it is in conformity with international instruments then extradition of the person who committed the act in question, is possible. 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. Account must also be taken of the Preamble which states that terrorist acts should under no circumstances be justifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them. (See par 10.132 - 10.141).

11. The State Law Advisers: International Law have noted in preliminary consultations that complex issues are raised by this investigation. 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, at present the Bill is drafted in order to address all relevant terrorism issues in one piece of legislation. They stated that in principle they support 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. This is something which must be determined by all the line function Departments. Comment is therefore in particular invited from all line function Departments on this aspect. (See par 10.5)

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] Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf of 1988.

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B. LEGISLATION

1. ***England***

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] Criminal Justice (Terrorism and Conspiracy) Act, 1998.

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2. ***Canada***

] Criminal Code of Canada.

3. ***France***

] Code Pänal.

] 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.

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] USA Anti-terrorist legislation, 1984.

] 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.

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6. SOUTH AFRICA : STATUTORY LAW

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CHAPTER 1

ORIGIN OF THE INVESTIGATION

1.1 The question why it is necessary to review security legislation, especially legislation relating to terrorism may be well asked. Apart from organized crime, the combatting of international terrorism is one of the issues pursued vigorously by the United Nations and Interpol. The United Nations, in recent documentation, 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."[1]

1.2 Interpol, at its recent Annual General Meeting held in Cairo, Egypt, adopted the Cairo declaration against terrorism. In the declaration awareness is expressed of the serious danger posed by acts of terrorism, not only with regard to security and stability but also to the "State of Law, to democracy and to human rights." Deep concern is expressed at the escalation of international terrorism, which makes essential to adopt the idea of appropriate countermeasures, co-ordinated between all countries. All terrorist acts, methods and practices are condemned in the declaration as criminal and unjustifiable, irrespective of where and by whom they are carried out. Support is expressed in the declaration for developing a common international strategy against terrorism, such as law enforcement methods, more effective action in combatting terrorism, its funding and support networks and its pernicious effects on international peace and security. Interpol stated that it attaches the greatest importance to the idea of implementing an international plan to strengthen police and judicial co-operation between member countries, *inter alia* by eliminating the obstacles which hinder the extradition of fugitive terrorists, the sharing of information essential to criminal investigations and to terrorism prevention measures, the detection of all types of traffic in weapons, explosives and other items directly or indirectly connected with the activities of organized terrorist groups, and the adoption of specific criminal charges relating to the use of new technologies for terrorist purposes." The psychological effect of a single, well-planned terrorist attack may trigger a civil war in a country, it may trigger a regional conflict, or it may evoke retaliatory actions which destabilises peace in

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

a region or the world for that matter.

1.3 There is in total 11 international conventions or instruments on terrorism, a number of which still have 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. No country can expect to be immune in this regard. The recent bombings of United States embassies in Dar Es Salaam, Tanzania, and Nairobi, Kenya, bear testimony of this fact. 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.

1.4 In respect of our domestic situation, 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 recent Planet Hollywood explosion in Cape Town are likened to acts of terrorism in many countries. One is amazed at the number of incidents which occurred since May 1994, in which explosive devices were discharged, causing damage or injury.

1.5 From 1 January 1994 until 24 September 1998, 338 criminal detonations of explosives occurred where 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 (42), commercial explosives (61), pipe bombs (117), hand grenades (59), rifle grenades (2), car bombs (4) a landmine, and petrol bombs (16) apart from capped fuses, stun grenades, thunder flashes and ammonium nitrate.

1.6 The following incidents which may be highlighted, occurred:

- 13/04/1994 - At a taxi rank in Khayalitsha where 10 people were killed and 23 injured in a hand-grenade explosion;
- 24/04/1994 - Corner of Breë and Von Wielligh Street, Johannesburg where 9 people were killed and 100 injured in a car bomb explosion;
- 25/04/1994 - In Germiston where 11 people were killed and 39 injured in a car bomb explosion;

C 27/04/1994 - 16 persons injured when a car bomb exploded at the Johannesburg International Airport;

C 24/12/1996 - 3 People were killed in a pipe bomb explosion at a shopping centre in Worcester;

C 8/04/1997 - 7 People injured in a land-mine explosion on a farm road near Messina;

C 2/07/1997 - 6 People injured at a taxi rank in Johannesburg in a hand-grenade explosion;

C 25/08/1998 - 2 People killed and 26 injured in a pipe-bomb explosion at the Planet Hollywood Restaurant at the Victoria and Alfred Waterfront, Cape Town;

C 03/01/1998 - One person injured in Orlando, Soweto in a house hand grenade;

C 04/01/1998 - Harmony Virginia "Amigo's" Restaurant Commercial explosives, no one injured;

C 04/01/1998 - Meloding, Virginia at a house, commercial explosives;

C 05/01/1998 - Mitchell's Plein, at a house, pipe bomb no injuries;

C 06/01/1998 - Sybrand Park, Mowbry, at a house, improvised explosive device, no injuries;

C 07/01/1998 - Rustenburg, at a house commercial explosives, no injuries;

C 10/01/1998 - Makekeni area, Loskop, at a house, hand grenade;

C 12/011998 - Aeideveld, Cape Town at a house, hand-grenade;

C 17/01/1998 - Ncambedland township, Umtata at a house, hand grenade;

C 18/01/1998- Hauston, Hermanus at a house, hand grenade, one person killed;

C 19/01/1998 - Khuma, Stilfontein at a house, commercial explosives;

C 20/01/1998 - Matroosfontein, Cape Town at a house, hand grenade;

C 20/01/1998 - Saulspoort, Rustenburg at a house, commercial explosives;

C 24/01/1998 - Lenasia at a house, hand grenade, one person injured;

C 25/01/1998 - Lentegeur, Mitchell's Plein, at a house, improvised explosive device;

C 25/01/1998 - Lansdowne, Cape Town at a house, pipe bomb;

C 25/01/1998 - Tafelsig, Mitchell's Plain at a house, pipe bomb;

C 25/01/1998 - Ventersdorp municipal waste dump, hand grenade;

C 30/01/1998 - Tafelsig, Mitchell's Plain at a house, 2 pipe bombs;

C 30/01/1998 - Ravensmead, Cape Town at flats, hand grenade, one person injured;

C 30/01/1998 - Newpark, Kimberley at a house round 30 mm, 2 persons injured;

C 01/02/1998 - Lentegeur, Mitchell's Plein at a house improvised explosives;

C 02/02/1998 - Driefontein farm, Vryburg in open veld, hand grenade, 2 persons injured;

C 05/02/1998 - Wilson, East London at market place, hand grenade;

C 06/02/1998 - Zwelitsha at a house, hand grenade;

C 06/02/1998 - Tseseng, Qwaqwa at a house, hand grenade stun, one person injured;

C 13/02/1998 - Lawley squatter camp, at a sink house, commercial explosives;

C 17/02/1998 - Heideveld, Mannenberg, at a house, improvised explosive device;

C 18/02/1998 - Krugersdorp central, Krugersdorp properties commercial explosives;

C 19/02/1998 - Rondebosh East, Athlone house hand grenade, one person injured;

C 20/02/1998 - Krugersdorp waste dumping place, hand grenade;

C 22/02/1998 - The Lague Delft, Cape Town at a house, hand grenade;

C 22/02/1998 - Kempton Park in parking area, at railway station commercial explosives;

C 23/02/1998 - Parkdene, Cape Town, at a house, pipe bomb and grenade, 2 persons injured;

C 02/03/1998 - Lawley squatter camp, at a sink house, commercial explosives 1 person killed and 2 persons injured;

C 02/03/1998 - Sunnyside, Pretoria at a message parlour, commercial explosives;

C 04/04/1998 - Mandela View, Bekkersdal at a sink house commercial explosives, 4 people injured ;

C 13/03/1998 - Belhar, Bellistle South at a house, hand grenade;

C 17/03/1998 - Bramley, Johannesburg parking area, hand grenade;

C 18/03/1998 - Wonderkop, Bethanie-Brits, at a house, commercial explosives;

C 18/03/1998 - Bishop Lavis, Cape Town, at a house, hand grenade;

C 20/03/1998 - Nylstroom at a house, ammonium nitrate;

C 25/03/1998 - Skilpadnest Northam, at a squatter camp sink house, commercial explosives;

C 25/03/1998 - Beaconville, Mitchell's Plein, at a house, pipe bomb;

C 30/03/1998 - Commercia, Midrand Madison at freight lines, commercial explosives;

C 07/04/1998 - Beaconville, Mitchell's Plein at a house pipe bomb, one person injured;

C 10/04/1998 - Rylands, Athlone, at a house, pipe bomb;

C 11/04/1998 - Lansdowne, Cape Town at a house and a vehicle pipe bomb;

C 11/04/1998 - Lentegeur, Mitchell's Plein at a house improvised explosive device, I person injured;

C 12/04/1998 - Scottsville, Kraaifontein at a house, improvised explosive device;

C 16/04/1998 - Tafelsig, Mitchell's Plein, at a house and a vehicle, pipe bomb, 2 persons injured;

C 16/04/1998 - Mabaleni, Peddie at a house, commercial explosives;

C 20/04/1998 - Grassy Park, Cape Town at a house, pipe bomb;

C 25/04/1998 - Lansdowne, Cape Town at a house, pipe bomb;

C 25/04/1998 - Hanoverpark, at a house, hand grenade;

C 26/04/1998 - Rissiville, Vereeniging at a post box, chemical explosive device;

C 26/04/1998 - Mannenberg, Cape Town at a house, pipe bomb;

C 27/04/1998 - Tafelsig, Mitchell's Plein, at a house and vehicle, 2 x pipe bombs;

C 27/04/1998 - Athlone, Cape Town at a house, pipe bomb;

C 27/04/1998 - Bonteheuwels, Cape Town, at a house, pipe bomb;

C 27/04/1998 - Soutrivier, Cape Town at a house and vehicle, improvised explosives device, 1 person killed;

C 09/05/1998 - Strandfontein, Cape Town at a house and two vehicles, hand grenade;

C 17/05/1998 - Bonteheuwels, Bishop Lavis at a house, 2 pipe bombs;

C 17/05/1998 - Crawford, Cape Town at a house, pipe bomb;

C 17/05/1998 - Seawind, Muizenberg at a house, pipe bomb;

C 17/05/1998 - East Bridge, Mitchell's Plein at a house, pipe bomb;

C 18/05/1998 - Gatesville, Athlone at a house and four vehicles, pipe bomb;

C 20/05/1998 - Kutlwanong, Odendaalsrus, commercial explosives, one person injured;

C 20/05/1998 - Rylands, Athlone vehicle and house, pipe bomb;

C 21/05/1998 - Lentegeur, Mitchell's Plein at a house, two pipe bombs, 3 persons injured;

C 21/05/1998 - Rawensmead at a house, pipe bomb, 1 person injured;

C 24/05/1998 - Bishop Lavis at a house, hand grenade, 1 person killed and one injured;

C 27/05/1998 - Rondebosch East, in a house and vehicle, pipe bomb;

C 27/05/1998 - Strandfontein at a house, pipe bomb;

C 28/05/1998 - Wetten, Lansdowne, in three vehicles, pipe bomb;

C 28/05/1998 - Woodstock, Cape Town, at a house and vehicle, pipe bomb;

C 29/05/1998 - Lentegeur, Mitchell's Plein at a cafe, pipe bomb

C 30/05/1998 - Manyonini, Umtata, children, hand grenade, 6 persons killed;

C 31/05/1998 - Bonteheuwels, Bishop Davis, at a house, hand grenade stun;

C 31/05/1998 - Rylands, Athlone, Khan's Autos 6 cars, pipe bomb

C 31/05/1998 - Eastridge, Mitchell's Plein, at a house, pipe bomb;

C 31/05/1998 - Raylands, Athlone house pipe bomb;

C 01/06/1998 - Grassy Park house pipe bomb;

C 03/06/1998 - Hanover Park, Phillip, at house, pipe bomb, one person injured;

C 03/06/1998 - Bridge Town, Athlone at a house, pipe bomb, I person injured;

C 05/06/1998 - Strandfontein, Mitchell's Plein, in a wendy house, pipe bomb;

C 06/06/1998 - Lentegeur, Mitchell's Plein, at a house, pipe bomb;

C 10/06/1998 - Joe Slovo township, Khutsong at a house, commercial explosives, I person injured;

C 17/06/1998 - Crawford, Cape Town at a house pipe bomb;

C 18/06/1998 - Nembulelo squatter camp, Grahamstad, open veld 40 mm m406 round, 3 persons injured;

C 18/06/1998 - Hanover park, Phillipi house pipe bomb;

C 18/06/1998 - Sonderwater section, Khutsong sink house, commercial explosives;

C 21/06/1998 - Grassy Park at Campwell hardware, pipe bomb, i person injured;

C 26/06/1999 - Mowbary, Cape Town, Mowbary SAPS, pipe bomb;

C 30/06/1998 - Meikeding, welkom sink house commercial explosives;

C 01/07/1998 - Welkom, open veld, chemical explosive device, 2 persons injured;

C 05/07/1998 - Lentegeur, Mitchell's Plein at Gerbra single flats and a vehicle, two pipe bombs;

C 05/07/1998 - Seapoint, Cape Town, at a house and five vehicles, pipe bomb;

C 10/07/1998 - Rondebosch East, Cape Town, at a house and vehicle, pipe bomb, I person injured;

C 13/07/1998 - Lansdowne, at a house and vehicle, pipe bomb;

C 15/07/1998 - Tafelsig, Mitchell's Plein at a house, pipe bomb, one person killed;

C 23/07/1998 - Tafelsig, Mitchell's Plein at a house, pipe bomb;

C 03/08/1998 - Oudtshoorn, high school at the gymnasium, rifle grenade no 103, 3 persons injured;

C 04/08/1998 - Grassy Park at a house and three vehicles, pipe bomb;

C 09/08/1998 - Paarl East, Paarl at a house and three vehicles pipe bomb;

C 15/08/1998 - Paarl East, Paarl at a house and vehicles, pipe bomb;

C 18/08/1998 - Thambo section, Bekkersdal mudhut, commercial explosives;

C 25/08/1998 - Victoria and Alfred Waterfront, Cape Town "Planet Hollywood Restaurant" pipe bomb, 2 persons killed and 26 injured;

C 29/08/1998 - Mmdantsane township, at a house and shack, hand grenade l person killed and 6 persons injured;

C 02/09/1998 - Ottery, Grassy Park at a house, pipe bomb;

C 03/09/1998 - Lotus River, Cape Town at a house, pipe bomb;

C 03/09/1998 - Witfontein, Randfontein at a house, stun-grenade, 2 injured;

C 05/09/1998 - Jan Hofmeyer, Johannesburg, at a street corner, commercial explosives;

C 24/09/1998 - Feedlots Crammond at a house, hand grenade stun, 1 person injured;

C 01/10/1998 - Garsfontein, Gauteng hand grenade, I person killed;

C 03/10/1998 - Beaufort Wes, Western Cape at Karoopark, Lochweg, unknown kind of explosive;

C 03/10/1998 - Manenberg, Western Cape, hand grenade, 3 persons killed;

C 16/10/1998 - Sharpeville, Vereeniging, Gauteng, hand grenade, 6 people injured;

C 19/10/1998 - Fauresmith, Free State at house, striker mechanism no 2151, 1 person injured;

C 20/10/1998 - Nieu Bethesda, Eastern Cape, at house methane gas explosion, 1

person injured;

C 26/10/1998 - Theunissen, under vehicle, commercial explosives;

C 30/10/1998 - Bellville, hand grenade, 5 persons injured;

C 03/11/1998 - Portlands, Mitchells Plein, Western Cape, hand grenade stun;

C 09/11/1998- Northam, Northern Province, at squatter camp, commercial explosives, I person killed;

C 09/11/1998 - Brits, North West at Majakoneng, commercial explosives;

C 14/11/1998 - Potgietersrus, Northern Waterberg High School , chlorine bomb;

C 14/11/1998 - Rustenburg, North West Province at Kanana Street, Rustenburg commercial explosives;

C 01/12/1998 - Bloemfontein, Freestate at Dave's Total Car Wash hand grenade stun, 1 person injured;

C 11/12/1998 - Lenasia, Gauteng, pipe bomb;

C 18/12/1998 - Wynberg, West Cape at Mortimar Street, church, pipe bomb;

C 20/12/1998 - Vlakfontein, De Deur, Gauteng metal gas;

C 24/12/1998- Thabony Freedom Square, commercial explosives, 2 people injured;

C 25/12/1998 - Bitye, Eastern Cape, at the Ngqungu admin area, hand grenade 2 people killed;

C 31/12/1998 - Brits, North West Province at the rugby field, chlorine bomb, 1 person injured;

C 03/05/1999 - Roodepoort, Gauteng at Lilak Street, unknown explosive;

C 05/05/1999 - Mitchells Plein, Western Cape, pipe bomb;

C 13/05/1999 - Kokomeng, North West at Manthestad, commercial explosives;

C 28/05/1999 - Randburg, Gauteng at golfclub commercial explosives;

C 07/06/1999 - Mayfair, Gauteng at Bellona Street, gun powder;

C 07/06/1999 - Brits, North West at SAPS, Phomolong, commercial explosives;

C 09/06/1999 - Muizenberg, Western Cape at Zandvleistrandmeer pipe bomb;

C 21/06/1999 - Woody Glen, Mpumalanga at house, grenade riffle m791;

C 28/06/1999 - Orkney, North West at radio room, commercial explosives;

C 02/07/1999 - Mqanduli, Eastern Cape in field, hand grenade m26, 3 people injured;

C 02/07/1999 - Fish River, Eastern Cape, at bridge hand grenade, 1 person killed and 3 people injured;

C 09/07/1999 - Atholone, Western Cape at a house, pipe bomb;

C 30/07/1999 - Stilfontein, Western Cape farm, commercial explosives, 1 person injured;

C 02/08/1999 - Mschweni, Natal in the Msahweni area, hand grenade m26, 1 person injured;

C 03/08/1999 - Rustenburg, North West at a house, commercial explosives;

C 03/08/1999 - Kathlonong, Freestate in field, commercial explosives, 1 person injured;

C 23/08/1999 - Rondebosch, Western Cape at a house, chlorine bomb;

C 29/08/1999 - Fochville, North West at a house, commercial explosives, 1 person injured;

C 31/08/1999 - Fochville, North West in field, commercial explosives, 1 person injured;

C 01/09/1999 - Kuruman, North Cape in street, chlorine bomb;

C 07/09/1999 - Randvaal, Gauteng at a house, commercial explosives, 2 people injured;

C 07/09/1999 - Kensington, Western Cape, hand grenade m26;

C 07/09/1999 - Cape Town, Western Cape at SAPS, pipe bomb;

C 07/09/1999 - Woodstock, Western Cape at SAPS, pipe bomb;

C 08/09/1999 - Germiston, Gauteng, at station, commercial explosives;

C 09/09/1999 - Dordrecht, Eastern Cape, at Tembisa township, commercial explosives;

C 13/09/1999 - Bronville, Freestate at house, commercial explosives;

C 13/09/1999 - Welkom, Freestate at house, commercial explosives, 1 person injured;

C 27/09/1999 - Vaalrand, Gauteng at house, hand grenade stun;

C 29/09/1999 - Germiston, Gauteng at road, hand grenade;

C 29/09/1999 - Palmietfontein, Eastern Cape at house, commercial explosives;

C 30/09/1999 - Port Elizabeth, Eastern Cape at house, hand grenade stun, I person injured;

C 02/10/1999 - Johannesburg, Gauteng at Von Wielligh Street, gas;

C 04/10/1999 - Cape Town, Western Cape, in Wandel Street, Vredehoek thunder flash;

C 05/10/1999 - Thembisa, Gauteng, Esangweni section commercial explosives;

C 06/10/1999 - Germiston, Gauteng at Scaw Metals, pipe bomb, 1 person injured;

C 06/10/1999 - Potchefstroom, North West at farm, hand grenade rifle, I person killed;

C 06/10/1999 - Tugeb ferry, Natal at a house, hand grenade rifle, 1 person injured;

C 07/10/1999 - Vereeniging, Gauteng at Prima Cars, grenades;

C 08/10/1999 - Phillipi, Western Cape at Lindsay Scrap Metal nosecone, I person injured;

C 08/10/1999 - Westonaria, Gauteng in squatter camp, hand grenade stun, I person injured;

C 08/10/1999 - Boshoff, Freestate in house, commercial explosives;

C 04/10/1999 - Melmoth, Western Cape at Gomintaba, Melmoth, hand grenade, 3 persons killed and 2 persons injured;

C 05/10/1999 - Rustenburg, North West at Kgala section, Phokeng commercial explosives;

C 08/10/1999 - Meloding, Freestate tyre, commercial explosives, 1 person injured;

C 10/10/1999 - Vereeniging, Gauteng at house, Indian king cracker;

- 11/10/1999 - Pietermaritzburg, Natal in supermarket, hand grenade;
- 12/10/1999 - Vereeniging, Gauteng at house, explosive;
- 12/10/1999 - Vereeniging, Gauteng at house, explosive;
- 29/10/1999 - Kutlwanong, Freestate in house, anti personnel mine ;
- 04/11/1999 - Lenasia, Gauteng in hospital, hand grenade, 1 person injured;
- 05/11/1999 - Rustenburg, North West in house, capped fuse;
- 22/11/1999 - Secunda, Mpumalanga squatters camp, commercial explosives, capped fuse, 1 person injured;
- 29/11/1999 - Campsbay, Western Cape in restaurant explosive, 43 persons injured;
- 06/12/1999 - Khutsong, Gauteng in house, igniter cord, capped fuse;
- 07/12/1999 - Rustenburg, North West in house, igniter cord, capped fuse;
- 16/12/1999 - Northam, Northen Province, in mine, igniter cord;
- 28/12/1999 - Rustenburg, North West in meriting section, connector cap fuse, 1 person injured;
- 29/12/1999 - Virginia, Freestate , igniter cord;
- 24/12/1999 - Greenpoint, Western Cape in restaurant, explosive;
- 24/12/1999 - Mitchells Plein, Western Cape in house, hand grenade stun.

1.7 One might agree that many of these explosions occurred shortly before and after the elections. However, 211 of the explosions referred to above, occurred since April 1997 until 30 September 1998 and many more thereafter. Since April 1997 111 of these explosions occurred in the Western Cape Province. Only explosions are dealt above. 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.

1.8 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, 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.

1.9 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 Vice-Chairperson of the Commission.
- Mrs P Jana, a member of Parliament.
- Mr G Marcus (SC), a senior advocate at the Johannesburg Bar.
- Mr D Nkadimeng, an attorney from Pietersburg.
- Mr D Tabata, an attorney from King Williams Town.

1.10 In the investigation into security legislation the Commission will consider matters such as the following and discussion papers and reports will be published as its investigation progresses:[2]

- 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.

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[2] The project committee recently 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

1.11 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).

1.12 The only provisions of the Internal Security Act, 1982, which remained in force, are sections 54(1) and (2). The Regulation of Gatherings Act, 1993, which repealed the Demonstrations in or near Court Buildings Prohibition Act, 1982, has been put into operation.

1.13 The current South African statutory and common law provisions criminalising conduct constituting terrorism and related activities are analysed and compared in this paper 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 discussion paper 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 is recommended. Particular attention is given to the laws of Canada and Northern Ireland, because the constitutional legislative framework in South African law is based primarily on the Canadian constitutional human rights provisions. This document also seeks to comply with South Africa's ongoing commitment to harmonise its legislation with international law. 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. The international threat of terrorism is, however, often directed at foreign officials, guests, embassies

and the interests of foreign states. The offence of terrorism as it exists in South African law is in this respect deemed inadequate. 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.

1.14 The project committee 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 committee therefore considers that the most compelling justification need to be advanced for the measures set out in regard to detention for the purposes of interrogation which are considered in this discussion paper. The committee wants to remind readers of the wording of sections 35(2) and 36 of the Constitution because we are squarely in the realms of justification when considering detention for the purposes of interrogation:

> 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.

1.15 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:[3]

> 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. ...

1.16 Torture and death in custody in South Africa during the period 1960 to 1994 is set out as follows in the Truth and Reconciliation Commission Report:[4]

> 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

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associated with the experience of torture, something the security police understood well and exploited. ...

95 The more severe the torture, the more vulnerable the detainee and the greater the silence. Extreme torture such as electric shocks or suffocation frequently resulted in loss of bladder or bowel control that detainees found painfully degrading. Some individuals gave in under pressure of torture and gave evidence against their former comrades. Often such detainees remained silent because of feelings of intense guilt.

...

98 Even where detainees did not give information, the mere fact of having broken down and screamed or pleaded for mercy left many unable to speak of their experiences. ...

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.

100 Moreover, the example held up by individual activists and in organisations that a 'good comrade' never broke exacerbated the sense of shame and vulnerability of those who had agreed to give the information their interrogators were seeking. The experience of custody, detention and interrogation, involving torture or not, was a threatening one. Different detainees responded in different ways.

101 The Commission believes that the harsh judgments meted out to those who may have given information in the past is inhumane and recommends that those who have been cruelly cut off by failing to meet up to such exacting standards be reintegrated into society.

1.17 The methods of torture are described as follows in the Truth and Reconciliation Commission Report:[5]

102 The Commission accepted the following internationally accepted definition of torture:

> The intentional infliction of severe pain and suffering, whether physical or mental, on a person for the purpose of (1) obtaining from that or another person information or a confession, or (2) punishing him for an act that he or a third person committed or is suspected of having committed, or (3) intimidating him or a third person, or (4) for any reason based on discrimination of any kind. Pain or suffering that arises only from, inherent in, or incidental to, a lawful sanction does not qualify as torture.

103 The cases of torture presented to the Commission included a wide range of physical and psychological types. ...

104 Beating was the most commonly used form of torture. The Commission did not distinguish between beating detainees as a form of torture and what appears to have been a routine practice of beating and assault at the point of arrest. The latter was used to instil terror and to ''soften people up'' before questioning and appears to have been widely and routinely used. This section, however, concentrates mainly on the use of torture to extract information or as a means of recruitment of informers.

105 A range of other techniques were regularly used. Suffocation as a form of torture increased significantly from 1975 to the end of the Commission's mandate period, when it became the third most common form of torture.

...

109 Forced postures or body positions were also used as a form of torture, sometimes involving the participation of the victim, thus inflicting psychological as well as physical stress. Examples included forcing the detainee to stand on a piece of foolscap piece of paper for hours, sometimes days, on end; forcing the detainee to balance on a brick or two bricks or to sit in an imaginary chair

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for hours on end; forcing the detainee to hold an object above her/his head. Other techniques were imposed by force. These included the ''helicopter'' technique which involved manacling detainees'' hands above their heads or hanging them upside down for lengthy periods.

...

111 Frank Bennetts described, again from the torturer's side, the method referred to as 'the helicopter', 'boeing' or 'aeroplane':

> *They would handcuff his feet together round the ankles and handcuff his hands behind his back and then place him on his stomach with his feet in the air and put a broom stick or quite a strong plank of wood between his ankles and then through his legs coming out the top here and pick him up and hang him between two desks like that. The result was similar to crucifixion. It pulled all your muscles. It closed up your chest. You couldn't breathe. Leave the guy there long enough, he's going to talk.*

112 Former Security Branch member Jeffrey Benzien [AM5314/97] described and demonstrated one form of suffocation during his amnesty application:

> *… it would be a cloth bag that would be submerged in water to get it completely wet ... I get the person to lie down on the ground on his stomach …… with that person's hands handcuffed behind his back. Then I would take up a position in the small of the person's back, put my feet through between his arms to maintain my balance and then pull the bag over the person's head and twist it closed around the neck in that way, cutting off the air supply to the person …… On occasions people have, I presume, and I say presume, lost consciousness. They would go slack and every time that was done, I would release the bag.*

113 Asked what the reactions of the person being suffocated were, Benzien replied:

> *There would be movement, there would be head movement, distress. All the time there would be questions asked — 'Do you want to speak?' …… and as soon as an indication was given that this person wanted to speak, the air would be allowed back …… the person would moan, cry ……*

114 Benzien claimed that, with few exceptions, this method yielded results within half an hour.

115 Cases of sexual torture included forcing detainees (both male and female) to undress; the deliberate targeting of genitals or breasts during torture; the threat of and, in some instances, actual rape of detainees (male and female); the insertion of objects such as batons or pistols into bodily orifices and placing detainees overnight in cells with common-law prisoners known to rape newcomers. ...

116 Fourteen-year-old Patrick Mzathi [CT06108/GEO] experienced the male version of the drawer method: 'They put my penis and my testicles into a drawer, it was the first time I experienced a pain of my private parts. I went unconscious.'

117 Aside from sexual forms of torture, security police frequently targeted women in ways related to their gender or as mothers (see also the chapter on *Women* in Volume Four). Ms Nobuhle Mohapi [EC0007/96PLZ] told the Commission:

> *The first month of my detention, I didn't get a drop of water to wash myself. I was unable to change and I was in my menstrual cycle …… I requested water so that I can bathe and wash myself, but nobody wanted to help me …… I stayed six months in solitary confinement ... and they would come and report some of the things that are happening at home. They even came and told me that my youngest child is dead. They promised to release me so that I can attend the funeral …… [if] I should sign this paper.*

118 Ms Shirley Gunn [CT00792/HEL] was detained at the Wynberg police station in Cape Town along with her sixteen-month-old unweaned son. The hygienic conditions were inadequate and the cell was drafty and cold. Social workers took her son away for a period of eight days. During this time police played a tape of his crying in order to put pressure on her.

119 The Commission received numerous statements detailing the effects of solitary confinement on detainees. Ms Zahrah Narkedien [JB04418/99OVE] describes the experience of being held in isolation in a cell the size of a small bathroom for seven months:

> *I don't even want to describe psychologically what I had to do to survive down there. I will write it one day but I could never tell you. It did teach me something and that is that no human being can live alone for more than I think a month …… The basement …… was*

… at the bottom with high walls. I felt as the months went by that I was going deeper and deeper into the ground …… I became so psychologically damaged that I used to feel that all these cells are all like coffins and there were all dead people in there, because they were not there, no one was there. It was as if I was alive and all these people were dead ……

I'm out of prison now for more than seven or ten years but I haven't recovered and I will never recover …… I have tried to and the more I struggle to be normal, the more disturbed I become. I had to accept that I was damaged, a part of my soul was eaten away as if by maggots ... and I will never get it back again.

1.18 The security legislation providing for detention during the mandate period is explained as follows in the Final Truth and Reconciliation Commission Report:[6]

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).

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).

121 Torture of political detainees was reported from the early 1960's. That torture of political detainees was a relatively new phenomenon during that period is evident from the following statement by Mr Joe Slovo:

However firm the old type of policemen were …… they were not torturers …… In a sense, up to about 1960/1, the underground struggle was fought on a gentlemanly terrain. There was still a rule of law. You had a fair trial in their courts. Nobody could be kept in isolation. Up to 1963, I know of no incident of any political prisoner being tortured.

122 It was widely believed by many political activists of the time that, in the early 1960's, a special squad of security policemen received special training in torture techniques in France and Algeria and that this accounted for a sudden and dramatic increase in torture. ...

...

124 It is more likely, therefore, that the French training promoted the development of other non-physical third degree methods. Indeed, in 1964, there was a marked shift to an approach in which teams working in relays used sleep deprivation and non-physical means such as standing on one spot or the 'hard/soft cop' routine. It is probable that the techniques apparent in the 1964 period were the fruit of the French exercise.

125 The Commission received confirmation that a number of officers received further training in interrogation and counter-interrogation techniques in France in about 1968. ...

126 It is further believed that, in the early 1980's, joint co-operation agreements between South Africa, Argentina, Chile and Taiwan led to further training opportunities and an exchange of ideas and experience. Close links with Argentina existed even before this. For example, Alfredo Astiz, a notorious torturer, was one of four torture experts attached to the Argentinian Embassy in Pretoria in 1979. During his stay, there were several seminars at which South African security police and the Argentines exchanged ideas regarding methods of interrogation.

127 It is also known that Military Intelligence (MI) operatives received training in interrogation techniques in Italy. According to one MI operative, such training tended to focus on non-aggressive methods of interrogation as the use of torture was seen to result in false confessions or information.

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128 Finally, the training grounds *par excellence* were Rhodesia and South West Africa where South African police developed hands-on experience in fighting a counter-insurgency war.

129 Following the general failure of the Security Branch to conclude investigations in sabotage cases in the early 1960's, a tougher approach was adopted and a group of police was drawn in from outside the ranks of the Security Branch to constitute a special 'sabotage squad'. This was part of a more extensive restructuring of legal provisions relating to detentions and police structures introduced by the new Minister of Justice, Police and Prisons, Mr BJ Vorster, his new commissioner of police, Lieutenant General Keevy and new head of the Security Branch, Colonel Hendrik van den Bergh. An SAP *Commemorative Album* records that:

> *Col van den Bergh decided that the Security Branch should be reorganised to enable it to deal more efficiently with subversive elements in the Republic. The Minister of Justice, who was fully aware of the threat against the Republic, agreed with Col van den Bergh and undertook to supply the Security Branch with the necessary arms to ward off the onslaught.*

130 The 'sabotage squad' was one of these 'necessary arms'. ... Their approach contrasted sharply with the 'gentlemanly approach' of earlier Security Branch men.

131 Arrests of people linked to sabotage campaigns increased markedly in 1963 and the Commission received reports of torture in respect of nearly every detainee interrogated by members of this team. Reports exposed the widespread use of beating, electric shock and terror tactics (see below).

132 The first allegations of torture of political detainees arose during the state of emergency declared on 24 March 1960. According to the Minister of Justice, ninety-eight whites, thirty-six coloureds, ninety Indians and 11 279 Africans were detained under the Public Safety Act of 1953. From statements received by the Commission, it appears as though detainees were routinely subjected to beating and other forms of assault. Several Pondoland detainees reported the use of electric shock and torture involving forced posture.

133 A second wave of torture allegations came from Poqo members detained under the General Laws Amendment Act of 1961. The main form of torture remained beatings and general assault, although again instances of electric shock and forced posture were reported.

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.

136 In the course of these detentions, torture went far beyond a routine level of physical assault; carefully honed techniques were put to use, designed primarily to extract information. By the end of January 1964, Minister Vorster conceded in Parliament that forty-nine complaints had been received concerning ill treatment and torture, including twenty-eight allegations of assault and twenty of electric shock. He reported that thirty-two had been investigated and found to be of no substance. Nevertheless, accounts of torture from this period — across region, rank and organisation — bear a remarkable consistency.

137 Mr Laloo Chiba [JB00667/016GTSOW] told the Commission about what appears from other statements to have been a routine experience:

> *There were about five or six people who were actually present in the room. They started assaulting me, punched me, kicked me and in the process my face was badly bruised. My left eardrum had been punctured. They wanted to know who my contact was in MK …… I pleaded ignorance …… The assault must have lasted half an hour or so. It is very, very difficult for me to assess the passage of time in these circumstances. But what was to*

follow was far more serious ……

138 Chiba, covered with a wet hessian sack, was then subjected to electric shock treatment:

Every time I resisted answering the questions, they turned on the dynamo and of course, violent electric shocks started passing through my body …… After the electric torture was over, I was unable to walk, I collapsed. They then carried me out.

139 Mr Rajeegopal Vandeyar [JB00809/01GTSOW] described Chiba's condition following this session:

His face was swollen severely. His eyes appeared to be coming out of their sockets. He was walking with great difficulty and was supported by a policeman. His legs were rigid. His knees did not bend. His hands were almost like he had severe arthritis. He looked like a Frankenstein monster.

140 Other methods of torture used included being dangled from the window, a range of psychological threats and, particularly from 1964, a combination of solitary confinement, sleep deprivation and forced standing, often for days on end.

141 Laloo Chiba, detained again in July 1964, gives his account of this new method:

I was assured that, unlike the previous time, they won't even lay a finger on me. What they did was, they took a foolscap sheet of paper, A4 size, they put it on the floor and they asked me to stand on that. They said that I was not allowed to move off from that sheet of paper …… I stood there from about nine o'clock on Monday morning until Wednesday early in the evening, late in the afternoon. That was a period of approximately fifty-eight to sixty hours without sleep.

142 The Security Branch worked in teams, ensuring that they were always fresh and clean, in sharp contrast to the exhausted detainees. Teams would also frequently alternate between apparently sympathetic police and those who displayed extreme aggression. Such methods, which left no mark, proved devastatingly effective in extracting confessions. It is important to note, however, that physical violence and electric shock continued to be used as well, particularly against less high-profile African detainees.

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.

146 A further window into the interrogation and torture of detainees under the Terrorism Act is provided by the detention of some eighty South African Students' Organisation (SASO) and Black People's Convention (BPC) activists in November 1974. Many of these were transported to Pretoria where they were intensively interrogated at the Security Branch's Compol offices. It appears that a team of security policemen from around the country were involved in these interrogations. Almost all detainees alleged severe torture.

147 Former Durban Security Branch member Colonel ARC 'Andy' Taylor [AM4077/96] played a prominent role in the interrogations. He applied for amnesty for the assault of Ms Bridgette Sylvia

Mabandla, Dr Sathasivan Cooper [JB06330/ 01GTSOW], Mr Revabalan Cooper [KZN/NSS/015/DN], Mr Lindani Muntu Myeza, Mr Nyangani Absalom Cindi and Mr Ruben William Hare. While Taylor claimed not to remember the details of these incidents, statements to the Commission and from Amnesty International indicate a consistent pattern: lengthy interrogations accompanied by assault and torture involving forced posture such as being forced to sit in an imaginary chair. In some instances, electric shocks were alleged to have been administered.

148 Numerous claims of torture in detention were made during the May 1976 trial of Mr Harry Gwala and nine others under the Terrorism Act. Over forty people were detained in connection with this trial. One of the detainees, Mr Joseph Mdluli, died in detention (see below). Six of the accused filed a summons against the Minister of Police for not responding to claims for damage as a result of torture. Two of the accused, Mr Joseph Nduli and Mr Cleopas Ndhlovu, had been abducted from Swaziland. In his amnesty application, Taylor stated that Nduli and Ndhlovu

> *were in charge of recruiting and escorting recruits through Swaziland in transit for training. They were abducted ... and taken to Island Rock near Sodwana, for questioning. They were assaulted with open hands, fists …… kicked. The detainees were also kept awake for long hours and deprived of sleep.*

159 A number of Johannesburg detainees who were detained with Mr Neil Aggett (see below) in 1981 made statements about torture under section 6 of the Terrorism Act. An amnesty application in this connection was received from Warrant Officer WC Smith [AM5469/97].

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.

161 It is also important to note the *modus operandi* of the Nduli and Ndlovu detentions — abduction from Swaziland and interrogation at a police camp rather than a formal place of detention. This foreshadows an extensive pattern of abduction and interrogation in the 1980s. In later years, however, such detainees were frequently killed.

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.

1.19 The Truth and Reconciliation Commission found that knowledge about torture existed but that torture was condoned:

214 The SAP and the former government have conceded that torture occurred, but have claimed that it represented the actions of a few renegade policemen. Thus, for example, in his submission to the Commission, the former leader of the National Party (NP) and former State President FW de Klerk maintained:

> *The National Party is prepared to accept responsibility for the policies that it adopted and for the actions taken by its office-bearers in the implementation of those policies. It is, however not prepared to accept responsibility for the criminal actions of a handful of operatives of the security forces of which the Party was not aware and which it never would have condoned.*

215 However, the NP's former Deputy Minister of Police Leon Wessels conceded that it was not possible to deny knowledge of torture. At the Commission's special hearing on the role of the State Security Council, Wessels said that 'it was foreseen that under those circumstances people would be detained, people would be tortured, everybody in this country knew people were tortured'. Wessels also conceded in an interview that, on one occasion, when he had raised the matter of torture with former Minister Louis le Grange, Le Grange had responded: 'Leon, but you have such a fantastic image amongst the Police and other people, why are you ... spoiling all of this by getting involved in this'.

216 While the courts in general failed to protect the rights of detainees, there were cases when magistrates and judges ruled in favour of those in custody. Thus, for example, in the *State v Mogale*, the Appellate Division established that the security police had severely assaulted a detainee in order to compel him to confess. Such assault had included punching, kicking, throttling with a medallion chain, electric shock and breaking of two teeth with pliers.

217 In the *State v Mayson*, the judge ruled that Mr Cedric Mayson's statement was inadmissible as he had been subjected to torture. Eight months before, one of the officers implicated in the Mayson case admitted at the Aggett inquest that he had 'given Lieutenant Whitehead and other officers permission to interrogate Aggett for an extraordinarily lengthy spell said to have covered sixty-three hours'. Shortly thereafter, other security police implicated in these cases were ordered to pay Mr Auret van Heerden R5 000 in damages for subjecting him to 'unreasonably lengthy periods of detention'. Hence, notwithstanding incriminating judgments, security police were allowed to continue torturing detainees unchecked.

218 Further evidence of tolerance of torture lies in the promotion, sometimes to the highest levels, of security police officers involved in torture. Statements before the Commission implicate four former heads of the Security Branch, two of whom subsequently became commissioners of police.

219 A number of officers commanding of divisional and local Security Branch offices and section heads at headquarters have been implicated either directly or indirectly of having knowledge of torture. These include the divisional commanders of the Eastern Cape, the Eastern Transvaal, Port Natal, Northern Transvaal and Border.

220 The use and condoning of torture allowed for the use of coercion in the investigation

of cases. Reinforced by deep racism, this approach increasingly characterised police work and led, furthermore, to serious neglect of investigative police work.

The Commission finds that the use of torture in the form of the infliction of severe physical and/or mental pain and suffering for the purposes of punishment, intimidation and the extracting of information and/or confessions, was practised systematically particularly, but not exclusively, by the security branch of the SAP throughout the Commission's mandate period.

The Commission finds further that a considerable number of deaths in detention occurred, either as a direct result of torture or as a consequence of a situation in which the circumstances were such that detainees were induced to commit suicide.
Given that:

- evidence to this Commission has shown that torture was used by the security branch at all levels, junior and senior, and in all parts of the country;
- many of those about whom either clear evidence existed or substantial allegations had been made of their involvement in torture, resulting at times in the deaths of their victims, were promoted to higher ranks;
- despite national and international concern at the evidence of the widespread and systematic use of torture by the South African security forces, little effective action was taken by the state to prohibit or even limit its use and that, to the contrary, legislation was enacted with the specific intent of preventing intervention by the judiciary and removing any public accountability on the part of the security forces for their treatment of detainees,

the Commission concludes that the use of torture was condoned by the South African government as official practice.

The Commission finds that torture as practised by members of the SAP constituted a systematic pattern of abuse which entailed deliberate planning by senior members of the sap, and was a gross human rights violation.

The Commission finds therefore that the following are directly accountable for the use of torture against detainees and indirectly for all unnatural deaths of detainees in police custody: the Ministers of Police and of Law and Order; the Commissioners of Police; Officers Commanding of the Security Branch at national, divisional and local levels. The Cabinet is found to be indirectly responsible.

221 As levels of conflict intensified, the security forces came to believe that it was no longer possible to rely on the due process of law and that it was preferable to kill people extra-judicially. Evidence of this is contained in numerous amnesty applications as well as section 29 hearings, in particular the hearing on the armed forces. Major-General 'Sakkie' Crafford [AM5468/97] claimed in his amnesty application that:

> *In some cases it was necessary to eliminate activists by killing them. This was the only way in which effective action could be taken against activists in a war situation …… to charge someone in the normal court structure and go through the whole process was cumbersome and occasionally totally inadequate and impossible.*

222 Extra-judicial killing was generally directed at high-profile activists 'whose detention in terms of security legislation would give momentum to the liberation struggle. The security police and the country could not afford a Nelson Mandela again'.
223 Crafford suggested that the purpose of extra-judicial killing was threefold:

a It scared off other supporters and potential supporters; it made people reluctant to offer open support; it created distrust and demoralisation amongst cadres.
b It gave white voters confidence that the security forces were in control and winning the fight against Communism and terrorism.
c The information gleaned during interrogation needed to be protected against disclosure.

224 The difficulty posed by extra-judicial killing was that it moved the security forces directly into an arena of illegality. While cross-border assassinations and raids certainly fell outside the scope of international protocols and sometimes law, the security forces perceived them to be legitimate, authorised and thus legal actions. Raids, for example, although organised at a clandestine level, were openly – and proudly – acknowledged after the operation was completed.

225 The internal situation was different. Here operations had to be highly covert, ensuring that actions could not be traced back to the security forces. This led to the development of covert units, such as region 6 of the Civil Co-operation Bureau (CCB) and Vlakplaas hit squads.

1.20 The Truth and Reconciliation Commission also noted the abduction, interrogation and killing of people:[7]

278 This section deals with a different category of killings — where the primary purpose was to obtain information, and death followed, apparently in order to protect the information received. Victims in almost all of these cases were suspected of having links with underground military structures or with networks that provided support for such structures. The purpose of interrogation was to gather intelligence on issues such as *modi operandi*, guerrilla infiltration routes and possible planned operations. This information was considered vital, not only to enable counter-measures to be taken, but for the ongoing and effective penetration of such structures by agents or *askaris.*

279 Amnesty applicants suggested that such intelligence had value only for as long as the 'enemy' was not aware that the information had been uncovered. Detainees – even those kept in solitary confinement – sometimes managed to smuggle out information about their detention and interrogation. Moreover, in the nature of clandestine work, once a detention was known about, old routines, codes and meeting places would be regarded as compromised and therefore changed. It was for this reason, the Security Branch argued, that it was preferable to abduct rather than officially detain, and to kill the abductee once information had been extracted. In some instances, the Security Branch attempted to 'turn' (recruit) the individual; where this proved unsuccessful, killing was regarded as necessary.

280 This *modus operandi* allowed for greater freedom to torture without fear of consequences. It should also be noted, as is evident in some of the cases below, that confessions and admissions were sometimes obtained only after brutal torture. The possibility that a number of people so targeted had no real link to underground military structures cannot be excluded.

1.21 Concern was raised in the South African media on measures suggested by Minister Steve Tshwete on aspects such as detention, interrogation and bail. When the media noted Minister Tshwete's suggestions, commentators reacted as follows:

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

C SAFETY and Security Minister Steve Tshwete may ask Parliament to aid the war against urban terrorism by amending the Constitution.[8]
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.

* IF SOCCER and rugby were not so popular, the compulsion to fix that which is not broken would easily qualify as our national sport. [9]
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.
Tshwete, a politician with a sense of the popular mood, and whose boss, President Thabo Mbeki, demands results, is no doubt feeling the pressure to break this cycle of failure.
He and his fellow security ministers have laudably tried to bring order and a command hierarchy to the many branches of the police and intelligence involved in anti-terrorist investigations.
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.
Tshwete's aim appears to be to increase the ability of the police to take action against suspects against whom they have little or no proof in the hope of 'breaking them down' and extracting confessions, or, at the very least, information on those involved in the

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8 "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

9 "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

bombings.
This is clearly not possible within the 48-hour detention-without-trial limit set by the Constitution.
The absurdity of the proposal becomes apparent when the question of exactly what it will take to get a confession is explored.
Breaking down someone's defences requires a longer time - perhaps a week, perhaps a month, perhaps, as was the case under the states of emergency in the '80s, six months or more. And even then, breaking someone down will not happen by isolation alone. There must be menace, the threat of force or the use of force.
Lawyers buzzing in and out of police cells will not be useful while this form of detective work is under way, so Tshwete has proposed that the legal access of suspects be limited.
The problem with this approach is that it is a slippery slope down which our social values, and our democratic culture, will slide.
For those not interested in maintaining abstract values at the expense of immediate results, there is another compelling argument.
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.
Perhaps, just as importantly, Tshwete needs to remind himself of Mao Tse-Tung's dictum that underground operators - these terrorists should not be called guerrillas - are like fish. They need the sea, and the sea is the community in which they are harboured, fed and idolised.
How else could it be explained that the apartheid government, employing states of emergency and laws five times as draconian as any proposed by Tshwete, was unable to break the underground movement against apartheid?
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.

C 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. [10]
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

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[10] “Trial better than detention for urban terror suspects” Jean Redpath http://www.suntimes.co.za/2000/01/09/insight/in14.htm

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, 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.

1.22 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:

C 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.[11]
A cabinet committee convened to consider measures to fight violence in the Western Cape failed to agree on a number of proposals. These are understood to include detention without trial and permission for informers to commit acts of violence in order to preserve their cover.
It is understood that the meeting was attended by Foreign Minister Alfred Nzo; his deputy Aziz Pahad; Defence Minister Joe Modise; his deputy Ronnie Kasrils; Safety and Security Minister Sydney Mufamadi; and Deputy Minister for Intelligence Joe Nhlanhla.
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 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.

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[11] Jonny Steinberg "Ministers divided over new anti-terrorism laws " 05 February 1999 see http://www.bday.co.za/99/0205/news/news3.htm

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.'

C "Cape Town: South Africa is drawing up anti-terrorist legislation similar to that of the apartheid era to try to curb Islamic radicals blamed for a wave of bombings in Cape Town.[12]

The Justice Minister, Mr Dullah Omar, said that although he was reluctant to tamper with the country's Constitution, there was an urgent need for special security powers.

An undeclared war is being fought between South African police and a group calling itself People Against Drugs and Gangsterism (PAGAD), assumed to be behind the urban terrorism.

In the swathe of townships known as the Cape Flats, police stations are at such risk of attack that they are hiring private security firms to help guard their buildings. One of Cape Town's prime tourist attractions, The Waterfront, has been bombed twice in five months.

Police officers, journalists, politicians and even Muslim clerics deemed by extremists to be too moderate have received death threats.

The measures the Government is considering include extending the 48-hour maximum detention for suspects.

PAGAD was formed three years ago as a movement against the drug gangs which have turned life in the Cape Flats, an area populated by mixed-race Coloureds, into a nightmare.

However, PAGAD has increasingly turned on the police as the main enemy and is believed to be linked to more overtly Islamic groups which have emerged in recent months.

'Their objective is to create a Muslim state in the Western Cape,' a police spokesman said.

'It will spread to the rest of the country.'

Police say they believe PAGAD, which describes itself as a 'divine religious group', has about 50 gunmen and that some of its operatives have been trained abroad, including in Afghanistan.

A group spokesman, Mr Abdussalam Ebrahim, said the bombings in Cape Town were not the work of PAGAD but of an unspecified 'third force' consisting of racist police officers.

'We don't know who the culprits are, but these [kinds] of attacks give the Government licence to act against PAGAD.'

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12 "Apartheid-era laws for war on terrorism" Tuesday, February 16, 1999 *The Sydney Morning Herald* see http://www.smh.com.au/news/9902/16/world/world9.html

CHAPTER 2

THE VIEWS OF THE SOUTH AFRICAN GOVERNMENT ON TERRORISM / 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 eleven 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 o 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 Discussion Paper 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.

CHAPTER 3

INTERNATIONAL TERRORISM : THEORY AND DEFINITIONS

A. BACKGROUND

3.1 The security legislation of the previous political dispensation in South Africa has been repealed and section 54 of the Internal Security Act, 1982, is the only provision of the Act which has not been repealed.

B. Basic Criteria for Definition

3.2 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.

3.3 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).

3.4 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.

3.5 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.

Domestic terrorism

3.6 Acts of terrorism can be classified as domestic (national of 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.

International/transnational terrorism

3.7 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.

3.8 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.

3.9 In this respect, the Central Intelligence Agency (CIA) differentiate 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".[13]

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

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[13] Alexander Y *Behavioural and Quantitative Perspectives on Terrorism* Oxford 1981.

CHAPTER 4

A. INTERNATIONAL INSTRUMENTS TO COMBAT TERRORISM / DOMESTIC LAW

4.1 On 9 December 1994 the United Nations General Assembly adopted Resolution 49/60 (Declaration on Measures to Eliminate International Terrorism). This resolution identified a series of international conventions that would enhance the international communities fight against terrorism. All member States are encouraged to ratify these conventions. In addition to the provisions summarised below most of the conventions provide that parties must establish criminal jurisdiction over offenders and if they do not prosecute the offenders, to extradite them.

(a) Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention, agreed 9/63 - safety of aviation):

4.2 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.

South Africa acceded to this Convention on 20 May 1972.

(b) Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention, agreed 12/70 - aircraft hijackings):

4.3 The Convention-

- makes it an offense 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.

4.4 South Africa ratified the Convention on 30 May 1972. It entered into force on 29 June 1972.

(c) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention, agreed 9/71 - applies to acts of aviation sabotage such as bombings aboard aircraft in flight):

4.5 The Convention

- makes it an offense 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.

4.6 South Africa ratified this Convention on 30 May 1972.

B. South African Law

4.7 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.

4.8 The following remarks by Judge James in the case of *S v Hoare and Others* 1982(4) SA

865 (NPD), in short reflects the approach followed in the said 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."

4.9 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.

C. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (agreed 12/73 - protects senior government officials and diplomats):

4.10 The Convention -

- 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 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";
- 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.

D. South African Law

4.11 The *Vienna Convention on Diplomatic Relations* 1961, and the *Vienna Convention on Consular Relations*, 1963, has, however, been incorporated in South African law by means of the *Diplomatic Immunities and Privileges Act*, 1989 (Act No 74 of 1989).

4.12 In terms of these Conventions the South African Government is obliged to "take all appropriate steps to prevent any attack on the person, freedom and dignity of diplomatic agents."

4.13 In terms of the South African common law any person, including heads of State representatives of Government or of international organizations, etc. enjoys the same protection, in that the murder, abduction or assault of any person is 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.

4.14 It is appreciated that accession to the Convention would imply to create by statute specific offences relating to the intentional commission of -

- a 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;
- All the above crimes are, as mentioned already, 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, should be considered. Specific offences to give effect to the Convention, are proposed in the draft Bill based on legislation of the United States of America, in which specific crimes were created in respect of assault, murder and kidnapping of internationally protected persons.

E. International Convention Against the Taking of Hostages (Hostage Convention, agreed 12/79):

4.15 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";
- 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.

4.15 In terms of the common law the crime "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.

4.16 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, 1982.

F. The International Convention for the Suppression of Terrorist Bombings[14]

4.17 As of 3 August 1999, 46 States had signed the Convention, in which, *inter alia*, "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."

4.17 The *International Convention for the Suppression of Terrorist Bombings*, has as its purpose to enhance international co-operation in eliminating the increasingly widespread use of terrorist attacks using explosive or other lethal devices. It is clear that the Convention reflects a unified determination at international level to eradicate terrorism globally. This Convention binds each State Party thereto, to adopt effective measures within their 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 as criminal offences within the ambit of their domestic law, the offences set out in article 2 of the Convention, and to make such offences punishable by appropriate penal provisions.

4.18 In terms of article 2, conduct which amounts to the unlawful and intentional delivery, placement, discharge or detonation of explosives or other lethal devices (as defined) into or against public places, State facilities, infrastructure facilities or public transportation systems (as defined) is prohibited, and constitutes an offence where such conduct is accompanied with the intention to cause death, serious bodily injury, or extensive destruction that results in actual or potential economic loss of such places or facilities (as defined). An explosive or lethal device is described as a weapon or device designed or having the capacity (itself or through release or impact of toxic chemicals, biological agents, or radioactive material) to cause death, serious

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[14] Adopted by the General Assembly of the United Nations on 15 December 1997.

bodily injury or substantial material damage. The conduct prohibited in article 2 takes the form of materially defined crimes with requisite *mens rea* in the form of intent by the perpetrator. Provision is also made for liability of participants to such crimes in the form of accomplicity and the doctrine of common purpose as set out in article 2.

4.19 The Convention directs State Parties to adapt their domestic legislation to prevent and counter these offences within or outside their geographical territories. In this regard the Convention proposes that, legislation that seeks to achieve this objective, should 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 article 2 offences within or outside the territory of the State Party.

4.20 The Convention obliges 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 this 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 justifiably by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.

4.21 The Convention sets out certain grounds upon which State Parties may found jurisdiction to try perpetrators and participants of offences as set out in article 2. In addition thereto, State Parties are legally obliged to take the necessary measures to establish jurisdiction over these offences, this would of necessity imply relevant and effective legislative measures. In having regard to practical implementation of the provisions of the Convention, 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 as set out in article 2.

4.22 In terms of the Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 when:

- The offence is committed in the territory of the State; or
- The 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

- The offence is committed by a national of that State.

4.23 In terms of the Convention, 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.

4.24 The Convention provides that 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 this Convention entering into force. In terms of the Convention, States Parties undertake to include article 2 offences in any and every subsequent extradition treaty concluded between them.

4.25 The provisions of article 2, in terms of the Convention, do not apply to nationals who commit these offences within the territorial boundaries of their own State. This Convention shall 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 this Convention to exercise jurisdiction, in such cases. Paragraph 1(a) and (b), read with paragraph 2, (2) of article 2, set out the prescription of the definition of acts relative to the perpetration of terrorism although no unified definition of terrorism is given. Paragraph 3(a), (b) and (c) of article 2 set out separate offences relative to the main offences in paragraph 1. Paragraph 3(a) prohibits accomplicity in any offence as set out in paragraph 1. Paragraph 3(b) prohibits conduct which would fall within the scope of organizing or directing others to commit offences as set out in paragraph 1. It appears that paragraph 3(b) incorporates a provision relative to indirect perpetration, co-perpetration and concurrent perpetration in the participation of these offences. Paragraph 3(c) incorporates the doctrine of common purpose into the ambit of prohibited conduct and prohibits acts of

association accompanied with the requisite mens rea, for the purpose of liability for such acts.

4.26 Notwithstanding the provisions of any other applicable law at domestic and international level, the performance of the obligations imposed by this Convention upon States Parties remain subject to the principles of non intervention, territorial integrity and sovereignty at international law. The legal prosecutory mechanisms and the humanitarian and human rights consideration of detainees is also taken into consideration.

G. Convention on the Marking of Plastic Explosives for the Purpose of Identification (agreed 3/91 - provides for chemical marking to facilitate detection of plastic explosives, e.g., to combat aircraft sabotage):

4.27 The Convention -

- is designed to control and limit the used of unmarked and undetectable plastic explosives (negotiated in the aftermath of the Pan Am 103 bombing);
- 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;
- requires that each party must, among other things, take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; take necessary and effective measures to prevent the movement of unmarked plastic explosives into or out of its territory; take necessary measures to exercise strict and effective control over possession and transfer of unmarked explosives made or imported prior to the entry-into-force of the convention; take necessary measures to 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, take necessary measures to 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.
- 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.

4.28 South Africa has already ratified this Convention.

4.29 Legislation to give effect to this Convention, has been adopted by Parliament and put into operation on 8 May 1998. The Convention has been incorporated in the South African Law and has been included as a schedule to the Act (*Explosives Amendment Act*, 1997).

4.30 The 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 and could be formed into innocuous looking objects and is otherwise undetectable.

H. Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention, agreed 10/79 - combats unlawful taking and use of nuclear material):

4.31 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;
- 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.

4.32 The Convention was signed by South Africa, but has not yet been ratified.

I. South African Law

4.33 In terms of section 21 of the *Nuclear Energy Act*, 1993 (Act No 131 of 1993), no person, except with the written authority of the Minister and excepting the Atomic Energy Corporation, shall -

- be in possession of any source material, unless he or she has come into possession thereof as a result of prospecting, reclamation or mining operations lawfully undertaken by him or her, or unless he or she is in possession of such material on behalf of a person who has so come into possession of such material or unless he has in any other manner lawfully acquired such material;
- acquire, use or dispose of any source material;
- import any source material into the Republic;
- process, enrich or reprocess any source material;
- acquire or be in possession of any special nuclear material;
- import any special nuclear material into the Republic;
- use or dispose of any special nuclear material;
- process, enrich or reprocess any special nuclear material;
- acquire or be in possession of any restricted material;
- import any restricted material into the Republic;
- use or dispose of any restricted material;
- produce nuclear energy;
- manufacture or otherwise produce or acquire, possess or dispose of uranium hexafluoride (UF6);
- import uranium hexafloride (UF6) into the Republic;
- manufacture, acquire, possess or dispose of nuclear fuel;
- import nuclear fuel into the Republic;
- manufacture or otherwise produce, import, acquire, possess, use or dispose of nuclear related equipment and material.

4.34 Section 22 of the same Act, controls the export of nuclear material and nuclear related equipment and material, whilst Chapter IV of the Act deals with, *inter alia*, control over discarding of radioactive waste and storage of irradiated nuclear fuel.

J. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, (agreed 3/88 - applies to terrorist activities on ships):

4.35 The Convention-

- establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established against international aviation.
- makes it an offense 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;

- 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;

K. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (agreed 3/88 - applies to terrorist activities on fixed offshore platforms):

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;
- 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 protocol.

4.37 Article 3 of the Convention for the Suppression of unlawful Acts against the Safety of Maritime Navigation provides for offences 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.

L. South African Law

4.38 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."

4.39 In terms of section 327 of the Act, the jurisdiction of the South African courts, in respect of any offence, (i.e. act or omission) which is punishable under the criminal law in force in the Republic is extended to South African ships on the high seas.

4.40 In terms of section 235 of the Act, it shall be an offence to send by or carry in any ship, except in accordance with the prescribed regulations, as cargo or ballast any dangerous goods. "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."

4.41 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.

M. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving

International Civil Aviation (agreed 2/88 - extends and supplements Montreal Convention):

4.42 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.

4.43 Section 2(1)(g) of the *Civil Aviation Offences Act*, 1972 (Act No. 10 of 1972) partly addresses the content of 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 of Violence at Airports Serving International Civil Aviation* and 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,...."

CHAPTER 5

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

5.1 There are a vast number of statutory provisions that can, to a greater or lesser extent, be utilised 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 Ac, 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).

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

5.2 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."

5.3 The offence of terrorism is widely phrased 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) sufficient to combat all instances of modern day terrorism. It excludes, for instance, international or transnational terrorism. Presently 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 opinion is held that 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.

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

5.4 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."

5.5 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.

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

5.6 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 theat 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."

5.7 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/organizations.

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

5.8 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*.

5.9 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 intends to review this Act shortly.

5.10 *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.

5.11 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.

5.12 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

C 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.

5.13 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.

5.14 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*.

5.15 Section 16A of the latter 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."

5.16 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.

5.17 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.

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

5.19 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 in terms of it's restrictive

prohibitory provisions on the one hand, controversy the Act provides certain exemptions thereto, on the other hand.

5.20 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."

5.21 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.

5.22 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.

5.23 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.

5.24 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.

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

5.26 The relevant South African legislation is the following:

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

5.27 The Minister of Defence controls the export, marketing, import, conveyance through the Republic, development and manufacture of certain conventional defence material. 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. Although the NCACC did not exist at the time (1968) when the Act was promulgated, this now forms the most important conventional arms control body in South Africa. The NCACC is committed to comply with international obligations and take humanitarian concerns into account.

5.28 A three-tier process allows for the issuing of marketing, contracting and export permits.

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

5.29 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.

(c) **The Nuclear Energy Act, 1993 (Act No 131 of 1993) and its implementing regulations**

5.31 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. Control responsibilities have been delegated to the Atomic Energy Corporation (AEC).

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

5.32 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."

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

5.33 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).

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

5.34 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.

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

5.35 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.

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

5.36 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.."

(i) **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)**

5.37 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.

5.38 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"

5.39 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."

5.40 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."

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

5.41 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."

5.42 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.

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

- *Civil Aviation Offences Act*, 1972 (Act No. 10 of 1972);
- *Merchant Shipping Act*, 1957 (Act No. 57 of 1957);
- *Diplomatic Immunities and Privileges Act*, 1989 (Act No. 74 of 1989) and
- *Nuclear Energy Act*, 1993 (Act No. 131 of 1993).

F. COMMON LAW

5.43 It should be kept in mind that 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.

5.44 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 COMPARATIVE STUDY ON COUNTERMEASURES AGAINST TERRORISM

A. United Kingdom (UK)

(a) The Prevention of Terrorism (Temporary Provisions) Act, 1989 (PTA)

6.1 The framework of the UK's anti-terrorist legislation essentially consists of-

- The Prevention of Terrorism (Temporary Provisions) Act, 1989, hereafter referred to as the PTA; and
- The Northern Ireland (Emergency Provisions) Act, 1996, hereafter referred to as the EPA.

6.2 The PTA is a comprehensive anti-terrorism Act which extends to the whole of the UK except as provided for in section 28. The Act defines terrorism as the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear. In the Act, acts of terrorism are generally qualified to mean acts of terrorism connected with the affairs of Northern Ireland, and acts of terrorism of any other description except acts connected solely with the affairs of the UK or any part of the UK other than Northern Ireland.

6.3 Under the Act, it became an offence to belong to a proscribed organization (e.g. the IRA), to solicit support for it, to arrange meetings to support it, and to wear, carry or display items of dress or other articles such as to arouse reasonable doubt that the person is a supporter of it. Provision is made for offences regarding financial assistance for terrorism and powers to forfeit property which might be used in connection with acts of terrorism or for the benefit of a proscribed organization. Possession of articles for suspected terrorist purposes, unlawful collection of information which could be useful to terrorists in planning or carrying out acts of terrorism, and the withholding of information about terrorism also constitute offences in terms of the Act.

6.4 The Secretary of State had the power to issue an exclusion order, prohibiting a person

concerned in the commission, preparation or instigation of acts of terrorism from being in or entering Great Britain, Northern Ireland or the UK. This power has, however, lapsed.

6.5 The Act empowers senior police officers to authorize the stop and search of vehicles, persons and pedestrians to prevent acts of terrorism. Constables may then exercise their powers whether or not they have any grounds for suspecting the presence of articles that could be used for the purpose of terrorism.

6.6 The Act makes provision for special powers of arrest and detention. A constable may arrest without warrant a person whom he reasonably suspects to be guilty of offences set out e.g., membership of the IRA, soliciting support for it, or a person whom he reasonably suspects to be concerned in the commission, preparation or instigation of acts of terrorism. The police may detain a person in these cases without charge for 48 hours and this could be extended by the Secretary of State for a further five days, making seven days in all. Provision has been made for periodic reviews by a review officer.

6.7 The Act contains detailed provisions for port and border controls, and confers powers to examine persons and goods arriving in or leaving Great Britain and Northern Ireland. Provision has also been made for powers of search and detention in this regard.

6.8 The police is empowered to impose police cordons in connection with investigations into the commission of acts of terrorism and to prohibit or restrict the leaving of vehicles, or their remaining at rest on any specific road. Non-compliance with such a prohibition or restriction constitutes an offence.

6.9 The *Criminal Justice (Terrorism and Conspiracy) Act*, 1998, amended the PTA by inserting provisions relating to procedure, forfeiture and conspiracy:

6.10 Where an accused is charged with the offence of membership of a proscribed organisation, a statement of opinion from a police officer of or above the rank of Superintendent that the accused is or was a member of a specified organisation is admissible as evidence. It also provides that certain inferences to that effect may be drawn from the accused's failure to mention, when being questioned or charged, a material fact which he could reasonably be expected to mention. Inferences can only be drawn where the accused was permitted to consult a solicitor before being questioned. An accused can, however, not be committed for trial or be

found to have a case to answer or be convicted on the basis of inferences or the statement of a police officer alone.

6.11 The Act confers power on the courts to order the forfeiture of property of a person convicted of an offence relating to a proscribed organization when that person is also a member of a specified organization. The property must have been in the possession or control of the convicted person and been used in relation to the activities of the specified organization.

6.12 The Act also closed a gap in previous legislation which allowed those who conspire in the UK to commit terrorist or other crimes abroad to escape punishment.

(b) <u>The Northern Ireland (Emergency Provisions) Act, 1996 (EPA)</u>

6.13 The EPA contains provisions which correspond with that of the PTA, especially with regard to:

- The definition of terrorism;
- Proscribed organizations;
- Offences;
- Powers of arrest, search and seizure.

6.14 The EPA makes provision for scheduled offences, preliminary inquiries into these offences and limitation of power to grant bail. The maximum period of remand in custody in the cases of scheduled offences is 28 days. A trial on indictment of a scheduled offence is generally to be conducted in Belfast in the crown court without a jury. Special provision is made in relation to the treatment of admissions by the accused. Scheduled offences include common law offences such as murder, manslaughter, kidnapping as well as statutory crimes such as causing explosions, making or possessing explosives, hijacking and taking of hostages. The Attorney General may, however, in a particular case certify that it is not to be treated as a scheduled offence.

6.15 There is also special provision as to the onus of proof in relation to possession of proscribed articles (explosives, firearms, etc.). Wide powers of arrest, search and seizure, and powers to stop and question are conferred on constables and members of the armed forces. Explosives inspectors have powers of search and seizure in relation to unlawfully kept

explosives or explosive substances. The Secretary of State has the power to direct the closure or diversion of roads.

6.16 Directing a terrorist organisation is an offence for which a person may be imprisoned for life. The EPA makes provision for offences relating to proscribed organisations, the possession of articles in circumstances giving rise to a reasonable suspicion that the items are intended for terrorist purposes, the unlawful collection of information, the training in the making or use of firearms and explosives, and the wearing of hoods or masks in public places. The provision of private security services is also regulated by the EPA.

6.17 The EPA provides for the detention of terrorists and wide powers have in this regard been conferred upon the Secretary of State. The Secretary of State is empowered to make an interim custody order for the temporary detention of a person suspected of being concerned in the commission or attempted commission of any act of terrorism, or in directing, organising or training persons for the purpose of terrorism. The Secretary of State may, at any time before the expiry of the period of 14 days following the date of an interim custody order, refer the case to an adviser. Unless a case is so referred, the order ceases to have effect at the expiry of that period. The Act provides that the detainee shall be served with a statement as to the nature of the terrorist activities of which he is suspected and a detainee may send written representations concerning his case to the Secretary of State and request that he be seen personally by an Adviser. The Adviser reports to the Secretary of State, who may make a detention order for the detention of the person if he is satisfied that the person has been concerned in the commission of an act of terrorism etc., and that the detention of that person is necessary for the protection of the public.

6.18 The Act regulates a detainee's right (under terrorism provisions of the PTA) to have someone informed of his detention. A detainee's right of access to legal advice is similarly regulated.

6.19 The Secretary of State has the power to make supplementary regulations for preserving the peace. He may reject an application for a licence under the Explosives Act, 1875 on the ground that the establishment of the factory or magazine in question is undesirable in the interests of safeguarding national security or protecting public safety. He also has the power to appoint an Independent Assessor of Military Complaints Procedures in Northern Ireland to keep under review procedures adopted by the General Officer commanding Northern Ireland. The Act

provides for the Secretary of State to make codes of practice in connection with the detention, treatment, questioning and identification of persons detained under the PTA, the exercise by police officers of powers conferred by the EPA or the PTA, and in connection with silent video recording of interviews held by police officers of persons detained.

6.20 Detailed provision is made regarding compensation for loss resulting from action taken under the emergency provisions.

6.21 The PTA and the EPA are subject to annual renewal and prosecutions in respect of offences under these Acts can only be instituted by or with the consent of the Director of Public Prosecutions.

6.22 The *Taking of Hostages Act*, 1982, implements the International Convention against the Taking of Hostages and provides that a person, whatever his nationality, who, in the UK or elsewhere, -

(a) detains any other person ("the 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. A person guilty of an offence under the Act is liable, on conviction on indictment, to imprisonment for life.

(c) <u>Limitations under English and Irish legislation to legal representation</u>

6.23 The applicant in *John Murray v United Kingdom* complained that he was denied access to a lawyer at a critical stage of the criminal proceedings against him. The applicant averred that in Northern Ireland the initial phase of detention is of crucial importance in the context of the criminal proceedings as a whole because of the possibility of inferences being drawn under the relevant legislation when a detainee maintains silence to questions put by the police. He was interviewed on twelve occasions without a solicitor being present to represent his interests. When he was finally granted access to his solicitor the latter advised him to remain silent partly because he had maintained silence already during the interview and partly because the solicitor would not be permitted to remain present during questioning.

6.24 The European Court of Human Rights observed in *Murray v United Kingdom* that it has not been disputed by the Government that Article 6 of the Convention applies even at the stage of the preliminary investigation into an offence by the police. The Court observed that national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. The Court considered that in such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation but that this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The Court was of the view that the question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.

6.25 The Court noted that the applicant's right of access to a lawyer during the first 48 hours of police detention was restricted under section 15 of the Northern Ireland (Emergency Provisions) Act 1987 on the basis that the police had reasonable grounds to believe that the exercise of the right of access would, inter alia, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such an act. The Court stated that it had no reason to doubt that it amounted to a lawful exercise of the power to restrict access. The Court however stated that although it is an important element to be taken into account, even a lawfully exercised power of restriction is capable of depriving an accused, in certain circumstances, of a fair procedure.

6.26 The Court was of the opinion in *Murray v United Kingdom* that the scheme complained of 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. It observed that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence, and if the accused chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. However, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. The Court considered that under such conditions the concept of fairness enshrined in Article 6 of the Convention requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation, and 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

Article 6.

6.27 The Court therefore found that there has been a breach of Article 6(1) in conjunction with paragraph 3(c) of the Convention as regards the applicant's denial of access to a lawyer during the first 48 hours of his police detention. The Court also pointed out that the applicant further complained that the practice in Northern Ireland regarding access of solicitors to terrorist suspects was discriminatory, contrary to Article 14 of the Convention taken in conjunction with Article 6, having regard to the fact that solicitors were not permitted to be present at any stage during the interviewing of suspects by the police unlike their counterparts in England and Wales. However, in the light of its conclusion that the denial of access to a solicitor in the present case gave rise to a breach of Article 6(1) in conjunction with paragraph 3(c) of the Convention, the Court did not consider that it was necessary to examine this issue.

6.28 The European Court of Human Rights also analysed the right of detainees in the case of *Brannigan and McBride V United Kingdom*.[1] The Court noted that the applicants' detention lasted for periods of six days, fourteen hours and thirty minutes, and four days, six hours and twenty-five minutes respectively. The applicants complained of violations of Article 5(3) and(5) of the Convention.[2] The Government, noting that both of the applicants were detained for longer periods than the shortest period found by the Court to be in breach of Article 5 (3) in the case of *Brogan and Others*, conceded that the requirement of promptness had not been respected in the present cases. The Government submitted that the failure to observe these requirements of Article 5 had been met by their derogation of 23 December 1988 under Article 15 of the

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1 Case number 5/1992/350/423-424.

2 Article 5 provides as follows:

"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:

…

(c) 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 ...;

…

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...

…

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article (art. 5) shall have an enforceable right to compensation."

Convention.[3] The Court noted that it therefore had to examine the validity of the Government's derogation in the light of this provision.

6.29 The Court considered, inter alia, whether the measures were strictly required by the exigencies of the situation. The Court recalled that judicial control of interferences by the executive with the individual's right to liberty provided for by Article 5 is implied by one of the fundamental principles of a democratic society, namely the rule of law. It further observed that the notice of derogation invoked in the present case was lodged by the respondent Government soon after the judgment in the *Brogan and Others* case where the Court had found the Government to be in breach of their obligations under Article 5(3) by not bringing the applicants "promptly" before a court. The Court stated that it must scrutinise the derogation against this background and taking into account that the power of arrest and detention in question has been in force since 1974. It also said, however, that it must be observed that the central issue in the present case is not the existence of the power to detain suspected terrorists for up to seven days but rather the exercise of this power without judicial intervention.

6.30 The Court considered whether the derogation was a genuine response to an emergency situation. It noted that for the applicants, the purported derogation was not a necessary response to any new or altered state of affairs but was the Government's reaction to the decision in *Brogan and Others* case and was lodged merely to circumvent the consequences of this judgment. The Government and the Commission maintained that, while it was true that this judgment triggered off the derogation, the exigencies of the situation have at all times since 1974 required the powers of extended detention conferred by the Prevention of Terrorism legislation. It was the view of successive Governments that these powers were consistent with Article 5(3) and that no derogation was necessary. The Court however considered that both the measures and the derogation were direct responses to the emergency

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[3] Article 15 provides:
"1. 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 [the] 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.
2. No derogation from Article 2 (art. 2), except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 (art. 3, art. 4-1, art. 7) shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

with which the United Kingdom was and continued to be confronted.

6.31 The Court observed that the power of arrest and extended detention has been considered necessary by the Government since 1974 in dealing with the threat of terrorism. Following the *Brogan and Others* judgment the Government were then faced with the option of either introducing judicial control of the decision to detain under section 12 of the 1984 Act or lodging a derogation from their Convention obligations in this respect. The adoption of the view by the Government that judicial control compatible with Article 5 para. 3 was not feasible because of the special difficulties associated with the investigation and prosecution of terrorist crime rendered derogation inevitable. Accordingly, the power of extended detention without such judicial control and the derogation of 23 December 1988 being clearly linked to the persistence of the emergency situation, there is no indication that the derogation was other than a genuine response.

6.32 The Court also considered whether the absence of judicial control of extended detention was justified. The Court noted the opinions expressed in the various reports reviewing the operation of the Prevention of Terrorism legislation that the difficulties of investigating and prosecuting terrorist crime give rise to the need for an extended period of detention which would not be subject to judicial control. It pointed out that these special difficulties were recognised in its *Brogan and Others* judgment. It further observed that it remains the view of the respondent Government that it is essential to prevent the disclosure to the detainee and his legal adviser of information on the basis of which decisions on the extension of detention are made and that, in the adversarial system of the common law, the independence of the judiciary would be compromised if judges or other judicial officers were to be involved in the granting or approval of extensions.

6.33 The Court also notes that the introduction of a "judge or other officer authorised by law to exercise judicial power" into the process of extension of periods of detention would not of itself necessarily bring about a situation of compliance with Article 5(3). The Court said that provision - like Article 5(4) - must be understood to require the necessity of following a procedure that has a judicial character although that procedure need not necessarily be identical in each of the cases where the intervention of a judge is required.[4]

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[4] The Court pointed out the following judgments: as regards Article 5(3) *Schiesser v. Switzerland* of 4 December 1979, Series A no. 34, p. 13, para. 30 and *Huber v Switzerland* of 23 October 1990, Series A no. 188, p. 18, paras. 42-43; as regards Article 5(4), *De Wilde, Ooms and Versyp v*

6.34 The Court explained that it is not its role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other. In the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the Government attach great importance. The Court considered that in the light of these considerations it cannot be said that the Government have exceeded their margin of appreciation in deciding, in the prevailing circumstances, against judicial control.

6.35 The Court considered the question of safeguards against abuse, noting that the applicants, Amnesty International and Liberty and Others maintained that the safeguards against abuse of the detention power were negligible and that during the period of detention the detainee was completely cut off from the outside world and not permitted access to newspapers, radios or his family. Amnesty International, in particular, stressed that international standards such as the 1988 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution 43/173 of 9 December 1988) ruled out incommunicado detention by requiring access to lawyers and members of the family. Amnesty submitted that being brought promptly before a judicial authority was especially important since in Northern Ireland habeas corpus has been shown to be ineffective in practice. In their view Article 5(4) should be considered non-derogable in times of public emergency. In addition, it was contended that a decision to extend detention cannot in practical terms be challenged by habeas corpus or judicial review since it is taken completely in secret and, in nearly all cases, is granted. This is evident from the fact that, despite the thousands of extended detention orders, a challenge to such a decision has never been attempted.

6.36 The Court took the view, having regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, that the Government have not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.

Belgium of 18 June 1971, Series A no. 12, p. 41, para. 78, *Sanchez-Reisse v. Switzerland* of 21 October 1986, Series A no. 107, p. 19, para. 51, and *Lamy v. Belgium* of 30 March 1989, Series A no. 151, pp. 15-16, para. 28.

(d) The right to silence and inferences

6.37 In the case of *Murray v United Kingdom*[5] the applicant contended that there had been a violation of the right to silence and the right not to incriminate oneself contrary to Article 6(1) and (2) of the Convention.[6] In the submission of the applicant the drawing of incriminating

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[5] Application number 00018731/91, case number 41/1994/488/570. . The applicant was arrested by police officers at 5.40 p.m. on 7 January 1990 under section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989. Pursuant to Article 3 of the Criminal Evidence (Northern Ireland) Order 1988, he was cautioned by the police in the following terms:

> "You do not have to say anything unless you wish to do so but I must warn you that if you fail to mention any fact which you rely on in your defence in court, your failure to take this opportunity to mention it may be treated in court as supporting any relevant evidence against you. If you do wish to say anything, what you say may be given in evidence."

In response to the police caution the applicant stated that he had nothing to say. At 7.05 p.m. he was informed of his right to have a friend or relative notified of his detention and indicated that he did not require anyone to be so notified. At 7.06 p.m. he indicated that he wished to consult with a solicitor. At 7.30 p.m. his access to a solicitor was delayed on the authority of a detective superintendent pursuant to section 15 (1) of the Northern Ireland (Emergency Provisions) Act 1987. The delay was authorised for a period of 48 hours from the time of detention on the basis that the detective superintendent had reasonable grounds to believe that the exercise of the right of access would, inter alia, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent an act of terrorism.
At 9.27 p.m. on 7 January a police constable cautioned the applicant pursuant to Article 6 of the Order, inter alia, requesting him to account for his presence at the house where he was arrested. He was warned that if he failed or refused to do so, a court, judge or jury might draw such inference from his failure or refusal as appears proper. He was also served with a written copy of Article 6 of the Order. In reply to this caution the applicant stated: "Nothing to say." At 10.40 p.m. he was reminded of his right to have a friend or relative notified of his detention and stated that he did not want anyone notified. He was also informed that his right of access to a solicitor had been delayed. He then requested consultation with a different firm of solicitors. A police inspector reviewed the reasons for the delay and concluded that the reasons remained valid.

The applicant was interviewed by police detectives at Castlereagh Police Office on twelve occasions during 8 and 9 January. In total he was interviewed for 21 hours and 39 minutes. At the commencement of these interviews he was either cautioned pursuant to Article 3 of the Order or reminded of the terms of the caution. During the first ten interviews on 8 and 9 January 1990 the applicant made no reply to any questions put to him. He was able to see his solicitor for the first time at 6.33 p.m. on 9 January. At 7.10 p.m. he was interviewed again and reminded of the Article 3 caution. He replied: "I have been advised by my solicitor not to answer any of your questions." A final interview, during which the applicant said nothing, took place between 9.40 p.m. and 11.45 p.m. on 9 January. His solicitor was not permitted to be present at any of these interviews.

[6] 6(1) In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
2. Everyone charged with a criminal offence has the following minimum rights:
…

inferences against him under the Criminal Evidence (Northern Ireland) Order 1988 violated Article 6(1) and (2) of the Convention. He argued that it amounted to an infringement of the right to silence, the right not to incriminate oneself and the principle that the prosecution bear the burden of proving the case without assistance from the accused.

6.38 The Court noted in *Murray v United Kingdom* that the applicant contended that a first, and most obvious element of the right to silence is the right to remain silent in the face of police questioning and not to have to testify against oneself at trial. In his submission, these have always been essential and fundamental elements of the British criminal justice system. In the applicant's view these are absolute rights which an accused is entitled to enjoy without restriction. A second, equally essential element of the right to silence, he submitted was that the exercise of the right by an accused would not be used as evidence against him in his trial.

6.39 The Court considered, inter alia, that the Northern Ireland Standing Advisory Commission on Human Rights, for its part, submitted that the right to silence was not an absolute right, but rather a safeguard which might, in certain circumstances, be removed provided other appropriate safeguards for accused persons were introduced to compensate for the potential risk of unjust convictions. The Government contended that what is at issue is not whether the Order as such is compatible with the right to silence but rather whether, on the facts of the case, the drawing of inferences under Articles 4 and 6 of the Order rendered the criminal proceedings against the applicant unfair contrary to Article 6 of the Convention.

6.40 The Court 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

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(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.

6.42 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.

6.43 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.

6.44 The Court stated in *Murray v United Kingdom* that as regards the degree of compulsion involved in the present case, it is recalled that the applicant was in fact able to remain silent. Notwithstanding the repeated warnings as to the possibility that inferences might be drawn from his silence, he did not make any statements to the police and did not give evidence during his trial. Moreover under Article 4 (5) of the order he remained a non-compellable witness. Thus his insistence in maintaining silence throughout the proceedings did

not amount to a criminal offence or contempt of court. Furthermore, as has been stressed in national court decisions, silence, in itself, cannot be regarded as an indication of guilt.

6.45 The Court considered that the facts of the case fell to be distinguished from those in *Funke* where criminal proceedings were brought against the applicant by the customs authorities in an attempt to compel him to provide evidence of offences he had allegedly committed. The Court noted that such a degree of compulsion in that case was found by the Court to be incompatible with Article 6 since, in effect, it destroyed the very essence of the privilege against self-incrimination. The Court remarked that admittedly a system which warns the accused - who is possibly without legal assistance (as in the applicant's case) - that adverse inferences may be drawn from a refusal to provide an explanation to the police for his presence at the scene of a crime or to testify during his trial, when taken in conjunction with the weight of the case against him, involves a certain level of indirect compulsion. However, since the applicant could not be compelled to speak or to testify, as indicated above, this factor on its own cannot be decisive.

6.46 The Court recalled in *Murray v United Kingdom* that it must confine its attention to the facts of the case and the reality of the case was that the applicant maintained silence right from the first questioning by the police to the end of his trial. The Court considered that it is not for the Court therefore to speculate on the question whether inferences would have been drawn under the Order had the applicant, at any moment after his first interrogation, chosen to speak to the police or to give evidence at his trial or call witnesses, nor should it speculate on the question whether it was the possibility of such inferences being drawn that explains why the applicant was advised by his solicitor to remain silent. Immediately after arrest the applicant was warned in accordance with the provisions of the Order but chose to remain silent. The Court, stated that like the Commission, it observed that there is no indication that the applicant failed to understand the significance of the warning given to him by the police prior to seeing his solicitor. Under these circumstances the fact that during the first 48 hours of his detention the applicant had been refused access to a lawyer does not detract from the above conclusion that the drawing of inferences was not unfair or unreasonable. Nevertheless, the issue of denial of access to a solicitor, has implications for the rights of the defence which call for a separate examination. The Court considered that against the above background, and taking into account the role played by inferences under the Order during the trial and their impact on the rights of the defence, the criminal proceedings were not unfair or that there had been an infringement of the presumption of innocence.

(e) Judicial control over deprivation of liberty

6.47 The *Brogan* case noted above, was preceded by the case of *Ireland v United Kingdom* which was also heard by the European Court of Human Rights. The Court noted that the substance of the Irish Government's allegations was that-

- the various powers relating to extrajudicial deprivation of liberty which were used in the six counties from 9 August 1971 to March 1975 did not satisfy the conditions prescribed by Article 5 of the Convention;[7]
- those powers violated Article 5 since they failed to meet in full the requirements of Article 15;
- those powers were furthermore exercised with discrimination and consequently also violated Article 14 taken together with Article 5.

6.48 The Court pointed out that Article 5(1) contains a list of the cases in which it is permissible under the Convention to deprive someone of his or her liberty. Subject to Article 15 that list is exhaustive: this appears from the words "save in the following cases" and is confirmed

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[7] Article 5(1) to (4) read as follows:

"(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:
(a) the lawful detention of a person after conviction by a competent court;
(b) 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;
(c) 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;
(d) 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;
(e) 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;
(f) 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.
(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) 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."

by Article 17. The different forms of deprivation of liberty in this case clearly did not fall under sub-paragraphs (a), (d), (e) and (f) of Article 5(1). The Court also remarked that neither were such deprivations covered by Article 5(1)(b), since they had no connection whatsoever with a "non-compliance with the ... order of a court" and were not designed to "secure the fulfilment of any obligation prescribed by law".[8] The Court remarked that at first sight, the different forms of deprivation of liberty may appear to bear some resemblance to the cases contemplated by art. 5(1)(c). However, a "suspicion" of an "offence" was not required before a person could be arrested under Regulation 10, nor did it have to be "considered necessary to prevent his committing an offence or fleeing after having done so"; arrest had merely to be "for the preservation of the peace and maintenance of order" and was sometimes used to interrogate the person concerned about the activities of others.[9] The Court pointed out that on the other hand, the other three Regulations complained of by the Irish Government did require a suspicion. While Regulations 11(1) (arrest) and 11(2) (detention) spoke both of an "offence" and of activity "prejudicial to the preservation of the peace or maintenance of order", and while this latter concept alone appeared in Regulation 12(1) (internment), section 2(4) of the Special Powers Act made such activity an offence.

6.49 The Court noted that the Terrorists Order (interim custody and detention) and the Emergency Provisions Act (arrest, interim custody and detention), for their part, were applicable only to individuals suspected of having been concerned in the commission or attempted commission of any act of terrorism, that is the use of violence for political ends, or in the organisation of persons for the purpose of terrorism; these criteria were well in keeping with the idea of an offence. The Court stated that irrespective of whether extrajudicial deprivation of liberty was or was not founded in the majority of cases on suspicions of a kind that would render detention on remand justifiable under the Convention, such detention is permissible under Article 5(1)(c) only if it is "effected for the purpose of bringing the detainee before the competent legal authority". Yet, the Court remarked, this condition - if interpreted, as must be done, in the light of Article 5(3) - was not fulfilled.

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8 *Lawless* judgment of 1 July 1961, Series A no. 3, p. 51, para. 12; *Engel and Others* judgment of 8 June 1976, Series A no. 22, p. 28, para. 69, third sub-paragraph.

9 The Court noted that exercise of the power was not conditional on suspicion of an offence and, following a practice originating in instructions issued to the military police in May 1970, the individual was not normally informed of the reason for his arrest; although looked upon in principle as a preliminary to detention and internment, arrest sometimes had the object of interrogating a person about the activities of others; and some arrests, and some subsequent detention orders, seem to have been made on the basis of inadequate or inaccurate information.

6.50 The Court stated that Article 5(2) to (4) place the Contracting States under an obligation to provide several guarantees in cases where someone is deprived of his liberty. Under article 5(2), "everyone who is arrested shall be informed promptly ... of the reasons for his arrest and of any charge against him". However, there was no such provision either in Regulations 10 and 11(1) or in section 10 of the Emergency Provisions Act. In point of fact, the persons concerned were not normally informed why they were being arrested; in general, they were simply told that the arrest was made pursuant to the emergency legislation and they were given no further details. This practice originated in instructions issued to the military police in May 1970 and it continued at least until it was declared unlawful by the courts.

6.51 As for article 5(3), taken together with article 5(1)(c), the Court found that the impugned measures were not effected for the purpose of bringing the persons concerned "promptly" before "the competent legal authority", namely "a judge or other officer authorised by law to exercise judicial power". Persons originally detained under, for example, Regulation 11(2) were, in fact, sometimes brought before the ordinary courts, but Articles 5(1) (c) and (3) of the Convention are not satisfied by an appearance "before the competent legal authority" in some cases since such appearance is obligatory in every single case governed by those paragraphs. For its part, the advisory committee before which were brought - on the occasions when they so consented - individuals interned under Regulation 12 (1) did not have power to order their release and accordingly did not constitute a "competent legal authority". On the other hand, such a power was vested by the Terrorists Order and, subsequently, by the Emergency Provisions Act in the commissioners who adjudicated on cases of persons subjected to interim custody orders made by the Secretary of State for Northern Ireland. However, even if such a commissioner is regarded as a judicial authority ("officer", "magistrate"), appearance before him did not take place "promptly". A person "arrested or detained" pursuant to one of the provisions complained of was even less entitled to "trial within a reasonable time" or to "release pending trial" conditioned, if need be, by "guarantees to appear for trial", within the meaning of Article 5 para. 3. The Court noted the contrary: the reason for the existence of those provisions and of the related practice was the fact that the circumstances prevailing at the time made it difficult, subject to exceptions, to institute criminal proceedings which would in principle have led to a judicial hearing ("audience") and to a "[decision] on the merits".

6.52 The European Court of Human Rights noted in the case of *Brogan and Others v United*

Kingdom[10] that all of the applicants were informed by the arresting officer that they were being arrested under section 12 of the 1984 Act and that there were reasonable grounds for suspecting them to have been involved in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland. They were cautioned that they need not say anything, but that anything they did say might be used in evidence. On the day following his arrest, each applicant was informed by police officers that the Secretary of State for Northern Ireland had agreed to extend his detention by a further five days under section 12(4) of the 1984 Act. None of the applicants was brought before a judge or other officer authorised by law to exercise judicial power, nor were any of them charged after their release.

6.53 The Court explained that it was not required to examine the impugned legislation *in abstracto*, but must confine itself to the circumstances of the case before it. The Court stated that the fact that the applicants were neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance with Article 5(1)(c). The Court said that as the Government and the Commission have stated, the existence of such a purpose must be considered independently of its achievement and Article 5(1)(c) does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody. The Court noted that such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. The Court remarked that there is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming or dispelling the concrete suspicions which, as the Court has found, grounded their arrest. The Court pointed out that had it been possible, the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority. The

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[10] Case number 10/1987/133/184-187. The first applicant, Mr Terence Patrick Brogan, was arrested at his home at 6.15 a.m. on 17 September 1984 by police officers under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984. He was then taken to Gough Barracks, Armagh, where he was detained until his release at 5.20 p.m. on 22 September 1984, that is a period of detention of five days and eleven hours. The second applicant, Mr Dermot Coyle, was arrested at his home by police officers at 6.35 a.m. on 1 October 1984 under section 12 of the 1984 Act. He was then taken to Gough Barracks, Armagh, where he was detained until his release at 11.05 p.m. on 7 October 1984, that is a period of detention of six days and sixteen and a half hours. The third applicant, Mr William McFadden, was arrested at his home at 7.00 a.m. on 1 October 1984 by a police officer under section 12 of the 1984 Act. He was then taken to Castlereagh Police Holding Centre, Belfast, where he was detained until his release at 1.00 p.m. on 5 October 1984, that is a period of four days and six hours. The fourth applicant, Mr Michael Tracey, was arrested at his home at 7.04 a.m. on 1 October 1984 by police officers under section 12 of the 1984 Act. He was then taken to Castlereagh Royal Ulster Constabulary ("RUC") Station, Belfast, where he was detained until his release at 6.00 p.m. on 5 October 1984, that is a detention period of four days and eleven hours.

Court held that their arrest and detention must therefore be taken to have been effected for the purpose specified in article 5(1)(c). The Court found therefore that there has been no violation of Article 5(1).

6.54 The Court also noted that the Government argued that in view of the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, the maximum statutory period of detention of seven days was an indispensable part of the effort to combat that threat, as successive parliamentary debates and reviews of the legislation had confirmed. In particular, they drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism, and that time was also needed to undertake necessary scientific examinations, to correlate information from other detainees and to liaise with other security forces. The Government claimed that the need for a power of extension of the period of detention was borne out by statistics. For instance, in 1987 extensions were granted in Northern Ireland in respect of 365 persons. Some 83 were detained in excess of five days and of this number 39 were charged with serious terrorist offences during the extended period.

6.55 The Court noted in the *Brogan* case, as regards the suggestion that extensions of detention beyond the initial forty-eight-hour period should be controlled or even authorised by a judge, that the Government pointed out the difficulty, in view of the acute sensitivity of some of the information on which the suspicion was based, of producing it in court. The Government also argued that not only would the court have to sit in camera but neither the detained person nor his legal advisers could be present or told any of the details, and this would require a fundamental and undesirable change in the law and procedure of the United Kingdom under which an individual who is deprived of his liberty is entitled to be represented by his legal advisers at any proceedings before a court relating to his detention. If entrusted with the power to grant extensions of detention, the judges would be seen to be exercising an executive rather than a judicial function. It would add nothing to the safeguards against abuse which the present arrangements are designed to achieve and could lead to unanswerable criticism of the judiciary. In all the circumstances, the Secretary of State was better placed to take such decisions and to ensure a consistent approach. Moreover, the merits of each request to extend detention were personally scrutinised by the Secretary of State or, if he was unavailable, by another Minister.

6.56 The Court remarked that the fact that a detained person is not charged or brought

before a court does not in itself amount to a violation of the first part of Article 5(3). No violation of Article 5(3) can arise if the arrested person is released "promptly" before any judicial control of his detention would have been feasible. If the arrested person is not released promptly, he or she is entitled to a prompt appearance before a judge or judicial officer. The Court explained that the assessment of "promptness" has to be made in the light of the object and purpose of Article 5.

6.57 The Court stated that it had regard to the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. The Court noted that judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, one of the fundamental principles of a democratic society which is expressly referred to in the Preamble to the Convention and from which the whole Convention draws its inspiration.

6.58 The Court noted that the case was exclusively concerned with the arrest and detention, by virtue of powers granted under special legislation, of persons suspected of involvement in terrorism in Northern Ireland, and that the requirements under the ordinary law in Northern Ireland as to bringing an accused before a court were expressly made inapplicable to such arrest and detention by section 12(6) of the 1984 Act. The Court remarked that there is no call to determine in the judgment whether in an ordinary criminal case any given period, such as four days, in police or administrative custody would as a general rule be capable of being compatible with the first part of Article 5(3). The Court noted that none of the applicants was in fact brought before a judge or judicial officer during his time in custody. The issue to be decided was therefore whether, having regard to the special features relied on by the Government, each applicant's release can be considered as "prompt" for the purposes of Article 5(3).

6.59 The Court considered that investigation of terrorist offences undoubtedly presents the authorities with special problems, partial reference to which has already been made under Article 5(1). The Court remarked that it took full judicial notice of the factors adverted to by the Government in this connection. It is also true that in Northern Ireland the referral of police requests for extended detention to the Secretary of State and the individual scrutiny of each police request by a Minister do provide a form of executive control, and, in addition, the need for the continuation of the special powers has been constantly monitored by Parliament and their

operation regularly reviewed by independent personalities. The Court however accepted that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5(3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.

6.60 The difficulties, the Court remarked, as alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5(3), for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. The Court however considered that they cannot justify, under Article 5(3), dispensing altogether with "prompt" judicial control. The Court remarked that the scope for flexibility in interpreting and applying the notion of "promptness" is very limited.

6.61 In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr McFadden, falls outside the strict constraints as to time permitted by the first part of Article 5(3). The Court considered that to attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". The Court held that an interpretation to this effect would import into Article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3). The Court thus found that there has been a breach of Article 5(3) in respect of all four applicants.

B. UK proposals for new legislation

6.62 The Belfast Agreement, endorsed by 71% of the people of Northern Ireland , and the subsequent elections to the new Northern Ireland Assembly, provided the means to take Northern Ireland on the road to lasting peace. The Government has drawn on the work of the Inquiry headed by Lord Lloyd of Berwick which reported in 1996 on the need for specific legislation dealing with Irish, international and domestic terrorism in the UK in the event of lasting

peace in Northern Ireland. The UK government stated that it believes 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. The Government's aim is to create legislation which is both effective and proportionate to the threat which the UK faces from all forms of terrorism, which ensures that individual rights are protected, and complies with the UK's international commitments.

6.63 The framework of the UK's counterterrorism legislation (the PTA and EPA) were examined along with existing and potential future terrorist threats. It proposed that the PTA and EPA be repealed and that they both be replaced by one piece of permanent legislation which will apply throughout the UK and to all forms of terrorism - Irish, international and domestic, including new forms of terrorism which may develop in the future.

6.64 While the threat of international terrorism remain entire, the UK Government expressed the hope and expects that the threat from Irish terrorism will diminish to the point where no additional special powers are necessary to combat it. It is the Government's objective to progressively transform the security environment, as appropriate, and achieve complete normalisation. The Government will wish, nearer to the time, to make a judgement as to whether or not it might be necessary to include in the new legislation a number of temporary provision which would be specific to Northern Ireland.

6.65 The 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:
>
> (i) Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure;
>
> (ii) 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;
>
> (iii) The need for additional safeguards should be considered alongside any additional powers;
>
> (iv) 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.

(a) The definition of terrorism

6.66 It is proposed in the Terrorism Bill that 'terrorism' means the use or threat, for the purpose of advancing a political, religious or ideological cause, of action which - a) involves serious violence against any person or property, b) endangers the life of any person, or c) creates a serious risk to the health or safety of the public or a section of the public."[11] "Domestic" terrorism would be included as well as Irish and international terrorism. The definition will 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.[12]

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[11] The definition proposed by the English Government in its 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.

[12] 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

(b) Proscription

6.67 The Government proposed to retain the provisions which allow the proscription of Irish terrorist organisations. It invited views on whether the proscription powers should be extended to cover international and domestic terrorist groups. It is noted in Research Paper 99/101 of the House of Commons that the *Prevention of Terrorism (Temporary Provisions) Act 1989* (PTA) and the *Northern Ireland (Emergency Provisions) Act 1996* (EPA) contain a number of criminal offences relating to membership of, or support for "proscribed organisations" and that those organisations which are proscribed are listed in Schedule 1 of the PTA and Schedule 2 of the EPA. It is explained in the Research Paper that the offences include making contributions of money and other property towards acts of terrorism or the resources of proscribed organisations, assisting in the retention or control of terrorist funds, or failing to disclose knowledge or suspicion that such offences are being committed and, in the case of the 1996 Act, displaying support in public for a it is an offence under sections 2(1) (a) of the Prevention of Terrorism (Temporary Provisions) Act 1989, or 30(1)(a) of the *Northern Ireland (Emergency Provisions) Act 1996* to belong or profess to belong to a proscribed organisation. It is noted that these offences, which are triable either summarily or on indictment, are punishable by up to ten years imprisonment and a fine following conviction on indictment, or six months imprisonment and a £5,000 fine following summary conviction.

6.68 It is pointed out in the Research Paper that the Irish Republican Army (IRA) and the Irish National Liberation Army (INLA) are proscribed in the whole of the UK under Schedule 1 of the *Prevention of Terrorism (Temporary Provisions) Act 1989*, and that the following organisations are proscribed in Northern Ireland under Schedule 2 of the *Northern Ireland (Emergency Provisions) Act 1996*:

- The Irish Republican Army (IRA);
- Cumann na mBan;
- Fianna na hEireann;
- The Red Hand Commando;
- Saor Eire;
- The Ulster Freedom Fighters (UFF);

EUR 45/43/00 April 2000 United Kingdom: Briefing on the Terrorism Bill at http://www.amnesty.org/ailib/aipub/2000/EUR/44504300.htm)

- The Ulster Volunteer Force (UVF);
- The Irish National Liberation Army (INLA);
- The Irish People's Liberation Organisation (IPLO);
- The Ulster Defence Association (UDA);
- The Loyalist Volunteer Force (LVF);
- The Continuity Army Council;
- The Orange Volunteers; and
- The Red Hand Defenders.

6.69 The Research Paper explains that at present organisations can only be proscribed in the UK as a whole under the PTA if they are concerned in, or promoting or encouraging terrorism connected with the affairs of Northern Ireland, and that organisations can only be proscribed in Northern Ireland under the EPA if they are "concerned in terrorism or in promoting or encouraging it". The Research Paper sets out that in practice proscription under the EPA has only been applied to organisations concerned in, promoting or encouraging terrorism connected with the affairs of Northern Ireland. It is noted that section 2 of the PTA creates an offence of membership of a proscribed organisation, which is punishable following conviction on indictment by up to 10 years' imprisonment and a fine, and it is committed by a person who belongs or professes to belong to a proscribed organisation, solicits or invites support for a proscribed organisation other than support with money or other property, or arranges or assists in the arrangement or management of, or addresses, any meeting of three or more persons which is concerned with the activities of proscribed organisations.[13]

6.70 The Research Paper points out that section 3 of the same Act creates an offence of displaying support for a proscribed organisation in public by the wearing of any item of dress or the wearing, carrying or display of any articles in such a way or in such circumstances as to arouse reasonable apprehension that the person concerned is a member or supporter of a

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[13] Amnesty International notes that the powers to proscribe organizations not only make it a criminal offence to belong to "a terrorist organisation", but that the Bill also criminalize anyone speaking at a meeting where a member of a proscribed organization is also speaking even if the speech opposes the activities of such organization. Amnesty International explains that the "meeting" could consist of three people "whether or not the public are admitted" and that the penalty for the latter offence could be imprisonment for up to ten years. Amnesty International says it is concerned that these powers may infringe on the rights to freedom of association and expression and, if anyone were to be imprisoned for speaking at such a meeting in such circumstances, the organization would consider him/her to be a prisoner of conscience. (See Amnesty International's report EUR 45/43/00 April 2000 United Kingdom: Briefing on the Terrorism Bill.)

proscribed organisation. The offence under section 3 is punishable by up to 6 months' imprisonment and a £5,000 fine. The offences under the PTA extend to England and Wales and Scotland. For Northern Ireland, sections 30 and 31 of the EPA set out similar offences, except that the maximum penalty for the offence of displaying support in public for a proscribed organisation is 1 year's imprisonment and a fine, rather than six months' imprisonment and a £5,000 fine. The Research Paper notes that in the report of his *Inquiry Into Legislation Against Terrorism* Lord Lloyd of Berwick noted the view of some commentators that the power to proscribe organisations was largely symbolic:

> "It is certainly true to say that there have been very few convictions under section 2 of the 1989 or any of its predecessors. Lord Colville considered, and rejected, a suggestion that proscription should be extended to cover international terrorist organisations operating in the United Kingdom. Indeed if it were possible, he would have been happy to do without proscription altogether. Lord Jellicoe was equally lukewarm.
>
> 6.9 I take a rather different view. From the outset of the Inquiry, I have been inclined to regard proscription as one of the key provisions in the Act, and that provisional view has been strengthened and confirmed as I have gone on, especially in the course of my visits overseas. Thus in Germany, as we have seen, it is an offence to participate in a terrorist organisation. 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. Article 129A is the foundation of all terrorist prosecutions in Germany. In Italy there is a similar crime of "association with the aims of terrorism and subversion of democratic order". In the USA the new Terrorism Prevention Act empowers the Secretary of State to designate foreign terrorist organisations. The purpose of the power is to deny material support to the designated organisation, and to seize its assets. It is not an offence as such to belong to a designated organisation. But membership of a designated organisation is a ground for deportation proceedings and the denial of entry. The point for present purposes is the importance which the US administration attaches to designation. Terrorist organisations are notoriously fissile. But this does not cause the US administration to question the need for designation, or to doubt its efficacy. They believe it will work.
>
> 6.10 Finally I should mention section 29 of our own EPA, under which it is an offence to direct a terrorist organisation at any level. This offence has not been used as much as one might have expected, no doubt because of the difficulty of proof. But it has been of real value. On at least two occasions it has resulted in the conviction of leading terrorists followed by long sentences.
>
> 6.11 Where does all this point in terms of permanent counter-terrorist legislation? It points, I think, to the terrorist organisation as being the key concept. "Terrorist organisation" will have

> been defined in section 1 of the new Act. 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. The former will carry the heavier sentence. "Participation in the activities of a terrorist organisation" is, I think, a better test than membership, although I note that Gearty and Kimbell favour an offence of being a member of a proscribed organisation. Membership might be taken to include nominal membership. Nominal membership of a foreign terrorist organisation should not, I think, carry with it criminal sanctions. But taking an active part in the UK should. No doubt "membership" could be defined in such a way as to limit the offence to active participation.

6.71 The Research Paper sets out that Lord Lloyd went on to reach the following conclusions about proscription in general:

> 6.12 If "membership" of a terrorist organisation, whether proscribed or not, is to be the key offence where does that leave proscription? In my view there should continue to be a power to proscribe terrorist organisations as at present. It should not be limited to Irish terrorism. It should be extended to include international as well as domestic terrorism. The purpose of proscription will be twofold. First, it will furnish a conclusive presumption that an organisation which is for the time being proscribed is a terrorist organisation. This will facilitate the burden of proof in terrorist cases. Secondly, proscription will be the starting point for the creation of a number of fundraising and other offences, especially fundraising for terrorism overseas, which I shall consider in Chapter 13. It would not be right to create an offence of contributing to the resources of an organisation, which might or might not be a terrorist organisation, unless the organisation had been formally and publicly proscribed. This is the purpose of designation in the US Terrorism Prevention Act. Proscription is another word for the same thing, and will serve the same purpose.

6.72 It is further pointed out in the Research Paper that in its consultation paper *Legislation Against Terrorism* the Government made the following comments about whether or not proscription powers should be retained in respect of terrorism in Northern Ireland:

> 4.7 In Northern Ireland, in particular, proscription has come to symbolise the community's abhorrence of the kind of violence that has blighted society there for over 30 years. The indications are that the proscription provisions have made life significantly more difficult for the organisations to which they have been applied. Whilst the measures may 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. Many activities by, or on behalf of, such groups are made more difficult by proscription, and that in

itself aids the law enforcement effort in countering them. But perhaps more importantly the provisions have signalled forcefully the Government's, and society's, rejection of these organisations' claims to legitimacy.

4.8 There have 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). But the indications are that the provisions have produced some less quantifiable but still significant outcomes. In particular it is suggested they have led proscribed organisations to tone down overt promotion and rallies. 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 believes these factors to be very important.

4.9 One reason why there have been relatively few convictions for proscription-related offences is that they can be difficult to prove in practice. This particular concern was addressed in the recent Criminal Justice (Terrorism and Conspiracy) Act 1998 in respect of those "specified" terrorist groups not observing a full and unequivocal ceasefire, by provision for a statement of opinion of a senior police officer to be admissible as evidence in court. In the wake of the Omagh bombing, and in line with similar action by the Irish Government, the Government rapidly introduced tough additional measures to tackle the difficulty of proving membership, targeted against the Real IRA and other terrorist groups who have not satisfied the Secretary of State that their ceasefire is complete and unequivocal. The fact that the Government chose in doing so to build upon the existing proscription powers underlines its conviction that these measures are 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.

4.10 Whilst optimistic that lasting peace will come to Northern Ireland, the Government does not believe that it would be right to repeal the power to proscribe Irish terrorist groups. The hope is that the existing terrorist organisations will continue to lose support and not be replaced - but there are no guarantees and the proscription measures have proved themselves to be fundamental to an effective response to the emergence of new terrorist groups. The Government therefore believes that the power of proscription in relation to Irish terrorism should be retained in future permanent counter-terrorism legislation. It proposes that, as now, 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.

4.11 The additional proscription-related provisions introduced this summer in the Criminal Justice (Terrorism and Conspiracy) Act 1998 (outlined in Annex A) constituted a specific and tightly defined response to the threat from small splinter groups opposed to the peace process in Northern Ireland. The Government hopes that well before any new permanent counter-terrorist legislation comes into force, the threat from Irish terrorism will have continued to reduce to the extent that the need to retain these provisions will have diminished. A decision on whether or not the provisions should be retained in the new legislation will need to be taken at that time, in the light of the security situation. The Government went on to set out its view of the advantages and disadvantages of extending the power to proscribe organisations to international and domestic terrorism.

4.14 An advantage in extending the 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. The current provisions, under which only Irish terrorist groups can be proscribed, could be construed by some as indicating that the Government does not take other forms of terrorism as seriously. Furthermore a wider provision could deter international groups from establishing themselves in the UK. Arguably, such groups can, to a greater extent than indigenous groups, choose their centres of operation, and proscription could send an unequivocal message that they are not welcome here.

4.15 Moreover, as for Irish terrorist groups, proscription or designation could make it easier to tackle terrorist fund-raising. (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 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. Criminalising fund-raising activity of any kind for a particular group would remove the requirement to prove end use of funds. But, of course, the provisions could 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.

4.16 Although the Government recognises there would appear to be some advantage in extending proscription-type powers to non Irish terrorist groups, it is also aware that there could be attendant difficulties. 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. 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 now, additions to, or deletions from, the list could only be made after debate by, and with the explicit agreement of, Parliament. Moreover the Government might 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.
>
> 4.17 In the light of these considerations, the Government recognises that the arguments are 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.

6.73 It is noted in the Research Paper of the House of Commons that in an article entitled "Terrorism and human rights: a case study in impending realities" published in the journal *Legal Studies* in September 1999 Conor Gearty, Professor of Human Rights Law at King's College, London, commented on the Government's consultation paper in the light of the imminent implementation of the *Human Rights Act 1998*. The Research Paper notes that the Act requires public authorities to act in a way which is compatible with the European Convention on Human Rights and enables arguments based on the Convention rights, which are set out in Schedule 1 of the Act, to be used in the UK courts. It is explained that it is already in force in Scotland and will come into force in the rest of the UK on 2 October, 2000. Article 11 of the European Convention on Human Rights, which is concerned with freedom of assembly and association, which provides as follows is pointed out in the Research Paper :

> "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."

6.74 The Research Paper points out that Professor Gearty commented that the question of whether or not the power to proscribe organisations would be compatible with Article 11 was not mentioned in the consultation paper. He suggested that the point was not clear-cut, even in respect of the current proscription power, much less the new expanded power being considered by the Government. He went on:

> 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.

6.75 The Research Paper states that Professor Gearty noted that in two recent European Court of Human Rights cases involving Turkey the point of principle had been developed in the context of illegitimate attempts to ban two political organisations, the United Communist Party and the Socialist Party.[14] It is explained in the Research paper that Part II of the *Terrorism Bill* is designed to merge the two separate lists of organisations proscribed under the PTA and EPA into a single list and establish a proscription regime that will apply across the whole of the UK. It is also explained that the Bill is designed to extend the ambit of proscription by making it possible for organisations concerned with international or domestic terrorism to be proscribed, as well as those concerned with terrorism connected with the affairs of Northern Ireland.

6.76 The Research Paper notes that Schedule 2 of the Bill lists those organisations that are currently proscribed under the PTA and EPA. Clause 3 seeks to enable the Secretary of State to make orders adding or removing organisations from the list in Schedule 2 or amending the Schedule in some other way. By virtue of clause 118 these orders will be subject to the affirmative procedure and will therefore require the approval of both Houses of Parliament. The Secretary of State will only be able to exercise his power to add an organisation to the list of proscribed organisations under Schedule 2 if he believes that it is concerned with terrorism. Clause 3 (5) provides that 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.

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[14] *United Communist Party of Turkey v. Turkey (1998) 26 EHRR 121* and *The Socialist Party of Turkey v. Turkey (1998) 27 EHHR 51*.

6.77 It is explained in the Research Paper that decisions to proscribe organisations under the PTA or the EPA may currently only be challenged by way of application for judicial review. The *Explanatory Notes* for the *Terrorism Bill* say that no proscribed organisation has ever done this. Clauses 4-6 of the Bill set out a procedure to be followed by an organisation which thinks it should not be proscribed, or an affected individual, who is seeking a remedy. It is intended that this procedure should begin with an application to the Secretary of State under clause 4, asking him or her to exercise the power under clause 3 (3)(b) to remove an organisation from the list of proscribed organisations set out in Schedule 2. The Secretary of State will be able to make regulations, which will be subject to the negative procedure, setting out the procedure for applications. These regulations will have to include time limits for the determination of applications and provisions requiring applications to state the grounds on which they are being made.

6.78 Where an application under Clause 4 is refused, the applicant will be able to appeal under clause 5 to the Proscribed Organisations Appeal Commission, a body the members of which will be appointed by the Lord Chancellor under Schedule 3. Schedule 3 also 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.

6.79 It is explained in the Research Paper that it is intended that where the Commission allows an appeal in respect of an organisation it should be able to make an order under clause 5(4).[15] The Secretary of State will then be required to give effect to the Commission's decision, and depending on the urgency of the situation, the Secretary of State will lay before Parliament a draft order under the affirmative procedure, removing the organisation from the list in Schedule 2, or, in urgent cases, the Secretary of State will make an order removing the organisation from the list. It is explained that If the latter procedure is used, the order will lapse within 40 days unless a resolution is passed by each of the Houses of Parliament during that period. It is further

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[15] (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-
(a) lay before Parliament, in accordance with section 121(3), the draft of an order under section 3(3)(b) removing the organisation from the list in Schedule 2, or
(b) make an order removing the organisation from the list in Schedule 2 in pursuance of section 121(4).

noted that an appeal from a decision of the Proscribed Organisations Appeal Commission on a point of law, to the Court of Appeal in London, the Court of Session in Edinburgh or the Court of Appeal in Northern Ireland, is allowed depending on whether the first appeal was heard in England and Wales, Scotland or Northern Ireland and an appeal to any of these courts will require the leave of the Commission or the Court to which the appeal would be brought. The Report explains that the Secretary of State will not be required to take any action under an order issued under clause 5(4) until after the final determination or disposal of an appeal under clause 6, including any subsequent appeal to the House of Lords.

6.80 The Report sets out if an appeal to the Proscribed Organisations Appeal Commission is successful and an order is made deproscribing the organisation, clause 7 is intended to enable anyone convicted, in respect of that organisation, of any one of a number of specified offences committed after the date of the refusal to deproscribe, to appeal against his conviction to the Court of Appeal. The offences are:

- being a member of a proscribed organisation (under clause 10);
- inviting support for a proscribed organisation (under clause 11);
- wearing the uniform of a proscribed organisation (under clause 12);
- terrorist fund-raising (under clause 14);
- the use or possession of money or other property for the purposes of terrorism (under clause 15);
- entering into funding arrangements for the purposes of terrorism (under clause 16);
- money-laundering terrorist property (under clause 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 (under Clause 18); or
- directing the activities of a terrorist organisation (under clause 54).

(c) Exclusion

6.81 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.

(d) Terrorist financing

6.82 The Government proposed that the current provisions for dealing with terrorist financing should be strengthened. It proposes that the existing measures should be extended so as to cover the raising and laundering of funds in the United Kingdom which are intended to be used in connection with, or in furtherance of, acts of terrorism anywhere abroad. It also proposes 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 proposes 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.

(e) Power of arrest

6.83 The Government's preliminary view was that a power to arrest without warrant anyone whom the police reasonably suspect of being involved in the commission, preparation, or instigation of acts of terrorism should be included in the new legislation.

(f) Detention

6.84 The 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 the current 7 day maximum, the period for which a detainee may be held subject, in future, to judicial authorization. It is noted in the House of Commons Research Paper 99/101 on the *Terrorism Bill* that a person arrested by the police under section 14 of the PTA may be detained for up to 48 hours without charge, and if the police wish to detain him or her for a further period they must apply to the Secretary of State to extend the period of detention, and the latter may extend the detention for a period of up to 5 days. It states that a person arrested under section 14 may therefore be detained for up to 7 days without charge. The Research Paper 99/101 also points out article 5(3) -(5) of the

European Convention on Human Rights.[16]

6.85 Research Paper 99/101 notes 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 is now section 14 of the PTA. The Research Paper points to the consultation paper *Legislation Against Terrorism in which* the United Kingdom 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.

6.86 The Research Paper further refers 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), which is the only derogation from the ECHR that the UK has in place:

> 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.

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[16] 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.

6.89 It is explained in Research Paper 99/101 that section 16 of the *Human Rights Act 1998* accordingly provides that if it has not already been withdrawn by the United Kingdom, the UK's derogation from Article 5(3) of the ECHR will cease to have effect for the purposes of the Act, that is, for the purpose of the incorporation of the ECHR into the UK's domestic law, at the end of the period of 5 years beginning with the date on which section 1(2) of the Act came into force. At any time before this 5 year period comes to an end the Secretary of State will have powers under section 16(2) of the 1998 Act to extend it by a further 5 years. It is noted in the research paper that the *Human Rights Act* 1998 is due to be implemented across the whole of the UK on 2 October 2000.

6.90 It is further explained in Research Paper 99/101 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.

6.91 Research Paper 99/101 points 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.

6.92 It is explained in Research Paper 99/101 that the consultation paper went on to say that it 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 current derogation, and that on balance the Government favoured Option 2. It is further set out in Research Paper 99/101 that under Clause 39 and Schedule 7, it is intended that the police should be able to detain a person arrested under section 39 for an initial period of up to 48 hours, a person's detention will have to be periodically reviewed by a review officer, who will be an officer who has not been directly involved in the investigation in connection with which the person has been detained and the review officer will only be able to authorise a person's continued detention if satisfied that it is necessary to obtain relevant evidence, whether by questioning him 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. It is noted in Research Paper 99/101 that the detained person, or his solicitor if he or she is available at the time of review, will be able to make oral or written representations about the detention. Furthermore, the review officer will have to make a written record of the outcome of the review, including the grounds on which any continued detention is authorised, and, unless the detained person is incapable of understanding what is said to him, is violent or likely to become violent, or is in urgent need of medical attention, the record will have to be made in his presence and he will have to be informed about whether the review officer is authorising continued detention and if so, on what grounds. If the police wish to detain a person beyond the 48 hour period specified in clause 39(3) paragraph 24 of Schedule 7 of the Bill aims 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. The Research Paper notes that "judicial authority" is defined in paragraph 24(4) of Schedule 7 as follows:

> (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.

6.93 Research paper 99/101 sets out that 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:

> (a) 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

(d) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.

6.94 It is explained in Research Paper 99/101 of the House of Commons that paragraph 28 of Schedule 7 is designed to give the detained person an opportunity to make representations about the application to extend his detention. He or she will also be entitled to be legally represented at the hearing, although the judicial authority will have powers to exclude both the detained person and his legal representative from any part of the hearing. It is noted that the officer applying for the warrant of extension will also be permitted to apply to the judicial authority for an order that specified information upon which he intends to rely be withheld from the detained person or his representative and paragraph 29 sets out various grounds on which the judicial authority may grant such an order.[17] The Research Paper states that the total period for which it will be possible to detain a person without charge under Clause 39 and Schedule 7 will be 7 days from the time of their arrest, or, of they were arrested while being detained under provisions in Schedule 6 concerning port and border controls, 7 days from the time when their examination under that Schedule began.[18]

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17 29. (1) A judicial authority may issue a warrant of further detention only if satisfied that-

(a) 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

(b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.

18 Amnesty International considered that the Bill fails to provide explicitly for detainees to be informed, upon arrest, of all of their rights. They pointed out that the Bill provides, for the right of a detainee to inform one person of his/her detention and the place of detention, and that the detainee is also entitled to consult a solicitor "as soon as is reasonably practicable" but that both of these rights can be delayed, up to 48 hours, if the police believe the granting of these rights may impede the investigation. Amnesty International was concerned that the provisions regarding judicial supervision of detention are still significantly weaker than under ordinary legislation. They noted that under the Bill, a person can be detained for 48 hours before a judicial authority shall determine whether an extension of that detention can be granted; this is longer than the 36 hours in ordinary criminal legislation. They also pointed out that under the Bill, the maximum period of detention without charge is seven days, whereas it is 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).

Amnesty International commented 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

(g) Powers of stop, search, entry and seizure

6.95 The Government proposed that, for the most part, the current powers in the PTA should be re-enacted and made applicable throughout the United Kingdom. This would enable some of the police powers under the EPA to be repealed. If nearer the time it is judged that any of the existing EPA powers need to be retained, they would form part of the temporary section of the new legislation and be governed by statutory codes of practice.

(h) Port and border controls

6.96 The government proposed that the maximum period that a person may be detained at a port for questioning, whether or not the examining officer has a reasonable suspicion that the person is or has been concerned in the commission, preparation or instigation of acts of terrorism, is reduced from 24 hours to 9 hours. 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. The provision allowing an examining officer to require certain passengers leaving or entering Great Britain or Northern Ireland to complete cards will be subject to the affirmative resolution procedure and may be lapsed or repealed. The information relating to passengers, crews or their vehicles which examining officers will be able to request will be set out in a separate order subject to the negative resolution procedure.

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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 allows 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.

(i) Temporary Northern Ireland specific measures

6.97 Options were explored for temporary Northern Ireland specific measures which the Government hopes and expects will not be required because the threat of terrorism will have diminished to the point where no such additional measures are necessary. The measures examined include the Diplock Court arrangements, the Army powers and the more specialized police powers under the EPA, to stop, search, enter and seize material. The Government is clear that if any temporary police or army powers are enacted, codes of practice would be drawn up governing the exercise of the powers and all of the temporary provisions would be subject to annual review, and to Parliament's annual agreement to their remaining in force. Individual provisions could be lapsed as appropriate. It has also been proposed that the ordinary criminal standard for admissibility of confession evidence in terrorist cases be adopted.[19]

j. Disclosing information on terrorism or terrorist property

6.98 The English Terrorism Bill also provides for a duty to disclose information about terrorism or terrorist property. Clause 18 seeks to require banks and other businesses to report suspicions they may have that individuals are laundering terrorist money or committing other offences under Clauses 14 to 17[20]. A person who has such a suspicion will commit an offence

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[19] Clause 75 (1) This section applies to a trial on indictment for - (a) a scheduled offence, or (b) two or more offences at least one of which is a scheduled offence.
(2) A statement made by the accused may be given in evidence by the prosecution in so far as- (a) it is relevant to a matter in issue in the proceedings, and (b) it is not excluded or inadmissible (whether by virtue of subsections (3) to (5) or otherwise).
(3) Subsections (4) and (5) apply if in proceedings to which this section applies - (a) the prosecution gives or proposes to give a statement made by the accused in evidence, (b) prima facie evidence is adduced that the accused was subjected to torture, inhuman or degrading treatment, violence or the threat of violence in order to induce him to make the statement, and (c) the prosecution does not satisfy the court that the statement was not obtained in the manner mentioned in paragraph (b).
(4) If the statement has not yet been given in evidence, the court shall - (a) exclude the statement, or (b) direct that the trial be restarted before a differently constituted court (before which the statement shall be inadmissible).
(5) If the statement has been given in evidence, the court shall - (a) disregard it, or (b) direct that the trial be restarted before a differently constituted court (before which the statement shall be inadmissible).
(6) This section is without prejudice to any discretion of a court to - (a) exclude or ignore a statement, or (b) direct a trial to be restarted, where the court considers it appropriate in order to avoid unfairness to the accused or otherwise in the interests of justice.

[20] Clause 14 deals with fund-raising for the purposes of terrorism, clause 15 with use and possession of money or other property for the purposes of terrorism, clause 16 with funding arrangements as

punishable by up to 5 years' imprisonment and a fine if he does not disclose his belief or suspicion and the information on which it is based to a constable as soon as is reasonably practicable.[21] It will be a defence that the person had a reasonable excuse for not making the disclosure or that he or she disclosed information to his employer in accordance with a procedure established for the purpose. Professional legal advisers who obtain information in privileged circumstances or whose beliefs or suspicions are based on information obtained in privileged circumstances will not be subject to the duty to disclose. Clause 18(6) provides that 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. Section 18 of the PTA provides a general offence, punishable by up to 5 years imprisonment and a fine, of failing to disclose information about terrorism. In the report of his *Inquiry into Legislation Against Terrorism* Lord Lloyd noted concerns that the offence was little used and appeared to be of little practical value in increasing the flow of information to the police, but had a chilling effect on the reporting of terrorism by the media. He observed that in their review of the PTA both Lord Colville and Lord Shackleton had recommended the repeal of section 18, although Lord Jellicoe recommended that it should stay, after examining it at some length. Lord Lloyd said: "The provision is commonly criticised on two grounds. First, there is the point of principle that, while every citizen has a moral obligation to help the police, the state should be reluctant to transform this into a legal duty. The second argument is a practical one; that prosecutions under section 18 are most often used against members of the families of suspected terrorists, putting them in an impossible position of conflicting loyalties." Lord Lloyd recommended that the offence under

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a result of which money or other property is made available or is to be made available that will or may be used for the purposes of terrorism and clause 17 with money laundering.

[21] Disclosure of information: duty.
18. (1) This section applies where a person - (a) believes or suspects that another person has committed an offence under any of sections 14 to 17, 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.

section 18 of the PTA should not appear in the new legislation and the Government agreed. Instead, Clause 18 replicates only section 18A of the PTA, focussing on beliefs and suspicions which people acquire as a result of information coming to their attention in the course of their work. Clauses 19 and 20 of the Bill correspond to the PTA and are designed to enable people to disclose information about terrorist property to the police, notwithstanding any restriction on the disclosure of information imposed by statute or otherwise. Clause 20(1) is also intended to protect informants and others by providing that a person does not commit an offence under Clauses 14 to 17 if he is acting with the express consent of a constable.

k. <u>Informing a named person of the detainee's detention and access to a lawyer</u>

6.99 It is proposed in the Terrorism Bill[22] that a person detained under Schedule 7[23] or section 41[24] 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 provides 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 is 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 proposes 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 may 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 is detained under section

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22 As introduced in the House of Lords.

23 Which deals with port and border patrols.

24 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 7when 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.

41 without warrant on the suspicion of being a terrorism he or she must 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 may give an authorisation for such a delay only if he or she has 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 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.

6.100 The Bill seeks 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 ceases to subsist there may be no further delay in permitting the exercise of the right in the absence of a further authorisation. The Bill also makes 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 may 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 may be given only if the officer giving it has reasonable grounds for believing that, unless the direction is given, the exercise of the right by the detained person will have any of the consequences as specified in the previous paragraph.

6.101 Amnesty International noted that whereas the Terrorism Bill permits a delay of up to 48 hours before the detained person can gain access to a lawyer under ordinary legislation this period is limited to a maximum of 36 hours.[25] They also pointed out that the right to have a lawyer present during interrogation is 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...".[26] They remarked that the Bill does 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 Internationals explained that although not explicitly stated in the Bill, one assumes 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 does 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.

6.102 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

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25 See Amnesty International - 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

26 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.

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 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.

6.103 Amnesty International noted that the Bill 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, 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.

C. The United States of America

6.104 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.:

- **r** Chapter 115 - Treason, sedition and subversive activities;
- **r** Chapter 113B - Terrorism;
- **r** Chapter 105 - Sabotage;
- **r** Chapter 84 - Presidential and presidential staff assassination, kidnapping and assault;
- **r** Chapter 18 - Congressional, cabinet and supreme court

			assassination, kidnapping and assault;
r	Chapter 51	-	Homicide;
r	Chapter 55	-	Kidnapping;
r	Chapter 41	-	Extortion and threats;
r	Chapter 12	-	Civil disorders;
r	Chapter 81	-	Piracy and privateering;
r	Chapter 39	-	Explosives and other dangerous articles;
r	Chapter 10	-	Biological weapons.

6.105 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.

6.106 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.

6.107 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.

6.108 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.

6.109 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.

6.110 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 -

- **r** 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
- **r** 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.

6.111 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.

6.112 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.

6.113 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.

6.114 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.

6.115 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 reports[27]. 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.[28] 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 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.

6.116 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:[29]

- 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

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27 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

28 http://www.amnesty.org/ailib/aipub/1999/AMR/25116899.htm

29 http://www.amnesty.org/ailib/aipub/1998/AMR/25104698.htm

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 participation in hostilities.

D. Canada

(a) Legislative measures in Canada

6.117 The Criminal Code of Canada does not provide for a specific offence of terrorism. Certain provisions of the Criminal Code are, however, particularly relevant to the type of offences often committed by terrorists, e.g. - section 279(1) (kidnapping), section 279.1 (hostage-taking), section 76 (hijacking), section 77 (endangering the safety of an aircraft or an airport, section 81 (using explosives). Provision is made for severe sentences, in certain cases imprisonment for life. In the case of hostage-taking, as well as in cases of offences involving nuclear material, war crimes and crimes against humanity, provision is made for extra-territorial jurisdiction.

6.118 Other provisions of interest include:

- Section 248, in terms of which a person who interferes with transportation facilities with intent to endanger the safety of any person is guilty of an offence and liable to imprisonment for life;

- Section 431, which aims to protect internationally protected persons from attacks on their official premises, private accommodation or means of transport;
- Section 430, in terms of which a person who wilfully destroys or damages property, renders it useless, or interferes with the lawful use thereof commits mischief. The Criminal Code specifically provides for mischief in relation to data. Everyone who commits mischief that causes actual danger to life is guilty of an indictable offence and liable to imprisonment for life.

6.119 Part II of the Code provides for Offences against Public Order, e.g. - High Treason and Treason (section 46), Sabotage (section 52), Sedition (section 59), Intimidating Parliament or legislature (section 57), Unlawful assemblies and riots (section 63 et. seq.), Unlawful drilling (section 70).

6.120 The Code further includes the following measures:

- Section 753(4) of the Code empowers a court, who has found an offender to be a dangerous offender, to impose a sentence of detention in a penitentiary for an indeterminate period. This provision is applicable in cases where an offender has been convicted of a serious personal injury offence. A serious personal injury offence means-

  (a) an indictable offence, other than high treason, treason, first or second degree murder involving -

    (i) the use or attempted use of violence against another person, or

    (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage to another person,

  and for which the offender may be sentenced to imprisonment for ten years or more, or

  (b) certain offences of sexual assault.

c Part XV - Special Procedures and Powers provide, inter alia, for powers to issue various types of warrants (warrants authorizing the use of certain devices, investigative techniques etc., and warrants to obtain bodily substances for forensic DNA analysis) and forfeiture of offence - related property.

(b) Self-incriminating statements under Canadian law

6.121 The Canadian Supreme Court considered in *R v Elshaw*[30] the appropriate test under s. 24(2) of the Canadian Charter of Rights and Freedoms for the admission of a self-incriminating statement obtained following a violation of the accused's s. 10(*b*) Charter rights. Judge Iacobucci noted that it is the fact that the police obtained evidence from a detained person prior to fulfilling their responsibilities under s. 10(*b*) which is important, not the relatively short period of time during which the appellant was detained. He pointed out that the violation of s. 10(*b*) arose when Constable Jorgensen began to question the appellant without advising him that he could retain a lawyer. The appellant was not even told that he had the right to remain silent and that anything he might say could be used against him. He remarked that in this light, it is clear that the violation of the appellant's rights was serious. The appellant was denied access to counsel or even the opportunity to take refuge in silence at the very moment when he could have most benefited from the exercise of these rights. The police obtained a statement which the Court of Appeal acknowledged contributed "substantially" to his conviction, and, finally, the self-incriminating evidence was used to provide a nexus to similar fact evidence regarding the appellant's previous conviction for child molesting which was the basis of the appellant's indeterminate sentence as a dangerous offender.

6.122 The next factor the court considered in *R v Elshaw* was the submission of the accused's counsel that there was no urgency or necessity to detain the accused in the fashion they did. The Court pointed out that here the two police officers were faced with a complaint of possible child molesting that had just taken place, they were required to make some very hasty decisions, and they had four potential witnesses to immediately question, and a suspect under their control. In Judge Iacobucci's view, it would have been unreasonable to expect the police officers to immediately release the suspect and let him go his way and then commence investigating the stories of the four witnesses. The Court considered that the situation these police officers found themselves in was something akin to the situation in *R. v. Strachan*, supra,

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30 [1991] 3 SCR 24. The judgment of Lamer C.J. and Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ. was delivered by Iacobucci J.

where the police officers refused to allow the accused to telephone his lawyer until the police had the premises safely under control. Under the circumstances, it was Judge Iacobucci's view that the police officers did what was not only reasonable but necessary in placing the accused in the patrol wagon for a short period of time to maintain control over the accused until their questioning of the witnesses was concluded and at the same time to remove him from the continued surveillance of four prospective witnesses.

6.123 The Court stated that it may have been reasonable and necessary to place the accused in the patrol wagon but the question is whether it was necessary to violate the appellant's Charter right in the circumstances. Judge Iacobucci considered that the court below mistakenly focussed on the detention rather than on the questioning of the appellant. The court remarked that if circumstances of urgency or necessity are to be a mitigating factor, they must go to the need to obtain information right away prior to advising the suspect of his or her rights to retain and instruct counsel, rather than the need to restrict a suspect's movements by detention or arrest. He noted that the urgency of detention should not be used as an excuse to violate the right to counsel if there is no need to question the accused immediately.

6.124 He said that in this case, there was no urgency or necessity that would have prevented compliance with s. 10(*b*). At trial, police officers Jorgensen and Randhawa testified that they were unsure whether they would charge the appellant with any offence until after they obtained the incriminating statement. He considered that this seemed odd in light of the fact that by that time they had interviewed both the adult witnesses and the complainants, and they had informed the appellant that they were investigating a possible child molesting. He remarked that even, however, if the police genuinely had not decided whether to arrest the appellant when he was questioned, this circumstance of uncertainty falls short of urgency or necessity and that the Crown did not produce any explanation or evidence to show why the police could not have waited to question the accused.

6.125 The court pointed out in *R v Elshaw* that the Crown tendered no evidence to show that Constables Jorgensen and Randhawa were ignorant of their responsibilities under s. 10(*b*) or that they had determined in their own minds that this was merely an "investigative" detention. He noted that it should be remembered that not only did the officers fail to advise the appellant of his right to counsel, but they also failed to give him the common law caution regarding the right to remain silent. He said even if the good faith of the police officers were definitively established, it should not have been considered by the Court of Appeal as a mitigating factor in the violation

of the appellant's rights. The Court noted the following comments in another s. 10(*b*) case, *Hebert*, *supra*, at pp. 207-8:

> As Lamer J. pointed out in *Collins*, any impingement on trial fairness strikes at the heart of the reputation of the administration of justice. But the Crown has submitted in the present case that the good faith of the police officers who arranged for the deception of the appellant ... is a significant factor in favour of receiving the evidence. For myself, I fail to see how the good faith or otherwise of the investigating officers can cure, so to speak, an unfair trial. ... It seems odd indeed to assert that evidence the admission of which would render a trial unfair ought to be admitted because the police officer thought he was doing his job. From the accused's perspective (whose trial is ex hypothesi proceeding unfairly), it makes little difference that the police officer has a clean conscience in the execution of his duty.

6.126 Judge Iacobucci noted that the bad faith of the police may strengthen the case for exclusion because, as Lamer J. points out in *Collins*, *supra*, it may tend to show a "blatant disregard for the Charter". However, the good faith of police will not strengthen the case for admission to cure an unfair trial. The fact that the police thought they were acting reasonably is cold comfort to an accused if their actions result in a violation of his or her right to fair criminal process.

6.127 Judge L'Heureux-Dubé found in a dissenting opinion in *R v Elshaw* that there was no violation of appellant's rights under s. 10(*b*) of the *Charter*; and that the appellant was not detained within the meaning of the section when he made the self-incriminating statements to the police. She noted that in her opinion the case before the Court presented the ideal opportunity to look south and learn from the experience of the United States. She remarked that the balancing between the rights of the individual to be free from unnecessary and unjustified harassment at the hands of state agents and the right of society at large to expect efficient law enforcement, is of primordial importance, and, given what appears to her to be the overly cumbersome and obtrusive position which has developed in Canada, the American position might well offer a compromise between the two conflicting rights which is worthy of the Court's attention.

6.128 Judge L'Heureux-Dubé stated that a promising avenue of inquiry, and a compromise which she saw as attending to both competing interests might be found in the doctrine of preliminary investigatory detention short of arrest. She noted, inter alia, that the question of preliminary investigatory detention for questioning was considered by the Australian Law Reform Commission in *Criminal Investigation*, where the majority of the members, concluded:

> ... a police officer should not question any person whom he thinks might be the author of a serious crime, nor seek to have that person go to a police station or anywhere else for the purpose of attempting to procure evidence against him, without previously advising him of his legal rights . . .

6.129 Judge L'Heureux-Dubé pointed out, however, that there was a dissenting minority opinion which was of the view that:

> ... a police officer at an early stage of the investigation ought to be able freely to pursue his inquiries from all citizens, whether suspected or not. . . . the giving of the warning and the request for the written acknowledgment by the person who may conceivably be implicated in an offence will impede adequate and proper police investigation.

6.130 She noted that a similar note was sounded in Scotland where, in a report prepared for the Secretary of State, *Criminal Procedure in Scotland* (Second Report) (1975), at para. 3.13, a period of investigatory detention was also advocated:

> Clearly the police should not be entitled to arrest anyone they want to interview but it seems plainly wrong, for example, that a suspected violent criminal with significant evidence on his clothing has to be left at large while the police seek other evidence of his guilt sufficient to entitle them to charge.

6.131 Judge L'Heureux-Dubé remarked that the period of detention, according to the Commission, was to be no longer than was necessary in the interests of justice and should not, in any event, exceed a fixed period of time (six hours) at the end of which the person would either be charged or released and that an officer would only be able to detain the person where he or she had reasonable cause to suspect that the person had committed an offence for which there already existed the power to arrest without warrant and there would be no general right to the assistance of counsel during the detention although this would be overridden if the police intended to search body cavities or take physical samples.

6.132 Judge L'Heureux-Dubé pointed out that this position was not retained by the Canadian Law Reform Commission and that in its report *Arrest* (Report 29) (1986), at p. 20, the Commission cautioned against the creation of any sort of intermediate position between arrest and complete liberty, arguing that either someone ought to be arrested and entitled to the full gamut of legal guarantees which that state entails, or they ought to be explicitly cautioned that their assistance is entirely voluntary:

> It is my respectful contention, however, that a balance which takes the rights of a possible suspect into account yet which protects the public at large by fulfilling reasonable expectations about law enforcement may be found by moving closer to the American position. In my view, a

large-scale endorsement of Le Dain J.'s third scenario in *Therens* would take Canadian justice to a point where the former interest, albeit a vitally important one, would be protected to the great detriment and complete neglect of the latter. The *Charter* cannot be interpreted in a manner which produces such an anomalous and unbalanced stance. Adopting a brief period of investigatory detention anterior to the point at which the full extent of the *Charter* rights take hold combines common sense and practicality while still being sufficiently sensitive to the protection of individual rights as guaranteed by our *Canadian Charter of Rights and Freedoms*.

In my opinion it is neither sound constitutional interpretation nor sound constitutional policy for the s. 10(*b*) rights guaranteed in the *Charter* to be required at every instance where a citizen may feel, rightly or wrongly, psychological compulsion in the presence of a police officer. It is clear to me that the rights guaranteed therein should be rendered active, if I may use those terms, at a point much later in the process -- after a period where the police have an opportunity to assess the situation which confronts them, to identify possible witnesses and suspects, and to confirm the initial information they receive. With respect to those who hold a contrary view, it would seem to me to be misguided to require the police to issue warnings pursuant to s. 10(*b*) to all the people they meet at the scene of an accident, or, as in the case currently before us, after they receive a call and must investigate some kind of a disturbance, on the off-chance that someone with whom they communicate may feel some kind of compulsion and make a self-incriminating statement.

While Professors de Montigny and Stuart may have legitimate concerns over the rights of a future accused in the proceedings prior to the laying of a charge, these concerns seem to me to be misplaced at such an early stage of an investigation and should not result in the obliteration of values which are equally important. As Justice Benjamin Cardozo remarked in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), at p. 122:

> The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. *But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true*. [Emphasis added.]

The American experience in the area has shown, I think, that there is a middle ground where the concerns expressed above may co-exist with effective law enforcement. To adopt a position which prevents state agents from attempting to gain any sort of information whatsoever from those persons whom, as a matter of simple common sense, they would routinely be expected to question would be to confuse constitutional vigilance with paranoia. We must be careful not to leave this common sense at the doorstep when we are called on to interpret the *Charter*.

On the facts of this case, I would hold that the appellant was not detained within the meaning of s. 10(*b*) when he made the statements in question to the police officers. There was, therefore, no violation and no need to proceed to the stage of deciding whether or not the admission of the evidence would bring the administration of justice into disrepute. However, should I be mistaken on this view of the law, I would still hold that pursuant to the criteria set down in *R. v. Collins*, [1987] 1 S.C.R. 265, the statements ought not to have been excluded under s. 24(2) since their admission, in my view, would not bring the administration of justice into disrepute and render the trial unfair.

(c) Legal representation in Canadian case law

6.133 In the case of *R v Prosper* [31] the Canadian Supreme Court considered whether section

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[31] [1994] 3 S.C.R. 236.

10(*b*) of the *Charter* imposes a substantive constitutional obligation on governments to ensure that duty counsel is available upon arrest or detention to provide free and immediate, preliminary legal advice upon request and whether the appellant's right to retain and instruct counsel without delay under s. 10(*b*) of the *Charter* violated in this case. The Court noted that section 10(*b*) of the *Charter* provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right and that the Canadian Supreme Court was unanimous in the *Brydges* case in concluding that -

> … in circumstances where an accused expresses a concern that the right to counsel depends upon the ability to afford a lawyer, it is incumbent on the police to inform him of the existence and availability of Legal Aid and duty counsel.

6.134 The Court however, noted that the majority of the Court went further and expanded the information component under s. 10(*b*), which is triggered by arrest or detention and that it was no longer constitutionally sufficient for law enforcement authorities simply to repeat the words of the *Charter* by cautioning detainees of their right "to retain and instruct counsel without delay".

6.135 Lamer CJ said that he was of the view that it is neither appropriate nor necessary for the Court to find that s. 10(*b*) of the *Charter* imposes on governments a substantive obligation to ensure that "*Brydges* duty counsel" is available to detainees, or likewise, that it provides all detainees with a corresponding right to such counsel:

> First, it is clear that s. 10(*b*) of the *Charter* does not, in express terms, constitutionalize the right to free and immediate legal advice upon detention. The right to retain and instruct counsel and to be informed of that right, or in French the right to "*l'assistance d'un avocat et d'être informé de ce droit*" is simply not the same thing as a universal right to free, 24-hour preliminary legal advice. Moreover, he stated that there is evidence which shows that the framers of the *Charter* consciously chose not to constitutionalize a right to state-funded counsel under s. 10 of the *Charter*: He noted that as the Supreme Court has stated on a number of occasions, s. 10(*b*) imposes both informational and implementational duties on state authorities who arrest or detain a person.
>
> Once a detainee has indicated a desire to exercise his or her right to counsel, the state is required to provide him or her with a reasonable opportunity in which to do so. In addition, state agents must refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel. As the majority indicated in *R. v. Ross*, [1989] 1 S.C.R. 3, at p. 12, once a detainee asserts his or her right to counsel, the police cannot in any way compel him or her to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right. In other words, the police are obliged to "hold off" from attempting to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel.
>
> In my view, what constitutes a "reasonable opportunity" will depend on all the surrounding circumstances. These circumstances will include the availability of duty counsel services in the jurisdiction where the detention takes place. As the majority in *Brydges* suggested (at p. 216), the existence of duty counsel services may affect what constitutes "reasonable diligence" of a

detainee in pursuing the right to counsel, which will in turn affect the length the period during which the state authorities' s. 10(*b*) implementational duties will require them to "hold off" from trying to elicit incriminatory evidence from the detainee. The non-existence of such services will also affect the determination of what, under the circumstances, is a "reasonable opportunity" to consult counsel. The absence of duty counsel in a jurisdiction does not give persons detained there more rights under s. 10(*b*) than those who are detained in jurisdictions which have duty counsel. It does, however, serve to extend the period in which a detainee will have been found to have been duly diligent in exercising his or her right to counsel. Similarly, if duty counsel exists but is simply unavailable at the time of detention, the "reasonable opportunity" given to detainees to contact counsel will have to reflect this fact.

In a situation such as the one in this case, where duty counsel services are available during regular office hours (although only to those eligible for legal aid) and a detainee expresses a desire to contact counsel and is duly diligent in exercising that right, but is prevented from doing so due to institutional factors beyond his or her control, s. 10(*b*) requires that the police hold off from trying to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel. Similarly, the "reasonable opportunity" provided to detainees in jurisdictions lacking duty counsel might extend to when the local Legal Aid office opens, when a private lawyer willing to provide free summary advice can be reached, or when the detainee is brought before a justice of the peace for bail purposes and his or her needs can be properly assessed and accommodated. In determining what is a reasonable opportunity, the fact that the evidence may cease to be available as a result of a long delay is a factor to be considered.

The holding-off requirement described above flows logically from the two implementation duties. I am also satisfied that making the police hold off from trying to elicit incriminatory evidence from a detainee in jurisdictions where no duty counsel is available at the time of request, and where the detainee has been sufficiently diligent upon being informed of the right to counsel to trigger and sustain his or her ensuing rights under s. 10(*b*), is consistent with the underlying purposes of s. 10(*b*).

It is now well accepted that s. 10(*b*) serves to protect the privilege against self-incrimination, a basic tenet of our criminal justice system which has been recognized by members of this Court to be a "principle of fundamental justice" under s. 7 of the *Charter*: *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, and *R. v. Jones*, [1994] 2 S.C.R. 229. In *R. v. Hebert*, [1990] 2 S.C.R. 151, at pp. 176-77, the relationship between s. 10(*b*) and the right to silence was acknowledged by the majority, at p. 176:

The first *Charter* right of importance in defining the scope of the right to silence under s. 7 of the *Charter* at the pre-trial stage is the right to counsel under s. 10(*b*) of the *Charter*.

The scheme under the *Charter* to protect the accused's pre-trial right to silence may be described as follows. Section 7 confers on the detained person the right to choose whether to speak to the authorities or to remain silent. Section 10(*b*) requires that he be advised of his right to consult counsel and permitted to do so without delay.

The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.

This point was confirmed in *Brydges*, where the majority held at p. 206 that:

> A detainee is advised of the right to retain and instruct counsel without delay because it is upon arrest or detention that an accused is in immediate need of legal advice. [Emphasis in original.] As I stated in Manninen, supra, at p. 1243, one of the main functions of counsel at this early stage of detention is to confirm the existence of the right to remain silent and to advise the detainee about how to exercise that right. It is not always the case that immediately upon detention an accused will be concerned about retaining the lawyer that will eventually represent him at a trial, if there is one. Rather, one of the important reasons for retaining legal advice without

> delay upon being detained is linked to the protection of the right against self-incrimination. This is precisely the reason that there is a duty on the police to cease questioning the detainee until he has had a reasonable opportunity to retain and instruct counsel. [Emphasis added.]

Making the police hold off in situations where a detainee has been reasonably diligent in exercising his or her right to counsel, including where appropriate trying to reach a private lawyer, and where "*Brydges* duty counsel" is not available would accommodate a detainee's privilege against self-incrimination. The police investigation with respect to evidence in the construction of which a detainee must necessarily participate (e.g., confessions, identification evidence, and breath and blood samples) would have to be held in abeyance until such reasonable time as a detainee is able to make contact with a private lawyer or whatever duty counsel service is in existence in the jurisdiction.

With respect to the liberty interests of detainees, it should be remembered that s. 10(*b*) of the *Charter* is triggered by an act of "detention" (which includes arrest) by the state. That is, the duty on state agents to inform individuals of their right to counsel does not arise until a person has been "detained" within the meaning of s. 10. As this Court explained in *R. v. Therens*, [1985] 1 S.C.R. 613, *per* Le Dain J., at pp. 641-42, detention involves some form of coercion or compulsion by the state which results in a deprivation of liberty. The physical constraint (or psychological perception of such constraint) which exists upon detention means that an individual loses his or her freedom of movement and, potentially at least, his or her access to services, including legal assistance, available in the wider community. Accordingly, it is clear that one of the purposes of the right to counsel under s. 10(*b*) is to safeguard the liberty interests of detainees, which are constitutionally protected under s. 7 of the *Charter*, and to assist detainees in regaining their freedom.

While it is true that detainees continue to be deprived of their freedom while the police hold off and they wait to be able to contact counsel, I am satisfied that any deprivation of liberty in these circumstances would be minimal and in accordance with the principles of fundamental justice under s. 7 of the *Charter*. I would further note that the bail provisions under the *Code* lay down a strict procedural code dealing with detention in custody and with release. For example, s. 503(1)(*a*) of the *Code* ensures that a person who is detained is brought before a justice "to be dealt with according to law" . . . without unreasonable delay" (emphasis added). Moreover, any delay which is considered excessive can be challenged under s. 9 of the *Charter*, which protects against arbitrary detention or imprisonment.

In sum, then, I find that s. 10(*b*) does not impose a positive obligation on governments to ensure that free, preliminary legal advice is available on a 24-hour, on-call basis. However, s. 10(*b*) does require, in situations where a detainee has asserted his or her right to counsel and been duly diligent in exercising it, that the police hold off in order to provide the detainee with a reasonable opportunity to contact counsel. It must also be noted that, although there is no constitutional obligation on governments to provide duty counsel services, the non-existence or unavailability of such services could, in some circumstances which I need not speculate on, give rise to issues of fair trial. Thus, in those situations, the state runs the risk of having evidence excluded under s. 24(2) of the *Charter*.

In circumstances where a detainee has asserted his or her right to counsel and has been reasonably diligent in exercising it, yet has been unable to reach a lawyer because duty counsel is unavailable at the time of detention, courts must ensure that the *Charter*-protected right to counsel is not too easily waived. Indeed, I find that an additional informational obligation on police will be triggered once a detainee, who has previously asserted the right to counsel, indicates that he or she has changed his or her mind and no longer wants legal advice. At this point, police will be required to tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity. This additional informational requirement on police ensures that a detainee who persists in wanting to waive the right to counsel will know what it is that he or she is actually giving up.

Given the importance of the right to counsel, I would also say with respect to waiver that once

a detainee asserts the right there must be a clear indication that he or she has changed his or her mind, and the burden of establishing an unequivocal waiver will be on the Crown: *Ross*, at pp. 11-12. Further, the waiver must be free and voluntary and it must not be the product of either direct or indirect compulsion. This Court has indicated on numerous occasions that the standard required for an effective waiver of the right to counsel is very high: *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, *Manninen*, and *Evans*. As I said in *Bartle*, at pp. 192-94 and 206, a person who waives a right must know what he or she is giving up if the waiver is to be valid. That being said, it stands to reason that the right to counsel guaranteed under s. 10(*b*) must not be turned into an obligation on detainees to seek the advice of a lawyer.

Finally, I wish to point out that there may be compelling and urgent circumstances in which, despite a detainee's being unable to contact a lawyer due to the unavailability of a "*Brydges* duty counsel" system, police will not be required under s. 10(*b*) to hold off. However, in the context of impaired driving cases, I am satisfied that the existence of the two-hour evidentiary presumption available to the Crown under s. 258(1)(*c*)(ii) of the *Code* does not, by itself, constitute such a compelling or urgent circumstance. "Urgency" of the kind referred to by this Court in cases such as *Manninen*, *supra*, and *R. v. Strachan*, [1988] 2 S.C.R. 980, is not created by mere investigatory and evidentiary expediency in circumstances where duty counsel is unavailable to detainees who have asserted their desire to contact a lawyer and been duly diligent in exercising their s. 10(*b*) rights. A detainee's *Charter*-guaranteed right to counsel must take precedence over the statutory right afforded to the Crown which allows it to rely on an evidentiary presumption about what a breathalyser reading would have been at the time of care and control of a vehicle. Loss of the benefit of this presumption is simply one of the prices which has to be paid by governments which refuse to ensure that a system of "*Brydges* duty counsel" is available to give detainees free, preliminary legal advice on an on-call, 24-hour basis. In the circumstances presented in this case it is neither necessary nor appropriate to consider s. 1 of the *Charter*. However, if, for example, a section of the *Code* was to be enacted which required a person to take a breathalyser test within a fixed time whether or not a lawyer had been consulted, then a court might well be required to consider, depending on the time allotted amongst other factors, whether such a provision could be justified under s. 1 of the *Charter*.

I would also note as an aside that where the Crown is unable to rely on the presumption under s. 258(1)(*c*)(ii) of the *Code* due to the unavailability of duty counsel, the Crown can still try and prove the "over 80" breathalyser charge by adducing expert evidence which seeks to relate later and lower test results back to the blood-alcohol level at the time of the offence: see, e.g., *R. v. Burnison* (1979), 70 C.C.C. (2d) 38 (Ont. C.A.). As this Court said clearly in *R. v. Deruelle*, [1992] 2 S.C.R. 663, where it considered the breathalyser scheme under the *Code*, evidence obtained more than two hours after the alleged offence is still admissible.

It may be that on some occasions a detainee's reasonable opportunity to contact counsel, and the corresponding holding-off period, will extend to the point at which it is no longer possible to obtain breathalyser readings that can be accurately extrapolated backwards to provide information about the accused blood alcohol level at the time of the alleged offence. The question of whether or not the imminent loss of the chance to obtain any meaningful breathalyser data might constitute an "urgent circumstance" sufficient to curtail the holding-off period does not arise on facts of this appeal. In the case at bar, breathalyser readings were obtained roughly an hour after the appellant was detained, well before any sense of urgency connected to the loss of the opportunity to obtain useful breathalyser data would have developed. It is, therefore, unnecessary to decide in this case whether, under different circumstances, the prospect of the loss of all opportunity to obtain breathalyser data might justify abridging the holding-off period. Moreover, this question could not, in my view, be decided without considering the statutory provisions upon which the police's ability to obtain breathalyser data rests. As I noted in *Bartle*, at p. 213, breathalyser evidence in impaired driving cases is often characterized as "statutorily compellable" by virtue of the fact that refusing to provide a breath sample in these circumstances is itself a criminal offence under s. 254(5) of the *Code.* The results of a breathalyser test are self-incriminatory evidence (*Bartle*, at pp. 213-14), and were it not for s. 254(5), a detainee would be free to choose not to assist the state's investigation by providing a breath sample. In my view, any consideration of the question of whether the state's interest in obtaining breathalyser

> readings was sufficiently pressing to constitute an "urgent circumstance" warranting the curtailment of a detainee's s. 10(*b*) rights would, by inference, require an examination of the constitutionality of s. 254(5), an issue that was not raised directly on this appeal. For these reasons, I prefer not to decide this question at this time.

6.137 In a dissenting opinion Judge L'Heureux-Dubé remarked in the *Prosper case* that, while she believes that the jurisprudence of the Canadian Supreme Court to date was correct, and that a detainee must be provided with a "reasonable opportunity" to consult with counsel where he or she expresses a desire to do so, she cannot accept that the duration of such a reasonable opportunity should depend on the existence or non-existence of duty counsel programs. She noted that the constitutional rights guaranteed under s. 10(*b*) of the *Charter* are uniform across the country and should not depend on the existence or non-existence of programs, such as 24-hour duty counsel services, that themselves are not mandated by the Constitution:

> Furthermore, even if s. 10(*b*) did impose a long "holding-off" requirement in provinces without duty counsel programs, I do not believe that such a holding-off period would be required with respect to breathalyser tests. This Court has long recognized that in urgent or dangerous circumstances, the police need not provide detainees with a reasonable opportunity to consult counsel before questioning them (*R. v. Manninen* and *R. v. Strachan*). While, it goes without saying that it is not in every situation that urgent and dangerous circumstances will be present, I firmly believe that in the case of breathalyser tests there is such an urgency. The test must be administered "forthwith" and the timing for efficacy of that test is two hours, a time frame also required by law. ...
>
> For all of the reasons explained above, I conclude that the appellant's rights under s. 10(*b*) of the *Charter* were not violated. To hold otherwise would be to penalize society for failing to provide a service which is not constitutionally required.
>
> In saying this, I am not in any way minimizing the importance of the s. 10(*b*) *Charter* guarantee. That guarantee is fully protected by providing the proper caution, as was done in this case, and by waiting a reasonable period of time before questioning a detainee who expresses a desire to consult with counsel. However, it is the detainee's responsibility to find counsel with whom to consult. The state is only required to provide the detainee with a reasonable opportunity to do so, which, was done in this case. Thus, I conclude that the appellant's s. 10(*b*) *Charter* rights were not violated.
>
> I cannot resist noting, however, that many of the problems the Court currently faces and will continue to face with respect to the scope of the right to counsel under s. 10(*b*) are partially the result of this Court's interpretation of the notion of "detention" provided for in the *Charter*. … I share Professor Hogg's view, expressed in *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 47-5, that:
>
> > It is difficult to identify any civil libertarian values that are served by the definition of detention that is applied in *Therens*, *Thomsen, Hufsky* and *Simmons*. These cases introduce a right to counsel into every situation, however brief or routine, in which there is a duty to comply with a demand by a police officer (or other official). In every case, the detained person has no choice but to obey the demand, and legal advice could only confirm that duty to obey. There is nothing that counsel could do to protect the innocent, who will in any case be exculpated by the breath test or other inspection or search that he or she is required by law to undergo. The sole effect of the right to counsel seems to be to create opportunities for delay by those who have reason to fear the outcome of the demanded test. Either that delay must be filled by custodial requirements that absorb police resources or the police must take the risk

> that incriminating evidence will disappear. Would it not be better to restrict the term "detention" to those official restraints that are neither routine nor transitory and in which the detained person faces choices that could be assisted by legal advice?

6.138 In *R v Hebert* [32] the Canadian Supreme Court held that the first Charter right of importance in defining the scope of the right to silence under s. 7 of the Charter at the pre-trial stage is the right to counsel under s. 10(b) of the Charter:

> The scheme under the Charter to protect the accused's pre-trial right to silence may be described as follows. Section 7 confers on the detained person the right to choose whether to speak to the authorities or to remain silent. Section 10(b) requires that he be advised of his right to consult counsel and permitted to do so without delay.
> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.
> The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.

E. Germany

6.139 German law was amended to criminalize terrorist acts and to extend security force powers in legal and police procedures, as well as to introduce firearms registration and identification measures. Consequently, terrorist offences are distinguished from ordinary crimes in respect of special treatment and harsher punishment.

6.140 Since 1971, the German criminal law has been amended to define terrorist crimes clearly and in detail. 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

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[32] [1990] 2 S.C.R. 151.

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.

6.141 In respect of police and criminal procedure, to facilitate the investigation of acts of terrorism, the law on the arrest of terrorists was strengthened and the limitation and exclusion of defence counsel of the detainee was instituted. The following were included in new or modified legislation regarding legal and police procedures: Firstly, the Federal Criminal Agency (BKA) was given the right to directly investigate cases of terrorism. Secondly, relations between lawyers and defendants were legally limited. A lawyer suspected of conspiring with his/her clients to commit further crimes could be dismissed as a defence counsel; written communication between lawyers and defendants was controlled by the court, though oral communication was not; installation of dividing panes for talks with terrorist-suspected clients 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 defendant. Thirdly, German police were given the rights to tap suspects' phones, 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.

6.142 The German *Kontaktsperregesetz* 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.[33] 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

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[33] 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.

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.

6.143 Section 31 of 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 sentenced for a 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 a 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.

6.144 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)[34] 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.

6.145 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.[35] 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.[36] The contact person may assist in the criminal investigation by lodging applications and making suggestions which indicate such exonerating facts and circumstances demanding

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34 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.

35 Wilhelm Krekeler “Änderung des sogenanntes Kontaksperregesetz” 1986 *NJW* at 417.

36 Paragraph 34a(I).

prompt clarification.[37] 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 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).

6.147 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 person[38] 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*).[39] 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.[40] A detainee does not have the right of choice to propose a particular lawyer as a contact person.[41] 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.[42] 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.[43]

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37 Paragraph 34a(I).

38 Paragraph 34a(II).

39 Which provides as follows:

40 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.

41 Paragraph 34a(IV).

42 Paragrapg 34a(IV).

43 Paragraph 34a(V).

6.148 The order loses its legal validity if it is not confirmed within two weeks after it was ordered.[44] 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.

6.149 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.[45] 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?

6.150 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.[46]

F. France

6.151 French counter-terrorist policy took shape during the 1980's when terrorist actions were so deadly that the public's feelings of insecurity and fear became very intense. French authorities have dealt with terrorism by enacting anti-terrorism laws and modifying their practices in police and criminal procedure. Their policy tends to centralize terrorist cases and to place more emphasis on law enforcement

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44 Paragraph 35.

45 Wilhelm Krekeler NJW at 418.

46 Wilhelm Krekeler *NJW* at 418.

6.152 Firstly, as special legislation to deal with terrorist crimes, the *Anti-terrorist Law* of 9 September 1986 was enacted. By this law the definition of terrorist crimes was introduced in the Code Pänal. According to the Code Pänal, the penalty of criminal acts, particularly acts directed against persons or property, is increased when those acts are committed in connection with an individual or collective enterprise whose purpose is to provoke a serious disruption of public order by means of intimidation or terror. Especially in cases that involve acts that are harmful to the environment for the same purposes as the above, which are punished as environmental terrorism (article 421-2).

6.153 Secondly, the French government centralized and co-ordinated counter-terrorist activities to give more force to the executive through various institutional measures. The UCLAT (*Unit de Coordination de la Lutte Anti-terorriste*) was set up under the head of the National Police, which could thus avoid being entangled in or embarrassed by the contingencies of Anti-terrorist operations. Increases in personnel for the police and the gendarmerie were announced, as well as the computerization of records about terrorism. The 1986 Law extended this centralization of judicial matters to the Paris Public Prosecutor's Office. This is the Central Antiterrorist Service (Service Central de Lutte Anti-Terroriste, SCLAT). The Paris Regional Court have been centralized as regards judicial decisions which deal with terrorist acts causing considerable disruption of public order (such a repeated bombings) that are committed by organized groups in connection with national or foreign terrorism. Regional judges may retain their competence, if the act of terrorism is of local or regional character. Terrorist cases are judged in a criminal court without a jury.

6.154 Thirdly, in handling terrorist crimes the power of the police was reinforced. To facilitate the investigation, the 1986 Law introduced extraordinary powers of arrest and detention. Police detention can be prolonged for up to four days and provision for further extension is made.

6.155 In order to prevent the commission of an offence, to preserve human life and physical integrity, and to dismantle terrorist networks, the Code Pänal provides an exemption and a reduction of sentence when members of the terrorist organization informs and collaborates with the administrative or judicial authorities.

G. Japan

6.156 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 against hostage taking was enacted.

H. The Russian Federation

6.157 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.

6.158 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".

6.159 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.

I. AUSTRALIA

(a) Legislative measures in Australia

6.160 Specific legislation was adopted in Australia such as Crimes (Ships and Fixed Platforms) Act 1992 no. 173 of 1992, Telecommunications Act of 1997, Crimes (Hostages) Act 1989, the Geneva Conventions Act of 1957, International War Crimes Tribunals Act of 1995 to deal with aspects of terrorism.

(b) Legislative measures in Australia governing police powers of detention and interrogation

6.161 The Tasmanian Criminal Law (Detention and Interrogation) Act of 1995 sets the powers of the police and the rights of detainees during custody and interrogation out 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:
>
> (a) the number and complexity of the offences to be investigated;
>
> (b) 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;

(c) 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;

(d) 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;

(e) 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;

(f) 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;

(g) 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;

(h) any time during which the questioning or investigation of the person is suspended or delayed to allow the person to receive medical attention;

(i) any time during which the questioning or investigation of the person is suspended or delayed to allow the person to rest or receive refreshment;

(j) the period of time when the person cannot be questioned because of his or her intoxication, illness or other physical condition;

(k) the need to detain the person whilst an identification parade is being arranged or conducted;

(l) the need to detain the person whilst searches or forensic examinations are carried out;

(m) 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 olice 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.

6.163 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:[47]

> "3.1.1 The general rule shall be that a person who has been arrested or is otherwise in the custody of a police officer may, if the conditions laid out in Recommendation 3.2 are satisfied, be detained in the custody of police for the purposes of further investigation for such time as is reasonable in all the circumstances, but for no more than four hours of actual investigation from the time of initial custody.[48]

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47 *Report* LRC 66 1990.

48 The New South Wales Law Reform Commission considered the comments on their proposals and stated as follows on their proposed reasonable time requirement:
4.10 ... The list of factors used in Victoria and the Northern Territory to determine "reasonable time" reflects the wide range of contingencies but fails to provide effective guidance. In an able but very young police force, such as we have in New South Wales, this is unsatisfactory.
4.11 As well as providing the least measure of guidance and accountability, the indeterminate "reasonable time" system violates the spirit of the common law. Although the judgments in *Williams* seem to invite legislative reform, the joint judgment of Wilson and Dawson JJ sounds a cautionary note against replacement of the common law with too open-ended a system of detention. ...
4.12 The Commission recommends a fourth option, that of a fixed-time system for custodial investigation. Under our proposals, the police would be able to detain a person for up to four hours for the purpose of investigation if it is reasonably necessary to do so. The four hours is actual investigation time - travelling and waiting time is excluded from the calculation in most circumstances (see 3.6). In more complex cases, police may apply to a court or to a justice (after hours) for a detention warrant authorising an additional period of up to eight hours of custodial investigation. The fixed-time regime is easily coupled with an array of procedural and evidentiary safeguards. ...
4.14 The Commission has come to the conclusion that the fixed-time system has the most to offer. It provides a high degree of certainty, and brings the area of criminal investigation under effective legal regulation for the first time. It operates on the basis that police will be given clear standards and rules of procedure to operate under, which will afford them a realistic opportunity to perform their duties; that persons in custody will be kept fully informed at all stages about their position and their rights; and that there will be proper record-keeping to enable contemporaneous and subsequent review. This "new professionalism" on the part of the police promotes the values of openness, fairness, accountability and efficiency which are meant to be the main criteria for successful management in a democracy. NSW Police already operate a two hour fixed-time regime in respect of breath testing for PCA offences, without undue difficulties.
4.15 It must be stressed again that our recommendations relate only to the narrow time band between the point when the person is arrested (or held "in custody") and when the person is charged or discharged. There is no limit to the amount of time police may devote to the pre-arrest investigation, nor to the post-charge investigation. Indeed, part of the "new professionalism" of police work involves changing police culture and practices from "arrest and investigate" to "investigate and arrest".
...
4.17 The selection of four hours for the initial period of custodial detention is based on the best empirical evidence available, which the Commission concedes still leaves something to be desired. South Australia has been operating a fixed-time system with a four hour initial period (and

3.1.2 All persons in custody must be dealt with expeditiously, and released as soon as the need for detention has ceased to apply.

3.1.3 Before the expiry of the four-hour period, application may be made to a judicial officer for an extension of the time within which to continue custodial investigation, up to a maximum of eight additional hours, in accordance with the provisions of Recommendation 4.

3.1.4 Absent such an extension, no person taken into custody for an offence (or group of offences) shall be questioned or subjected to any other investigative procedure for a period longer than four hours from the commencement of the custody. The "consent" of the person to a further period of questioning shall not, of itself, permit an extension beyond four hours, but such "consent" may be considered by the judicial officer in determining whether (and for how long) to grant an extension

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considerably fewer time-out exclusions than we are recommending) for five years now. Our discussions with senior South Australian police officials and lawyers indicate that "the legislation has proven to be effective", "is a vast improvement" from an operational viewpoint, and "there have not been any major problems encountered in the application of this legislation". The Australian Law Reform Commission has also recommended a four hour initial period (with limited time-out exclusions), based on an empirical study which it commissioned, and research studies from America show that as many as 97 per cent of cases could be cleared in this time. In Scotland, where there is a six hour fixed period with no second stage, the average length of detention is just over two hours. The Review Committee of Commonwealth Criminal Law (the Gibbs Committee) also recommended an initial period of between four-to-six hours, and the *Crimes (Investigation of Commonwealth Offences) Amendment Bill* 1990 currently before the Commonwealth Parliament provides for a four hour initial period.

...

4.19 The New South Wales police carried out a pilot survey for three months in 1987, and found that in 91 per cent of cases surveyed it took less than four hours to process suspects between arrest and charge. No time-out exclusions were taken into account, nor were the police operating in a system in which time was of the essence, so it may be anticipated that the "success" figure will be higher if our Recommendations are adopted.

4.20 In the small percentage of cases where the initial period is not sufficient, we recommend that the police may apply for an extension of custody for a further eight hours (see Recommendation 4). The Commission seriously considered whether a further extension (or "trapdoor" procedure) should be possible for the extraordinary case which requires a longer period of custodial investigation. In such cases, police could apply to a court for a further detention warrant of up to 12 more hours (making the total detention period 24 hours, excluding time-outs). A heavy onus would be placed on the police to satisfy a District or Supreme Court judge that the circumstances were indeed exceptional and compelled the granting of extra time. This hearing would involve both parties, with the suspect given the opportunity to present a contrary case and to challenge police evidence. Legal aid would need to be available for suspects in this position. The Commission has decided not to recommend such a procedure at this time, however, preferring to wait until there is sufficient experience with the fixed-period system in New South Wales to determine whether a trapdoor mechanism is absolutely necessary. ...

4.21 The Commission's recommendation is for the initial four hour period of custodial investigation be codified in legislation, subject to review. If after one year of experience it is evident that the time limits (both the initial period and the extension) need adjustment, then this should be done. The Commission has recommended that there be a mandatory review of the scheme after one year. By then, the system will for the first time be capable of producing reliable empirical information, drawn from the custody records, to facilitate informed debate and the design of a fair and effective process of criminal investigation.

(see Recommendation 4.3).

6.162 The New South Wales Law Reform Commission noted the following grounds for detention following arrest:

> 3.2.1 A person who has been arrested or is otherwise in the custody of a police officer may only be detained for the purpose of investigation if it is necessary
>
> (1) to follow up reasonable suspicions in order to confirm or dispel these suspicions;
>
> (2) to enable such further investigation and inquiries as are reasonably necessary to determine whether a prosecution will be launched and the nature of the charge(s);
>
> (3) to complete any necessary documentation which requires the presence of the detained person;
>
> (4) to establish the identity of the person; or
>
> (5) to conduct other authorised investigative procedures, as detailed in Recommendation 3.5.
>
> 3.2.2 The decision whether a person is to be detained for the purpose of investigation, the determination of a "reasonable period" of detention within the maximum of four hours, and the decision whether to apply to a judicial officer for authorisation of a further period of detention, should all be made by the police officer exercising the function of a custody officer (see Recommendation 3.4 below).

6.164 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;
>
> (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.

6.165 The New South Wales Law Reform Commission stated that these factors are to be considered in the first instance by the police officer exercising the function of a custody officer in determining a "reasonable period" of detention within the four hour maximum, and that these matters must also be considered by the judicial officer to whom an application is made for an extension of the period of detention, to determine whether any such extension is justified, and if so, what further period (up to eight hours) should be authorised. The Commission considered that in both cases, the determination of a "reasonable period" must be subject to an overriding concept of proportionality, balancing the period of custodial investigation necessary against the circumstances and seriousness of the alleged offence and the requirement that the investigation be conducted diligently and expeditiously.

6.166 The New South Wales Law Reform Commission set the functions of a custody officer out as follows:

> 3.4.1 The NSW Police Service should consider the practicability of the introduction of a formal system of "Custody Officers" in New South Wales to operate the proposed custodial detention scheme.
>
> 3.4.2 Until such time as a formal system of Custody Officers is introduced, the Commission recommends that someone in each police station at any given time (hereafter referred to as the "custody officer") must be given specific responsibility for
>
> (1) determining whether detention for the purpose of investigation is warranted (Recommendation 3.2);
>
> (2) determining what a "reasonable period" of detention is in the circumstances of each case (Recommendation 3.3);
>
> (3) ensuring that the required safeguards, such as the giving of a caution and permitting communication with family and legal advisers, are effectively afforded to the detained person (Recommendations 2.5, 2.9, and 5);

(4) ensuring the safety and well-being of all persons in custody (Recommendations 2.7 and 2.9);

(5) determining whether to apply to a judicial officer for an extension of the period of detention, and preparing or assisting in the preparation of such an application (Recommendation 4);

(6) maintaining the Custody Record for each person in police custody (Recommendation 2.9); and

(7) ensuring that the Codes of Practice for police investigations are complied with (Recommendation 7.1).

3.4.3 Where an officer of higher rank than the custody officer gives directions relating to a person in police detention, and the directions are at variance with any decision made or action taken by the custody officer in the performance of a duty imposed on him or her by these recommendations (or with any decision or action which would have been made or taken in the performance of such a duty, but for the directions), the custody officer shall refer the matter at once to a commissioned officer who is responsible for the police station.

3.4.4 The designated custody officer should preferably be of or above the rank of senior constable or be in charge of the police station for the time being. Unless it is unavoidable, the arresting officer should not act as the custody officer. In such cases, the arresting officer must contact a commissioned officer for authorisation, and note this in the custody record.

6.167 The New South Wales Commission recommended the following investigative procedures during detention:

3.5.1 During the period of detention for the purpose of investigation, it shall be proper for the police to conduct the following investigative procedures (to the extent that these procedures are already authorised by law)

(1) questioning or obtaining a statement from the detained person;

(2) questioning or obtaining statements from witnesses or other persons who may have relevant information for the police;

(3) searching of the arrested person;

(4) searching of premises, a vehicle or other conveyance;

(5) fingerprinting;

(6) photographing;

(7) conducting medical examinations;

(8) obtaining forensic samples;

(9) subjecting physical evidence to scientific analysis; and

(10) holding identification parades.

3.5.2 Where a person in police custody states or otherwise indicates that he or she does not wish

to be questioned, police must not persist. If after the questioning has commenced, the person states or otherwise indicates a desire not to answer any further questions, no further questions should be asked (see Police Commissioner's Instruction 31.10).

3.5.3 Codes of Practice should be developed to govern the conduct of these investigative procedures (see Recommendation 7.1).

6.168 The New South Wales Commission was of the opinion that there should be "time-outs" during the period of detention:

> The following periods of time, during which the questioning or investigation of the person is suspended or delayed, shall not be included in calculating the amount of time a person has spent in custody for the purpose of investigation
>
> (1) the direct travel time from the place of apprehension to the police station or police establishment;
>
> (2) any time spent arranging communication with a relative, friend, consular official or lawyer;
>
> (3) any time spent arranging for the services of a qualified interpreter;
>
> (4) any time spent waiting for the arrival at the police station of a relative, friend, lawyer, consular official or interpreter;
>
> (5) any time spent by the detained person receiving medical attention, or resting, or receiving refreshment;
>
> (6) any period in which authorised investigative procedures (per Recommendation 3.5.1) may not be conducted by reason of the person's state of intoxication (caused by alcohol or drugs); and
>
> (7) any period during which an application for a detention warrant (per Recommendation 4) is in progress.
>
> Any "time-out periods" to be applied to the four hour time limit for detention (or any greater period which is judicially authorised) must be recorded on the Custody Record (see Recommendation 2.9). Responsibility for recording and calculating the time-out periods shall be placed on the custody officer.

6.169 The New South Wales Commission considered that at the end of the authorised period of detention the police must either -

(1) release the person without any information being laid; or

(2) release the person on the basis that a summons has issued or will issue against

the person; or

(3) charge the person with a criminal offence.

6.170 The New South Wales Commission recommended that if the decision is made to charge the person, then a further decision shall be made with respect to the granting of "police bail" pursuant to the provisions of the Bail Act. The Commission considered that if police bail is denied, or granted on conditions which are unacceptable to the accused, then the person must be brought before a justice or magistrate as soon as is reasonably practicable, and in any event no later than the next sitting of the most appropriate court, following arrival at such court after travel thereto by the most direct route. (In determining the most appropriate court, regard should be had to the need for the case to be dealt with expeditiously, so that the timing of the next sitting of the court is more important than the convenience of the location). The Commission suggested that no further period of detention for the purpose of investigation may be authorised, and that it should, for example, not be possible for bail to be granted conditional on the person's undertaking that he or she will later attend a police station for the purpose of conducting an investigative procedure. The Commission was further of the view that provision must be made to guard against the expedient re-arrest of a suspect following the expiry of the authorised investigation period, in order to avoid the limitations on detention imposed by their proposed new regime. They thus recommended that a person who has already been detained for the purpose of investigation, and released must not be re-arrested without a warrant and subjected to any further period of investigative detention for the offence or offences for which he or she was previously arrested, unless new material evidence justifying a further arrest has come to light since the release.

6.171 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.

1.172 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. 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. The New South Wales Commission noted that as a study sponsored by the Lord Chancellor's Department 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.

(c) The right to silence

6.173 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 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".

6.174 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 Stevenson's study of District Court trials in New South Wales found that confessional evidence was tendered by police in over 96 per cent of cases, and other empirical studies confirm 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 (which is somewhat uncertain in application). 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.

(d) The right to contact a friend or relative

6.175 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 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.

6.176 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.

(e) The right to legal assistance

6.177 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".

6.178 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. The New South Wales Commission noted that the New South Wales Police Commissioner's Instructions provide that persons in custody should be given the opportunity to seek access to legal assistance, but there is no routine mechanism for seeing that legal advice is actually delivered. They remarked that few suspects would "have a solicitor" a phone call away, and there is no duty solicitor scheme for police stations in New South Wales as there is for the local courts. The New South Wales Commission considered that in keeping with the lack of empirical knowledge about the rest of the criminal investigation process in New South Wales (and Australia), there was simply no empirical evidence available about the extent to which suspects in police custody actually ask for, and receive, legal assistance, although there was much anecdotal evidence (including that contained in submissions to the Commission) that few suspects in custody have lawyers present at the interview and that police do not encourage the presence of lawyers, to put the proposition mildly.

6.179 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.

6.180 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.

6.181 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.

6.182 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 in submissions 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.

6.183 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.

J. INDIA

6.184 Amnesty International recommended in their 1997 report on India[49] that in light of the widespread disregard for arrest and detention procedures which safeguard the rights of detainees, the Human Rights Committee should enquire into measures taken to ensure the systematic monitoring of the use and implementation of existing safeguards present in the criminal law, police manuals and government guidelines to protect detainees. Amnesty International noted that section 330 and 331 of the IPC and section 29 of the Indian Police Act specifically forbid the practice of torture, while section 376 of the IPC specifies the offence of rape in custody, and that despite these safeguards, they have documented widespread torture of detainees throughout India for many years. Amnesty International noted that as well as the torture of political prisoners in areas of internal armed conflict, there is widespread torture of common criminal suspects.

6.185 Amnesty International explained that it welcomed the Government of India's stated commitment to eradicate torture, and the commitment to ratify the Convention Against Torture. Amnesty International also welcomed interventions on the issue of torture by the NHRC and acknowledges its programmes in human rights training amongst police and security forces, and its concern for deaths in custody. However, despite these positive steps there appeared to Amnesty International to be no indication that the practice of torture is diminishing, nor are there fewer reports of deaths in custody. Amnesty International stated that activists in India have pointed to an increase in the torture, including rape, of women, as a punitive act, used to punish a woman's husband, other family members, or her community.[50]

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[49] Amnesty International - Report - ASA 20/27/97 July 1997: India Submission to the Human Rights Committee Concerning Implementation of Articles of the International Covenant on Civil and Political Rights, see http://www.amnesty.org/ailib/aipub/1997/ASA/32002797.htm

[50] Amnesty International noted the following:
"Police officers in India acknowledge that beatings of suspects in police stations are routine. During a visit to Bombay by Amnesty International delegates in January 1994, a senior police official referred to the use of a "good thrashing", while another said "not all police know how to behave rationally and politely". During a visit to a women's police station in Bangalore in August 1996 by Amnesty International delegates, senior police officers spoke of the perceived need to use force to obtain information about crimes in some instances. Other reasons given by police for the continuing use of torture are poor pay and employment conditions, lack of equipment and poor training in the use of investigative methods. In particular, senior officials point to the lack of awareness of basic human rights throughout the country.
In March 1997, a deputy inspector general of police in the state of West Bengal - where a state human rights commission was established in February 1995 - was quoted as saying:

> "Crime increased over the last couple of years since the West Bengal Human Rights Commission came into being. It is difficult to extract information from hardened criminals

6.186 Amnesty International pointed out that disregard for arrest and detention procedures facilitates torture, and that while torture and ill-treatment often occurs during the first stage of detention in police custody, Indian law is virtually silent regarding the questioning of suspects in police custody. Amnesty International noted that there are no provisions concerning interrogation in the CrPC. Amnesty International stated that in January 1995, the Government of India, in correspondence with Amnesty International, referred to a set of undated guidelines issued by the Ministry of Home Affairs to state governments to "curb the use of questionable and coercive methods by police during investigation". Amnesty International pointed out that the guidelines referred to safeguards within the CrPC and that the following was stated:

> "The instructions contained in the Police Manuals of different States regarding prohibiting or restricting the use of force by the police while effecting arrest, interrogating suspects and accused or during any other stage of police inquiry or investigation, should be brought to the notice of all police officers for strict compliance and if necessary, refresher courses may be conducted for the police personnel".

6.187 Amnesty International noted, however, that it is not clear what status these guidelines hold within police training or disciplinary procedures, or whether there is systematic monitoring by state or central governments of the use in training and implementation of these guidelines and instructions contained in Police Manuals. Police recording obligations do not provide for comprehensive custody records to be kept containing hour-by-hour accounts of what happens to persons in custody (medical condition on arrival, the length and time when suspects are questioned, the provision of food, the presence of lawyers or other visitors, periods of sleep, and so on). Amnesty International also had concerns abut conditions of detention which may constitute cruel, inhuman or degrading treatment. Amnesty International pointed out that in January 1997 the Supreme Court directed that prisoners should not be tortured in jails and said any physical force used against them constituted "cruelty", and that it also held that neglect of prisoners and provision of inadequate food and clothing would also constitute state violence against them. Amnesty International indicated that the judges gave an example of Tihar Jail in Delhi which has a capacity of 2,500 but which holds 8,500 and that it is interesting to note that the government, in its report to the Committee, has pointed to previous similar Supreme Court

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without resorting to third-degree methods"

His statements appear to have been endorsed by several other police officials in the state as well as the West Bengal Home Minister (in charge of police) Mr B. Bhattacharya who reportedly called on police to "see to it that the message of human rights does not get the better of them".

judgements setting out safeguards for detainees, which in light of recent judgements, and recent pronouncements by the NHRC, appear not to have been implemented in practice.

6.188 Amnesty International remarked that when ratifying the ICCPR in 1979, India made a declaration with respect to articles 9[51] and 13 of the covenant, and that the effect of these declarations have been to allow for human rights violations. From an analysis of the effect of the declaration, and on reading the General Comments of the Committee, Amnesty International considered the effect of the declaration is to remove the autonomous meaning of the covenant obligations under article 9. Amnesty International pointed out that in its third report to the Human Rights Committee, the Government of India has omitted any discussion of the declaration it made with respect to Article 22 of the Constitution of India when ratifying the covenant, and its effect on the application of article 9(1). Amnesty International explained that article 22 of the Constitution of India is a justiciable fundamental right that provides protection from arrest and detention in certain cases and that article 22(1) and (2) of the Constitution obliges the authorities to bring anyone who is arrested before a magistrate within 24 hours of arrest and to permit him/her to consult a lawyer of choice. Amnesty International also noted, however, that article 22 contains a number of limitations that authorise preventive or administrative detention: clause 5 of the article lays down that these rights do not apply "to any person who is arrested under any law providing for preventive detention" and that preventive detention laws also by their very nature deny the detainee the right to be tried and to be tried "within a reasonable time" as no charges are brought for which the detainee could be tried.

6.189 Amnesty International noted that the Government of India's report to the Human Rights Committee focused on the application of the Terrorist and Disruptive Activities (Prevention) Act (TADA) and its subsequent repeal in 1995. Amnesty International stated that while it welcomed that TADA - which contained provisions contravening international human rights law - was allowed to lapse, it noted that its provisions continue to be used retrospectively against some individuals and that hundreds remain in detention under its provisions and that cases can still be filed under TADA under section 14 which provides that it should be applied to active trials in various courts before its expiry and to defendants tried in future in connection with offences alleged to have been committed prior to the lapsing of the Act.

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[51] Article 9(1): 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 are established by law .

6.190 Amnesty International pointed out that notwithstanding the lapse of TADA, there was no lack of constitutional and legislative provisions allowing for administrative detention and that the minimum guarantees delineated by article 9(1) of the covenant are suspended by a range of special legislation. Amnesty international said that in addition to Article 22 of the Constitution, the Constitution is clear that preventive detention is a subject on which legislation can be made by the central government: "for reasons connected with defence, foreign affairs, or the security of India" and, in addition, both the central and state governments can enact legislation permitting preventive detention: "for reasons connected with the security of a State, maintenance of public order, or maintenance of supplies and services essential to the community".

6.191 Amnesty International pointed out that under the federal system prevailing in India, the States of the Union of India retain extensive jurisdiction over the application of the criminal law, for example in preventive detention legislation, and the effect of such legislation may be to deprive people living in certain areas of the minimum guarantees safeguarded by the covenant. Amnesty International explained that procedures for arrest by the police are laid down in sections 46-58 of the CrPC, and require the police to inform the arrested person promptly of the offence or grounds for his or her arrest and of the charges brought and that they also require a magistrate to order a medical examination at the request of the arrested person. Amnesty International stated that while examining India's second periodic report in 1991, members of the Human Rights Committee observed that under section 8(2) of the National Security Act, the authorities may decide not to disclose the grounds on which people can be detained, in direct contravention of the covenant.[52]

6.192 Amnesty International further reported that it has extensively documented the way in which guarantees which do exist against arbitrary arrest and detention procedures are flouted in practice and that for example, delegates from the organization who visited Bombay in January 1994 found evidence of widespread abuse of these legal safeguards and that it would be interested to learn what steps have been taken by the Government of India to ensure that police officers inform detainees of their rights following arrest. Amnesty International pointed out that the Jammu and Kashmir Public Safety Act (PSA) obliges the authorities to inform arrested persons of the grounds for arrest within five days but clause 13(2) of the Act permits the authorities to withhold any facts for reason of “public interest”, and that lawyers report that this

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[52] Article 9(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him .

provision has been broadly interpreted and that it is indeed common practice in the state not to inform detainees held under the Act of the ground of their detention. Amnesty International reported that it has received reports that a large number of people in Jammu and Kashmir are arbitrarily detained, either under the PSA or without reference to any law whatsoever and that reports indicated they are not brought before a tribunal at all, or are charged and tried after a prolonged period in unacknowledged and unrecorded detention of the security forces, often in places not officially designated as detention centres.

6.193 Amnesty International further pointed out that the practice of incommunicado detention, sometimes in unofficial detention centres, has been used in areas of India where there is internal armed conflict, notably in Punjab and in Jammu and Kashmir, and that it facilitated the practice of torture. Amnesty International noted that safeguards spelt out in Article 22 of the Constitution do not apply to persons held under preventive detention legislation more commonly in force in areas of armed conflict and that human rights activists from Jammu and Kashmir have told Amnesty International that those arrested in the state on suspicion of armed opposition activities, regularly go through a process of detention and interrogation which lasts several months. Amnesty International said that during this time there is no record made of their arrest and they are not brought before a magistrate, a FIR is lodged with the police, showing the person as having been detained a few days earlier under sections of the Jammu and Kashmir Public Safety Act or other legislation, and, at this point, the investigation report is presented to a magistrate who orders that the detainee be remanded to judicial custody. Amnesty International noted that during this period of incommunicado detention, detainees are transferred between various security force camps, temporary and unofficial detention centres as well as "Joint Interrogation Centres" (JIC) and lawyers and relatives are denied access to detainees throughout this process. Amnesty International also reported that although frequent applications for access are made to the High Court and granted, they are regularly denied by the security forces.

K. LEBANON

6.194 Amnesty International remarked in 1997[53] 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

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[53] 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

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 ICCPR.

6.195 Amnesty International pointed out that respect for individuals' rights and freedoms is enshrined in the Lebanese Constitution of 1943 and was further affirmed 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.

6.196 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.

6.197 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.[54] 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 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.

6.198 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

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[54] 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”.

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 the 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.

6.199 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.

6.200 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.

6.201 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.

6.202 Amnesty International pointed out that international human rights treaties, to which Lebanon is a state party, prohibit torture and ill-treatment.[55] 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.

6.203 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

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55 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.'"

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.

6.204 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 Lebanese Constitution[56] 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.

L. Turkey

6.205 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".[57] 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

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56 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 ...".

57 "Unacceptable" law on detention procedures unlikely to prevent torture see http://www.amnesty-usa.org/news/1997/44401897.htm

counsel after the first four days' detention.

6.206 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 ÇÇiller'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 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.

6.207 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.

6.208 Amnesty International pointed out that they urged changes in the draft legislation on police

detention in December 1996.[58] 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 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.

6.209 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.

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[58] http://www.icomm.ca/aiusa/news/1996/44418596.htm

6.210 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.

6.211 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. [59]

6.212 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.

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[59] "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."

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,[60] 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."

6.213 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,

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60 *See also* http://www.xs4all.nl/~kicadam/kurdistan/phr.html Twee jaar lang heeft de Physicians for Human Rights (PHR) materiaal verzamelt 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.
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 officiëële 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 èèn 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.

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.

6.214 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.

6.215 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."

6.216 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."

6.217 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.

M. Israel

6.218 In 1996 the State of Israel Ministry of Justice explained[61] 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.

6.219 The Israeli Ministry of Justice noted that the basic guidelines on interrogation were set by the Landau Commission of Inquiry[62] 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

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61 http://web.idirect.com/~cic/israelDemocracy/tamarGaulanArticle.html

62 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.

circumstances include situations in which 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).

6.220 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.

6.221 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."

6.222 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.

6.223 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.

6.224 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.

6.225 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.

6.226 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.

6.227 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 iIn 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.

6.228 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.

6.229 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.

6.230 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.[63] 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.

6.231 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.

6.232 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 Committee's recommendations and declare illegal all GSS interrogation methods

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63 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

which violate the Convention's prohibition on torture and cruel, inhuman or degrading treatment or punishment, methods condemned by the Committee as torture.

6.233 In August 1998 Human Rights Watch[64] called on Israel to:

A. 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;

B. 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;

C. 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

6.234 The High Court of Justice banned the method of interrogating prisoners by the General Security Service (GSS/ Shin Bet), declaring them tantamount to torture.[65] 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.

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64 http://www.hrw.org/hrw/press98/aug/isrl0820.htm

65 "High Court declares GSS interrogation methods illegal" *Israel Wire* 9/06 see http://www.israelwire.com/New/990906/99090626.html

6.135 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.

6.236 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.[66] 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 iIn 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.

6.237 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 suspects[67] 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 is fulfilling its responsibility to stop terrorists from blowing up buses and that he explained that the decision limits their 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

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66 "Deputy attorney general opposes interrogation law" *Israel Wire* 9/15 see http://www.israelwire.com/New/990915/99091530.html

67 "AG Rubinstein supports legislation to bypass High Court's GSS ruling" *Israel Wire* 9/9 http://www.israelwire.com/New/990909/99090928.html

'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.

6.238 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 operations[68] 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.

N. ITALY

6.239 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.[69]

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[68] "AG planning legislation to circumvent High Court Decision" *Israel Wire* 9/7 see http://www.israelwire.com/New/990907/99090734.html

[69] 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

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.

6.240 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 recommendations put forward by the CPT, shed light on Italy's implementation of some of these recommendations.

6.241 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.

6.242 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”.

6.243 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.

6.244 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.

6.245 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.

6.246 Amnsty 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.

6.247 Amnesty Intrnational aslo 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 be available in several languages and, in addition,

detainees should certify that they have been informed of their rights in a language they understand.

6.248 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.

6.249 Amnety 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.

6.250 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".

6.251 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.

6.252 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.

CHAPTER 7

MINISTERIAL CONFERENCE ON TERRORISM : PARIS, FRANCE

7.1 A comprehensive action plan against terrorism has been formulated by a Ministerial Conference on Terrorism, in Paris, France, on 30 July 1996.[1] In view of a relevance and importance of the document, the 25 measures proposed in the document to combat terrorism, are quoted:

1. Strengthen internal co-operation among all government agencies and services concerned with different aspects of counter-terrorism.

2. Expand training of personnel connected with counter-terrorism to prevent all forms of terrorist action, including those utilizing radioactive, chemical, biological or toxic substances.

3. In line with the efforts carried out in the fields of air and maritime transportation, such as railway, underground and bus transport systems, we recommend that transportation security officials of interested States urgently intensify consultations to improve the capability of governments to prevent, investigate, and respond to terrorist attacks on means of public transportation, and to co-operate with other governments in this respect. These consultations should include standardization of passenger and cargo manifests and adoption of standard means of identifying vehicles to aid investigations of terrorist bombings.

4. Accelerate research and development of methods of detection of explosives and other harmful substances that can cause death or injury, and undertake consultations on the development of standards for marking explosives in order to identify their origin in post-blast investigations, and promote co-operation where appropriate.

5. When sufficient justification exists according to national laws, investigate the use of organizations, groups or associations, including those with charitable, social, or cultural goals, by terrorists using them as cover for their own activities.

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[1] Internet http://sung7.univ.-lyon2.Gr/toronto/terror25.htm, accessed on 1999-02-22.

6. Note the risk of terrorists using electronic or wire communications systems and networks to carry out criminal acts and the need to find means, consistent with n national law, to prevent such criminality.

7. Adopt effective domestic laws and regulations including export controls to govern manufacture, trading, transport, and export of firearms, explosives, or any device designed to cause violent injury, damage, or destruction in order to prevent their use for terrorists acts.

8. Take steps within their power to immediately review and amend as necessary their domestic anti-terrorist legislation to ensure, inter alia, that terrorists' acts are established as serious criminal offenses and that the seriousness of terrorists' acts is duly reflected in the sentence served.

9. Bring to justice any person accused of participation in the planning, preparation, or perpetration of terrorist acts or participation in supporting terrorist acts.

10. Refrain from providing any form of support, whether active or passive, to organizations or persons involved in terrorist activity.

11. Accelerate consultations, in appropriate bilateral or multilateral fora, on the use of encryption that allows, when necessary, lawful government access to data and communications in order to, inter alia, prevent or investigate acts of terrorism, while protecting the privacy of legitimate communications.

12. Take strong measures to prevent the movement of terrorist individuals or groups by strengthening border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery, or use of false papers.

13. While recognizing that political asylum and the admission of refugees are legitimate rights enshrined in international law, make sure that such a right should not be taken advantage of for terrorist purposes and seek additional international means to address the subject of refugees and asylum seekers who plan, fund, or commit terrorist acts.

14. Join international conventions and protocols designed to combat terrorism by the year 2000; enact domestic legislation necessary to implement them; affirm or extend the competence of their courts to bring to trial the authors of terrorist acts; and if needed, provide support and assistance to other governments for their purposes.

15. Develop, if necessary, especially by entering into bilateral and multilateral agreements and arrangements, mutual legal assistance procedures aimed at facilitating and speeding investigations and collecting evidence, as well as co-operation between law enforcement agencies in order to prevent and detect terrorist acts.

In cases where a terrorist activity occurs in several countries, States with jurisdiction should co-ordinate their prosecutions and the use of mutual assistance measures in a strategic manner so as to be more effective in the fight against terrorist groups.

16. Develop extradition agreements and arrangements, as necessary, in order to ensure that those responsible for terrorist acts are brought to justice; and consider the possibility of extradition even in the absence of a treaty.

17. Promote the consideration and development of an international convention on terrorist bombings or other terrorist acts creating collective danger for persons, to the extent that the existing multilateral counter-terrorism conventions do not provide for co-operation in these areas. Examine, also, the necessity and feasibility of supplementing existing international instruments and arrangements to address other terrorist threats and adopt new instruments as needed. Accelerate in the International Civil Organization (ICAO) consultations to establish uniform and strict international standards for bomb detection and the ongoing consultations to elaborate and adopt additional heightened security measures at airports, and urge early implementation of screening procedures and all other ICAO standards already agreed upon.

18. We recommend to State Parties to the Biological Weapons Convention that they confirm at the forthcoming Review Conference their commitment to ensure, through adoption of national measures, the effective fulfilment of their obligations under the convention to take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of such weapons within their territory, under their jurisdiction or under their control anywhere, in order, inter alia, to exclude use of those

weapons for terrorist purposes.

19. Prevent and take steps to counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have to 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. These domestic measures may include, where appropriate, monitoring and control of cash transfers and bank disclosure procedures.

20. Intensify information exchange concerning international movements of funds sent from one country or received in another country and intended for persons, associations or groups likely to carry out or support terrorist operations.

21. Consider, where appropriate, adopting regulatory measures in order to prevent movements of funds suspected to be intended for terrorist organizations, without impeding in any way the freedom of legitimate capital movements.

22. Facilitate exchange of information and the transmission of legal requests through establishing central authorities so organized as to provide speedy co-ordination of requests, it being understood that those central authorities would not be the sole channel for mutual assistance among states. Direct exchange of information among competent agencies should be encouraged.

23. Intensify exchange of basic information concerning persons or organizations suspected of terrorist-linked activities, in particular on their structure, their “modus operandi” and their communications systems in order to prevent terrorist actions.

24. Intensify exchange of operation information, especially as regards:

- the actions and movements of persons or groups suspected of belonging to or being connected with terrorist networks.

- travel documents suspected of being forgeries or falsified.

- **r** traffic in arms, explosives, or sensitive materials.

- **r** the use of communications technologies by terrorist groups.

- **r** the threat of new type of terrorist activities including those using chemical, biological, or nuclear materials and toxic substances.

25. Find ways of accelerating these exchanges of information and making them more direct, while at the same time preserving their confidentiality in conformity with the laws and regulations of the State supplying the information.

CHAPTER 8

UNITED NATIONS RESOLUTIONS ON TERRORISM

8.1 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 also issues resolutions on this matter which reaffirms the international community's commitment to eliminate terrorism. 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 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.

8.2 In the last decade the seminal resolution on international terrorism has been Resolution 49/60 adopted by the UN General Assembly on 9 December 1994. This resolution identified certain basic principles that are essential for measures to eliminate terrorism. In addition to identifying the international conventions dealing with certain aspects of terrorism, which are discussed elsewhere in this document, the resolutions also place an onus on states not only to refrain from supporting international terrorism, but also to actively co-operate with other members of the international community in formulating and enforcing measures to eliminate terrorism.

8.3 The *Declaration on Measures to Eliminate Terrorism* contained in Resolution 49/60 forms the basis for subsequent resolutions of the UN on Measures to Eliminate Terrorism. A practice has 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. In addition to the abovementioned Resolution 49/60 (1994) the resolutions on measures to eliminate terrorism are: Resolution 50/53 (1995), Resolution 51/210 (1996), Resolution 52/165 (1997), Resolution 53/108 (1998).

8.4 As the *Declaration on Measures to Eliminate Terrorism* in Resolution 49/60 forms the basis for the international and domestic obligations to eliminate terrorism it may be useful to summarise the provisions of the basic principles of this Declaration. They are:

1. Member States reaffirm their unequivocal condemnation of all acts methods and practices of terrorism.

2. Act, methods and practices of terrorism constitute a grave violation of the purposes and principles of the UN.

3. States must refrain from organizing, instigating or participating in terrorist acts, or from acquiescing in or encouraging activities directed towards the commission of such acts.

4. States must fulfil their obligations under the UN Charter and other provisions of international law with respect to combatting terrorism and are urged to take effective and resolute measures in accordance with international law for the speedy and final elimination of terrorism, in particular -

   (a) refrain from any form of support for terrorist activities and ensure that their territories are not used for terrorist acts;

   (b) ensure apprehension and prosecution of perpetrators of terrorist acts in accordance with their national law;

   (c) endeavour to conclude special agreements to that effect on a bilateral, regional and multilateral basis;

   (d) co-operate in exchanging relevant information;

   (e) promptly take all steps to implement existing international conventions on this subject, including the harmonization of their domestic legislation with those conventions; and

   (f) take appropriate measures to ensure that asylum seekers are not

engaged in any terrorist activities.

5. States should increase their co-operation in the prevention and combatting of terrorism.

6. States that have not done so are urged to consider, as a matter of priority, becoming parties to the international conventions and protocols relating to various aspects of international terrorism.

CHAPTER 9

REGIONAL INSTRUMENTS ON TERRORISM

9.1 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.

9.2 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.

9.3 During the 35th Ordinary Session the Heads of State and Government of the OAU 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."

9.4 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).

9.5 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.

9.5 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.

9.6 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:

C 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.

C 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.

C 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.

C 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.

C 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.

C 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.

9.7 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.

9.9 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.

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

9.11 In the draft Bill, which is part of this report, the legal obligations flowing from the Convention, are, in so far as legislation is concerned, addressed.

9.12 The Convention is included in this discussion paper (see Annexure B).

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 92

PROJECT 105

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

PART 2

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PART 2

CHAPTER 10

CHAPTER 10

OPTIONS ON REFORM

Z. INTRODUCTION

10.1 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 is indebted to the Police Service who conducted the initial research and drafted a Bill on which this discussion paper and the proposed Bill are based. The reader will therefore find references in this paper 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 "A" to this paper) are those amendments which the project committee and working committee considered should be made. The Bill is published in this format to facilitate comment and 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).

10.2 The present offence of terrorism in South African law, section 54(1) of the Internal Security Act, 1982, relates only to terrorism in respect of the South African Government/population. The threat of terrorism worldwide is often directed at foreign officials, guests, embassies and the interests of foreign states. In this respect the offence of terrorism in the South African law is deemed inadequate.

10.3 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. 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.

10.4 It is imperative that South Africa sign, ratify or accede to the respective instruments relating to terrorism as soon as possible. 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. The other is to draft an omnibus Act addressing the issue of terrorism on a broader basis.

10.5 The second option is preferred. A draft Anti-Terrorism Bill to that effect, is attached to this paper, for general information and comment (see Annexure A). The State Law Advisers: International Law have noted in preliminary consultations that complex issues are raised by this investigation. 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, at present the Bill is drafted in order to address all relevant terrorism issues in one piece of legislation. They stated that in principle they support 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. This is something which must be determined by all the line function departments. Comment is therefore in particular invited from all line function Departments on this aspect.

10.6 The draft Bill as drafted originally by the South African Police Service deals with the following aspects:

(1) Definitions (see clause 1);
(2) offences relating to terrorist acts (see clause 2);
(3) the providing of material support in respect of terrorist acts (see clause 3);
(4) membership of terrorist organisations (see clause 4);
(5) sabotage (see clause 5);
(6) hijacking of aircraft (see clause 6);
(7) endangering the Safety of Maritime Navigation (see clause 7);
(8) terrorist bombings (see clause 8);
(9) taking of hostages (see clause 9);
(10) sentences in case of murder or kidnapping of internationally protected person (see clause 10);
(11) protection of internationally protected persons (see clause 11);
(12) protection of property occupied by foreign governments (see clause 12);
(13) offences relating to fixed platforms (see clause 13);

(14) nuclear terrorism (see clause 14);
(15) jurisdiction of the Courts of the Republic in respect of offences under the Bill (see clause 15);
(16) custody of persons suspected of committing terrorist acts (see clause 16);
(17) identification of special offences by Directors of Public Prosecutions (see clause 17);
(18) powers of court in respect of offences under the Act (see clause 18);
(19) pleas at trial of offences under this Act (see clause 19);
(20) bail in respect of offences under this Act (see clause 20);
(21) duty to report information on terrorist acts (see clause 21);
(22) powers to stop and search vehicles and persons (see clause 22);
(23) authority of the Director of Public Prosecutions (see clause 23);
(24) amendment and repeal of laws (see clause 24); and
(25) interpreting the Bill (see clause 25).

AA. PREAMBLE TO THE BILL

10.7 The project committee noted that it is told by the drafters of the original Bill that the real motivation for the Bill is to deal with internal incidents of terrorism but that the motivation for the Bill is largely based on international precedents.

10.8 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."[2] 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

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[2] Security Council Resolution 1269: *What it Leaves Out* 20 October, 1999 see http://www.ict.org.il/

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.

10.9 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 terrorism[3] is a matter of point of view and does not lend itself to objective

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[3] 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:

1. The boundary between terrorism and other forms of political violence
2. Whether government terrorism and resistance terrorism are part of the same phenomenon
3. Separating 'terrorism' from simple criminal acts, from open war between 'consenting' groups, and from acts that clearly arise out of mental illness
4. Is terrorism a sub-category of coercion? Violence? Power? Influence?
5. Can terrorism be legitimate? What gains justify its use?
6. The relationship between guerilla warfare and terrorism
7. 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

judgment but that this cliche 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 ones 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?

10.10 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 latest one 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

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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.”

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.

10.11 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 latest 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.

10.12 The project committee noted 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.

10.13 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.

10.14 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 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"

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[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.

instead of “criminal acts”.

10.15 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 ...”.

BB. DEFINITIONS

10.16 The project committee noted the definitions contained in the Bill. The committee decided that in the definition of “combatting terrorism” the words “terrorist activities” should be replaced by “terrorist acts” and wherever else the words “terrorist activities”are used in the Bill. The committee considered the original definition of “place of public use” as set out in the International Convention of Suppression of Terrorist Bombings and questioned the way it is 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.

10.17 The project committee noted that a definition is included in the Bill 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.

10.18 The project committee considered clause 16 which provides 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 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 makes 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.

10.19 The project committee noted 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".

10.20 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.

10.21 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 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 leave "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.

10.22 The committee also considered subparagraph (ii) of the definition of terrorist acts.[5] 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.

10.23 The committee considered a suggestion on subparagraph (iii) that 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.[6] 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

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5 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;

6 By Prof Medard Rwelamira of the Department of Justice's Policy Unit.

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.

10.24 The committee considered also whether the definition of “terrorist organisation” ought not perhaps be simplified. The committee noted that the words “or activities or an organisation that approves the possibility of using terrorism” is dealing 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 of 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”.

10.25 The project committee considered the wording of “terrorist organisation” and stated that the proposed subclause (b) “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” does not seem to be 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.

10.26 The 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"[7] and "sabotage"[8]. 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

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7 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.

8 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.

of traffic on land commits the offence of sabotage and furthermore, that the taxi blockades or farmers 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.[9]

D. CLAUSE 2: OFFENCES UNDER THE ACT

10.27 The project committee considered that the words "if such act falls, in terms of this Act within the jurisdiction of the courts of the Republic"[10] in clause 2 is superfluous and should be

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[9] 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 of 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. ..."

[10] 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".

deleted. The committee proposed that clause 2 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".

E. CLAUSE 3: MATERIAL SUPPORT, HARBOURING AND CONCEALING TERRORIST ACTS

10.28 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,[11] 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."

10.29 The committee noted the definition in the proposed Bill relating 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.

10.30 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 highjacking 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"

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[11] See the discussion of the American legislation in Chapter 6 above in regard to the sections referred to in this section.

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".[12] 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 ".

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[12] 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.

10.31 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.[13] 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.

F. CLAUSE 4: MEMBERSHIP OF TERRORIST ORGANISATIONS

10.32 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 he does not have to go around banning 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.

10.33 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 47 of 1982 which provided for the banning of organisations was repealed; and the thinking at the time

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[13] By Prof Medard Rwelamira of the Department of Justice's Policy Unit.

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.

10.34 The committee also noted a suggestion that membership of terrorist organisations is difficult to prove.[14] 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.

G. CLAUSE 5: SABOTAGE

10.35 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.

H. CLAUSE 6: HIJACKING

10.36 In *S v Hoare*[15] the court considered the offences under the *Civil Aviation Offences Act*,

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[14] By Prof Medard Rwelamira of the Department of Justice's Policy Unit.

[15] 1982(4) SA 865 (T) at 871D - I.

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."

10.37 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 already in clause two, namely imprisonment for life.

I. CLAUSE 7: ENDANGERING THE SAFETY OF MARITIME NAVIGATION

10.38 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.[16]

J. CLAUSE 8: TERRORIST BOMBINGS

10.39 The project committee raised the question 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 making provision 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.[17] 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

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[16] 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.

[17] It is noteworthy that the English Terrorism Bill deals with terrorist bombings by addressing the issue of jurisdiction and extradition. The clause as submitted to the House of Lords provides 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.

(2) The offences referred to in subsection (1)(b) are-
- (a) an offence under section 2, 3 or 5 of the Explosive Substances Act 1883 (causing explosions, etc.),
- (b) an offence under section 1 of the Biological Weapons Act 1974 (biological weapons), and
- (c) an offence under section 2 of the Chemical Weapons Act 1996 (chemical weapons).

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 invites specific comment on the question whether there is any need for making provision separately for terrorist bombings in the Bill.

10.40 The question also arose whether the exemption contained in clause 8(2)[18] 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 intentionally 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.[19] 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

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[18] 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.

[19] 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.

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 provides 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 is enough and that there would be no need for an exemption clause.

K. CLAUSE 10: INTERNATIONALLY PROTECTED PERSON

10.41 The project committee noted 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 substituted with the word "threathens". 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.[20]

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[20] See section 18(1) and (2) of the Riotous Assemblies Act.

L. CLAUSE 11: MURDER OR KIDNAPPING OF INTERNATIONALLY PROTECTED PERSONS

10.42 The project committee noted clause 11(1) which provides that any person who murders or attempts to murder or kidnaps or attempts to kidnap an internationally protected person, is liable, 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. The committee also considered clause 11(2) which seeks to provide that if the victim of an offence under clause 11(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 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.

M. CLAUSE 12: PROTECTION OF PROPERTY OCCUPIED BY INTERNATIONALLY PROTECTED PERSONS

10.43 The project committee considered clause 12 which provides 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 in clause 12(1)(a) 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.

N. CLAUSE 13: OFFENCES RELATING TO FIXED PLATFORMS

10.44 The project committee suggested 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".

O. CLAUSE 14: NUCLEAR TERRORISM

10.45 The project committee noted clause 14. The committee was also 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 agreed 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.

P. CLAUSE 15: JURISDICTION OF THE COURTS OF THE REPUBLIC

10.46 The project committee considered 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. The committee remarked 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.[21] 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".

10.47 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 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".

P. CLAUSE 16: CUSTODY OF PERSONS SUSPECTED OF COMMITTING TERRORIST ACTS

(a) Justification for clause 16

10.48 The project committee wanted to emphasise that it has been presented with a proposal emanating from the Police Service and that the committee has not received evidence of the

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[21] By Prof Medard Rwelamira of the Department of Justice's Policy Unit.

justification for what the Police have in mind. The committee has 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 Australia do not have such measures, conventional policing methods seem to be regarded adequate in these countries even in the USA which also faces serious terrorist incidents from time to time. The committee appreciated that arguments are 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 says should be conveying its acceptance as presently advised 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.

10.49 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 so on 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 recently in. However, the committee considered that terrorism is a matter of serious and grave concern as is reflected by the bombing incidents reflected in Chapter 1 of this discussion paper. The project committee however also noted that countries from which South Africa would be happy to take a lead, have not considered it necessary in the light of their problems, to providing for the kind of measures proposed under clause 16 of the Bill.

10.50 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 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:[22]

> 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.[23] By the time the Rabie Commission[24] 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.
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> 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'.
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> 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 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

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22 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. I am told by counsel that 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.)' ..."

23 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.

24 *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.

> 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.

10.51 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 here 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 is 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 is an incredibly drastic measure.

10.52 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*[25] should be considered. Justice Ackermann remarked as follows:

> [22] ... s 12(1), in entrenching the right to freedom and security of the person, entrenches the two different aspects of the right to freedom ... The one that O'Regan J has, in the above-cited passages, called the right not to be deprived of liberty 'for reasons that are not acceptable' or what may also conveniently be described as the substantive aspect of the protection of freedom is given express entrenchment in s 12(1)(a), which protects individuals against deprivation of freedom 'arbitrarily or without just cause'. The other, which may be described as the procedural aspect of the protection of freedom, is implicit in s 12(1) as it was in s 11(1) of the interim Constitution.
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> [23] The substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive

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[25] 1998 3 SA 785 (CC).

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 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.

[24] Although para (b) of s 12(1) only refers to the right 'not to be detained without trial' and no specific reference is made to the other procedural components of such trial it is implicit that the trial must be a 'fair' trial, but not that such trial must necessarily comply with all the requirements of s 35(3). This was the Court's unanimous holding in respect of s 11(1) of the interim Constitution in *Nel*'s case and is equally applicable to s 12(1)(b) in the context of the entrenchment of the 'right to freedom and security of the person' in s 12(1) of the 1996 Constitution, there being no material difference between the two provisions.
...
[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 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. In its ordinary grammatical sense 'detention' is a word of wide meaning and relates to 'keeping in custody or confinement; arrest. Used spec of the confinement of a political offender . . . bodily restraint.' In legal use its meaning is determined by the context and can relate to a variety of physical restraints.
...
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.
...

[45] When formulating in s 12(1) the 'right to freedom and security of the person' and including therein (in paras (a) and (b) respectively) the right 'not to be deprived of freedom arbitrarily or without just cause' and 'not to be detained without trial' the Constitutional Assembly chose to do so in broad and unqualified terms. It did not, in the description or definition of these rights, exclude from the ambit of their protection specific cases of detention, as was done in art 5.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this Convention, the following forms of detention are, amongst others, excluded from the 'right to liberty and security of person':

> '(T)he 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 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.'

Situations such as these will be adverted to later in this judgment. The broad protection in our Constitution must moreover be evaluated in the light of the foundational constitutional commitment to the rule of law.
...
[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 which fits very closely Dicey's description, quoted in the preceding paragraph, namely one 'based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of restraint'. The nature and extent of these inroads is detailed by Mathews, who reminds us that as recently as 1988 internal security law made provision for no less than six forms of what may be called administrative detention, three of which fell into the category of preventative detention and three into that of pre-trial detention. The singular importance of the Judiciary as the protector of constitutional guarantees, seen also as a manifestation of the separation of powers doctrine, is well illustrated by the judgment in *Minister of the Interior and Another v Harris and Others*.

[48] In attempting to give flesh to fundamental constitutional concepts and values such as the separation of powers and the rule of law, it is instructive to note how other democratic countries based on freedom and equality regulate detention or committal to prison in circumstances comparable to those of the present case, and to what extent the intervention of a judicial officer is considered essential. At the end of the day it is of course our Constitution which has to be construed and its values applied in the South

African context.

10.53 Justice Diddcott remarked as follows in *De Lange v Smuts NO*.[26]

> [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).
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> [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.
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> [118] A word or two had better be said in that connection about *Nel v Le Roux NO and Others*, where we considered s 189 of the Criminal Procedure Act 51 of 1977 which

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[26] 1998 3 SA 785 (CC).

provided for the imprisonment of recalcitrant witnesses in criminal proceedings. One of the criticisms levelled at the section was that it allowed a witness to be 'detained without trial', a remedy likewise prohibited by s 11(1) of the interim Constitution (Act 200 of 1993). We seem to have accepted that an imprisonment might fall foul of s 11(1) in circumstances not going the length of the infamous detentions that I have described. But the supposition does not obstruct me from taking a different view now since, in the particular circumstances postulated by s 189, we dismissed the objection in any event.
...
[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.

10.54 Justice Sachs remarked as follows in *De Lange v Smuts NO*.[27]

[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:

(a) the right 'not to be deprived of freedom arbitrarily or without just cause' (s 12(1)(a)),
(b) the right 'to be free from all forms of violence from either public or private sources' (s 12(1)(c)) and
(c) 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

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[27] 1998 3 SA 785 (CC).

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.

10.55 The committee noted that in considering whether the proposed legislation is justified[28]

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[28] 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* were 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. Elevating the sentiments of the community above the interests of the detainee is constitutionally impermissible.
[55] There is force in the argument. Ordinarily, the factors identified in s 60(4)(e) and (8A) would not be relevant in establishing whether the interests of justice permit the release of the accused. 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. The mere likelihood of such disorder independently of any influence on the part of the accused, would suffice. 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. There is widespread misunderstanding regarding the purpose and effect of bail. Manifestly, much must still be done to instil in the community a proper understanding of the presumption of innocence and the qualified right to freedom pending trial under s 35(1)(f). The ugly fact remains, however, that public peace and security are at times endangered by the release of persons charged with offences that incite public outrage. ...
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 hen 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. And in that judicial process we know that the scheme introduced by the 1995 amendment was not to prescribe but to guide, substantially ameliorating its bite. If a court, or certain courts, elevate this particular factor to a pre-eminence it should not have, that is not a constitutional issue to be resolved in this Court. Courts will no doubt be alive to the danger of public sentiment being orchestrated by pressure groups to serve their own ends. The constitutional principle is clear: a court may, not must, take the factors enumerated in ss (8A) into account, and must do so judicially; and the ordinary appeal and review mechanisms can remedy any undue deference that may be afforded to public sentiment.
[57] ... The limitation of the right is therefore as narrowly tailored as possible to achieve the

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 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 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.[29]

10.56 The project committee considered it noteworthy that the proposed measures do not exist

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compelling interests in maintaining public peace, and meets the requirement of proportionality between this purpose and the nature of the right.

…

[68] Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of s 36, it is not the only factor relevant to that exercise. ne must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights. It is well established that s 36 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. Parliament enacted s 60(11)(a) with the clear purpose of deterring and controlling serious crime, an indubitably important goal. Its effect is to limit, to an appreciable extent, the right of an arrested person to bail if the interests of justice permit. The question we need to answer is whether the extent of that limitation is justifiable.

[69] In order to determine whether the limitation is permissible in terms of s 36, it is necessary to consider whether the limitation would be considered reasonable and justifiable in democratic societies based on freedom, equality and dignity. In many democratic societies there are legislative provisions which permit a court to deny bail to accused persons in certain circumstances. In considering statutory provisions in other jurisdictions, a cautionary note must of course be sounded. Each system of criminal justice will vary and the application of substantive rules will depend upon procedures and practices peculiar to each system. ..."

29 *De Lange v Smuts NO* 1998 3 SA 785 (CC).

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 question 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 crime[30] and, particularly, terrorism. The committee considered that safeguards ensuring the ultimate 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.

10.57 The project committee posed the question what evidence would be needed in order to

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[30] See the headnote to *Nel v Le Roux and Others* 1996 (1) SACR 572 (CC):
The court held that the arguments advanced on behalf of the applicant did not take adequate account of 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. 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. The persons who are authorised to take evidence at the s 205 proceedings 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 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. ...

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.

10.58 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 has been presented to it. Hence, the project committee considered that it is an unanswered question at this stage 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.

(b) Clause 16(1)

(i) Withholding information from a law enforcement officer

10.59 The committee noted that clause 16(1) seeks to provide that 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.[31] 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) Should the judiciary be involved in authorising detention

10.60 The project committee considered the question whether the judiciary should be involved in considering and authorising detention. The committee noted 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.

10.61 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 establish 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.[32] The committee considered that the principle

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31 Prof Medard Rwelamira of the Department of Justice's Policy Unit.

32 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

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.

10.62 The committee noted that disquiet was expressed in the past where the control provided for in similar legislation was other than judicial:[33]

> 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 Bill. In essence the Rabie Report advances two justifications for this recommendation: first that judicial supervision "*nie prakties is nie*"[34] (to quote the police evidence); and secondly, that provision is made for ministerial control.
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> 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

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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.

33 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.

34 Translated the words "is nie prakties nie" means "it is not practical".

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 *Schermbrucker 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 *Schermbrucker 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.

10.63 The project committee also noted the following remarks made by Justice Ackermann in the case of *De Lange v Smuts NO*:[35]

[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 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

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35 1998 3 SA 785 (CC).

> 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.

10.64 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. It does not have to be a judge, but obviously judges by reason of their training and 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, for further detention and also to determine the conditions of detention. Comment is invited in particular on this aspect.

(iii) Should applications for warrants be made by Directors of Public Prosecutions?

10.65 The committee considered the question whether provision should be made in clause 16(1) 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 and why the law enforcement officer cannot apply to a judge for such a warrant. The question was raised 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 will 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 additional to the present situation by granting these powers to "law enforcement officers" instead of granting them to policemen only.

(iii) Limited scope of Bill

10.66 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".

(iv) Keeping someone in custody or detention

10.67 The project committee noted that it is provided in the last line of clause 16(1) that the judge may issue a warrant for "the arrest and keeping in custody" of the person concerned. The committee asked whether it is really arrest as arrest connotes a pending charge whereas detention does not. The committee therefore suggested that the last line should read "issue a warrant for the detention of such a person".

(v) Conditions of detention

10.68 The project committee noted that the Bill makes 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 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 conditions[36] although one cannot

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[36] See on conditions of detention the case of *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. On 22 April 1988 he was arrested ... For

legislate for every little thing to be ordered.

10.69 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 India[37] the following recommendations made in

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some days thereafter he was held in the police cells at Caledon Square. From 3 May to 6 October 1988 the plaintiff was detained at Pollsmoor Prison ... 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'. ... counsel for the defendant had difficulty in suggesting any more accurate characterisation of the constraints under which the plaintiff was held.

Man is by nature a social animal whose well-being depends upon his association with others. Recluses who voluntarily seek seclusion are known, but they are the exception to the rule. In most people the gregarious instinct is strongly implanted; and to deprive the average person of contact with his fellows is to cause him to suffer anguish of mind. 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.

One of an individual's absolute rights of personality is his right to I bodily integrity. The interest concerned is sometimes described as being one in corpus, but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element. ... 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 right to which, in the quotation above, Joubert refers as 'die verstandelike welstand'. It remains to consider whether in terms of the relevant penal enactments the prison authorities were entitled so to treat the plaintiff.

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."

37 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 incummunicado 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.

1987 in the *Study of Detention and Torture in South Africa*:[38]

> 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.
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> Provisions must be made for the following:
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> 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 9[39] and 10[40]

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38 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 1887. 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 e 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.

39 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.

40 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

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 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.

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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.

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.

10.70 The project committee also noted that in 1998 the 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*.[41]

10.71 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*[42] is also noteworthy where he said:

> 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

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41 Final report of the Truth and Reconciliation Commission Volume 5 Chapter 8.

42 1999 (4) SA 1108 (ZS).

> 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.
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> The same complaint was raised in *Le Maire v Maass* 745 F Supp 623 (1990). ...
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> The abuse of the applicants by police interrogators prior to admission to prison is also to be borne in mind. Their condition was known to the second respondent. 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. See *The Republic of Ireland v The United Kingdom* (1979 - 1980) 2 EHRR 25 at para 162; *Koskinen v Finland* (1994) 18 EHRR 146 at 158. 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.

10.72 Finally, the committee noted section 35 of the Constitution yet again.[43] 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 under clause 16(1) 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. It should thereafter also be possible to impose or

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[43] 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.

amend the conditions of detention when the detainee is brought to the place of detention in terms of clause 16(3)(a) or when he or she appears subsequently before a judge in terms of clause 16(3)(b). 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 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".

(vi) Oral or written applications?

10.73 The project committee noted that clause 16(1) says 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.

(c) Clause 16(2): the detainee is entitled to reasons

10.74 The project committee noted that clause 16(6) of the original Bill does 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.[44] It was not entirely clear to the

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[44] *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

project committee what the drafters had in mind 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.

10.75 The project committee asked how could a detainee ever challenge his or her detention

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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, 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."

without knowing what the reasons for his or her detention are.[45] The committee considered that the detainee is entitled to be informed of the founding reasons why it is believed that the he or she has or possesses information which he or she is withholding from a law enforcement officer.[46] The committee noted that the drafters' intention seems to have been to exclude the

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[45] 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 matter is to be submitted for review'."

[46] See Prof LJ Boulle "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

giving of reasons but considered that such a derogation from the constitutional provision[47] 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.

10.76 The project committee noted the case of *Matanzima v Minister of Police, Transkei*[48] 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 aforegoing cases that the reasons advanced for the arrest of the detainee in respondent's answering affidavits must be critically examined in order to

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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."

47 35(2)(a) Everyone who is detained, including every sentenced prisoner, has the right to be informed promptly of the reason for being detained.

48 1992 2 SA 401 (Tk). See also *Atofa 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 ..."

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.[49]

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[49] 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 was 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
>
> (a) 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);
>
> (b) 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);
>
> (c) 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);
>
> (d) 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);
>
> (e) 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 uitsluitsel met betrekking tot iedereen van die regsbetoë 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 I 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

> 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 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.

10.77 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

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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."

further of the view that the word “detained” should be substituted for the word “arrested” in the second line of clause 16(2).

10.78 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”.

(d) Clause 16(3)

(i) Periodic appearances of a detainee before a judge

10.79 The project committee considered 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”.

10.80 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) Enquiries by the judge into the detainee’s conditions of detention and welfare

10.81 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.

(iii) DPPs must justify further detention

10.82 The project committee noted that clause 16(3) contemplates 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 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 are 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.

10.83 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.

(iv) Provision for representations

10.84 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.

10.85 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.

(e) Clause 16(4): Duration of period of detention

10.86 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.

10.87 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 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:

C 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.[50]

C 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.[51]

C 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 Minister. ...
In Northern Ireland, which is subject to a greater security threat than South Africa, the period of detention for interrogation in 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)?[52]

10.88 The Committee also considered the findings and recommendations made by Don Foster

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50 Prof John Dugard *"A Triuph for Executive Power - An Examination of the Rabie Report and the Internal Security Act 74 of 1982*" 1982 SALJ 589 - 604 at p 596.

51 Final report of the Truth And Reconciliation Commission Vol 5 Chapter 8.

52 *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.

and Judge Dennis Davis[53] 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:[54]

> 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 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.

10.89 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

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[53] Professor Davis at that stage.

[54] 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 1887.

information which the detainee will in all probability present.[55] 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*[56] on conditions of detention and their influence on detainees:

> 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:

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55 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 delusionary 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. ..."

56 1993 1 *SACR* 582 (Tk) at 589 - 590.

> '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.

10.90 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 the present British legislation it is a maximum period of 28 days.[57]

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[57] In terms of the English Terrorism Bill the total period for which it will 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 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 committee remarked that 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.[58]

(f) Clause 16(6)

(i) Access to lawyers

10.91 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.[59] 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

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the exigencies of the situation."

58 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.

59 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.

independent safeguards to the detainee such as access to a legal representative.

10.92 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 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.[60] 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.

10.93 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 her[61] and that the Bill should make provision for such access

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60 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 5,300 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. ..."

61 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

as lawyers can at least provide a crucially important safeguard to detainees.[62]

10.94 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

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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."

62 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."

Africa:[63]

> 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.
> ...
> 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. [64]

> The denial of a right to access to counsel[65] was effected under regulation 3(10) of the

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63 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 (Goredema 1997 *SAJC*) 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.

64 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 politiële verdachtenverhoor.*

65 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.

emergency regulations, and rule 5(1),[66] issued by the Minister of Justice[67] in the exercise of his power 'to regulate the detention of persons in terms of' regulation 3. ...
Omar's[68] 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.

C 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.[69]

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.

C 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. ...

The observance of the minimum standards of procedural fairness requires that if one

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66 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.

67 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.

68 *Omar and Others v Minister of Law and Order and Others* 1987 3 SA 859 (A).

69 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.

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.[70]

This 'privilege' could be exercised in one of at least four ways:

(a) by allowing the detainee to choose his own legal adviser; or
(b) 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
(c) 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;
(d) 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.

C 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 illusionary, 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

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70 Harold Rudolph *Security, Terrorism Torture: Detainees' Rights in South Africa and Israel - a Comparative Study* Juta: Cape Town 1984 at p 27 - 28.

more fully with the basic principles of our legal tradition.[71] ...

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 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.[72]

C 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:[73]

> 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.

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71 *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.

72 *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.

73 Final Report of the Truth and Reconciliation Commission Volume 5 Chapter 8.

C 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.[74]

C [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.[75]

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

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74 *S v Melani* 1996 2 *BCLR* 174 (E) at 187e - g.

75 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*.

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.[76]

C 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.[77]

10.95 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 advice 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.[78]

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[76] Goredema points out that the superintendent must have reasonable grounds for believing that the exercise of the right of access to a lawyer will-

- C lead to interference with or harm to evidence connected with the offence or interference with or physical injury to other persons; or
- C lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
- C hinder the recovery of any property obtained as a result of such an offence.

[77] Prof Nico Steytler *Constitutional Criminal Procedure* Durban: Butterworths 1998 at 163 -164.

[78] 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

10.96 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

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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 is proposed in the English 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. An officer of at least the rank of superintendent may authorise a delay in permitting a detained person to consult a solicitor only if he has 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, (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.

committee considered that interrogation can only be allowed with the necessary safeguards such as access to a lawyer.

10.97 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) Access to a medical practitioner of the detainee's choice

10.98 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.[79] The committee considered that there is no reason why the family doctor shouldn't be able to have access to the detainee.[80] 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.

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79 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."

80 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.

10.99 The committee considered the suggestion made in the *Report on the Rabie Report*[81] that there is a real need for detainees to have access to independent 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)."

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81 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 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)

10.100 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.

(iii) Communicating with and being visited by the spouse or partner, next of kin and chosen religious counsellor

10.101 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.

10.102 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.

(iv) Admissibility of evidence against detainee in subsequent criminal proceedings

10.103 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 made in regard to clause 29:[82]

> 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

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82 *The Report on the Rabie Report: An examination of Security Legislation in South Africa* at p 54.

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 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 a ta 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.

10.104 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.[83] The committee noted that this brings section 35(3) of the Constitution squarely

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[83] 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 strogly 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

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 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,[84] the right to silence, the prohibition on self-incrimination etc. The

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'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 trail and the due administration of justice. ..."

[84] 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

committee considered that one of the safeguards to the detainee could possibly be that the statements cannot be used against the detainee.[85]

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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 application of chap 3: it allows the court to have regard to prevailing circumstances, as well as to the public acceptance of constitutional values which one hopes will increase in time. ... The court should in fact endeavour to educate the public to accept that a fair trial means a constitutional trial, and vice versa. ... It is therefore the duty of the courts in their everyday activity to carry the message to the public that the Constitution 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 courts 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 to accept constitutional norms using plain language understandable to the common man.'

85 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 where the detainee was debilitated by his

10.105 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.

10.106 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.[86] The committee was of the view that it

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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?"

86 "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, tp 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 al 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?

should not be possible to draw 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.

10.107 The committee considered the insightful decision made by the then Chief Justice of Transkei in the case of *S v Wanna and Others*[87] 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

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> It is my contention that there is no support in the heritage of the early common law for an 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.
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> 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."

87 1993 1 SACR 582 (TK).

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. And it is perhaps even more so if the person who contemplates his detention has a family dependent upon him. 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.'

As Mr Semenya correctly said, 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, and one can hardly imagine the prosecution contending for the admission in evidence of a confession that was made after the making of such a threat. The only question can be whether it makes any difference, for the purposes of the requirements for admissibility, that the carrying out of such a threat is statutorily permitted for the purposes of interrogation of suspected offenders against the Public Security Act.

An affirmative answer to that question was given by the Full Bench of the Eastern Cape Division in a case on which the Attorney-General relies, *S v Hlekani* 1964 (4) SA 429 (E). ... I am, with respect, entirely satisfied that *Hlekani*'s case was wrongly decided, and if this Court were to be ridiidly bound to follow it in this case the accused, who are facing capital charges, would not be fairly tried.

Wynne J, who delivered the judgment in *Hlekani*'s case, 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.' At 590F-591A he points out that the judgment erred in regarding the case of *Rossouw v Sachs* 1964 (2) SA 551 (A) as having held that s 17 of Act 37 of 1963 sanctioned self-incrimination, whereas it held only that the section authorised further detention until a detainee replied satisfactorily to all questions.
Williamson J went on to say:

> ... I fail to understand how the purpose of the section is nullified if a statement obtained thereunder is not admitted in evidence. Its purpose is to obtain information which presumably is achieved when the detainee satisfactorily answers all questions. What this has to do with the entirely collateral matter of possible criminal proceedings against the detainee is difficult to appreciate.'

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. As Diemont JA pointed out at 484E, s 6 of the Terrorism Act of 1967, which section approximates to our s 47, 'is obviously the more drastic section and the likelihood of the detainee being influenced by the circumstances of his detention is far greater when he is arrested and detained under the provisions of the Terrorism Act.' (My emphasis.) It was in relation to the far less rigorous detention under s 22 that Diemont JA went on to say, in the passage at 485C-D on which the Attorney-General relies:

> 'The Court will not automatically assume that because the person concerned is being held under that section any statement he makes is not freely and voluntarily

> given. But at the same time the court will recognise 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*.' (Emphasis added.)

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.
With regard to accused Nos 7 and 9 I am of the view that the conclusion to be drawn, on a balance of probability to say the least, is that the inducing tendency of s 47 detention must have been present to their minds and that it was an operative factor in evoking their confessions. In Hackwell's case supra Macdonald AJA referred with approval to the following passage in Wigmore on Evidence:

> 'It must be remembered that no attempt is ever made to investigate the actual motives of the person confessing, or the part played by the inducement among other motives. The whole theory of inducement rests on the probable effect, not the actual effect, upon the person. If while that inducement is held out a confession is made, no enquiry is ever made into the exact share of influence which the inducement had in evoking the confession. Nevertheless, though there is no enquiry into the actuality of the operation of the inducement, and though it is assumed that if it was there it operated, we may often have to enquire whether in fact it was there at all, ie present to the mind of the person confessing.'

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.

10.108 In the case of Dlamini[88] 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

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88 *S v Dlamini, S v Dladla and others, S v Joubert, S v Schietekat* 1999 2 SACR 51 (CC).

> 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 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.

10.109 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.

(g) Clause 16(7): criteria for detention or continued detention

10.110 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 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.

10.111 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.

10.112 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".

(h) Clause 16(8): Upon expiry of the period referred to in subsection (4) a detainee shall be released immediately

10.113 The committee noted that it is 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".

10.114 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 newly formulated clause 16(8) in terms of which a detainee must be released immediately upon expiry of the detention period.

10.115 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 is 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.

R. CLAUSE 17: IDENTIFICATION OF SPECIAL OFFENCES BY A DPP

10.116 The project committee noted 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 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 questioned the fact that the DPP might deem an offence as something that it is not. The committee explained that it has too readily read clause 17 to mean that al 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".

10.117 The committee also noted that once an offence is categorised as a special offence it becomes permissible under clause 19(4)(b) 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.

S. CLAUSE 18: POWERS OF COURT IN RESPECT OF OFFENCES UNDER THE ACT

10.118 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 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 is 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.

T. CLAUSE 19: PLEA AT TRIAL OF OFFENCES UNDER THE ACT

10.119 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 provides 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

provides 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) covers those aspects dealt with sufficiently by section 113 of the Criminal Procedure Act, that it doesn't say anything more than the Criminal Procedure Act does and considered that there is no need for the clause.

10.120 The committee further considered clause 19(4)(a)(i) which deals with the aspects governed by section 115 of the Criminal Procedure Act and considered that there is also no need for clause 19(4)(a). The project committee was of the view that clause 19(4)(b) poses a potential problem in the use of the wording which states 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 is drafted, it might even 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 isn't 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.[89]

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89 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

10.121 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 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.

10.122 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.

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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.

U. CLAUSE 20: BAIL IN RESPECT OF OFFENCES UNDER THE BILL

10.123 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.

U. CLAUSE 21: DUTY TO REPORT INFORMATION

10.124 The committee noted that the Bill imposes a Bill 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”.)

10.125 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.

W. CLAUSE 22: POWERS TO STOP AND SEARCH VEHICLES AND PERSONS

10.126 The project committee noted that clause 22 originally only dealt with the power to stop and search pedestrians.[90] 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".

10.127 The project committee considered whether clause 22(3)[91] 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

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90 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.

91 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.

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 such as the Criminal Procedure Act requiring reasonable grounds founding the basis of the suspicion.

10.128 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.[92] 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.

10.129 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.

10.130 The committee questioned the rationale for the 28 day period under clause 22(8)(c) for which the authority continues in force.[93] The committee asked whether it means that

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92 By Prof Medard Rwelamira of the Department of Justice's Policy Unit.

93 The committee suggested 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

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.

X. CLAUSE 24: AMENDMENT AND REPEAL OF LAWS

10.131 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".

Y. CLAUSE 25: INTERPRETATION CLAUSE

10.132 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 offences[94] and what the clause is really saying is that one should not be fooled by the label

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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.

94 See *Rapholo v State President and Others* 1993 1 SA 680 (T) where the court remarked as follows at 683G - 684H: "The State President on 2 February 1990 in a historic speech announced the demise of the apartheid policy and the legitimation 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 I 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

"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.[95]

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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 to which reference will be made below.

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 I 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. ...

95 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, meeting last Friday in Budapest, 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 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.

Parliamentarians called for greater understanding between these two countries and for a constructive dialogue through the good offices of the Council of Europe of which they are both members.

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

10.133 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.[96] The committee also noted that if the intention is to exclude terrorist acts

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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.
Press reports now indicate that he has returned to Zimbabwe where he has lived under President Mugabe's protection since fleeing Ethiopia in 1991. Amnesty International will be pursuing its concerns with the Zimbabwean government.
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.'
Amnesty International calls on the South African government to provide a detailed and transparent account of the reasons for its failure to ensure that Mengistu Haile-Mariam remained in the country for investigations into his alleged crimes.

96 See "UItleveringen aan turkije in de jaren tachtig: wie eenmaal liegt.." www.ozgurluk.org/nl/uitlbrd.html
"De Duitse regering wil honderden Koerdische aktivisten die gearresteerd werden n.a.v. protestakties, uitwijzen naar Turkije. Volkenrechtelijke enasielrechtelijke 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 briefwisselingtussen de ministeries van de beide landen m.b.t. de behandeling van de uit televeren 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 vanTurkse 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 Turkseleger overgedragen, nog voordat over hun asielaanvraag in de BRD een besluit wasgenomen. Het bekenst 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. Hij was mede-oprichter van de linkse scholierenorganisatie . ... Altun was in de pers inverband 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.

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.

10.134 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 surrender someone to a foreign State:

The Minister may-

In december 1982 verklaarde de rechtbank in Berlijn (net als later hetConstitutioneel Hof) dat de uitlevering rechtmatig was. Gevaar voor politiekevervolging zou in Turkije niet bestaan. De destijds nog jonge regering-Kohl hadzich uitdrukkelijk uitgesproken voor de uitlevering van Altun. 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 diensterkend als asielzoeker. De Bondsregering gaf opdracht om in beroep te gaan. Indeze situatie, waarin de BRD tot elke prijs de uitlevering van Altun probeerdete bereiken, maakte deze - in panische angst voor een overhandiging aan de Turksefolterknechten - 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 deTurkse militaire junta, brak Turkije niet alleen regelmatig geldendinternationaal recht, maar ook alle met de BRD-regering gemaakte speciale afspraken. ...

... De huidige plannen van de Bondsregering om Koerdische aktivisten en Turkseoppositionelen uit te wijzen naar de folterstaat Turkije met de verwijjzing naarverzekeringen van de Turkse regering voor politieke vervolging, folter en de dood, zijjn bedriegelijk en ze bouwen op een kort geheugen van links. Verklaringen van de Turkse regering zijn het papier niet waard waarop ze geschreven zijn! Deervaringen van de jaren '80 hebben getoond dat Turkije tot elke leugen bereid isom oppositionelen in handen te krijgen. In elke individuele bovengenoemde zaak heeft Turkije niet alleen geldend internationaal recht geschonden, maar ooksystematisch alle met de Bondsregering gemaakte afspraken.

Hoe de zaken toch op elkaar lijken...

In 1994 dreigde hetzelfde lot voor de Turkse vakbonds-activist Mahmut Özpalat. ...

(1) Dat asielaanvragers voor de afsluiting van de procedure uitgeleverd kunnen worden, blijkt uit art.4 van de Asielprocedurewet: ‘De besluiten over de asielaanvraag zijn in alle gevallen bindend ... Dit geldt niet voor de uitleveringsprocedure’.

(2) Bij de specialiteit gaat het om een in de uitleveringspraktijk bij zonder belangrijk volkenrechtelijk principe. Het is vastgelegd in art. 14 van het zoweldoor Turkije als de BRD geratificeerde Europees Uitleveringsverdrag uit 1957. 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)

(j) 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

(k) 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.

10.135 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:[97]

> "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.[98]
> 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.[99] The

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97 See http://www.coe.fr/cp/2000/200a(2000).htm

98 This 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.

99 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

Protocol also specifies certain cases in which extradition may be refused.[100]
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."[101]

10.136 The committee further considered how the European Convention Relating to Extradition Between the Member States of the European Union[102] 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:[103]

Article 5 - Political offences
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.
In view of similarity in the political concepts between Member States and the basic trust in the functioning of the criminal justice systems in the Member States, it was logical to look again at whether the political offence exception should continue to be applied as a ground for refusal of extradition among Member States of the European Union. Article 5 was the outcome of this review.
The significant changes introduced by the new provisions are to be read in conjunction with the Joint Declaration of Member States attached to the Convention on the Right of Asylum (1951 Convention relating to the Status of Refugees, as amended by the 1967 New York Protocol) in which it is stated the relation between this Convention and the provisions on asylum contained in the constitutions of some Member States and the relevant international instruments.
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.

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.

100 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.

101 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.

102 The European Council approved the text of the Convention (97/C 191/03) on 26 May 1997.

103 See http://europa.eu.int/eur-lex/en/lif/dat/1997/en_497Y0623_01.html

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 of 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 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.

10.137 The project committee also noted that comments were made on the Convention Relating to Extradition between the Member States of the European Union:[104]

> ... 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 enkelge strafbaar feit zal worden beschouwd als een politiek delict, een met een politiek delict samenhangend feit of een feit ingegeven door politieke motieven. Om alle misverstanden uit te sluiten, vatte 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 ‘politiek 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 principile 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.
> ...
> Het staaltje machtspolitiek dat Frankrijk recentelijk tegen Nederland demonstreerde om het drugsbeleid fundamenteel gewijzigd te krijgen, illustreert treffend dat de politieke consensus in Europa op zijn best broos genoemd kan worden. Volgens Harmen van der Wilt moet het uitleveringsverdrag dan ook niet worden gezien als uiting van politieke

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104 Jelle van Buuren “Politieke uitleveringen binnen europa...” Dit artikel is verschenen in Kleintje Muurkrant nr 305, januari 1997 see www.contrast.org/eurostop/articles/uitlever.html and 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

consensus, maar juist als breekijzer om integratie te bewerkstelligen. "Het wordt min of meer als voldongen feit gepresenteerd. We hebben de politieke integratie bereikt, dus nu kunnen we ook de exceptie van het politieke delict afschaffen. Er zijn een aantal mensen en instanties die steeds de trom roeren van de politieke integratie en dan op een gegeven moment zo 'n verdrag aanvoeren als bewijs dat de politieke integratie bewerkstelligd is. Dat vind ik een gevaarlijke tendens.'

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 opknapbeurt. De commissie Van Traa constateerde niets minder dan een crisis in de rechtsstaat toen na haar onderzoek de contouren van de IRT-affaire enigszins duidelijk werden. De vele justitiële en politiële schandalen die in de nasleep van de affaire Dutroux bij onze Zuiderburen naar boven komen wijzen ook niet direct op een strikte naleving van de principes van een rechtsstaat zoals die op de universiteiten worden onderwezen. En in maart van het net afgelopen jaar, om nog maar een ander voorbeeld te noemen, 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.

Dat zijn blijkbaar allemaal zaken die er niet zo toe doen. Of misschien beter gezegd: het wordt gezien als de prijs die de moeite van het betalen waard is voor de zo fel begeerde integratie. Van der Wilt denkt dat Nederland puur vanuit dit soort politieke overwegingen akkoord is gegaan met het verdrag. Een direct belang heeft Nederland er niet bij. Er bestond zelfs enige reserve tegen de Franse voortvarendheid omdat men op het ministerie onderkende dat de heksenjacht die Parijs tegen de metro-bommenleggers opende, niet helemaal vrij was van racistische trekjes. Maar Nederland heeft vanwege haar economische positie als aanlegsteiger en exportland domweg een enorm belang bij de politieke integratie van Europa en zal dus alles aangrijpen om dat te bevorderen. Ed van Thijn onderstreepte dat enige weken geleden nog eens op het congres 'Europa van de burger''. Nederland moet zich meer inspannen voor de Europese integratie, stelde hij: "Nederland gedraagt zich vaak als verwend kind met een pruillip'.

Hoewel geven en nemen onlosmakelijk is verbonden met politiek, is het de vraag of hier niet heel veel wordt weggegeven. ...

Het uitleveringsverdrag, dat in feite een lofdicht is op het democratisch blazoen van de lidstaten, is tot stand gekomen binnen politieke structuren die het predikaat 'democratisch' niet echt verdienen. In de zogenaamde derde pijler van Maastricht, waarbinnen de samenwerking op het gebied van Justitie en Binnenlandse Zaken plaatsvindt (en waar dit verdrag is gesloten), ligt de macht exclusief bij de Raad van Ministers. Het Europees Parlement heeft er niets over te zeggen, en het Europese Hof van Justitie mag zich slechts mondjesmaat op dit terrein begeven. Bovendien vind het gehele politieke proces plaats achter stevig gesloten deuren met de sleutel drie keer omgedraaid. De Europese burger komt in het hele verhaal niet voor. Maar ook de nationale parlementen hebben het nakijken.

Van der Wilt: 'Het verdrag moet uiteindelijk worden voorgelegd aan het parlement. Daar ontkom je niet aan, dat staat in de Grondwet. Maar de hele totstandkoming van het verdrag, de stempatronen, de concessies, de belangenafwegingen, dat wordt allemaal weggemoffeld. Zo'n verdrag wordt vervolgens met gezwinde spoed door het parlement geleidt. Er is nauwelijks ruimte voor fatsoenlijke discussie, en het verdrag kan niet geamendeerd worden. De parlementariërs hebben slechts één optie: slikken of stikken.

Gezien de druk die op de Europese integratie staat, ligt de uitslag bij voorbaat eigenlijk al vast'. ..."

10.138 The project committee also noted the 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.

10.139 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.

10.140 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.

10.141 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 Legislation 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 the first three lines of clause 25 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.[105] The committee however considered that the words "terrorist activities" should be deleted in clause 25.

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[105] 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.

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]

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

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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.

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.

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-

"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

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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).

(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;

"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);

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7 See also Article 2281 of section 60019: Offenses of Violence against Maritime Navigation or Fixed Platforms, (United States).

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.

"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 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~~

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12 See Article 1(1) of the *International Convention for the Suppression of Terrorist Bombings*, 1998.

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).

~~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 ~~is~~ liable on conviction to imprisonment for life.

Providing material support in respect of ~~terrorist acts~~ offences under this Act

3. (1) Any person who -

(a) provides material, logistical or organisational support[15] 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.

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[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.

[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".

(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]

~~**Sabotage**~~

~~5. Any person who, in the Republic of 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 to[18] –~~

~~(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~~

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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 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.

~~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]

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]

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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.

Endangering the Safety of Maritime Navigation[22]

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;

(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 -

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22 The offence of "piracy" is also included in the draft *Defence Bill*.

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.

(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 bombings[24]

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.

~~(2) This section does not apply to the military forces of a State~~[25] -

~~(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]

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[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".

[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

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 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~~

Prevention and Punishment of the Crime of Hostage Taking (United States of America).

[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*).

~~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]

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;

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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*.

(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]

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;

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[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*.

(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 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 ~~of~~ registered in the Republic;[32] or

(viii) against the security of the Republic.[33]

Custody of persons suspected of committing terrorist acts ~~or terrorist activities~~

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 Act[34] -

~~(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)[35];~~

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32 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.

33 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*.

34 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.

35 Take into account the definitions in the *Firearms Control Bill*, 1999, once finalized.

~~(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-

(i) ~~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
(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 30~~[36] ~~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.

(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.[37]

(b) A detainee shall be entitled to be visited in detention by his or her medical practitioner.[38]

(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;

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36 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.

37 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.

38 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.

(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.~~

(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~~ offences[39] **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 -

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[39] 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.

(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 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;~~[40] ~~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.

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.[41]

(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.

Powers to stop and search vehicles and persons[42]

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[40] The project committee considered that clause 19(4)(b) might well also have implications to the constitutional right to silence etc.

[41] The English Terrorism Bill also provides for a duty to disclose information about terrorism or terrorist property. See Chapter 6 above.

[42] 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

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 power~~s~~ ~~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 -

(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 -

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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.

(i) for such period, not exceeding 28 days[43] ~~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.[44]

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

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.[45]

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***.

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43 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.

44 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 citizen but at the same time it will cause unnecessary administrative paperwork on an already hard-pressed police force.

45 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.

SCHEDULE

SCHEDULE OF LEGISLATION REPEALED

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."[46]
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

[46] 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 B

CONVENTION OF THE ORGANIZATION OF AFRICAN UNITY ON THE PREVENTION AND COMBATING OF TERRORISM

The Member States of the Organization of African Unity:

Considering the purposes and principles enshrined in the Charter of the Organization of African Unity, in particular its clauses relating to the security, stability, development of friendly relations and cooperation among its Member States;

Recalling the provisions of the Declaration on the Code of Conduct for Inter-African Relations, adopted by the Thirtieth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, held in Tunis, Tunisia, from 13 to 15 June, 1994;

Aware of the need to promote human and moral values based on tolerance and rejection of all forms of terrorism irrespective of their motivations;

Believing in the principles of international law, the provisions of the Charters of the Organization of African Unity and of the United Nations and the latter's relevant resolutions on measures aimed at combating international terrorism and, in particular, resolution 49/60 of the General Assembly of 9 December, 1994 together with the annexed Declaration on Measures to Eliminate International Terrorism as well as resolution 51/210 of the General Assembly of 17 December, 1996 and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexed thereto;

Deeply concerned over the scope and seriousness of the phenomenon of terrorism and the dangers it poses to the stability and security of states;

Desirous of strengthening cooperation among Member States in order to forestall and combat terrorism;

Reaffirming the legitimate right of peoples for self-determination and independence pursuant to the principles of international law and the provisions of the Charters of the Organization of African Unity and the United Nations as well as the African Charter on Human and Peoples' Rights;

Concerned that the lives of innocent women and children are most adversely affected by terrorism;

Convinced that terrorism constitutes a serious violation of human rights and, in particular, rights to physical integrity, to life, freedom and security, and impedes socio-economic development through destabilization of states;

Convinced further that terrorism cannot be justified under any circumstances and, consequently, should be combated in all its forms and manifestations, including those in which States are involved directly or indirectly, without regard to its origin, causes and objectives;

Aware of the growing links between terrorism and organized crime, including the illicit traffic of arms, drugs and money laundering;

Determined to eliminate terrorism in all its forms and manifestations;

HAVE AGREED AS FOLLOWS:

PART I

SCOPE OF APPLICATION

Article 1

For the purposes of this Convention:

25. "Convention" means the Convention of the Organization of African Unity on the Prevention and Combating of Terrorism.

26. "State Party" means any Member State of the Organization of African Unity which has ratified or acceded to this Convention and has deposited its instrument of ratification or accession with the Secretary- General of the Organization of African Unity.

3. "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).

Article 2

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.

Article 3

1. Notwithstanding the provisions of Article 1, the struggle waged by peoples 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 shall not be considered as terrorist acts.

2. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.

PART II

AREAS OF COOPERATION

Article 4

1. States Parties 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.

2. States Parties shall adopt any legitimate measures aimed at preventing and combating 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.

Article 5

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

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

PART III

STATE JURISDICTION

Article 6

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.

2. A State Party may also establish its jurisdiction over any such 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.

3. Upon ratifying or acceding to this Convention, each State Party shall notify the Secretary-General of the Organization of African Unity of the jurisdiction it has established in accordance with paragraph 2 under its national law. Should any change take place, the State Party concerned shall immediately notify the Secretary General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the acts set forth in Article 1 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

Article 7

1. Upon receiving information that a person who has committed or who is alleged to have committed any terrorist act as defined in Article 1 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its national law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its national law so as to ensure that person's presence for the purpose of prosecution.

3. Any person against whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) 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;

(b) be visited by a representative of that State;

(c) be assisted by a lawyer of his or her choice;

(d) be informed of his or her rights under sub-paragraphs (a), (b) and (c).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the national law of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws must enable full effect to be given to the

purposes for which the rights accorded under paragraph 3 are intended.

PART IV

EXTRADITION

Article 8

1. Subject to the provisions of paragraphs 2 and 3 of this Article, the States Parties shall undertake to extradite any person charged with or convicted of any terrorist act carried out on the territory of another State Party and whose extradition is requested by one of the States Parties in conformity with the rules and conditions provided for in this Convention or under extradition agreements between the States Parties and within the limits of their national laws.

2. Any State Party may, at the time of the deposit of its instrument of ratification or accession transmit to the Secretary-General of the OAU the grounds on which extradition may not be granted and shall at the same time indicate the legal basis in its national legislation or international conventions to which it is a party which excludes such extradition. The Secretary-General shall forward these grounds to the State Parties.

3. Extradition shall not be granted if final judgement has been passed by a competent authority of the requested State upon the person in respect of the terrorist act or acts for which extradition is requested. Extradition may also be refused if the competent authority of the requested State has decided either not to institute or terminate proceedings in respect of the same act or acts.

4. A State Party in whose territory an alleged offender is present shall be obliged, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution if it does not extradite that person.

Article 9

Each State Party undertakes to include as an extraditable offence any terrorist act as defined in Article 1, in any extradition treaty existing between any of the States Parties before or after the entry into force of this Convention.

Article 10

Exchange of extradition requests between the States Parties to this Convention shall be effected directly either through diplomatic channels or other appropriate organs in the concerned States.

Article 11

Extradition requests shall be in writing, and shall be accompanied in particular by the following:

(a) an original or authenticated copy of the sentence, warrant of arrest or any

order or other judicial decision made, in accordance with the procedures laid down in the laws of the requesting State;

(b) a statement describing the offences for which extradition is being requested, indicating the date and place of its commission, the offence committed, any convictions made and a copy of the provisions of the applicable law; and

(c) as comprehensive a description as possible of the wanted person together with any other information which may assist in establishing the person's identity and nationality.

Article 12

In urgent cases, the competent authority of the State making the extradition may, in writing, request that the State seized of the extradition request arrest the person in question provisionally. Such provisional arrest shall be for a reasonable period in accordance with the national law of the requested State.

Article 13

1. Where a State Party receives several extradition requests from different States Parties in respect of the same suspect and for the same or different terrorist acts, it shall decide on these requests having regard to all the prevailing circumstances, particularly the possibility of subsequent extradition, the respective dates of receipt of the requests, and the degree of seriousness of the crime.

2. Upon agreeing to extradite, States Parties shall seize and transmit all funds and related materials purportedly used in the commission of the terrorist act to the requesting State as well as relevant incriminating evidence.

3. Such funds, incriminating evidence and related materials, upon confirmation of their use in the terrorist act by the requested State, shall be transmitted to the requesting State even if, for reasons of death or escape of the accused, the extradition in question cannot take place.

4. The provisions in the above paragraphs shall not affect the rights of any of the State Parties or bona fide third parties regarding the materials or revenues mentioned above.

PART V

EXTRA-TERRITORIAL INVESTIGATIONS (COMMISSION ROGATOIRE) AND MUTUAL LEGAL ASSISTANCE

Article 14

1. Any State Party may, while recognizing the sovereign rights of States Parties in matters of criminal investigation, request any other State Party to carry out, with its assistance and

cooperation, on the latter's territory, criminal investigations related to any judicial proceedings concerning alleged terrorist acts and, in particular:

(a) the examination of witnesses and transcripts of statements made as evidence;

(b) the opening of judicial information;

(c) the initiation of investigation processes;

(d) the collection of documents and recordings or, in their absence, authenticated copies thereof;

(e) conducting inspections and tracing of assets for evidentiary purposes;

(f) executing searches and seizures; and

(g) service of judicial documents.

Article 15

A commission rogatoire may be refused:

(a) where each of the States Parties has to execute a commission rogatoire relating to the same terrorist acts;

(b) if that request may affect efforts to expose crimes, impede investigations or the indictment of the accused in the country requesting the commission rogatoire; or

(c) if the execution of the request would affect the sovereignty of the requested State, its security or public order.

Article 16

The extra-territorial investigation (commission rogatoire) shall be executed in compliance with the provisions of national laws of the requested State. The request for an extra-territorial investigation (commission rogatoire) relating to a terrorist act shall not be rejected on the grounds of the principle of confidentiality of bank operations or financial institutions, where applicable.

Article 17

The States Parties shall extend to each other the best possible mutual police and judicial assistance for any investigation, criminal prosecution or extradition proceedings related to the terrorist acts as set forth in this Convention.

Article 18

The States Parties undertake to develop, if necessary, especially by concluding bilateral and

multilateral agreements and arrangements, mutual legal assistance procedures aimed at facilitating and speeding investigations and collecting evidence, as well as cooperation between law enforcement agencies in order to detect and prevent terrorist acts.

PART VI

FINAL PROVISIONS

Article 19

1. This Convention shall be open to signature, ratification or accession by the Member States of the Organization of African Unity.

2. The instruments of ratification or accession to the present Convention shall be deposited with the Secretary General of Organization of African Unity.

3. No State Party may enter a reservation which is incompatible with the object and purposes of this Convention.

4. No State Party may withdraw from this Convention except on the basis of a written request addressed to the Secretary- General of the Organization of African Unity.

5. The withdrawal shall take effect six months after the date of receipt of the written request by the Secretary- General of the Organization of African Unity.

6. The Secretary- General of the Organization of African Unity shall inform Member States of the Organization of the deposit of each instrument of ratification or accession.

Article 20

1. This Convention shall enter into force thirty (30) days after the deposit of the fifteenth (15) instruments of ratification with the Secretary-General of the Organization of African Unity.

2. For each of the States that shall ratify or accede to this Convention shall enter into force thirty (30) days after the date of the deposit by that State Party of its instrument of ratification or accession.

Article 21

1. Special protocols or agreements may, if necessary, supplement the provisions of this Convention.

2. This Convention may be amended if a State Party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the proposed amendment after all the States Parties have been duly informed of it at least three (3) months in advance.

3. The amendment shall be approved by a simple majority of the State Parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedures three months after the Secretary General has received notice of the acceptance.

Article 22

1. Nothing in this Article 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.

2. Any dispute that may arise between the State Parties regarding the interpretation or application of this Convention shall be amicably settled by direct agreement between them. Failing such settlement, any one of the States Parties may refer the dispute to the International Court of Justice in conformity with the Statute of the Court or by arbitration by other African States Parties to this Convention.

Article 23

The original of this Convention, of which the Arabic, English, French and Portuguese texts are equally authentic, shall be deposited with the Secretary General of the Organization of African Unity.

ANNEXURE C

EUROPEAN CONVENTION ON EXTRADITION

Paris, 13.XII.1957

The governments signatory hereto, being members of the Council of Europe,
Considering that the aim of the Council of Europe is to achieve a greater unity between its members;
Considering that this purpose can be attained by the conclusion of agreements and by common action in legal matters;
Considering that the acceptance of uniform rules with regard to extradition is likely to assist this work of unification,
Have agreed as follows:

Article 1 - Obligation to extradite

The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

Article 2 - Extraditable offences

1. Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months.
2. If the request for extradition includes several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences.
3. Any Contracting Party whose law does not allow extradition for certain of the offences referred to in paragraph 1 of this article may, in so far as it is concerned, exclude such offences from the application of this Convention.
4. Any Contracting Party which wishes to avail itself of the right provided for in paragraph 3 of this article shall, at the time of deposit of its instrument of ratification or accession, transmit to the Secretary General of the Council of Europe either a list of the offences for which extradition is allowed or a list of those for which it is excluded and shall at the same time indicate the legal provisions which allow or exclude extradition. The Secretary General of the Council shall forward these lists to the other signatories.
5. If extradition is subsequently excluded in respect of other offences by the law of a Contracting Party, that Party shall notify the Secretary General. The Secretary General shall inform the other signatories. Such notification shall not take effect until three months from the date of its receipt by the Secretary General.
6. Any Party which avails itself of the right provided for in paragraphs 4 or 5 of this article may at any time apply this Convention to offences which have been excluded from it. It

shall inform the Secretary General of the Council of such changes, and the Secretary General shall inform the other signatories.

7. Any Party may apply reciprocity in respect of any offences excluded from the application of the Convention under this article.

Article 3 - Political offences

1. Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.
2. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.
3. The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offence for the purposes of this Convention.
4. This article shall not affect any obligations which the Contracting Parties may have undertaken or may undertake under any other international convention of a multilateral character.

Article 4 - Military offences

Extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Convention.

Article 5 - Fiscal offences

Extradition shall be granted, in accordance with the provisions of this Convention, for offences in connection with taxes, duties, customs and exchange only if the Contracting Parties have so decided in respect of any such offence or category of offences.

Article 6 - Extradition of nationals

1. a. A Contracting Party shall have the right to refuse extradition of its nationals.
   a. Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term "nationals" within the meaning of this Convention.
   b. Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognised as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in sub-paragraph a of this article.
   c. If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.

Article 7 - Place of commission

The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.
When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.

Article 8 - Pending proceedings for the same offences

The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.

Article 9 - *Non bis in idem*

Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

Article 10 - Lapse of time

Extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.

Article 11 - Capital punishment

If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.

Article 12 - The request and supporting documents

The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more Parties.
The request shall be supported by:

a the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

b a statement of the offences for which extradition is requested. The time and place

of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and

c a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

Article 13 - Supplementary information

If the information communicated by the requesting Party is found to be insufficient to allow the requested Party to make a decision in pursuance of this Convention, the latter Party shall request the necessary supplementary information and may fix a time-limit for the receipt thereof.

Article 14 - Rule of speciality

A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:

a when the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention;

b when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.

The requesting Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.

When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.

Article 15 - Re-extradition to a third state

Except as provided for in Article 14, paragraph 1.b, the requesting Party shall not, without the consent of the requested Party, surrender to another Party or to a third State a person surrendered to the requesting Party and sought by the said other Party or third State in respect of offences committed before his surrender. The requested Party may request the production of the documents mentioned in Article 12, paragraph 2.

Article 16 - Provisional arrest

In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the

matter in accordance with its law.

The request for provisional arrest shall state that one of the documents mentioned in Article 12, paragraph 2.a, exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when and where such offence was committed and shall so far as possible give a description of the person sought.
A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol) or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request.

Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought.

Release shall not prejudice re-arrest and extradition if a request for extradition is received subsequently.

Article 17 - Conflicting requests

If extradition is requested concurrently by more than one State, either for the same offence or for different offences, the requested Party shall make its decision having regard to all the circumstances and especially the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State.

Article 18 - Surrender of the person to be extradited

The requested Party shall inform the requesting Party by the means mentioned in Article 12, paragraph 1, of its decision with regard to the extradition.

Reasons shall be given for any complete or partial rejection.

If the request is agreed to, the requesting Party shall be informed of the place and date of surrender and of the length of time for which the person claimed was detained with a view to surrender.

Subject to the provisions of paragraph 5 of this article, if the person claimed has not been taken over on the appointed date, he may be released after the expiry of 15 days and shall in any case be released after the expiry of 30 days. The requested Party may refuse to extradite him for the same offence.

If circumstances beyond its control prevent a Party from surrendering or taking over the person to be extradited, it shall notify the other Party. The two Parties shall agree a new date for surrender and the provisions of paragraph 4 of this article shall apply.

Article 19 - Postponed or conditional surrender

The requested Party may, after making its decision on the request for extradition, postpone the surrender of the person claimed in order that he may be proceeded against by that Party or, if he has already been convicted, in order that he may serve his sentence in the territory of that Party for an offence other than that for which extradition is requested.

The requested Party may, instead of postponing surrender, temporarily surrender the person claimed to the requesting Party in accordance with conditions to be determined by mutual agreement between the Parties.

Article 20 - Handing over of property

The requested Party shall, in so far as its law permits and at the request of the requesting Party, seize and hand over property:

a which may be required as evidence, or
b which has been acquired as a result of the offence and which, at the time of the arrest, is found in the possession of the person claimed or is discovered subsequently.

The property mentioned in paragraph 1 of this article shall be handed over even if extradition, having been agreed to, cannot be carried out owing to the death or escape of the person claimed.

When the said property is liable to seizure or confiscation in the territory of the requested Party, the latter may, in connection with pending criminal proceedings, temporarily retain it or hand it over on condition that it is returned.

Any rights which the requested Party or third parties may have acquired in the said property shall be preserved. Where these rights exist, the property shall be returned without charge to the requested Party as soon as possible after the trial.

Article 21 - Transit

Transit through the territory of one of the Contracting Parties shall be granted on submission of a request by the means mentioned in Article 12, paragraph 1, provided that the offence concerned is not considered by the Party requested to grant transit as an offence of a political or purely military character having regard to Articles 3 and 4 of this Convention.

Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.

Subject to the provisions of paragraph 4 of this article, it shall be necessary to produce the documents mentioned in Article 12, paragraph 2.

If air transport is used, the following provisions shall apply:

a when it is not intended to land, the requesting Party shall notify the Party over whose territory the flight is to be made and shall certify that one of the documents mentioned in Article 12, paragraph 2.a exists. In the case of an unscheduled landing, such notification shall have the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a formal request for transit;

b when it is intended to land, the requesting Party shall submit a formal request for transit.

A Party may, however, at the time of signature or of the deposit of its instrument of ratification of, or accession to, this Convention, declare that it will only grant transit of a person on some or all of the conditions on which it grants extradition. In that event, reciprocity may be applied.

The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his life or his freedom may be threatened by reason of his race, religion, nationality or political opinion.

Article 22 - Procedure

Except where this Convention otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party.

Article 23 - Language to be used

The documents to be produced shall be in the language of the requesting or requested Party. The requested Party may require a translation into one of the official languages of the Council of Europe to be chosen by it.

Article 24 - Expenses

Expenses incurred in the territory of the requested Party by reason of extradition shall be borne by that Party.

Expenses incurred by reason of transit through the territory of a Party requested to grant transit shall be borne by the requesting Party.

In the event of extradition from a non-metropolitan territory of the requested Party, the expenses occasioned by travel between that territory and the metropolitan territory of the requesting Party shall be borne by the latter. The same rule shall apply to expenses occasioned by travel between the non-metropolitan territory of the requested Party and its metropolitan territory.

Article 25 - Definition of "detention order"

For the purposes of this Convention, the expression "detention order" means any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence.

Article 26 - Reservations

Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.

Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.

A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.

Article 27 - Territorial application

This Convention shall apply to the metropolitan territories of the Contracting Parties.

In respect of France, it shall also apply to Algeria and to the overseas Departments and, in respect of the United Kingdom of Great Britain and Northern Ireland, to the Channel Islands and to the Isle of Man.

The Federal Republic of Germany may extend the application of this Convention to the *Land* of Berlin by notice addressed to the Secretary General of the Council of Europe, who shall notify the other Parties of such declaration.

By direct arrangement between two or more Contracting Parties, the application of this Convention may be extended, subject to the conditions laid down in the arrangement, to any territory of such Parties, other than the territories mentioned in paragraphs 1, 2 and 3 of this article, for whose international relations any such Party is responsible.

Article 28 - Relations between this Convention and bilateral Agreements

This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties.

The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.

Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties. Contracting Parties which exclude or may in the future exclude the

application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph.

Article 29 - Signature, ratification and entry into force

This Convention shall be open to signature by the members of the Council of Europe. It shall be ratified. The instruments of ratification shall be deposited with the Secretary General of the Council.

The Convention shall come into force 90 days after the date of deposit of the third instrument of ratification.

As regards any signatory ratifying subsequently the Convention shall come into force 90 days after the date of the deposit of its instrument of ratification.

Article 30 - Accession

The Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to this Convention, provided that the resolution containing such invitation receives the unanimous agreement of the members of the Council who have ratified the Convention.

Accession shall be by deposit with the Secretary General of the Council of an instrument of accession, which shall take effect 90 days after the date of its deposit.

Article 31 - Denunciation

Any Contracting Party may denounce this Convention in so far as it is concerned by giving notice to the Secretary General of the Council of Europe. Denunciation shall take effect six months after the date when the Secretary General of the Council received such notification.

Article 32 - Notifications

The Secretary General of the Council of Europe shall notify the members of the Council and the government of any State which has acceded to this Convention of:

a the deposit of any instrument of ratification or accession;
b the date of entry into force of this Convention;
c any declaration made in accordance with the provisions of Article 6, paragraph 1, and of Article 21, paragraph 5;
d any reservation made in accordance with Article 26, paragraph 1;
e the withdrawal of any reservation in accordance with Article 26, paragraph 2;
f any notification of denunciation received in accordance with the provisions of Article 31 and by the date on which such denunciation will take effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Paris, this 13th day of December 1957, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to the signatory governments.

ANNEXURE D

European Convention on the Suppression of Terrorism: Strasbourg, 27.I.1977

The member States of the Council of Europe, signatory hereto,Considering that the aim of the Council of Europe is to achieve a greater unity between its members; Aware of the growing concern caused by the increase in acts of terrorism;Wishing to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment;Convinced that extradition is a particularly effective measure for achieving this result,Have agreed as follows:

Article 1

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 2

1. For the purpose of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.
2. The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons.
3. The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 3

The provisions of all extradition treaties and arrangements applicable between Contracting States, including the European Convention on Extradition, are modified as between Contracting States to the extent that they are incompatible with this Convention.

Article 4

For the purpose of this Convention and to the extent that any offence mentioned in Article 1 or 2 is not listed as an extraditable offence in any extradition convention or treaty existing between Contracting States, it shall be deemed to be included as such therein.

Article 5

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

Article 6

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.
2. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 7

A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1, shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

Article 8

1. Contracting States shall afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought in respect of the offences mentioned in Article 1 or 2. The law of the requested State concerning mutual assistance in criminal matters shall apply in all cases. Nevertheless this assistance may 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.
2. Nothing in this Convention shall be interpreted as imposing an obligation to afford mutual assistance if the requested State has substantial grounds for believing that the request for mutual assistance in respect of an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons.
3. The provisions of all treaties and arrangements concerning mutual assistance in criminal matters applicable between Contracting States, including the European Convention on Mutual Assistance in Criminal Matters, are modified as between Contracting States to the

extent that they are incompatible with this Convention.

Article 9

1. The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention.
2. It shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 10

1. Any dispute between Contracting States concerning the interpretation or application of this Convention, which has not been settled in the framework of Article 9, paragraph 2, shall, at the request of any Party to the dispute, be referred to arbitration. Each Party shall nominate an arbitrator and the two arbitrators shall nominate a referee. If any Party has not nominated its arbitrator within the three months following the request for arbitration, he shall be nominated at the request of the other Party by the President of the European Court of Human Rights. If the latter should be a national of one of the Parties to the dispute, this duty shall be carried out by the Vice-President of the Court or if the Vice-President is a national of one of the Parties to the dispute, by the most senior judge of the Court not being a national of one of the Parties to the dispute. The same procedure shall be observed if the arbitrators cannot agree on the choice of referee.
2. The arbitration tribunal shall lay down its own procedure. Its decisions shall be taken by majority vote. Its award shall be final.

Article 11

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
2. The Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or approval.
3. In respect of a signatory State ratifying, accepting or approving subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 12

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Convention shall apply.
2. Any State may, when depositing its instrument of ratification, acceptance or approval or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.
3. Any declaration made in pursuance of the preceding paragraph may, in respect of any

territory mentioned in such declaration, be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect immediately or at such later date as may be specified in the notification.

Article 13

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, declare that it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives, provided that it undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including:
   (a) that it created a collective danger to the life, physical integrity or liberty of persons; or
   (b) that it affected persons foreign to the motives behind it; or
   (c) that cruel or vicious means have been used in the commission of the offence.
2. Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.
3. A State which has made a reservation in accordance with paragraph 1 of this article may not claim the application of Article 1 by any other State; it may, however, if its reservation is partial or conditional, claim the application of that article in so far as it has itself accepted it.

Article 14

Any Contracting State may denounce this Convention by means of a written notification addressed to the Secretary General of the Council of Europe. Any such denunciation shall take effect immediately or at such later date as may be specified in the notification.

Article 15

This Convention ceases to have effect in respect of any Contracting State which withdraws from or ceases to be a member of the Council of Europe.

Article 16

The Secretary General of the Council of Europe shall notify the member States of the Council of:
   (a) any signature;
   (b) any deposit of an instrument of ratification, acceptance or approval;
   (c) any date of entry into force of this Convention in accordance with Article 11 thereof;
   (d) any declaration or notification received in pursuance of the provisions of Article 12;
   (e) any reservation made in pursuance of the provisions of Article 13, paragraph 1;
   (f) the withdrawal of any reservation effected in pursuance of the provisions of Article 13, paragraph 2;
   (g) any notification received in pursuance of Article 14 and the date on which

denunciation takes effect;

(h) any cessation of the effects of the Convention pursuant to Article 15.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.Done at Strasbourg, this 27th day of January 1977, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory States.

General considerations[47]

“11. The purpose of the Convention is to assist in the suppression of terrorism by complementing and, where necessary, modifying existing extradition and mutual assistance arrangements concluded between member States of the Council of Europe, including the European Convention on Extradition of 13 December 1957 and the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, in that it seeks to overcome the difficulties which may arise in the case of extradition or mutual assistance concerning persons accused or convicted of acts of terrorism.
12. It was felt that the climate of mutual confidence among the like-minded member States of the Council of Europe, their democratic nature and their respect for human rights safeguarded by the institutions set up under the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, justify opening the possibility and, in certain cases, imposing an obligation to disregard, for the purposes of extradition, the political nature of the particularly odious crimes mentioned in Articles 1 and 2 of the Convention. The human rights to which regard has to be had are not only the rights of those accused or convicted of acts of terrorism but also of the victims or potential victims of those acts (cf. Article 17 of the European Convention on Human Rights).
13. One of the characteristics of these crimes is their increasing internationalisation; their perpetrators are frequently found in a State other than that in which the act was committed. For that reason extradition is a particularly effective measure for combating terrorism.
14. If the act is an offence which falls within the scope of application of existing extradition treaties the requested State will have no difficulty, subject to the provisions of its extradition law, in complying with a request for extradition from the State which nas jurisdiction to prosecute. However, terrorist acts might be considered "political offences", and it is a principle –– laid down in most existing extradition treaties as well as in the European Convention on Extradition (cf. Article 3 paragraph 1) –– that extradition shall not be granted in respect of a political offence.
Moreover, there is no generally accepted definition of the term "political offence". It is for the requested State to interpret it.

15. It follows that there is a serious lacuna in existing international agreements with regard to the possibility of extraditing persons accused or convicted of acts of terrorism.
16. The European Convention on the Suppression of Terrorism aims at filling this lacuna by eliminating or restricting the possibility for the requested State of invoking the political nature of

[47] See the explanatory report on the Convention at http://conventions.coe.int/treaty/EN/cadreprincipal.htm

an offence in order to oppose an extradition request. This aim is achieved by providing that, for extradition purposes, certain specified offences *shall never* be regarded as "political" (Article 1) and other specified offences *may not* be (Article 2), notwithstanding their political content or motivation.

17. The system established by Articles 1 and 2 of the Convention reflects the consensus which reconciles the arguments put forward in favour of an obligation, on the one hand, and an option, on the other hand, not to consider, for the purposes of the application of the Convention, certain offences as political.

18. In favour of an obligation, it was pointed out that it alone would give States new and really effective possibilities for extradition, by eliminating explicitly the plea of "political offence", a solution that was perfectly feasible in the climate of mutual confidence that reigned amongst the member States of the Council of Europe having similar democratic institutions. It would ensure that terrorists were extradited for trial to the State which had jurisdiction to prosecute. A mere option could never provide a guarantee that extradition would take place and, moreover, the criteria concerning the seriousness of the offence would not be precise.

19. In favour of an option, reference was made to the difficulty in accepting a rigid solution which would amount to obligatory extradition for political offences. Each case should be examined on its merits.

20. The solution adopted consists of an obligation for some offences (Article 1), and an option for others (Article 2).

21. The Convention applies only to particularly odious and serious acts often affecting persons foreign to the motives behind them. The seriousness of these acts and their consequences are such that their criminal element outweighs their possible political aspects.

22. This method, which was already applied to genocide, war crimes and other comparable crimes in the Additional Protocol to the European Convention on Extradition of 15 October 1975 as well as to the taking or attempted taking of the life of a head of State or a member of his family in Article 3.3 of the European Convention on Extradition, accordingly overcomes for acts of terrorism not only the obstacles to extradition due to the plea of the political nature of the offence but also the difficulties inherent in the absence of a uniform interpretation of the term "political offence".

23. Although the Convention is clearly aimed at not taking into consideration the political character of the offence for the purposes of extradition, it does recognise that a Contracting State might be impeded, e.g. for legal or constitutional reasons, from fully accepting the obligations arising from Article 1. For this reason Article 13 expressly allows Contracting States to make certain reservations.

24. It should be noted that there is no obligation to extradite if the requested State has substantial grounds for believing that the request for extradition has been inspired by the considerations mentioned in Article 5, or that the position of the person whose extradition is requested may be prejudiced by these considerations.

25. In the case of an offence mentioned in Article 1, a State refusing extradition would have to submit the case to its competent authorities for the purpose of prosecution, after having taken the measures necessary to establish its jurisdiction in these circumstances (Articles 6 and 7).

26. These provisions reflect the maxim *aut dedere aut judicare*. It is to be noted, however, that the Convention does not grant Contracting States a general choice either to extradite or to prosecute. The obligation to submit the case to the competent authorities for the purpose of prosecution is subsidiary in that it is conditional on the preceding refusal of extradition in a given case, which is possible only under the conditions laid down by the Convention or by other relevant treaty or legal provisions.

27. In fact, the Convention is not an extradition treaty as such. Whilst the character of an offence may be modified by virtue of Articles 1 and 2, the legal basis for extradition remains the extradition treaty or other law concerned. It follows that a State which has been asked to extradite a terrorist may, notwithstanding the provisions of the Convention, still not do so if the other conditions for extradition are not fulfilled; for example, the offender may be a national of the requested State, or there may be time limitation.

28. On the other hand, the Convention is not exhaustive in the sense that it does not prevent States, if their law so allows, extraditing in cases other than those provided for by the Convention, or to take other measures such as expelling the offender or sending him back, if in a specific case the State concerned is not in possession of an extradition request made in accordance with the Convention, or if it considers that a measure other than extradition is warranted under another international agreement or particular arrangement.

29. The obligation which Contracting States undertake by adhering to the Convention are closely linked with the special climate of mutual confidence among the Members of the Council of Europe which is based on their collective recognition of the rule of law and the protection of human rights manifested by Article 3 of the Council''s Statute and by the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 which all member States have signed.

For that reason it was thought necessary to restrict the circle of Contracting Parties to the member States of the Council, in spite of the fact that terrorism is a global problem.

30. It goes without saying that the Convention does not affect the traditional rights of political refugees and of persons enjoying political asylum in accordance with other international undertakings to which the member States are party."

ANNEXURE E

COUNCIL ACT of 27 September 1996 drawing up the Convention Relating to Extradition Between the Member States of the European Union (96/C 313/02)[48]

CONVENTION drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union THE HIGH CONTRACTING PARTIES to this Convention, Member States of the European Union,REFERRING to the Act of the Council of the European Union of 27 September 1996,DESIRING to improve judicial cooperation between the Member States in criminal matters, with regard both to prosecution and to the execution of sentences,RECOGNIZING the importance of extradition in judicial cooperation for the achievement of these objectives,STRESSING that Member States have an interest in ensuring that extradition procedures operate efficiently and rapidly in so far as their systems of government are based on democratic principles and they comply with the obligations laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950,EXPRESSING their confidence in the structure and operation of their judicial systems and in the ability of all Member States to ensure a fair trial,BEARING IN MIND that by Act of 10 March 1995 the Council drew up the Convention on simplified extradition procedure between the Member States of the European Union,TAKING ACCOUNT of the interest in concluding a Convention between the Member States of the European Union supplementing the European Convention on Extradition of 13 December 1957 and the other Conventions in force on the matter,CONSIDERING that the provisions of those Conventions remain applicable for all matters not covered by this Convention,HAVE AGREED AS FOLLOWS:**Article 1**

General provisions1. The purpose of this Convention is to supplement the provisions and facilitate the application between the Member States of the European Union:- of the European Convention on Extradition of 13 December 1957 (hereinafter referred to as the 'European Convention on Extradition`),- the European Convention on the Suppression of Terrorism of 27 January 1977 (hereinafter referred to as the 'European Convention on the Suppression of Terrorism`),- the Convention of 19 June 1990 applying the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders in relations between the Member States which are party to that Convention, and- the first chapter of the Treaty on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand-Duchy of Luxembourg and the Kingdom of the Netherlands of 27 June 1962, as amended by the Protocol of 11 May 1974 (hereinafter referred to as the 'Benelux Treaty`) in relations between the Member States of the Benelux Economic Union.2. Paragraph 1 shall not affect the application of more favourable provisions in bilateral or multilateral agreements between Member States, nor, as provided for in Article 28 (3) of the European Convention on Extradition, shall it affect extradition arrangements agreed on the basis of uniform or reciprocal laws providing for the execution in the territory of a Member State of warrants of arrest issued in the territory of another Member State.**Article 2** Extraditable offences1. Extradition shall be granted in respect of offences which are punishable under the law of the requesting Member State by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested Member State by deprivation of liberty or a detention order for a maximum period of at least six

[48] See http://europa.eu.int/eur-lex/en/lif/dat/1996/en_496Y1023_02.html

months.2. Extradition may not be refused on the grounds that the law of the requested Member State does not provide for the same type of detention order as the law of the requesting Member State.3. Article 2 (2) of the European Convention on Extradition and Article 2 (2) of the Benelux Treaty shall also apply where certain offences are punishable by pecuniary penalties.**Article 3**
Conspiracy and association to commit offences1. Where the offence for which extradition is requested is classified by the law of the requesting Member State as a conspiracy or an association to commit offences and is punishable by a maximum term of deprivation of liberty or a detention order of at least 12 months, extradition shall not be refused on the ground that the law of the requested Member State does not provide for the same facts to be an offence, provided the conspiracy or the association is to commit:(a) one or more of the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism;or(b) any other offence punishable by deprivation of liberty or a detention order of a maximum of at least 12 months in the field of drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons.2. For the purpose of determining whether the conspiracy or the association is to commit one of the offences indicated under paragraph 1 (a) or (b) of this Article, the requested Member State shall take into consideration the information contained in the warrant of arrest or order having the same legal effect or in the conviction of the person whose extradition is requested as well as in the statement of the offences envisaged in Article 12 (2) (b) of the European Convention on Extradition or in Article 11 (2) (b) of the Benelux Treaty.3. When giving the notification referred to in Article 18 (2), any Member State may declare that it reserves the right not to apply paragraph 1 or to apply it under certain specified conditions.4. Any Member State which has entered a reservation under paragraph 3 shall make extraditable under the terms of Article 2 (1) the behaviour of any person which contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism as in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons, punishable by deprivation of liberty or a detention order of a maximum of at least 12 months, even where that person does not take part in the actual execution of the offence or offences concerned; such contribution shall be intentional and made having knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence or offences concerned.**Article 4**
Order for deprivation of liberty in a place other than a penitentiary institutionExtradition for the purpose of prosecution shall not be refused on the ground that the request is supported, pursuant to Article 12 (2) (a) of the European Convention on Extradition or Article 11 (2) (a) of the Benelux Treaty, by an order of the judicial authorities of the requesting Member State to deprive the person of his liberty in a place other than a penitentiary institution.**Article 5**
Political offences1. For the purposes of applying this Convention, no offence may be regarded by the requested Member State as a political offence, as an offence connected with a political offence or an offence inspired by political motives.2. Each Member State may, when giving the notification referred to in Article 18 (2), declare that it will apply paragraph 1 only in relation to:(a) the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism;and(b) offences of conspiracy or association - which correspond to the description of behaviour referred to in Article 3 (4) - to commit one or more of the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism.3. The provisions of Article 3 (2) of the European Convention on Extradition and of Article 5 of the European Convention on the Suppression of Terrorism remain unaffected.4. Reservations made pursuant to Article 13 of the European Convention on the Suppression of Terrorism shall not apply to

extradition between Member States.**Article 6** Fiscal offences1. With regard to taxes, duties, customs and exchange, extradition shall also be granted under the terms of this Convention, the European Convention on Extradition and the Benelux Treaty in respect of offences which correspond under the law of the requested Member State to a similar offence.2. Extradition may not be refused on the ground that the law of the requested Member State does not impose the same type of taxes or duties or does not have the same type of provisions in connection with taxes, duties, customs and exchange as the law of the requesting Member State.3. When giving the notification referred to in Article 18 (2), any Member State may declare that it will grant extradition in connection with a fiscal offence only for acts or omissions which may constitute an offence in connection with excise, value-added tax or customs.**Article 7** Extradition of nationals1. Extradition may not be refused on the ground that the person claimed is a national of the requested Member State within the meaning of Article 6 of the European Convention on Extradition.2. When giving the notification referred to in Article 18 (2), any Member State may declare that it will not grant extradition of its nationals or will authorize it only under certain specified conditions.3. Reservations referred to in paragraph 2 shall be valid for five years from the first day of application of this Convention by the Member State concerned. However, such reservations may be renewed for successive periods of the same duration.Twelve months before the date of expiry of the reservation, the depositary shall give notice of that expiry to the Member State concerned.No later than three months before the expiry of each five-year period, the Member State shall notify the depositary either that it is upholding its reservation, that it is amending it to ease the conditions for extradition or that it is withdrawing it.In the absence of the notification referred to in the preceding subparagraph, the depositary shall inform the Member State concerned that its reservation is considered to have been extended automatically for a period of six months, before the expiry of which the Member State must give notification. On expiry of that period, failure to notify shall cause the reservation to lapse.**Article 8** Lapse of time1. Extradition may not be refused on the ground that the prosecution or punishment of the person would be statute-barred according to the law of the requested Member State.2. The requested Member State shall have the option of not applying paragraph 1 where the request for extradition is based on offences for which that Member State has jurisdiction under its own criminal law.**Article 9** AmnestyExtradition shall not be granted in respect of an offence covered by amnesty in the requested Member State where that State was competent to prosecute the offence under its own criminal law.**Article 10** Offences other than those upon which the request for extradition is based1. A person who has been extradited may, in respect of offences committed before his surrender other than those upon which the request for extradition was based, without it being necessary to obtain the consent of the requested Member State:(a) be prosecuted or tried where the offences are not punishable by deprivation of liberty;(b) be prosecuted or tried in so far as the criminal proceedings do not give rise to the application of a measure restricting his personal liberty;(c) be subjected to a penalty or a measure not involving the deprivation of liberty, including a financial penalty, or a measure in lieu thereof, even if it may restrict his personal liberty;(d) be prosecuted, tried, detained with a view to the execution of a sentence or of a detention order or subjected to any other restriction of his personal liberty if after his surrender he has expressly waived the benefit of the rule of speciality with regard to specific offences preceding his surrender.2. Waiver on the part of the person extradited as referred to in paragraph 1 (d) shall be given before the competent judicial authorities of the requesting Member State and shall be recorded in accordance with that Member State's national law.3. Each Member State shall adopt the measures necessary to ensure that the waiver referred to in paragraph 1 (d) is established in such a way as to show that the person has given it voluntarily and in full awareness of the consequences. To that end, the person extradited shall have the right to legal counsel.4.

When the requested Member State has made a declaration pursuant to Article 6 (3), paragraph 1 (a), (b) and (c) of this Article shall not apply to fiscal offences except those referred to in Article 6 (3).**Article 11** Presumption of consent of the requested Member StateEach Member State, when giving the notification referred to in Article 18 (2) or at any time, may declare that, in its relations with other Member States that have made the same declaration, consent for the purposes of Article 14 (1) (a) of the European Convention on Extradition and Article 13 (1) (a) of the Benelux Treaty is presumed to have been given, unless it indicates otherwise when granting extradition in a particular case.Where in a particular case the Member State has indicated that its consent should not be deemed to have been given, Article 10 (1) still applies.**Article 12** Re-extradition to another Member State1. Article 15 of the European Convention on Extradition and Article 14 (1) of the Benelux Treaty shall not apply to requests for re-extradition from one Member State to another.2. When giving the notification referred to in Article 18 (2), a Member State may declare that Article 15 of the European Convention on Extradition and Article 14 (1) of the Benelux Treaty shall continue to apply except where Article 13 of the Convention on simplified extradition procedure between the Member States of the European Union (1) provides otherwise or where the person concerned consents to be re-extradited to another Member State.**Article 13** Central authority and transmission of documents by facsimile1. Each Member State shall designate a central authority or, where its constitutional system so requires, central authorities responsible for transmitting and receiving extradition requests and the necessary supporting documents, as well as any other official correspondence relating to extradition requests, unless otherwise provided for in this Convention.2. When giving the notification referred to in Article 18 (2) each Member State shall indicate the authority or authorities which it has designated pursuant to paragraph 1 of this Article. It shall inform the depositary of any change concerning the designation.3. The extradition request and the documents referred to in paragraph 1 may be sent by facsimile transmission. Each central authority shall be equipped with a facsimile machine for transmitting and receiving such documents and shall ensure that it is kept in proper working order.4. In order to ensure the authenticity and confidentiality of the transmission, a cryptographic device fitted to the facsimile machine possessed by the central authority shall be in operation when the equipment is being used to apply this Article.Member States shall consult each other on the practical arrangements for applying this Article.5. In order to guarantee the authenticity of extradition documents, the central authority of the requesting Member State shall state in its request that it certifies that the documents transmitted in support of that request correspond to the originals and shall describe the pagination. Where the requested Member State disputes that the documents correspond to the originals, its central authority shall be entitled to require the central authority of the requesting Member State to produce the original documents or a true copy thereof within a reasonable period through either diplomatic channels or any other mutually agreed channel.**Article 14** Supplementary informationWhen giving the notification referred to in Article 18 (2), or at any other time, any Member State may declare that, in its relations with other Member States which have made the same declaration, the judicial authorities or other competent authorities of those Member States may, where appropriate, make requests directly to its judicial authorities or other competent authorities responsible for criminal proceedings against the person whose extradition is requested for supplementary information in accordance with Article 13 of the European Convention on Extradition or Article 12 of the Benelux Treaty.In making such a declaration, a Member State shall specify its judicial authorities or other competent authorities authorized to communicate and receive such supplementary information.**Article 15** AuthenticationAny document or any copy of documents transmitted for the purposes of extradition shall be exempted from authentication or any other formality unless expressly required by the provisions of this Convention, the European Convention on Extradition or the Benelux Treaty. In the latter case,

copies of documents shall be considered to be authenticated when they have been certified true copies by the judicial authorities that issued the original or by the central authority referred to in Article 13.**Article 16** TransitIn the case of transit, under the conditions laid down in Article 21 of the European Convention on Extradition and Article 21 of the Benelux Treaty, through the territory of one Member State to another Member State, the following provisions shall apply:(a) any request for transit must contain sufficient information to enable the Member State of transit to assess the request and to take the constraint measures needed for execution of the transit vis-à-vis the extradited person.To that end, the following information shall be sufficient:- the identity of the person extradited,- the existence of an arrest warrant or other document having the same legal effect or of an enforceable judgment,- the nature and the legal description of the offence,- a description of the circumstances in which the offence was committed, including the date and place;(b) the request for transit and the information provided for in point (a) may be sent to the Member State of transit by any means leaving a written record. The Member State of transit shall make its decision known by the same method;(c) in the case of transport by air without a scheduled stopover, if an unscheduled landing occurs, the requesting Member State shall provide the transit Member State concerned with the information provided for in point (a);(d) subject to the provisions of this Convention, in particular Articles 3, 5 and 7, the provisions of Article 21 (1), (2), (5) and (6) of the European Convention on Extradition and Article 21 (1) of the Benelux Treaty shall continue to apply.**Article 17** ReservationsNo reservations may be entered in respect of this Convention other than those for which it makes express provision.**Article 18** Entry into force1. This Convention shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the constitutional procedures for the adoption of this Convention.3. This Convention shall enter into force 90 days after the notification referred to in paragraph 2 by the State, Member of the European Union at the time of adoption by the Council of the Act drawing up this Convention, which is last to complete that formality.4. Until this Convention enters into force, any Member State may, when giving the notification referred to in paragraph 2, or at any other time, declare that as far as it is concerned this Convention shall apply to its relations with Member States that have made the same declaration. Such declarations shall take effect 90 days after the date of deposit thereof.5. This Convention shall apply only to requests submitted after the date on which it enters into force or is applied as between the requested Member State and the requesting Member State.**Article 19** Accession of new Member States1. This Convention shall be open to accession by any State that becomes a member of the European Union.2. The text of this Convention in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.3. The instruments of accession shall be deposited with the depositary.4. This Convention shall enter into force with respect to any State that accedes to it 90 days after the deposit of its instrument of accession or on the date of entry into force of this Convention if it has not already entered into force at the time of expiry of the said period 90 days.5. Where this Convention is not yet in force at the time of the deposit of their instrument of accession, Article 18 (4) shall apply to acceding Member States.**Article 20** Depositary1. The Secretary-General of the Council of the European Union shall act as depositary of this Convention.2. The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, declarations and reservations, and also any other notification concerning this Convention.In witness whereof, the undersigned Plenipotentiaries have hereunto set their hands.Done in a single original, in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, such original remaining deposited in the archives of the General Secretariat of the Council of the European

Union. The Secretary-General shall transmit a certified copy to each of the Member States.**ANNEX** Joint Declaration on the right of asylum The Member States declare that this Convention is without prejudice either to the right of asylum to the extent to which it is recognized by their respective constitutions or to the application by the Member States of the provisions of the Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the Convention relating to the Status of Stateless Persons of 28 September 1954 and by the Protocol relating to the Status of Refugees of 31 January 1967.Declaration by Denmark, Finland and Sweden concerning Article 7 of this Convention Denmark, Finland and Sweden confirm that - as indicated during their negotiations on accession to the Schengen agreements - they will not invoke, in relation to other Member States which ensure equal treatment, their declarations under Article 6 (1) of the European Convention on Extradition as a ground for refusal of extradition of residents from non-Nordic States.**Declaration on the concept of 'nationals'** The Council takes note of the Member States' undertaking to apply the Council of Europe Convention of 21 March 1983 on the Transfer of Sentenced Persons in respect of the nationals of each Member State within the meaning of Article 3 (4) of the said Convention.The Member States' undertaking mentioned in the first paragraph is without prejudice to the application of Article 7 (2) of this Convention.**Declaration by Greece re Article 5** Greece interprets Article 5 from the standpoint of paragraph 3 thereof. This interpretation ensures compliance with the conditions of the Greek constitution, which:- expressly prohibits extradition of a foreigner pursued for activities in defence of freedom,and- distinguishes between political and so-called mixed offences, for which the rules are not the same as for political offences.**Declaration by Portugal on extradition requested for an offence punishable by a life sentence or detention order** Having entered a reservation in respect of the European Convention on Extradition of 1957 to the effect that it will not grant extradition of persons wanted for an offence punishable by a life sentence or detention order, Portugal states that where extradition is sought for an offence punishable by a life sentence or detention order, it will grant extradition, in compliance with the relevant provisions of the Constitution of the Portuguese Republic, as interpreted by its Constitutional Court, only if it regards as sufficient the assurances given by the requesting Member State that it will encourage, in accordance with its law and practice regarding the carrying out of sentences, the application of any measures of clemency to which the person whose extradition is requested might be entitled.Portugal reaffirms the validity of undertakings entered into in existing international agreements to which it is party, in particular in Article 5 of the Convention on Portuguese accession to the Convention Applying the Schengen Agreement.**Council declaration on the follow up to the Convention** The Council declares:(a) that it considers that there should be a periodic review, on the basis of information supplied by the Member States, of:- the implementation of this Convention,- the functioning of this Convention after its entry into force,- the possibility for Member States to amend the reservations entered in the framework of this Convention with a view to easing the conditions for extradition or withdrawing its reservations,- the general functioning of extradition procedures between the Member States;(b) that it will consider, one year after entry into force of this Convention, whether jurisdiction should be given to the Court of Justice of the European Communities.

ANNEXURE F

RESOLUTION 1269 (1999)

Adopted by the Security Council at its 4053rd meeting,
on 19 October 1999

The Security Council,

Deeply concerned by the increase in acts of international terrorism which endangers the lives and well-being of individuals worldwide as well as the peace and security of all States,

Condemning all acts of terrorism, irrespective of motive, wherever and by whomever committed,

Mindful of all relevant resolutions of the General Assembly, including resolution 49/60 of 9 December 1994, by which it adopted the Declaration on Measures to Eliminate International Terrorism,

Emphasizing the necessity to intensify the fight against terrorism at the national level and to strengthen, under the auspices of the United Nations, effective international cooperation in this field on the basis of the principles of the Charter of the United Nations and norms of international law, including respect for international humanitarian law and human rights,

Supporting the efforts to promote universal participation in and implementation of the existing international anti-terrorist conventions, as well as to develop new international instruments to counter the terrorist threat,

Commending the work done by the General Assembly, relevant United Nations organs and specialized agencies and regional and other organizations to combat international terrorism,

Determined to contribute, in accordance with the Charter of the United Nations, to the efforts to combat terrorism in all its forms,

Reaffirming that the suppression of acts of international terrorism, including those in which States are involved, is an essential contribution to the maintenance of international peace and security,

1. Unequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security;

2. Calls upon all States to implement fully the international anti-terrorist conventions to which they are parties, encourages all States to consider as a matter of priority adhering to those to which they are not parties, and encourages also the speedy adoption of the pending conventions;

3. Stresses the vital role of the United Nations in strengthening international cooperation in combating terrorism and, emphasizes the importance of enhanced coordination among States, international and regional organizations;

4. Calls upon all States to take, inter alia, in the context of such cooperation and coordination, appropriate steps to:

(i) 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;

(j) prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism;

(k) deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition;

(l) 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;

(m) 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;

5. Requests the Secretary-General, in his reports to the General Assembly, in particular submitted in accordance with its resolution 50/53 on measures to eliminate international terrorism, to pay special attention to the need to prevent and fight the threat to international peace and security as a result of terrorist activities;

6. Expresses its readiness to consider relevant provisions of the reports mentioned in paragraph 5 above and to take necessary steps in accordance with its responsibilities under the Charter of the United Nations in order to counter terrorist threats to international peace and security;

7. Decides to remain seized of this matter.

ANNEXURE G

THE SIGNING OF AN ARAB ANTI-TERRORISM AGREEMENT.TIGHTENING UP THE PREVENTATIVE RULES AND CONTINUOUS EXCHANGE OF INFORMATION BETWEEN THE ARAB COUNTRIES.NO FUNDING FOR TERRORISM AND NO PROTECTION FOR TERRORISTS. The Arab Interior and Justice Ministers signed the Arab Anti-Terrorism Agreement.[49] It has forty-three clauses and organises trial and extradition procedures for those accused and convicted in terrorist cases. It also deals with co-ordination between the security services in the Arab countries and exchange of information and the adoption of measures to prevent infiltration across borders. What follows is the text of the agreement. - The undersigned countries pledge not to organise, fund, or commit terrorist activities or take part in them in any form whatsoever. As a commitment to prevent and combat terrorist crimes according to the internal laws and procedures of each country, each country will: 1- Prevent its territory becoming a stage for the planning, organisation or execution of terrorist crimes, or the initiation or participation in any form of terrorist crime including the prevention of terrorist elements from infiltration or residence on its soil, either individuals or groups, or to receive them, harbour them, train them, arm them, or fund them, or offer any kind of help or facilities to them. 2- Co-operate and co-ordinate with other signatory countries, especially neighbouring countries and which suffer from terrorist crimes in a similar or joint way. 3- Develop and strengthen organisations responsible for uncovering the transfer, import, export, storage and use of weapons, ammunition and explosives, and other methods of aggression, murder and destruction. Develop and strengthen the procedures for monitoring the above via customs and borders to prevent it moving from one signatory country to another, or to any other country except for legitimate purposes on a regular basis. 4- Develop and strengthen organisations responsible for the procedures of monitoring and securing the borders and passageways by land, sea, and air to prevent terrorist infiltration through them. 5- Strengthen the ways of securing and protecting individuals, vital institutions, and public transport. 6- Strengthen the protection, security and safety of diplomatic and consular staff and missions, and regional and international bodies, based in the signatory countries according to international agreements which govern this matter. 7- Strengthen the activities of security communication and the co-ordination with media activities in each country according to its media policies, to uncover the goals of terrorist groups and organisations, and to defeat their plans and show the dangers they pose against security and stability. 8- Each signatory country will set up an information base to collect and analyse information pertaining to terrorist elements, groups, movements, and organisations, and follow up any new developments in the phenomenon of terrorism and successful new ways of combating it, and to update this information and to pass it around the specialist agencies in the signatory countries, and within the limits allowed by the internal laws and procedures of each country. Secondly: Preventative Steps 1- To arrest those who commit terrorist crimes and try them according to the national law or hand them over according to the rules of this agreement or bilateral agreements between the two countries between which the extradition occurs. 2- To provide effective protection to those working in the field of criminal justice. 3- To provide effective protection to the sources of information in terrorist crime and witnesses to it. 4- To provide whatever help is needed to the victims of terrorism. 5- To set up effective co-operation between the relevant organisations and among citizens to combat terrorism, and that includes the setting up of appropriate guarantees and incentives to encourage people to provide information about terrorist activities and offer it to help uncover such activities and to co-operate in the arrest of perpetrators of terrorism. The signatory countries will co-operate to prevent and to combat terrorist crimes according to the internal laws and procedures of each country through the following steps: First: Exchange of information. The signatory countries undertake to strengthen the exchange of information between them over: A- The activities and crimes of terrorist groups, their leadership and membership, their headquarters and training grounds and the ways and sources of their funding, arming, and the kinds of weapons ammunition and explosives which they use, and any other means of aggression, murder, and destruction. B- The means of communication and propaganda used by the terrorist groups and their modus operandi and the movements of their leaders and members and the travel documents they use. 2- Each signatory country undertakes to notify any other signatory country as soon as possible of any information it has about any terrorist crime which takes place on its soil which aims to attack the interests of that country and its citizens, demonstrating in that notification the nature and conditions of the crime and who the perpetrators and intended victims are, and the losses

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[49] See http://www.ain-al-yaqeen.com/issues/19980506/feat7en.htm

caused by it and the tools and the means by which it is carried out, and this to the degree in which there is no conflict with the requirements of research and investigation. 3- The signatory countries undertake to co-operate between one another to exchange information to prevent terrorist crimes and to inform any other signatory country or countries of all that it possesses of information or notification which would prevent terrorist crimes from taking place on its soil or against its citizens or those who reside there or against its interests. 4- Each signatory country pledges to provide any other signatory country with any information or communication which it possesses which would: A- Help in the arrest of any person or people accused of committing a terrorist crime against the interests of that country or initiating or participating in it either by help, agreement, or incitement. B- Lead to the seizure of any weapons, explosives, ammunition, or tools, or funds, used or prepared for the use in a terrorist crime. 6- The signatory countries pledge to maintain the secrecy of information exchanged between them, and not to provide any country that is not a signatory, or any other party, with that information, without the prior permission of the country which was the source of the information. Secondly: Investigations. The signatory countries pledge to strengthen co-operation between them and to provide help in the field of investigation and arrest of fugitives, be they accused or convicted of terrorist crimes according to the laws and regimes of each country. Thirdly: Exchange of expertise. 1- The signatory countries will co-operate in the production and exchange of studies and research to prevent terrorist crimes. They will also exchange any expertise in the prevention of terrorism that they possess. 2- The signatory countries will co-operate, each within their own capacity, to provide available technical assistance, to prepare programmes, or to set up joint training courses, as well as courses in individual countries, or in groups of countries, when needed, for those who work in the field of terrorist prevention in order to develop their scientific and practical abilities and improve their performance. * The Judicial Sphere: The signatory countries pledge to surrender those accused or convicted of terrorist crimes that are wanted in any of these countries according to the conditions and rules laid down in this agreement. It is not permitted to surrender them in any of the following case: A- If the crime for which surrender is required is, according to the laws of the signatory country required to surrender, for a crime that has a political nature. B- If the crime for which surrender is required is in breach of military duty. C- If the crime for which surrender is required has taken place within the borders of the signatory country that is required to surrender, unless this crime had damaged the interests of the signatory country seeking surrender, and its laws specify the tracking-down of criminals and punishing them, if the country required to surrender had started investigation or trial. D- If there is a final decision (which has the power of an adjudicated matter) in the signatory country required to surrender. E- If the legal proceedings are over by the time the request for extradition is made, or the punishment is finished because of the time elapsed according to the law of the signatory country seeking extradition. F- If the crime is committed outside the borders of the signatory country, and the person does not carry its citizenship, or nationality, and the law of the signatory country required to surrender does not permit the accusation of a person of such a crime, if it is committed outside its borders. G- If a pardon has been issued which includes these terrorist criminals in the signatory country which is seeking extradition. H- If the legal system in the country required to surrender does not allow it to surrender its own citizens, the country required to surrender must charge those who commit a terrorist crime, if the crime is punishable in each of the two countries with a custodial punishment, which is not less than one year, or with a stronger punishment. The nationality of a person required for extradition is determined by the date of the crime for which he is being extradited, and the investigations made by the country seeking extradition will be used. * Extradition Procedures: The exchange of extradition requests between countries will take place by direct diplomatic means or by means of the ministries of justice in each countries, or whoever undertakes that role. The request for extradition will be given in writing, accompanied by the following: the original conviction, or the arrest order, or any other papers with the same power, which have been issued according to the required condition made by the laws of the countries seeking extradition, or any official copy of the above, and a notice of the activities for which extradition is required, with a clarification of the time and place of their committal, and their legal conformity, indicating the laws applying to them, and a copy of these laws, and a description of the person sought for extradition, with the greatest possible degree of accuracy, and any other data which would identify him, and his nationality, to the judicial authorities in the country seeking extradition. The country seeking extradition is allowed to ask the country from which extradition is sought -- in any form of written communication -- for the provisional arrest of the wanted person until such time as the extradition request is received. It is possible in this case for the country from which extradition is required to arrest the wanted person provisionally, and if the extradition request is not accompanied by the required documentation mentioned above, it is not possible to arrest the person whose extradition is required for a period of time in excess of thirty days from the date of his arrest. Concluding Terms: - This agreement is conditional upon the acceptance or ratification by the signatory countries. The documents for endorsement, confirmation and

ratification, will be placed at the General Secretariat of the League of Arab States, at a date no longer than thirty days from the date of endorsement, confirmation and ratification. The General Secretariat has to inform the rest of the member states of every deposit of such documents and the date it occurred. - This agreement is effective thirty days after the date of the deposit of the documents of endorsement, confirmation and ratification of seven Arab countries and this agreement cannot be effective on any other Arab country, except after the deposit of the document of endorsement, confirmation and ratification at the General Secretariat of the Arab League, and the passing of thirty days from the date of deposit. - It is not permissible for any of the countries to show any reservation which implies either directly or indirectly disagreement with the clauses of this agreement or a departure from its goals. - It is not permissible for any of the signatory countries to withdraw from this agreement except by means of a written request which it has to send to the Secretary General of the Arab League. - Any withdrawal is effective after six months of the date of the request made to the Secretary General of the Arab League.

ANNEXURE H

International Convention for the Suppression of the Financing of Terrorism[50]

Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999

Preamble

The States Parties to this Convention,

Bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly resolution 50/6 of 24 October 1995,

Recalling also all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which 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 jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States,

Noting that the Declaration on Measures to Eliminate International Terrorism also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter,

Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations 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 regulatory 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 to intensify the exchange of information concerning international movements of such funds,

Recalling also General Assembly resolution 52/165 of 15 December 1997, in which the Assembly called upon States to consider, in particular, the implementation of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210 of 17 December 1996,

Recalling further General Assembly resolution 53/108 of 8 December 1998, in which the Assembly decided that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 should elaborate a draft international convention for the suppression of terrorist financing to supplement related existing international instruments,

Considering that the financing of terrorism is a matter of grave concern to the international community as a whole,

Noting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain,

Noting also that existing multilateral legal instruments do not expressly address such financing,

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50 See http://www.un.org/law/cod/finterr.htm

Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. A “Funds” means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

2. A “A State or governmental facility” means 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.

3. A “Proceeds” means any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in article 2.

Article 2

1. Any person commits an offence within the meaning of this Convention 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:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, 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 to abstain from doing any act.

2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

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

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of

this article;

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Article 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 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.

Article 4

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

(a) To establish as criminal offences under its domestic law the offences set forth in article 2;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Article 5

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

Article 6

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.

Article 7

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State;

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;

(b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;

(c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;

(d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

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

5. 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.

6. Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 8

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

Article 9

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) 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;

(b) Be visited by a representative of that State;

(c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 7, paragraph 1, subparagraph (b), or paragraph 2, subparagraph (b), to invite the International Committee of the Red Cross to

communicate with and visit the alleged offender.

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 7, paragraph 1 or 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 10

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay 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 other 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 this 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.

Article 11

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to

the extent that they are incompatible with this Convention.

Article 12

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.

2. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.

3. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

4. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5.

5. States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 13

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence.

Article 14

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. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may 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.

Article 15

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 16

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 2 may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of the present article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with the present article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 17

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall 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.

Article 18

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

(a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;

(b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

(a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;

(b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

(i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;

(ii) The movement of funds relating to the commission of such offences.

4. States Parties may exchange information through the International Criminal Police Organization (Interpol).

Article 19

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 20

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 21

Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.

Article 22

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

Article 23

1. The annex may be amended by the addition of relevant treaties that:

(a) Are open to the participation of all States;

(b) Have entered into force;

(c) Have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the present Convention.

2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.

3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.

4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all those States Parties having deposited such an instrument. For each State Party ratifying, accepting or approving the amendment after the deposit of the twenty-second instrument, the amendment shall

enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

Article 24

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 25

1. This Convention shall be open for signature by all States from 10 January 2000 to 31 December 2001 at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 26

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 27

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 28

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on 10 January 2000.

Annex

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.

ANNEXURE I

International Convention for the Suppression of Terrorist Bombings

The States Parties to this Convention,

Having in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations of 24 October 1995,General Assembly resolution 50/6.

Recalling also the Declaration on Measures to Eliminate International Terrorism, annexed to General Assembly resolution 49/60 of 9 December 1994, in which, inter alia, "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",

Noting that the Declaration also encouraged States "to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter",

Recalling further General Assembly resolution 51/210 of 17 December 1996 and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexed thereto,

Noting also that terrorist attacks by means of explosives or other lethal devices have become increasingly widespread,

Noting further that existing multilateral legal provisions do not adequately address these attacks,

Being convinced of the urgent need to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators,

Considering that the occurrence of such acts is a matter of grave concern to the international community as a whole,

Noting that the activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. "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.

2. "Infrastructure facility" means any publicly or privately owned facility providing or distributing services for the benefit of the public, such as water, sewage, energy, fuel or communications.

3. "Explosive or other lethal device" means:

(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. "Military forces of a State" means the armed forces of a 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.

5. "Place of public use" means those parts of any building, land, street, waterway or other location that are 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 that is so accessible or open to the public.

6. "Public transportation system" means all facilities, conveyances and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons or cargo.

Article 2

1. Any person commits an offence within the meaning of this Convention if that 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:

(c) With the intent to cause death or serious bodily injury; or

(d) 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.

2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1.

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

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2; or

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2; or

(c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 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.

Article 3

This Convention shall 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 article 6, paragraph 1, or article 6, paragraph 2, of this Convention to exercise jurisdiction, except that the provisions of articles 10 to 15 shall, as appropriate, apply in those cases.

Article 4

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

(a) To establish as criminal offences under its domestic law the offences set forth in article 2 of this Convention;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of those offences.

Article 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, 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.

Article 6

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State; or

(b) The 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

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State; or

(b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or

(c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or

(d) The offence is committed in an attempt to compel that State to do or abstain from

doing any act; or

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2 under its domestic law. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

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

5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 7

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence as set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) 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;

(b) Be visited by a representative of that State;

(c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 6, subparagraph 1 (c) or 2 (c), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 6, paragraphs 1 and 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes

the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 8

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay 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 other 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 this 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.

Article 9

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 6, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention.

Article 10

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 11

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. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may 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.

Article 12

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 13

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of testimony, identification or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention may be transferred if the following conditions are met:

   (a) The person freely gives his or her informed consent; and

   (b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of this article:

   (a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

   (b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

   (c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

   (d) The person transferred shall receive credit for service of the sentence being served in the State from which he was transferred for time spent in the custody of the State to which he was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with this article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained

or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 14

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall 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 law of human rights.

Article 15

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

(a) By taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or engage in the perpetration of offences as set forth in article 2;

(b) 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 set forth in article 2;

(c) Where appropriate, through research and development regarding methods of detection of explosives and other harmful substances that can cause death or bodily injury, consultations on the development of standards for marking explosives in order to identify their origin in post-blast investigations, exchange of information on preventive measures, cooperation and transfer of technology, equipment and related materials.

Article 16

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 17

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 18

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

Article 19

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Article 20

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 21

1. This Convention shall be open for signature by all States from 12 January 1998 until 31 December 1999 at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 22

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 23

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 24

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at New York on 12 January 1998.

DRAFT RESOLUTION II

Measures to eliminate international terrorism

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling all its relevant resolutions, including resolution 49/60 of 9 December 1994, by which it adopted the Declaration on Measures to Eliminate International Terrorism, and resolutions 50/53 of 11 December 1995 and 51/210 of 17 December 1996,

Recalling also the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, See resolution 50/6.

Deeply disturbed by the persistence of terrorist acts, which have taken place worldwide,

Stressing the need further to strengthen international cooperation between States and between international organizations and agencies, regional organizations and arrangements and the United Nations in order to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever and by whomsoever committed,

Mindful of the need to enhance the role of the United Nations and the relevant specialized agencies in combating international terrorism, and of the proposals of the Secretary-General to enhance the role of the Organization in this respect,

Recalling that in the Declaration on Measures to Eliminate International Terrorism contained in the annex to resolution 49/60 the General Assembly encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there was a comprehensive legal framework covering all aspects of the matter,

Bearing in mind the possibility of considering in the near future the elaboration of a comprehensive convention on international terrorism,

Having examined the report of the Secretary-General,A/52/304 and Corr.1 and Add.1.

1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;

2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological,

racial, ethnic, religious or other nature that may be invoked to justify them;

3. Reiterates its call upon all States to adopt further measures in accordance with the relevant provisions of international law, including international standards of human rights, to prevent terrorism and to strengthen international cooperation in combating terrorism and, to that end, to consider, in particular, the implementation of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210;

4. Also reiterates its call upon all States, with the aim of enhancing the efficient implementation of relevant legal instruments, to intensify, as and where appropriate, the exchange of information on facts related to terrorism and, in so doing, to avoid the dissemination of inaccurate or unverified information;

5. Further reiterates its call upon States to refrain from financing, encouraging, providing training for or otherwise supporting terrorist activities;

6. Urges all States that have not yet done so to consider, as a matter of priority, becoming parties to relevant instruments as referred to in paragraph 6 of resolution 51/210, and calls upon all States to enact, as appropriate, domestic legislation necessary to implement the provisions of those Conventions and Protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts and to cooperate with and provide support and assistance to other States and relevant international and regional organizations to that end;

7. Reaffirms the Declaration on Measures to Eliminate International Terrorism contained in the annex to resolution 49/60 and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism contained in the annex to resolution 51/210, and calls upon all States to implement them;

8. Reaffirms the mandate of the Ad Hoc Committee established by the General Assembly in its resolution 51/210;

9. Decides that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 will meet from 16 February to 27 February 1998 to continue its work in accordance with the mandate provided in paragraph 9 of that resolution, and recommends that the work continue during the fifty-third session of the General Assembly from 28 September to 9 October 1998 within the framework of a working group of the Sixth Committee;

10. Requests the Secretary-General to invite the International Atomic Energy Agency to assist the Ad Hoc Committee in its deliberations;

11. Also requests the Secretary-General to continue to provide the Ad Hoc Committee with the necessary facilities for the performance of its work;

12. Requests the Ad Hoc Committee to report to the General Assembly at its fifty-third session on progress made in accomplishing its mandate;

13. Recommends that the Ad Hoc Committee be convened in 1999 to continue its work as referred to in paragraph 9 of resolution 51/210;

14. Decides to include in the provisional agenda of its fifty-third session the item entitled "Measures to eliminate international terrorism".