

**Counter-Terrorism Measures and the
Impact on International Human Rights Standards
in the Field of Criminal Justice**

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To the International Centre for Criminal Law Reform
And Criminal Justice Policy
July 2004
For the Montreal Conference**

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Introduction

The attacks on the World Trade Towers and the Pentagon in the United States on September 11, 2001 shocked the world. It has been said that everything changed, that the “war on terrorism” demanded a concerted effort to combat the evasive enemy. Part of the strategy undertaken by governments has been to use the criminal justice system as a tool to not only to punish but also to prevent terrorist acts. The present threat of international terrorism is seen by some as such an exceptional phenomenon that it is not practicable to apply the principles of law and the rules of evidence generally recognised in the trial of criminal cases.¹ Such reasoning has been used to justify the promulgation of various counter-terrorism measures by a number of countries that extend powers to investigate, arrest and detain, create new offenses, expand State’s powers for detaining suspected terrorists, indefinitely or *incommunicado*, and permit the use of secret evidence. However, voices have risen to express concern and opposition to the extreme measures being taken in the fight against terrorism to the detriment of human rights. There is great concern that the international campaign against terrorism has or will lead to violations of human rights, such as inappropriate detention, denial of access to defence, presumption of guilt, unfair trials and discrimination on racial grounds.

For countries that are in the process of ratifying the *International Covenant on Civil and Political Rights* (the *ICCPR*)² a critical question is being asked – how have the recent counter terrorism measures impacted on the principles, norms and standards that have been set out in international human rights law. States have an obligation of strict compliance with international norms and standards no matter how serious the crime that has been committed. Certain limits or justifications and exceptions are allowed in their application, but within the framework provided for by the treaty provisions themselves. Of course some of these rights may be subject to derogation when a State has lawfully declared a state of emergency but there are also conditions to such derogable rights. What are those presumptions and how has the war on terrorism affected their applicability within the human rights framework? Are human rights being marginalised or clearly violated by some counter-terrorism measures or have the standards been lowered in the actual interpretation of these rights? It is now becoming possible to assess the effects of September 11 on limiting the application of human rights standards. This paper attempts to review the assessments made so far.

The particular focus of this paper is to analyse and discuss how these counter-terrorism provisions, enacted to protect our national security and personal safety, measure up to human rights standards in the field of criminal justice, during investigations, detentions and prosecutions of crimes. Part I describes briefly the response to September 11 and the war on terrorism, by the international community under the auspices of the United Nations, and responses at the regional and national level. Part II, the bulk of this paper, reviews the human rights standards in the field of criminal justice and explores the impact of various counter-terrorist measures on these rights.

¹ President Bush stated in the executive order concerning the trial of terrorist: “I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principle of law and the rules of evidence generally recognised in the trial of criminal cases in the United States district courts” *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57, 833 (2001) (also known as the Military Order).

² *International Covenant on Civil and Political Rights*, G.A. res 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc A 16316(1966), 999 UNTS 171 entered into force 23 Mar 1976.

Part I Responses to 9/11: Balancing Between Counter-Terrorism and Human Rights

1. Response at the international level

In the context of international relations and diplomacy, the response following September 11 by Member States at the United Nations was swift and immediate. The Security Council passed resolution 1373 mandating Member States to adopt specific measures to combat terrorism calling for tough criminal, financial and administrative measures aimed at individuals and entities considered supportive of or involved in terrorism in “all its forms and manifestations”.³ The resolution also created a new entity called the Counter Terrorism Committee of the Security Council which oversees the implementation of resolution 1373. Member States had to report to this Committee within 90 days on measures they have adopted.

Also fairly immediate was the mounting tension between combating terrorism from a security point of view and respect for human rights. Resolution 1373 makes no positive reference to Member States’ obligations to respect human rights. The Counter Terrorism Committee’s guidance to States did not indicate that they should comply with human rights standards nor advise them how to do so.⁴ The request by the United Nations Office of the High Commissioner for Human Rights for the appointment of a human rights expert to the Committee was not followed.⁵

The balance between security concerns and respect for human rights not only appeared but in reality shifted heavily to the security side during the first few months after September 11. This is reflected in the Counter Terrorism Committee’s policy on human rights expressed by the Chairman in January 2002 where he noted that monitoring performance against human rights conventions is outside the scope of the Committee’s mandate.⁶ However, perhaps surprisingly in the opinion of many observers and activists, the response from the various United Nations human rights bodies and mechanisms is having an impact on the mainstream response to international terrorism. In January 2003, a new Security Council resolution 1456 stressed that “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law”.⁷ However, while the Counter-Terrorism Committee recognises that counter-terrorism measures have to be taken without undue damage to civil liberties, the

³ Security Council Resolution 1373 on international cooperation to combat threats to international peace and security caused by terrorist acts adopted on 28 September 2001. S/RES/1373 (2001) found at www.un.org/terrorism/sc.htm.

⁴ Human Rights Watch, “*In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*” A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003. Found at <http://hrw.org/un/chr59/counter-terrorism-bck/htm>.

⁵ *ibid.* As quoted in the Human Rights Watch Report *supra* note 4. The late High Commissioner Sergio Vieira de Mello met with the Counter-Terrorism Committee on October 21, 2002 and reiterated the earlier recommendation put forward by Mary Robinson that the Committee appoint a human rights advisor. The Committee has not done so to date.

⁶ S/PV.4453, United Nations Security Council fifty-seventh year, 4453rd meeting (18 January 2002). The Chairman of the Counter-Terrorism Committee made the following statement: “The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee’s mandate. But we will remain aware of the interaction with human rights concerns, and will keep ourselves briefed as appropriate. It is, of course, open to other organisations to study States’ reports and take up their content in other forums”. Found at www.un.org/Docs/sc/committees/1373/human_rights.html.

⁷ Security Council Resolution 1456 on high level meeting of the Security Council: combating terrorism adopted January 2003. S/RES/1456 (2003) found at www.un.org/terrorism/sc.htm.

Chairman of the Committee reminded everyone that monitoring this was not the Committee's responsibility.⁸

The General Assembly adopted a new resolution in November 2002 entitled "protecting human rights and fundamental freedoms while countering terrorism".⁹ In emphasising the need for States to comply with their legal obligations under international humanitarian law, refugee law and human rights, it asked the High Commissioner for Human Rights to monitor the protection of human rights in the fight against terrorism and to make recommendations to governments and United Nations bodies. In response, the High Commissioner for Human Rights has produced a set of guidelines highlighting human rights obligations that should be actively considered by the Counter Terrorism Committee when reviewing country reports.¹⁰ While the United Nations Commission for Human Rights did not take up the issue of terrorism and human rights at its 58th session in 2002, some said due to strong opposition by the United States, it has done so in 2003 restoring some credibility in the United Nations system.¹¹

Of particular note are the discussions of the special procedure mechanisms of the Commission on Human Rights, such as thematic rapporteurs and independent experts, which has resulted in joint statements being issued in which they remind States of their obligations under international law to uphold human rights and fundamental freedoms.¹² They express concern over the adoption of anti-terrorist and national security legislation and other measures that might infringe upon the environment of human rights. In their June 2003 statement they express alarm at the growing threats against human rights, particularly the multiplication of policies, legislations and practices increasingly being adopted by many countries in the name of the fight against terrorism, which are having a negative affect on the enjoyment of all human rights.

A number of United Nations human rights treaty bodies and special procedure mechanisms continue to monitor the impact of counter-terrorism measures on human rights. These include the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, and the Special Rapportuer on terrorism and human rights, to name a few. Recently a group of international non-governmental organisations have launched a joint declaration calling on the United Nations to establish a United Nations mechanism to monitor the impact on human rights in the fight against terrorism.¹³ They are

⁸ Human Rights Watch Report, *supra* note 4. On March 6, 2003 during a special meeting of the Counter-Terrorism Committee, Chairman Ambassador Greenstock stated that counter-terrorism measures had to be taken "without undue damage" to civil liberties. But he also reminded those gathered that while the Committee not ask States to do anything incompatible with their human rights obligations, monitoring such obligations was not the responsibility of the Committee. The documents from the March 6, 2003 Special Meeting can be found at www.un.org/Docs/sc/committees/1373/human_rights.html.

⁹ General Assembly Resolution 57/219 of 18 December 2002, A/RES/57/219 (2002).

¹⁰ Office of the High Commissioner for Human Rights "Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures" found at www.un.org/Docs/sc/committees/1373/ohchr1.htm.

¹¹ Human Rights Watch Report, *supra* note 4. United Nations Commission on Human Rights Resolution 2003/68 of 25 April 2003 entitled "protection of human rights and fundamental freedoms while countering terrorism". The Special Rapportuer on terrorism and human rights mentions that a similar resolution in 2002 had been withdrawn for lack of support, Addendum to the Additional Progress Report of the Special Rapporteur on terrorism and human rights, Ms. Kalliopi Koufa, submitted to the Sub-Commission on the Promotion and Protection of Human Rights Fifty-fifth session, E/CN.4/Sub.2/2003/WP.1/Add.1 (8 August 2003).

¹² In December 2001 on Human Rights Day, 17 thematic rapporteurs and independent experts issued a joint statement found at <http://193.194.138.190/hurricane/hurricane.nsf/newsroom>. In June 2003, the Special Rapporteurs, Representatives, Experts and Chairpersons of the Working Groups of the special procedures of the UN Commission on Human Rights issued another joint statement found at www.unog.ch/news2/documents/newsen/hr0344e.htm.

¹³ Joint Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-Terrorism found at www.icj.org/IMG/pdf/CT_Declaration_ENG_logos-2.pdf.

concerned that there is no universal and comprehensive United Nations mechanism or system to monitor the compatibility of domestic counter-terrorism measures with international norms and human rights. They are pushing to have the Commission on Human Rights establish such a mechanism in its 60th session in 2004.

2. Responses at the regional and national levels

A number of regional inter-governmental organisations, such as the African Union, the Association of South East Asian Nations, the Council of Europe, the European Union, the League of Arab States, the Organisation of American States and the Organisation of the Islamic Conference, have been engaged in developing regional counter-terrorism measures.¹⁴ Various regional organisations have developed guidelines in respect of human rights and counter-terrorism measures, such as the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism and the Report on Terrorism and Human Rights of the Inter-American Commission on Human Rights.¹⁵

It is recognised that States have been responding to terrorism in their domestic regimes for years. Many countries have laws which allow authorities to investigate terrorism and prosecute those who engage in various specific acts generally associated with terrorism, including hijacking, murder and sabotage.¹⁶ However since September 11 and the passing of resolution 1373, there has been a proliferation of counter-terrorism legislation, policies and measures being promulgated and enforced in many States. Frequently, initiatives taken by States to respond to terrorist activities have been in the field of criminal justice. In many countries, there were strong views that existing laws used to investigate and prosecute terrorism were not sufficient.¹⁷ This included the conviction that there was a need to focus on “preventing” terrorist acts from happening in the first place. Serious concerns were expressed whether counter-terrorism measures were adequate to deter and prevent terrorist activity; to prevent such horrific acts as those of September 11. These preventative measures are meant to compliment existing laws that allow for investigation and prosecution of terrorism after it already occurred. States have attempted to adopt existing law enforcement mechanisms but more and more have developed new mechanisms to investigate, suppress and punish terrorism on a domestic level and internationally.¹⁸

What action has been taken? In fact, a number of States are intensifying international cooperation in investigating and prosecuting terrorists.¹⁹ These efforts include enhanced

¹⁴ Special Rapporteur on terrorism and human rights, Addendum Report “An update on International Anti-Terrorist Activities and Initiative”, *supra* note 11.

¹⁵ The “Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism” were adopted by the Deputies of the Ministers of Foreign Affairs of the Council at its 804th meeting on 11 July 2002. Found at www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Terrorism/CM_Guidelines_20020628.asp. On 22 October 2002, the Inter-American Commission on Human Rights issued its report on “Human Rights and Terrorism”. OEA/Ser.L/V/II 116, Doc.5rev.1.corr found at www.cidh.oas.org/Terrorism.

¹⁶ Lesley Jacobs “Securer Freedom for Whom: Risk Profiling and the New Anti-Terrorism Act – Book Review on the Security of Freedom Essays on Canada’s Anti-Terrorism Bill” (2003) 36 U. Brit. Colum L. Rev. 376.

¹⁷ *ibid.*

¹⁸ Stefanie Schmahl “Specific Methods of Prosecuting Terrorists in National Law” found at <http://edoc.mpil.de/conference-on-terrorism/index.cfm>.

¹⁹ Anja Seibert-Fohr “The Relevance of International Human Rights Standards for Prosecuting Terrorists” found at <http://edoc.mpil.de/conference-on-terrorism/index.cfm>.

implementation of extradition, mutual legal assistance, information sharing and other forms of interstate co-operation in criminal matters, such as inter-state transfer of witnesses and prisoners in the context of criminal proceedings, and more rigorous enforcement of measures to exclude, remove or extradite aliens suspected of participation in terrorist activities.²⁰

States have also introduced new measures addressing the criminalisation of terrorist-related activities. Prior to September 11 a definition of the term “terrorism” or “terrorist crime” was only known in some countries which were severely affected by the threat of national terrorism.²¹ However after September 11, a significant number of States have responded by amending their criminal code and including provisions to penalise the mere formation of or the membership in terrorist organisation or a similar association as well as the collaboration with them.²² New provisions relating to detention, prosecution and punishment of persons suspected of terrorist activities have been introduced to varying degrees. Detention for an indefinite period or refusal to grant the right to asylum and immigration have been introduced in some countries.

For the purpose of this discussion, examples of counter-terrorism measures are mainly taken from the recent initiatives by the United States, Canada and the United Kingdom.²³ All three States adopted new anti-terrorism legislation shortly after September 11 and some of those provisions have been subject to domestic political opposition and legal challenges. However, it is beyond the scope of this paper to review all counter-terrorism measures that have been put in place nor is that the purpose of this paper. Rather several of the measures will be examined to assist in the reflection of the nature and scope of specific human rights norms and how they have been affected in the field of criminal justice.

3 Methodology used in analysing these responses

The evident tension between security and human rights provides an opportunity to analyse several specific legal and human rights in the field of criminal justice guaranteed by the International Covenants and other instruments. The current debate about the appropriate balance between security and human rights serves to highlight the nature and scope of these rights. It is taken as a given that States who are responding to the threat of terrorism continue to be bound by their obligations under international law. International law and the jurisprudence of human rights treaty bodies are there to provide a reference point to the kind of measures that may be adopted to counteract terrorist acts within the framework of the rule of law and respect for human rights. Further, the law and jurisprudence provides indications of the circumstances in which they may be adopted and the conditions in which they are to be implemented.

²⁰ International Council on Human Rights Policy “*Human Rights After September 11*” found at www.unige.ch/~clapham/HRClass2002/NGO-Docs/ICHRP.pdf.

²¹ Anja Seibert-Fohr, *supra* note 19.

²² *ibid.*

²³ Britain, in December 2001, the *Anti-Terrorism, Crime and Security Act 2001* went into force, c. 24 SS 21-23 (Eng.) found at www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm. In Canada, Bill C-36 “*An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism* (referred to as the Canadian Anti-terrorism Act), 1st Sess., 37th Parl., 2001 (assented to 18 December 2001, S.C. 2001, c. 41) found at www.parl.gc.ca/37/1/parlbus/chmibus/house/bills/government/C-36/C-36_4/90168e/. Earlier drafts of Bill C-36 also found at that website. In the United States, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001*, Pub.L.No 107-56, 115 Stat. 272 (2001).

It is broadly accepted by the members of the international community that interpreting international human rights law, particularly the *ICCPR*, comes from a number of sources. The first and foremost is the Human Rights Committee, which is made up of 18 experts from all parts of the world and oversees the application of the *ICCPR* by States Parties. The jurisprudence of the Human Rights Committee includes case law, country observations, recommendations and general comments. In the aftermath of September 11, the Human Rights Committee has examined certain counter-terrorism measures taken by States and their compatibility with the *ICCPR*. The Human Rights Committee has repeatedly insisted that States Parties seeking to give effect to its obligation to combat terrorism activities pursuant to Security Council resolution 1373 must undertake that any measures are in full compliance with the provisions of the Covenant.²⁴

Assistance in interpreting certain rights can be had by examining how other mechanisms in the United Nations have addressed the issue of human rights and terrorism. Several human rights treaty bodies, such as the Committee Against Torture and the Committee on the Elimination of Racial Discrimination, have issued statements as well as recommendations after reviewing States Parties' reports.

Regional regimes also provide guidance for understanding the scope of human rights. Regional jurisprudence, such as the case law of the European Court of Human Rights, particularly dealing with the Northern Ireland situation, is valuable to review. It reflects the tension between terrorist legislation and human rights which has generated much litigation. The Inter-American Commission on Human Rights has also written on this topic. The jurisprudence of the Inter-American Court of Human Rights also provides direction to States as to which types of counter-terrorism measures are incompatible with human rights obligations.

As mentioned, examples of counter-terrorism measures are mainly taken from the recent initiatives by the United States, Canada and the United Kingdom. There have been various legal challenges to certain provisions and continue to be so. Therefore, no one knows which parts of these domestic legislations will survive. However, domestic court decisions and the national debates provide important indications as to how human rights standards are being interpreted in light of our "new world reality". Critical observations by human rights organisations are also valuable to review. For instance, Human Rights Watch has examined the periodic reports by States Parties under article 40 of the *ICCPR* and reported publicly their findings.

The next part of this paper looks at various aspects of the right to a fair trial and how these norms have been understood in light of the "war on terrorism". The various aspects of the right to a fair trial are inter-related and connected, therefore the dissection of specific rights in the next part has been done for ease of discussion only.

²⁴ A number of the Observations by the Human Rights Committee after reviewing States' periodic reports are summarised in Human Rights Watch Report, *supra* note 4.

Part II Analysis of the Impact in the Field of Criminal Justice

1. General issues

1.1 State of emergency

Emergency powers have been invoked in the fight against terrorism, justifying certain counter-terrorism measures that may be considered in violation of States' treaty obligations. The body of international human rights law recognises the reality that States do face public emergencies, such as periods of violent conflict and other challenges to national security. It should be remembered that terrorism is far from being a new phenomenon and that States have faced this and other types of emergencies before September 11. In fact, human rights law accommodates such situations by defining the boundaries of permissible measures that balance between legitimate national security concerns and respect for human rights.²⁵ Derogation clauses in the *ICCPR* and other human rights treaties specifically contemplate that exceptional measures requiring the temporary suspension of some rights may sometimes be necessary to protect the rule of law from such threats as terrorism.

The United Kingdom has been one of the few States to officially declare a state of emergency in order to permit derogation from its obligations under the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*.²⁶ While other States have not made such an official declaration, many have argued in domestic courts that national security concerns outweigh certain individual rights.²⁷ The United Kingdom has made such a declaration in order to allow the power to detain indefinitely non-nationals suspected of international terrorism.²⁸ Public statements by the British Home Secretary made at this time indicated that there was no immediate intelligence pointing to a specific threat to the United Kingdom and that such a declaration was a technicality necessary to ensure implementation of certain anti-terrorism measures.²⁹ Shortly after such a declaration, the Human Rights Committee questioned the United Kingdom after it submitted its periodic report on the *ICCPR*. The Human Rights Committee noted their concern on the legislative measures being considered by the British government, which could require derogations from its human rights obligations.³⁰ In response, the British representative invoked Article 103 of the *United Nations Charter* to argue that its obligations to the Counter Terrorism Committee under resolution 1373 took precedence over its obligations to the Human Rights Committee.³¹

²⁵ For example, see article 4 of the *ICCPR*, *supra* note 2; article 27 of the *American Convention on Human Rights*, OAS Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978 found at www1.umn.edu/humanrts/oasinstr/zoas3com.htm; article 15 *European Convention on Human Rights and Fundamental Freedoms* (Council of Europe) ETS No. 5, Rome 4.XI.1950 found at www.pfc.org.uk/legal/echrttext.htm.

²⁶ *Human Rights Act 1998 (Designated Derogation) Order 2001*, entered in force 13 November 2001, found at www.hms.gov.uk/si/2001/20013644.htm.

²⁷ See the cases of *Hamdi v Rumsfeld*, 316 F 3d 450 (4th Cir. 2003) and *Padilla* case as discussed in Michael Kelly "Executive Excess v Judicial Process: American Judicial Responses to the Government's War on Terror" (2003) 13 Ind. Int'l & Comp. L. Rev. 787.

²⁸ The power to detain under s. 23 of the Anti-Terrorism, Crime and Security Act, 2001 involved derogation from the right of liberty contained in article 5(1) of the ECHR. The Act is available at www.legislation.hms.gov.uk/acts2001/20010024.htm.

²⁹ Human Rights Watch Report *supra* note 4.

³⁰ UN Human Rights Committee, *Concluding Observations of the Human Rights Committee on the Fifth Periodic Report Submitted by the United Kingdom of Great Britain and Northern Ireland*, CCPR/CO/73/UK, November 2001.

³¹ Human Rights Watch Report, *supra* note 4.

The question of whether the United Kingdom has made a valid declaration is presently the subject of litigation in the domestic courts.³² The Special Immigration Appeals Commission held the derogation to be unlawful. However this decision was reversed by the Court of Appeal who concluded that the circumstances justified the derogation. This decision has been appealed to the House of Lords. Once all domestic remedies are exhausted, this case is expected to go before the European Court of Human Rights. For other States that may be contemplating derogating from their obligations under international human rights law in the fight against terrorism, a review of the law and jurisprudence provides guidance as to the definition of public emergency required to make a declaration and what measures can be taken.

Article 4 of the *ICCPR* permits States to take measures to derogate from certain rights set out in the Covenant “in times of public emergency which threatens the life of the nation... and to the extent strictly required by the exigencies of the situation”.³³ Some rights are classified as non-derogable, which must be respected at all times and in all circumstances. The Human Rights Committee, shortly before September 11, elaborated on the scope of article 4 in its *General Comment 29, States of Emergency*.³⁴ A State’s ability to derogate is not unlimited. Before a State Party can invoke article 4, the situation must amount to a public emergency which threatens the life of the nation. Even in armed conflicts, measures derogating from the *ICCPR* are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. The State Party must then make an official proclamation of a state of emergency. This means that States Parties must provide careful justification not only for a decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. They must act within their constitution and other provisions of law that govern such proclamations and the exercise of emergency powers. This is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. This also provides safeguards against arbitrary treatment and abuse.

General Comment 29 further provides that a fundamental requirement for any measure derogating from the *ICCPR* is that such measure be limited to the extent strictly required by the exigencies of the situation. Also the derogation measures cannot be inconsistent with a State’s international obligations, whether based on treaty or general international law. This safeguards the principle of legality and the rule of law inherent in the Covenant as a whole. “Required by the exigencies of the situation” refers to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. These measures must be based on the principles of legality, proportionality, necessity and be of limited duration.

³² The status of the domestic challenge relating to the derogation is set out in Lord Carlile, *Review of Part 4, Section 28 of the Anti-Terrorism, Crime and Security Act* (12 Feb 2003) found at www.homeoffice.gov.uk/terrorism/reports/index.html.

³³ Article 4 of the *International Covenant on Civil and Political Rights*, *supra* note 2:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from Articles 6, 7, 8 (1)(2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary on the date on which it terminates such derogation.

³⁴ UN Human Rights Committee, *General Comment 29, States of Emergency (article 4)* UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) found at <http://www1.umn.edu/humanrts/gencomm/hrc29.html>.

The Human Rights Committee, in its country observations, has examined the use of emergency powers as anti-terrorism measures. They have expressed concern at situations where constitutional reforms are aimed at suppressing time-limits on states of emergency.³⁵ The Committee has also raised concern where the power of review by the constitutional courts has been eliminated and where governments are conceding functions of the judicial police to military authorities. They also do not like when governments reduce the powers of the ministry of justice or attorney general to investigate human rights abuses and the conduct of the military.³⁶

States are given a wide margin of appreciation to determine what constitutes an emergency and what measures are needed to avert it. Jurisprudence from the European Court of Human Rights provides some guidance as to how wide this margin of appreciation may extend. Of particular use here is a review of the case law arising from the situation in Northern Ireland. In these cases, the European Court discusses the nature or degree of a terrorist threat that is required to give rise to an emergency that threatens a State's independence or security so as to allow derogation from certain human rights.³⁷ Public emergency has been held to mean "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".³⁸ The situation in Northern Ireland was held to constitute a public emergency threatening the life of the nation and therefore derogation was considered justified by the European Court. The situation was characterised by the presence in the State's territory of the Irish Republican Army (IRA), a secret army engaged in unconstitutional and violent activities. In addition, the operations of the IRA outside the territory of the State was potentially jeopardising the relationship with its neighbours. The steady and alarming increase in terrorist activities, and the failed attempts to control the situation using ordinary legislative and criminal procedures added to the state of emergency.³⁹ In *Aksoy v Turkey*, the European Court observed that PKK terrorist activity in southeast Turkey had created a public emergency that threatened the life of the nation and could justify recourse to derogation.⁴⁰ In these cases, states of emergency had been formally declared. If a state of emergency has not been declared, authorities may not derogate from their human rights obligations.

Once it was determined that a state of emergency existed, the European Court examined whether the measures taken were based on the principles of legality, proportionality and necessity and were of limited duration. An important question is what safeguards have been put in place in order to ensure that the measures are strictly necessary. In *Lawless v Ireland*, detention without trial was ruled proportional to the gravity of the situation. The European Court noted that the "ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order".⁴¹ This was because "the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups

³⁵ *Concluding Observations of the Human Rights Committee: Columbia*, CCPR/C/79/Add.76, 3 May 1997.

³⁶ *ibid.*

³⁷ *Lawless v Ireland*, 1 Eur. H.R. Rep. 15 (1961); *Ireland v the United Kingdom*, 2 Eur. H.R. Rep. (1978) and *Brannigan and McBride v The United Kingdom*, A 258-B ECHR Judgement (1993).

³⁸ *Lawless v Ireland*, *supra* note 37.

³⁹ *Lawless v Ireland* and discussion in Virginia Helen Henning, "Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights?" 17 Am. U. Int'l L. Rev. 1263.

⁴⁰ *Aksoy v Turkey*, ECHR Report 1996-VI, No 26 (1996).

⁴¹ *Lawless v Ireland*, *supra* note 37.

was meeting with great difficulties caused by the military, secret and terrorist character of those groups and the fear they created among the population and because the operational activities of those groups were carried out essentially abroad".⁴² The Court found that the Irish legislation included many safeguards to prevent abuses of its emergency powers, which further limits the measures to those strictly required by the situation. The Irish Parliament supervised the application of the law by receiving details of its enforcement and had the authority to annul the proclamation that a public emergency existed. In another case dealing with the situation in Northern Ireland, the arrest of a person who was in no way suspected of a crime or offence, for the sole purpose of obtaining information, was justified by the situation, notably the impossibility for the judicial system to function properly because of witness intimidation by terrorist groups.⁴³ However, the same situation did not justify certain inhuman and degrading practices employed during interrogation by the British authorities.⁴⁴ In the situation in Turkey, the fight against terrorism did not justify Turkey rendering judicial intervention impracticable.⁴⁵

Returning to the situation currently in the United Kingdom, a number of human rights organisations have raised doubt as to whether its recent derogation is valid.⁴⁶ The public statement by the British Home Secretary indicates that the exceptional situation of crisis or emergency does not affect the whole population or constitute a threat to the organised life of the British people but rather was made to avoid compliance with certain human rights obligations. If indeed there is a state of emergency, then indefinite detention should apply to all persons certified as international terrorists regardless of nationality and only based on the gravity of the threat they pose to the national security of the United Kingdom. As the law stands, indefinite detention only applies to non-nationals. Others have argued that the United Kingdom has made a valid declaration.⁴⁷ This argument is based on the following reasons: the government's belief that it is not only a possible target of international terrorism but also an organisational base of terrorist activity; the large immigrant community which allows non-nationals to blend in easily; the local mosques support of Islamic extremism; and the concern for the protection of human rights makes it difficult for law enforcement agencies to investigate and identify suspected activities quickly.⁴⁸ It has also been pointed out that the British legislation requires review of the sections that derogate from human rights standards, providing the necessary safeguards.⁴⁹

1.2 Non-derogable rights

Many countries have justified the use of counter-terrorism measures as being necessary under the extraordinary circumstances caused by the events of September 11. However, there are certain human rights that may never be suspended or disregarded at any time, even in states of emergency. This concept of non-derogable rights is fundamental in international human rights law. Non-derogable rights include the prohibition of torture and ill treatment; the prohibition of

⁴² *ibid.*

⁴³ *Ireland v The United Kingdom*, *supra* note 37.

⁴⁴ *ibid.*

⁴⁵ *Aksoy v Turkey*, *supra* note 40.

⁴⁶ Human Rights Watch, *Commentary on the Anti-Terrorism, Crime and Security Bill 2001* (16 November 2001) found at www.hrw.org/backgrounder/eca/Ukleg1106.htm.

⁴⁷ Virginia Helen Henning, *supra* note 39.

⁴⁸ *ibid.*

⁴⁹ *ibid.*

discrimination; the prohibition of arbitrary deprivation of life; prohibition against slavery; the principle of legality with regard to crimes and punishment; recognition before the law; and freedom of thought, conscience and religion.⁵⁰ Non-derogable rights are not only those expressly enumerated in the different human rights instruments, but also others which have attained the status of norms of general international law, or which are apparent on the basis of other provisions of international instruments.⁵¹ Clearly States cannot derogate when such derogation would be inconsistent with States' other obligations under international law. This includes restrictions on the modification to the independent and impartial nature of the judicial system and the principles of effective separation of powers.⁵²

A number of counter-terrorist measures using the criminal justice system to investigate, prosecute and punish terrorists raise a number of questions. Can alleged terrorists be detained indefinitely? How does this relate to non-derogable rights against torture and ill treatment? Is it necessary for such detention to be based on a concrete accusation or can it be based on general indications, such as the person belonging to a certain group? When should the arrested or detained person be brought before a judge? Is it possible to deal with terrorists outside the normal criminal law system? It may not always be clear to what extent rights can be derogable. A review of the jurisprudence from the Human Rights Committee and the regional bodies sheds some light on these questions.

For example, the right to a fair trial is not included in the list of non-derogable rights in the *ICCPR* or the *ECHR*. However, in its *General Comment 29*, the Human Rights Committee stated that "State Parties may in no circumstances invoke article 4 ... as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance... by deviating from fundamental principles of fair trial, including the presumption of innocence".⁵³ The Committee reasons that safeguards related to derogation are based on the principle of legality and the rule of law, both of which are inherent in the *ICCPR* as a whole. Also, certain elements of the right to a fair trial are explicitly guaranteed under International Humanitarian Law during armed conflicts. Therefore the Human Rights Committee finds no justification for derogation from these guarantees during other emergency situations. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State Party's decision to derogate from the *ICCPR*.

A further source of interpretation is the Inter-American Commission on Human Rights, which has examined the issue of fair trial in times of emergencies in detail.⁵⁴ The *American Convention on Human Rights* (the *American Convention*) in article 27 expressly provides that judicial guarantees essential for the protection of non-derogable rights may not be suspended.⁵⁵

⁵⁰ These listed rights are expressly provided for in Article 4 of the *ICCPR*. Similar non-derogable rights are listed in article 15 of the *ECHR*.

⁵¹ Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Report of the High Commissioner submitted pursuant to GA Res 48/141 "*Human Rights: a united framework*", E/CN.4/2002/18 (27 February 2002).

⁵² General Comment 29, *supra* note 34.

⁵³ *ibid.*

⁵⁴ See the Inter-American Commission on Human Rights Report, *supra* note 15.

⁵⁵ *American Convention on Human Rights*, *supra* note 25.

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

While the *American Convention* does not explicitly list the right to fair trial as one of the non-derogable rights, the Commission has held that States are not free to derogate from the fundamental due process or fair trial protections referred to in the Convention and comparable provisions of other international instruments.⁵⁶ The Commission highlights the essential role that due process safeguards may play in the protection of non-derogable human rights and the complementary nature of State's international human rights obligations. Due process provides safeguards against the enhanced risk of abuse of a State's exceptional authority in states of emergency. In this sense, due process rights form an integral part of the judicial guarantees essential for the protection of non-derogable rights and may therefore be considered non-derogable under the express terms of Article 27 of the *American Convention*. The Commission notes that no human rights supervisory body has yet found the exigencies of a genuine emergency situation sufficient to justify suspending even temporarily basic fair trial safeguards.⁵⁷

It could be argued then that basic components of the right to fair trial could not be justifiably suspended. Such basic components could include the right to a fair trial by a competent, independent and impartial court for persons charged with criminal offences, the presumption of innocence, the right to be informed promptly and intelligibly of any criminal charge, the right to adequate time and facilities to prepare a defence, the right to legal assistance of one's own choice or free legal counsel where the interests of justice require, the right not to testify against oneself and protection against coerced confessions, the right to attendance of witnesses, the right of appeal, as well as respect for the principle of non-retroactive application of penal laws.⁵⁸ There may be some aspects of due process and fair trial standards that may potentially be suspended in *bona fide* emergencies.⁵⁹ For example, the requirement that an individual be tried within a reasonable time or released may be limited. Preventative or administrative detention for longer periods than usually permissible under ordinary circumstances may be permitted but must be justified by the State. Any such detention should continue for only such period as is necessitated by the situation and remain subject to the non-derogable right of judicial oversight. Another possibility may include the right to a public trial where limitations on public access to proceedings are demonstrated to be strictly necessary in the interest of justice, such as national security, public order, the interests of juveniles, or where publicity might prejudice the interest of justice. Any such restrictions must, however, be strictly justified by the State concerned on a case by case basis and be subject to on-going judicial supervision. The right of the accused to examine or have examined witnesses presented against him could also be, in principle, the subject of restrictions in some limited instances, such as protection concerns for the safety of the witnesses. These measures must be necessary to ensure the accused's fair trial rights, including the right to challenge the veracity of the witnesses' evidence by alternative methods.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

⁵⁶ Inter-American Commission on Human Rights Report, *supra* note 15.

⁵⁷ *ibid.*

⁵⁸ Inter-American Commission on Human Rights Report, *supra* note 15.

⁵⁹ The following examples are taken from the discussion found in the Inter-American Commission on Human Rights Report, *supra* note 15.

A number of counter-terrorist measures have also targeted aliens, immigrants and refugees.⁶⁰ International human rights law applies to all persons within the territory and subject to the jurisdiction of the State Party concerned. Obviously, this includes non-nationals. The prohibition against discrimination is a non-derogable right. One case likely to head to the European Court of Human Rights will address whether the right of non-discrimination can indeed be derogated in times of emergency. In Britain, nine non-nationals who are certified as suspected terrorists have been detained without trial.⁶¹ According to the new anti-terrorism legislation, non-nationals who cannot be deported to places where they face torture or ill treatment and yet are certified as suspected international terrorists can be detained without trial, since Britain formally derogated from the *ECHR*.⁶² The nine individuals appealed to the Special Immigration Appeals Commission and succeeded on the ground of discrimination, as the Act only allowed suspected terrorists who are non-nationals to be detained when there are equally dangerous British nationals who are in exactly the same position who cannot be detained. The government appealed to the Court of Appeal. While the Court of Appeal recognised the right of non-discrimination and the danger of unlawful discrimination is acute at times of national insecurity, the Court of Appeal was swayed by the government's arguments that September 11 had changed the landscape of terrorism and that detention provisions in the Act represented a balance between the interest of the suspected individuals and the interests of the community as a whole to be protected from terrorism.⁶³ The Court spoke of an appropriate degree of deference to the actions of the executive, which it regarded as proportionate to what was necessary. This case is being appealed to the House of Lords.⁶⁴

1.3 Principle of *nullum crimen sine lege* and the definition of terrorism

Terrorism is not easy to define. The United Nations has not been able to come up with a consensus as to a definition. This is why there are seven conventions dealing with specific acts of terrorism but no general definition of terrorism.⁶⁵ This difficulty has unfortunately been apparent in domestic attempts to define terrorism or terrorist activity. States have taken a variety of approaches in attempting to prescribe sufficiently clear and effective anti-terrorism laws. Some States have tried to prescribe a specific crime of terrorism based on commonly identified characteristics of terrorist violence. Other States have chosen not to prescribe terrorism as a crime *per se*, but rather have varied existing and well-defined common crimes, such as murder, by adding a terrorist intent or variations in punishment that will reflect the particular heinous nature of terrorist violence.⁶⁶ The Special Rapporteur on Terrorism and Human Rights has articulated the concerns of many human rights bodies and organisations when she notes that many national anti-terrorist laws contain vague, ambiguous or imprecise

⁶⁰ Discussion in Sir David Williams "The United Kingdom's Response to International Terrorism" 13 *Ind. Int'l & Comp. L. Rev.* 683 (2003).

⁶¹ This case and proceedings have been discussed in Sir David Williams, *supra* note 60.

⁶² *Anti-Terrorism, Crime and Security Act*, *supra* note 23, Part IV.

⁶³ *A, X and Y v Sec'y of State* [2002] C.A. Civ 1502 (Lord Woolf).

⁶⁴ Carlile report, *supra* note 32.

⁶⁵ For a good review of the history of defining terrorism and the various relevant conventions, please see Ms. Kalliopi K. Koufa, Special Rapporteur "Terrorism and Human Rights" *Second progress report* E/CN.4/Sub.2/2002/35 (17 July 2002) and *Additional Progress Report* (E/CN.4/Sub.2/2003/WP.1 (8 August 2003).

⁶⁶ Ms. Kalliopi K. Koufa, Special Rapporteur "Terrorism and Human Rights" *Addendum: An Update on International Anti-Terrorist Activities and Initiatives* E/CN.4/Sub.2/2003/WP.1/Add.1 (8 August 2003).

definitions of terrorist activities.⁶⁷ Some of which appear to criminalize legitimate exercise of fundamental freedoms and forms of dissent, peaceful political or social opposition, such as anti-globalisation demonstrations and other lawful acts, such as wild cat strikes.⁶⁸

There is also a concern about a new technique of incrimination in anti-terrorist measures: the drawing up of official lists of groups qualified as terrorist groups.⁶⁹ Membership or collaboration with these groups is in itself an offence. The penalised collaboration may include the participation in the activities of a terrorist group, the facilitation of a terrorist activity, the instruction to carry out terrorist activities and the harbouring or concealing of terrorists. Sometimes these provisions significantly extend the chain of criminal liability laid down for normal criminal offences, such as aiding, abetting or counselling a crime or attempting to commit a crime.⁷⁰ Such practice may conflict with the principle of individual criminal responsibility. Other practices which places groups on official terrorist lists may have little to no analysis of the particulars of the situation or the nature of the group.⁷¹ Those groups and others embracing similar views but not involved with the groups may face serious repercussions. Also judicial proceedings to challenge this mistaken labelling or to defend a person charged with an offence of terrorist activity could allow for negation of a wide range of procedural rights.⁷²

The scope of how precise and unambiguous the definition of the crime of terrorism should be is more clearly understood with a review of international human rights law and jurisprudence from the various human rights bodies. Any definition of a crime must be in conformity with established principles of criminal law and of international human rights law. The principle of legality of the offence, *nullem crimen sine lege* and *nulla poena sine lege*, is the cornerstone of modern criminal law and is enshrined in the *ICCPR*, as well as the regional conventions on human rights.⁷³ Individuals cannot be prosecuted or punished for acts or omissions that did not constitute criminal offences under applicable law at the time they were committed.

The Human Rights Committee specified that the principle of legality in the field of criminal law signifies that criminal responsibility, as well as punishment, must be defined with “clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty”.⁷⁴ The Inter-American Commission on Human Rights considers that the principle of legality is closely linked to the right of any individual to life, liberty and security of the person.⁷⁵ The purpose of the principle is to guarantee the safety of the individual, by allowing him or her to know the acts which he or she might be held criminally responsible. The Inter-American Commission echoes the Human Rights Committee when holding that crimes must be “classified and described in precise and unambiguous language that narrowly defines the punishable offence,

⁶⁷ *ibid.*

⁶⁸ *ibid.*, also see Canadian Bar Association “Submission on Bill C-36: Anti-terrorism Act” (October 2001) found at www.cba.org/PDF/submission.pdf.

⁶⁹ This technique is referred to in Ms. Kalliopi K. Koufa Progress Report, *supra* note 65. As well as discussed in International Commission of Jurists, *Terrorism and Human Rights*, found at www.icj.org-IMG-pdf-terrorism-2.2.pdf.

⁷⁰ Anja Seibert-Fohr, *supra* note 19.

⁷¹ Ms. Kalliopi K. Koufa, Progress Report, *supra* note 65.

⁷² *ibid.*

⁷³ *ICCPR* article 15; *ECHR* article 7; *American Convention*, article 9; *African Charter on Human and Peoples’ Rights*, article 7; *Arab Charter of Human Rights*, article 6 and most recently reaffirmed in the *Rome Statute* (UN Doc A/CONF.183/9) as a general principle of criminal law.

⁷⁴ *General Comment 29*, *supra* note 34.

⁷⁵ Inter-American Commission on Human Rights Report, *supra* note 15.

thus giving full meaning to the principle”.⁷⁶ The European Court uses the same phrase of requiring criminal offences to use “precise and unambiguous” language that narrowly defines the punishable offence, by providing a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviours that are either not punishable offences or are punishable by other penalties.⁷⁷ Ambiguity in defining crimes creates doubt and the opportunity for abuse of power. It also undermines the propriety of criminal processes that enforce those laws, but also may have implications beyond the criminal justice process, such as in the fields of immigration and refugee law. The consequences of being investigated and prosecuted for terrorism is significant: usually life sentences, preventative arrest, police surveillance, and freezing and forfeiture of assets. The definition of terrorism requires as much precision as possible.

The European Court on Human Rights, in an older case, has held that arresting a person who is suspected of planning to commit an offence on the sole ground that he belongs to a group of individuals recognised as dangerous and known for its continuing propensity to crime was in violation of the Convention.⁷⁸ In a more recent case the European Court held that suspicion of involvement in unspecified acts of terrorism but no suspicion of having committed a specific offence was not properly defined as an offence and therefore in violation to the *ECHR*.⁷⁹ The European Court found that the definition of terrorism as “violence for the use of political ends” was sufficiently specific in keeping with the idea of an offence under article 5 of the *ECHR*.⁸⁰

The Inter-American Court on Human Rights has confirmed that to in order to ensure punishment imposed for crimes relating to terrorism are rational and proportionate, States should include measures that provide judges with the authority to consider the circumstances of individual offenders and offences when imposing sentences for terrorist crimes.⁸¹ The Inter-American Court has also discussed the fact that there can be no collective criminal responsibility.⁸² Criminal prosecutions must comply with the principle of individual penal responsibility. Convicting persons based solely upon their membership in a group or organisation has been historically opposed by various human rights bodies. This restriction does not, however, preclude the prosecution of persons on such established grounds of individual criminal responsibility such as complicity, incitement, or participation in a common criminal enterprise. The Inter-American Court has found certain domestic anti-terrorism laws to violate the principle of legality, such as in those cases where a comprehensive definition of terrorism is overbroad and imprecise.⁸³

Another avenue for examining the scope of this principle is by reviewing the experiences in domestic jurisdictions. In the United Kingdom, the government has provided for a certification for suspected international terrorists which can include individuals the government believes has “links” with a person who is a member of or belongs to an international terrorist group⁸⁴.

⁷⁶ *ibid.*

⁷⁷ *Kokkinakis v Greece*, European Court of Human Rights (Merits and just satisfaction) of 25 May 1993.

⁷⁸ *Guzzardi v Italy*, European Court of Human Rights, Judgement (Merit and just satisfaction) of 6 November 1980, A39, and refer to in the International Commission of Jurists Report, *supra* note 69.

⁷⁹ *Brogan v the United Kingdom* (1988), European Court of Human Rights (Merits) of 1988, A145-B.

⁸⁰ *ibid.*

⁸¹ Inter-American Commission on Human Rights Report, *supra* note 15.

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ *Anti-Terrorism, Crime and Security Act*, *supra* note 23, Part IV.

Commentators have considered such a link to be rather tenuous and could result in findings of guilt by association.⁸⁵ In the United States, legislation has criminalized providing material support to any group designated by the government as a terrorist group.⁸⁶ There is a concern that the lack of any intent element in the crime itself unfairly relieves the prosecution of proving in court that defendants actually meant to do the country harm through their perhaps misguided actions.⁸⁷ Prior to 2001, at least two American courts have ruled parts of that legislation unconstitutional.⁸⁸ One decision held that some sections were impermissibly vague and therefore they were struck from the statute. A second decision found that the statute unconstitutional, focusing on the inability of such groups designated as terrorists to contest that designation. The law gives these groups no notice and no opportunity to contest their designation as a terrorist organisation.

In Canada, one of the most debated aspects of the definition of “terrorist activity” is a subclause which catches an act or omission causing serious interference or disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm, specifically causing death or serious bodily harm, endangers a person’s life or causes serious risk to the health and safety of the public. What is interesting to note is that the original version of the draft Bill was defined to exclude “lawful” advocacy, protest, dissent or stoppage of work.⁸⁹ However this would have broadly included illegal strikes as terrorist activity. After a public debate and criticism on this matter, the word lawful was removed to reduce the overbreadth of the definition.⁹⁰ However, it has been noted that even this amendment does not solve the problem as it still targets organised advocacy and protest that can result in violence or fear of violence, but would not amount to a terrorist activity. The courts have not yet addressed whether that will be enough to ensure the definition does not violate the principles of legality.

In Canada, terrorist activity was defined to include an element of political, religious or ideological purpose.⁹¹ This has drawn some criticism as it may be interpreted too broadly and raises the fear that the law may be used to target those who hold political or religious views that are deemed to be extreme or unusual. As one commentator has written, this requires proof of motive as an essential element of a crime, something that is generally not necessary in criminal law.⁹² Other definitions of the crime of terrorism that raise concerns include crimes which prohibit facilitation of terrorism as this could capture people who have no criminal intent, which should be required given the significant penalties associated with terrorist offences.⁹³ The offences of participating in or contributing to terrorism could catch lawyers who are defending individuals accused of terrorist offences.

⁸⁵ Human Rights Watch Report, *supra* note 46.

⁸⁶ *Antiterrorism and Effective Death Penalty Act of 1996*, 18 U.S.C. 2339A(2003).

⁸⁷ Michael Kelly, *supra* note 27.

⁸⁸ *The Humanitarian Law Project v Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998) is discussed in Michael Kelly, *ibid*.

⁸⁹ Draft Anti-Terrorism Act (Bill C-36), *supra* note 23.

⁹⁰ See various groups submissions to the Canadian Federal government on the draft Bill C-36 such as Coalition of Muslim Organisations “*Standing Committee on Justice and Human Rights: Submissions on Bill C-36*” (8 November 2001); Amnesty International “*Protecting Human Rights and Providing Security: Amnesty International’s Comments with Respect to Bill C-36*”; Federation of Law Societies of Canada “*FLSC Submission on Bill C-36*” (November 2001) and also Canadian Bar Association, *supra* note 68.

⁹¹ Anti-Terrorism Act (Bill C-36), *supra* note 23.

⁹² Kent Roach “*Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism*” (2002) 47 McGill L.J. 893.

⁹³ See the discussions in the submissions made in Canada, *supra* note 90.

1.4 Obligation to respect rights without discrimination

Under international human rights law, States are required to fulfil their obligations without discrimination of any kind, including discrimination based on religion, political or other opinion or national or social origin.⁹⁴ This is non-derogable.⁹⁵ States must ensure respect for the principle of non-discrimination in the context of terrorist threats as well as ensure that all measures taken to address the terrorist threat are compliant with such principle. The principle of non-discrimination also applies to a State's treatment of individuals who are being subjected to certain methods of investigation and prosecution for terrorism, including their treatment when in detention. The other side of the coin is that everyone is equal before the law. All those who breach the law are equal and should be subjected to the same treatment by the same judiciary. States generally do not have separate bodies to deal with different types of offenders.⁹⁶

Concern has been raised with investigative methods by law enforcement agencies that engage in practices such as profiling which targets race and national origin. The Inter-American Commission on Human Rights has addressed this issue and stated that in light of the significant risk, such investigative methods of this nature are on their face discriminatory or may be utilised in a discriminatory manner.⁹⁷ The Commission considers that any use of profiling or similar devices by a State must comply strictly with international principles governing necessity, proportionality and non-discrimination and must be subject to close judicial scrutiny.⁹⁸ The State must provide an especially weighty interest and compelling justification for the distinction based on discriminatory grounds.

Certain circumstances can never be justified. Where States detain individuals for reasons relating to a terrorist threat, whether for administrative or preventative reasons, the laws authorising the detention cannot be applied so as to target individuals based upon a prohibited ground of discrimination. Of course, an investigation into terrorist crimes may, owing to their ideological motivation and the collective means by which they are carried out, necessitate the investigation of individuals or groups who are connected with particular political, ideological or religious movements or, in the case of state-sponsored terrorism, the governments of certain States.⁹⁹ Anti-terrorist measures that incorporate criteria of this nature, must be based upon objective and reasonable justifications, in that they further a legitimate objective, and the means must be reasonable and proportionate to the end sought. It is difficult to draw the line on justifiable investigation methods and discrimination. In one country, the calls for an explicit ban on racial and religious profiling in the anti-terrorism legislation were ignored.¹⁰⁰ Such distinctions based on the grounds enumerated in the *ICCPR* and other human rights treaties should be subject to enhance level of scrutiny.

⁹⁴ *ICCPR*, article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁹⁵ *ICCPR*, article 4.

⁹⁶ For a good discussion about the use of the criminal justice system in dealing with all forms of crimes, see Emanuel Gross, "Trying Terrorists – Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights" (2002) 13 *Ind. Int'l & Comp. L. Rev.* 3.

⁹⁷ Inter-American Commission on Human Rights, *supra* note 15.

⁹⁸ *ibid.*

⁹⁹ Inter-American Commission on Human Rights, *supra* note 15.

¹⁰⁰ This was the situation in Canada, as discussed in Kent Roach, *supra* note 92.

2. Pre-trial issues

2.1 Gathering evidence

Since September 11, States have increased their legal and operational capacity to monitor individuals suspected of terrorism and to investigate alleged terrorist activities. Counter-terrorism measures have included expanded powers given to law enforcement authorities to use phone-tapping, wiretaps, police surveillance, search warrants, encryption technology and control of the internet and freedom of movement.¹⁰¹ Investigative techniques have also included detention of migrants and other individuals, which will be discussed in more detail in the next section.

The *ICCPR* provides guidelines for States during investigation of crime and the gathering of evidence. Article 14 ensure the presumption of innocence during such investigations and article 17 ensures that everyone shall be free of arbitrary or unlawful interference with privacy, family, home or correspondence.¹⁰² These same rights are reflected in the regional conventions, such as the *ECHR*.¹⁰³ The jurisprudence of the European Court provides some understanding of how these rights have been interpreted in domestic situations. Interception of mail and telephone tapping by State authorities has been held to be potentially an interference with family and private life as protected by the *ECHR*.¹⁰⁴ Due to this potential, there is a need for legal regulations to be set out in advance and to ensure that privacy is interfered with only when necessary. In another case, it was found that monitoring of lawyers' phones without specific suggestion of wrongdoing was a breach.¹⁰⁵ Also, the use of electronic listening device without a framework for legal regulation capable of protecting privacy rights was in violation of the *ECHR*.¹⁰⁶

An important safeguard against the unlawful interference with privacy has been the recourse for individuals to apply for access of information which allow them to know what information the government has gathered against them. However in Canada, this safeguard has been substantially eroded. The Ministry of Justice can issue unpublished certificates prohibiting the release of certain pieces of information in the interests of international relations, national security or national defence.¹⁰⁷ This provision has been criticised as effectively nullifying the mandate of the Privacy Commissioner who usually is able to review the information.¹⁰⁸ The original draft Bill gave the Ministry of Justice an unfettered, unreviewable right to conceal information in secrecy for indefinite periods of time. After criticism that this provision did not sufficiently safeguard democratic scrutiny of government decision-making and contained no checks and balances on the Minister, the Anti-Terrorism Act provides for a limited judicial

¹⁰¹ Examples listed here taken from the American, Canadian and British anti-terrorist legislations as well as from the Lawyers Committee for Human Rights "Assessing the New Normal: Liberty and Security for the Post-September 11 United States" (September 2003) and an article by Michael Kelly, *supra* note 27.

¹⁰² *ICCPR* art 14(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

art 17 (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 17(2) Everyone has the right to the protection of the law against such interference or attacks.

¹⁰³ *ECHR* articles 6 and 8.

¹⁰⁴ *Klass v Germany*, European Court of Human Rights (Merits) A 28 (1978).

¹⁰⁵ *Kopp v Switzerland*, Decision of the European Court of Human Rights, 25 March 1998.

¹⁰⁶ *Govell v The United Kingdom*, Committee of Ministers Resolution (98) 212 (1998).

¹⁰⁷ *Anti-Terrorism Act (Bill C-36)*, *supra* note 23.

¹⁰⁸ Canadian Bar Association, *supra* note 68.

review by the Federal Court of Appeal and a fifteen year limit for secrecy. Such sweeping power needs to clearly specify the circumstances under which it might be exercised and the types of information it would cover. The power should be subject to some form of review and not exercised in secret. Safeguards that provide some limitations and judicial review may be enough to ensure that this provision is in compliance with human rights obligations.

Other proposed measures have included authority for the Minister of Defence to authorise interception of foreign communication in an effort to monitor situations that might compromise national defence.¹⁰⁹ This expanded power may be justified in particular, clearly limited, circumstances. Certain safeguards, such as ensuring protection of solicitor-client communications and communications to journalists and provisions for judicial review may be enough to ensure compliance with the *ICCPR*'s rights. It has not yet been determined whether a discretionary provision to create an oversight commissioner at the will of the Minister of Defence would be enough of a safeguard.

In the United States, there has been an increase in the use of foreign intelligence surveillance orders, which is a type of search warrant whose availability was expanded after September 11.¹¹⁰ These orders may now be issued with far fewer procedural checks than ordinary criminal search warrants. Requests for such orders are evaluated *ex parte* by a secret court in the United States Justice Department, the Foreign Surveillance Intelligence Court, and the officials need not show probable cause of criminal activity to secure the order.¹¹¹ A decision by the Foreign Surveillance Intelligence Court found that the FBI and the Department of Justice had provided the court with false or erroneous information on which to base search warrants and wiretap authorisation on at least 75 occasions.¹¹² It reproached the Department of Justice for breaching the wall separating intelligence gathering for criminal prosecution and that gathered for actual foreign intelligence purposes. The Court rejected the government's argument that the counter-terrorism measures allowed the FBI much more leeway in its domestic surveillance. However on appeal to a three judge panel selected by the Chief Justice of the highest court in the land, the ruling was overturned. One commentator noted that the courts have been extraordinarily solicitous of the government's efforts, providing them with broad latitude to pursue counter-terrorism objectives.¹¹³ However, the appeal shows that the secret appellate court structure, with judges hand selected by the Chief Justice that hears only the government's evidence and grants only the government a right to appeal is an inappropriate forum to resolve the issues that threaten human rights.

2.2 Detention, arrest and the right to personal liberty

Some of the most common anti-terrorism measures include those measures depriving individuals of their liberty, either of an administrative or judicial nature. These measures reflect the extraordinary powers of governments to expand authority to detain individuals. Concerns have been raised that some of these measures may constitute arbitrary forms of detention.¹¹⁴

¹⁰⁹ This proposed measure was discussed in the Canadian Bar Association Report, *ibid*.

¹¹⁰ *U.S.A. Patriot Act*, *supra* note 23 and the Lawyers Committee for Human Rights Report, *supra* note 101.

¹¹¹ Michael Kelly, *supra* note 27.

¹¹² The case is discussed in Michael Kelly, *ibid*, but not identified.

¹¹³ *ibid*.

¹¹⁴ Human Rights Watch Report, *supra* note 4 and Lawyers Committee for Human Rights Report, *supra* note 101.

Such measures often serve to broadly restrict the right to challenge the lawfulness of detention, sometimes suppressing it all together. A review of various counter-terrorism measures along with a review of the international human rights law and jurisprudence provides an opportunity to examine the scope and different aspects of the right to personal liberty. It also provides some insight as to how far States can reduce the safeguards that are suppose to protect the abuse of a State's power to detain individuals. Detainees, at a time when they are wholly within the control of the State, are particularly vulnerable to abuse by authority. Their well-being requires protection and safeguards, not only to ensure their legal rights but also their personal liberty.

The *ICCPR* provides that everyone has the right to liberty and security of the person and that no one shall be subjected to arbitrary arrest or detention.¹¹⁵ This does not mean that a person cannot be deprived of his or her liberty but when this does occur it must be based on such grounds as provided by law and procedures that are strictly defined thereunder. When someone is arrested, they must be informed, at that time, of the reasons for the arrest and be told promptly of any charges against them. When arrested or detained on a criminal charge, they must be brought promptly before a judge or other authorized official. They have the right to a trial within a reasonable time or should be released. The general rule is that they should be released pending trial. They also have the right to *habeas corpus*, which means to have the lawfulness of their detention reviewed. Anyone who has been the victim of unlawful arrest or detention has the right to compensation.¹¹⁶ These aspects of the right to personal liberty are reflected in other human rights treaties such as the *Convention on the Rights of the Child* as well as the regional human rights conventions.¹¹⁷

Building on this right are a range of declarations, principles, codes of conduct and guidelines which elaborate on specific aspects. For example, the *Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment* (the *Body of Principles*) provides further details as to when a detainee shall be brought before a judicial authority and his or her right to make a statement on the treatment received while in custody.¹¹⁸ The *Declaration on the Protection of All Persons from Enforced Disappearance* and the *Standards Minimum Rules for the Treatment of Prisoners* provide that persons deprived of their liberty must be held in official places of detention and the authorities must keep a record of their identities.¹¹⁹

¹¹⁵ *ICCPR* 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.

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.

9(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

9(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

9(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

¹¹⁶ The information in this paragraph is from Eileen Skinnider "Case Study on the Right to Fair Trial" for the China International Standards Project (1999).

¹¹⁷ *Convention on the Rights of the Child*, article 37; *ECHR*, article 5.

¹¹⁸ *Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment* (1988), Principle 37, GA res 43/173, annex found at www1.umn.edu/humanrts/instreet/g3bppedi.htm.

¹¹⁹ *Declaration on the Protection of All Persons from Enforced Disappearance*, GA res 47/133 found at www1.umn.edu/humanrts/instreet/h4dpaped.htm and the *Standards Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/611, annex found at www1.umn.edu/humanrts/instreet/g/smr.htm.

Article 9 of the *ICCPR* is not separately mentioned in the list of non-derogable rights in article 4, therefore the right to personal liberty and security is derogable during times of emergencies. However, certain aspects of this right have been held to be non-derogable. The Human Rights Committee has recalled the non-derogable character of the right not to be arbitrarily detained, and the full enjoyment, even during conflict and states of emergency, of legal remedies such as *habeas corpus*.¹²⁰ In its jurisprudence, the Committee has also made it clear that States cannot suspend judicial remedies for unlawful detention.¹²¹ The Inter-American Commission has viewed the right to *habeas corpus* as non-derogable, reiterating the vital role it performs in ensuring a person's life and physical integrity are respected, in preventing his disappearance or keeping his whereabouts secret, and in protecting him against torture or ill treatment.¹²² This position recognises that detainees or prisoners are completely at the mercy of those holding them and as such need to have judicial guarantees to protect their rights. International human rights bodies have identified other fundamental safeguards that may not be suspended even in states of emergency. These include the requirement that the grounds and procedures for the detention be prescribed by law, the right to be informed of the reasons for the detention, as well as certain guarantees against prolonged *incommunicado* or indefinite detention, including access to legal counsel, family and medical assistance following arrest, prescribed and reasonable limits upon the length of preventative detention and maintaining a central registry of detainees.¹²³

Certain aspects of counter-terrorism measures have expanded the powers of law enforcement officers to detain or arrest individuals. Normally under criminal law, a law enforcement officer may detain or arrest a person whom they believe, on reasonable grounds, has committed or is about to commit an offence. The potential to commit an offence usually requires some immediacy. Some anti-terrorist provisions provide for law enforcement officers to arrest without charge or warrant if the officer believes that a person "may" commit an offence.¹²⁴ "May" does not connote urgency and immediacy in the same way as imminent does. The threshold for arrest without warrant has been significantly lowered.¹²⁵ An unanswered question is how far can it be lowered and remain in compliance with international human rights law.

The Human Rights Committee has looked at the link between the right not to be arbitrarily detained with safeguards provided by such rights as the right to be informed promptly and precisely of the charges or reasons for the arrest or detention and the right to *habeas corpus* or review of the detention.¹²⁶ Detention or arrest without charges suggest that the law enforcement officer is acting without sufficient evidence to form reasonable grounds or identify the elements of a particular offence. He or she will then be unable to promptly provide the detained person with reasons of the detention. In cases dealing with persons suspected of terrorist activity, the European Court of Human Rights has held that a State can deprive an individual of his liberty only when it is for the purpose of bringing the person arrested before the competent judicial authority, irrespective of whether that person is reasonably suspected of having committed an

¹²⁰ *General Comment 29*, *supra* note 34.

¹²¹ *WBE v Netherlands*, (comm No 432/1990) 23 October 1992.

¹²² Inter-American Commission on Human Rights Report, *supra* note 15.

¹²³ For a review of the various treaty bodies on the safeguards, see Inter-American Commission on Human Rights Report, *supra* note 15.

¹²⁴ *Anti-Terrorism Act (Bill C-36)*, *supra* note 23.

¹²⁵ Kent Roach, *supra* note 92.

¹²⁶ Human Rights Committee, *General Comment 8, Article 9* (1982) found at www1.umn.edu/humanrts/gencomm/hrcom8.htm.

offence or of planning to commit one.¹²⁷ The European Court noted that for an arrest to be compatible with the *ECHR*, it must be based on a reasonable suspicion, which presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.¹²⁸ The Court emphasised that although the exigencies of dealing with terrorist crime meant that the “reasonableness” of the suspicion could not always be judged by the same standards as those applied in dealing with conventional crime, they could not justify stretching the notion of reasonableness to the point where the essence of the safeguards secured by the Convention is impaired.

Administrative detention or preventative detention used for reasons of public security must be controlled by the same provisions as detention, meaning that it must not be arbitrary. Where the executive branch of government can indefinitely extend the detention of a person without bringing him or her before a court, this transforms the executive into the judicial power and puts an end to the separation of powers. To ensure that administrative or preventative detention is not arbitrary, it must be based on grounds and procedures established by law, information of the reasons must be given and some form of judicial review must be available. When a person is subjected to preventative detention, it must be demonstrated that States authorities have adequate justification for the detention and that the State has exercised the requisite diligence in ensuring the duration of such confinement is not unreasonable. Possible justifications have been held by the Inter-American Commission to include the existence of a reasonable suspicion that the accused has committed an offence, the danger of flight, the need to investigate the possibility of collusion, the risk of pressure on witnesses and the preservation of public order.¹²⁹ The validity of any justification must be interpreted in light of an accused’s right to the presumption of innocence.

Administrative detention must also have minimum safeguards against arbitrariness. The European Court has ruled that detention without trial, or administrative detention, may be strictly required in some circumstances but must involve a number of safeguards designed to prevent abuse.¹³⁰ Some of these safeguards include parliamentary oversight, the possibility to refer the case to a detention commission that could order the detainee’s release, the undertaking to release a detainee who undertook to respect the constitution and the law. Where there has been the denial of access to lawyers, doctors, relatives or friends and the absence of any realistic possibility of being brought before a court to test the legality of the detention, the European Court found a violation of the Convention.¹³¹

Other counter-terrorism measures have included the use of secret detention or *incommunicado* detention. This means that neither the fact nor place of detention is communicated to an outside family member or lawyer. Some provisions allow for the State to formally request from a competent court an order to hold the detainee *incommunicado* for a certain period if there are specific and exceptional reasons for caution and secrecy. One extreme example of this is in the United States where some 1200 non-citizens, mostly from the Middle East and South Asia,

¹²⁷ European Court of Human Rights, Judgement (Merit) 18 January 1978 cited in the International Commission of Jurist Report, *supra* note 69.

¹²⁸ *Fox, Campbell and Hartley v The United Kingdom*, European Court of Human Rights, (Merits) 30 August 1990, A 182.

¹²⁹ Inter-American Commission on Human Rights Report, *supra* note 15.

¹³⁰ *Lawless v Ireland*, *supra* note 37.

¹³¹ *Aksoy v Turkey*, *supra* note 40.

were detained in connection with the investigation of September 11.¹³² The government maintained in secrecy the names of these detainees, their place of incarceration and the names of their counsel and closed their deportation proceedings to the public. While the Human Rights Committee has not dealt with the American situation, it has expressed concern of such practices in its country observations and urge States Parties to abandon the use of secret detention as such provisions are not in compliance with article 9 and 14 of the *ICCPR*.¹³³ In response to one country's report, the Committee raised concerned where persons suspected of belonging to or collaborating with armed groups were being detained *incommunicado* for up to five days.¹³⁴ Back to the situation in the United States, there have been several court challenges brought against the government's detention policy, attacking the decision not to release their names, secrecy of the immigration hearings and misuse of the material witness statute to hold individuals indefinitely without filing charges against them or allowing them access to legal counsel. The results have been mixed, as the domestic courts continue to wrestle with the balance between justice and national security.¹³⁵ Recently, the United States Supreme Court declined to review a Federal Appeals Court ruling upholding the government's power to withhold basic information about those detained as part of the security survey after September 11.¹³⁶

Another common anti-terrorist measure is to limit or suspend the right to judicial review of detention. One more extreme example is from the United States, which has refused the right to *habeas corpus* to any Afghan war or al-Qaeda detainees held in Cuba or elsewhere.¹³⁷ A recent United States Federal Appeals Court decision has granted the right to *habeas corpus* and the United States government is responding by releasing a large number of the detainees.¹³⁸ International human rights law provides that anyone arrested or detained on a criminal charge shall be brought promptly before a judicial officer who rules on whether the detention will continue, otherwise the person detained must be released. The right to *habeas corpus* basically views that every imprisonment is *prima facie* unlawful and this principle applies to every

¹³² The American government has never disclosed the exact number. These individuals were held on immigration charges or criminal charges or as material witnesses. Four have been indicted for terrorist-related crimes. Although the detainees were of interest to the Department of Justice because of possible links to terrorism, they were held under immigration laws, which enabled the Department of Justice to circumvent the greater safeguards in the criminal law, including the requirement of probable cause for arrest; the right to a court-appointed counsel; and the right to be brought before a judge within 48 hours of arrest. See Michael Kelly, *supra* note 27 and Human Rights Watch, *supra* note 4.

¹³³ *Concluding Observations of the Human Rights Committee: Spain*, CCPR/C/79/Add.61, 3 April 1996.

¹³⁴ *ibid.*

¹³⁵ One federal court's decision required the government to release the names of those detained and to open the deportation hearings to the public. However these decisions were appealed by the government who argued that this is an extraordinary case touching on the nation's very ability to defend itself against the continuing threat of hostile attacks. One federal court ruled that relying on the material witness statute to detain people who are presumed innocent in order to prevent potential crimes is an illegitimate use of the statute. However another federal court judge ruled in favour of the government noting that the government could proceed to use the statute to indefinitely detain individuals in secrecy in pursuit of its war on terrorism. These arguments were accepted by the Federal Court of Appeal. Federal Court of Appeal, 8 October 2002, as discussed in Michael Kelly, *supra* note 27.

¹³⁶ Lawyers Committee for Human Rights, Media Alert "*Supreme Court Misses Important Opportunity to Review Blanket Secrecy Surrounding 9/11 Detentions*" (14 January 2004) found at www.lchr.org/media/2004_alerts/0114.htm.

¹³⁷ The American government has denied access to competent tribunals to determine whether any of the detained combatants are entitled to prisoner of war status. The American government asserts that no legal regime applies to them and that in the war against terrorism the government may hold such combatants for as long as it chooses. The Inter-American Commission on Human Rights requested the US government to provide for a lawful tribunal or court to determine the status of these detainees; however the American government declined. At the domestic level, initially a federal judge ruled that the US federal courts did not have jurisdiction to hear constitutional claims brought by aliens held by the US outside the US sovereign territory. July 20, 2002, US federal court decision. See John Broomes "*Maintaining Honor in Troubled Times: Defining the Rights of Terrorism Suspects Detained in Cuba*" (2002) 42 *Washburn Law Journal* 107.

¹³⁸ In December 2003, a federal appeals court in San Francisco rules that US courts have jurisdiction to hear claims from detainees at Guantanamo Bay, Cuba and affirmed the crucial role that courts play in preventing the executive from ignoring human rights. It is expected that the United States Supreme Court will hear an appeal in June 2004. See for further information Human Rights Watch "*United States: Guantanamo Two Years On: US Detention Undermine the Rule of Law*" (9 January 2004) found at www.hrw.org/english/docs/2004/01/09/usdom6917.htm.

person notwithstanding his or her nationality. The Human Rights Committee has raised concerns of violations when a detention is ordered by a Ministry of Defence and when such detention can only be challenged one year after such detention.¹³⁹ While international law does not provide a specified time for a detainee to be brought before a judicial officer, the Human Rights Committee jurisprudence indicates that the delay of detention without judicial order lies somewhere between 73 hours where no violation arose and 5 days where *ICCPR* was held to be breached.¹⁴⁰ The Inter-American Commission has suggested that a delay of more than 2-3 days in bringing a detainee before a judicial authority will generally not be considered reasonable.¹⁴¹ Even in cases where there has been a state of public emergency declared due to terrorist threats, the European Court held that measures which allowed detention for 14 days or more without being brought before a judge exceeded the government's margin of appreciation and could not be strictly required by the exigencies of the situation.¹⁴²

As noted before, there have been various counter-terrorism measures that try to change this standard by extending the detention period for presumed terrorists, sometimes to allow periods of indefinite detention.¹⁴³ Not only does this affect the right to liberty but also may result in unjustified pressure which can result in violations of the rights to refuse testimony and the privilege against self-incrimination. Prolonged detention could also be deemed a violation of the prohibition against torture or ill treatment. The Human Rights Committee has expressed concern where in one country, a centralised court had special powers to order arrest, search and prolonged detention in police custody for up to four days for suspected terrorists (twice the normal length).¹⁴⁴ The Human Rights Committee, in past cases regarding the old anti-terrorist legislation in Britain, considered that such powers of extended periods of detention without charge to be excessive.¹⁴⁵ While the validity of the recent derogation and current provision in Britain have not yet been addressed by the Human Rights Committee or the European Court of Human Rights, the British Court of Appeal held that the indefinite detention of aliens on national security grounds is a power expressly reserved to the State in times of war or similar public emergency.¹⁴⁶ However international and regional bodies have found that indefinite detention has been determined to be a form of arbitrary detention.¹⁴⁷

Regarding detention pending trial, an accused person so detained has a right to priority in the organisation of trials. Risk of flight or of committing further offences are legitimate grounds for detention awaiting trials but the longer someone is detained the more pressing the reasons must be¹⁴⁸. The domestic court must examine whether there are specific reasons why this suspect

¹³⁹ *Concluding Observations of the Human Rights Committee: Sri Lanka*, (October 1995) A/50/40.

¹⁴⁰ Seibert-Fohr, *supra* note 19.

¹⁴¹ Inter-American Commission on Human Rights, *supra* note 15.

¹⁴² *Aksoy v Turkey*, *supra* note 40.

¹⁴³ An example is in the United States. In one case, an American citizen, Hamdi, has been designated an enemy combatant. A federal appeals court agreed with the US position that a citizen alleged to be an enemy combatant could be detained indefinitely without charge and without access to counsel if a court, based on documents provided by the government agrees that there is "some basis" for the enemy combatant designation. The court rejected Hamdi's petition for habeas corpus even though Hamdi was never given an opportunity to contest or review the facts alleged against him by the government and was never permitted to meet with his counsel. This decision has been appealed. For further discussion see Doug Cassells "American Citizens, Enemy Combatants: No Rights?" World View Commentary No 137 (13 June 2002).

¹⁴⁴ *Concluding Observations of the Human Rights Committee: France*, CCPR/C/79/Add.80, 4 August 1997, as cited by the International Commission of Jurists Report, *supra* note 69.

¹⁴⁵ *Ireland v The United Kingdom*, *supra* note 37.

¹⁴⁶ Carlile report, *supra* note 32.

¹⁴⁷ Inter-American Commission on Human Rights, *supra* note 15.

¹⁴⁸ *Wemhoff v Germany*, European Court of Human Rights (27 June 1968), Aa-7.

must be detained pending trial. It is not enough to derive this from the nature of the charge.¹⁴⁹ This means that simply because the accused has been accused of a serious offence or there is a need to deter others does not justify the detention of the accused until the conclusion of the criminal proceedings. Arrest for reason of deterrence contradicts the fundamental presumption of innocence. The Human Rights Committee also looked at different States' justifications for lengthy delays in detention. The Human Rights Committee rejected the argument of complex legal issues and ongoing investigations¹⁵⁰ and also rejected the excuse of difficult economic circumstances to justify delays in the criminal process.¹⁵¹

In reviewing the lawfulness of the detention, the judicial officer before whom the suspect is brought must have adequate guarantees of independence from the parties and the State.¹⁵² The judicial officer must personally review all the issues in the case and hear the detainee if he or she wants to be heard.¹⁵³ Where the decision to detain has been taken by administrative or executive authorities, there is a right to recourse to a "competent legal authority".¹⁵⁴ Any review should be judicial in character. Even where a person has surrendered himself to the authorities, the European Court held that the lawfulness of the detention could still be challenged. The protection of this right will not be lost through voluntary surrender.¹⁵⁵

The equality of arms principle applies to the review of detention hearings.¹⁵⁶ Detainees have a right to see statements relied upon by the authorities that justify continuing detention.¹⁵⁷ Where the accused has not been promptly informed of the charge, this may prevent him or her from properly preparing his or her defence at the same time.¹⁵⁸ In a case where the accused was arrested under a terrorist act, the European Court found that, in the absence of any information by the prosecution as to the basis of the suspicion, it was not possible for the Court to find the arrest justified.¹⁵⁹ In that case, the Court even made a reference to the fact that it could not expect highly sensitive information to be released. It is not required that the existence and nature of the offence be definitely proved, however the European Court must examine whether on the facts disclosed there existed grounds for 'reasonable suspicion', regardless what domestic law expresses on the matter. In another case where the government was relying on indirect facts conveyed to the police by an informer, the Court recognized the need to use confidential sources in the fight against terrorism.¹⁶⁰

2.3 Treatment in custody and the right to humane treatment

Anti-terrorism measures on the conduct of investigations, conditions of detention and the treatment of persons in situations of particular vulnerability have been analysed by various bodies as to the compliance with international standards of humane treatment. International

¹⁴⁹ *Mansur v Turkey*, European Court of Human Rights (8 June 1995), A-321.

¹⁵⁰ *Van Duzen v Canada*, (comm No R12/50) 7 April 1982.

¹⁵¹ *Fillastre and Bizouar v Bolivia*, (comm No 336/1988) 5 November 1991.

¹⁵² *Huber v Switzerland*, European Court of Human Rights (1990), A-188.

¹⁵³ *Schiesser v Switzerland*, European Court of Human Rights (4 December 1979), A-34.

¹⁵⁴ *De Wilde, Ooms and Versyp v Belgium*, European Court of Human Rights (18 June 1971) A-12.

¹⁵⁵ *ibid.*

¹⁵⁶ *Sanchez-Reisse v Switzerland*, European Court of Human Rights (21 October 1986) A-107.

¹⁵⁷ *Lamy v Belgium*, European Court of Human Rights (30 March 1989), A-151.

¹⁵⁸ *Chichlian and Ekindijan v France*, European Court of Human Rights (29 November 1989), A-162-B.

¹⁵⁹ *Fox, Campbell and Hartley v The United Kingdom*, *supra* note 128.

¹⁶⁰ *Margaret Murray v The United Kingdom*, European Court of Human Rights (1994), A-300-A.

standards of humane treatment and respect for human dignity provide for minimum and non-derogable requirements for all persons held under the authority and control of the State.¹⁶¹ Violations of the prohibition of torture and other serious breaches of humane treatment norms are not only violations under international human rights law but also may entail the individual criminal responsibility for those participating in or supervising such treatment, under the provisions of the *Rome Statute* establishing the International Criminal Court.¹⁶²

The provisions in the *ICCPR* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the *Convention Against Torture*) cover three broad categories: (1) torture; (2) other cruel, inhuman, or degrading treatment or punishment; (3) other prerequisites for respect for physical, mental or moral integrity, including certain regulations governing the means and objectives of detention or punishment. The *ICCPR* does not define torture so we look to the *Convention Against Torture* for such definition. Torture has three main elements: it must be an intentional act through which physical and mental pain and suffering is inflicted on a person; it must be committed with a purpose (such as personal punishment or intimidation) or intentionally (for example to produce a certain result in the victim); and it must be committed by a public official or by a private person acting at the instigation of the former.¹⁶³ For the Inter-American Commission, torture is also understood to include the use of methods upon a person intended to obliterate the personality of the victim or to diminish his or her physical or mental capacities, even if they do not cause physical pain or mental anguish.¹⁶⁴ The concept of torture does not include physical or mental pain or suffering that is inherent in or solely the consequences of lawful measures.

The international law does not elaborate on what is understood by “inhuman or degrading treatment” and how it differentiates from torture. However the jurisprudence of the Human Rights Committee and regional bodies provides assistance. The essential criterion to distinguish torture from other cruel, inhuman or degrading treatment or punishment is the intensity of the suffering inflicted. Inhuman treatment is that which deliberately causes severe mental or psychological suffering, which, given the particular situation, is unjustifiable. Degrading treatment includes being severely humiliated in front of others or being compelled to act against one’s wishes or conscience.¹⁶⁵ The European Court found that even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning might be deemed inhumane treatment.¹⁶⁶ The Inter-American Court found that the degrading aspect of treatment is characterised by fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his or her physical and moral resistance.¹⁶⁷ The Court also noted that the degrading aspect of the treatment can be exacerbated by the vulnerability of a person who is unlawfully detained.¹⁶⁸

The jurisprudence illustrates that the treaty bodies have certain latitude in assessing at what minimum level of severity the treatment must be in order to be considered inhuman or

¹⁶¹ *ICCPR* article 7 and 10; *ECHR* article 3; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the *Convention Against Torture*); *Convention on the Rights of the Child* article 37.

¹⁶² *Rome Statute*, article 6 and 7, *supra* note 73.

¹⁶³ *Convention Against Torture*, article 2.

¹⁶⁴ Inter-American Commission on Human Rights Report, *supra* note 15.

¹⁶⁵ A summary of Human Rights Committee’s findings as discussed in the Inter-American Commission on Human Rights Report, *ibid.*

¹⁶⁶ *Ireland v The United Kingdom*, *supra* note 37.

¹⁶⁷ Inter-American Commission on Human Rights Report, *supra* note 15.

¹⁶⁸ *ibid.*

degrading. The European Court on Human Rights has held that the minimum is relative and depends on the circumstances in each case, such as the duration of the treatment, its physical and mental effects, and in some cases, the sex, age and health of the victim.¹⁶⁹ The Inter-American Commission also finds that assessments must be done on a case by case basis, taking into account the peculiarities of each case, the duration of the suffering, the physical and mental effects on each specific victim and the personal circumstances of the victim.¹⁷⁰

The United Nations Special Rapporteur on Torture and other human rights bodies have found the following acts to amount to torture or inhuman treatment: prolonged incommunicado detention; keeping detainees hooded and naked in cells and interrogating them under the drug pentothal; imposing a restricted diet leading to malnutrition; applying electric shocks to a person; holding a person's head in water until the point of drowning; standing or walking on top of individuals; beating, cutting with pieces of broken glass, putting a hood over a person's head and burning him or her with lighted cigarettes; rape; mock burials, mock executions, beatings, deprivation of food and water; threats of a behaviour that would constitute inhumane treatment; threats of removal of body parts, exposure to the torture of other victims; and death threats.¹⁷¹ Some specific cases of the European Court found that beating a suspect over several days with the aim of obtaining a confession amounted to torture.¹⁷² Any violence used against a detainee, which is not rendered necessary by his or her conduct amounts to inhuman treatment.¹⁷³

Specifically dealing with investigative techniques on suspected terrorists, the decision of the European Court in *Ireland v UK* provides guidance on what constitutes torture and inhumane treatment.¹⁷⁴ The five disorientation techniques used (wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink) constituted inhumane treatment but not torture as they did not occasion suffering of the particular intensity and cruelty implied by the word torture. The Inter-American Court have held that the undeniable difficulties encountered in dealing with terrorist must not be allowed to restrict the protection of a person's right to physical integrity.¹⁷⁵

The European Torture Committee made an *ad hoc* visit to the United Kingdom to monitor detentions under its anti-terrorist law.¹⁷⁶ They expressed concern about cruel, inhuman or degrading treatment, long periods of isolation, lack of access to healthcare, in particular to psychological support (associated with the uncertainty of when they will be released), lack of exercise of religion and educational services, lack of exercise, translation and interpretation problems and lack of adequate contact with the outside world. Human rights organisations, such Human Rights Watch has documented mistreatment of non-citizens detained in the September 11 investigation in the United States.¹⁷⁷ Concerns of mistreatment have including:

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ Examples taken from the Human Rights Committee, the United Nations Special Rapporteur on Torture, the Inter-American Commission and Court on Human Rights and the European Commission and Court on Human Rights, as discussed in *ibid.*

¹⁷² *Selmouni v France*, European Court of Human Rights (28 July 1999).

¹⁷³ *Ribitsch v Austria*, European Court of Human Rights (4 December 1995) A-336.

¹⁷⁴ *Ireland v UK*, *supra* note 37.

¹⁷⁵ Inter-American Commission on Human Rights Report, *supra* note 15.

¹⁷⁶ Over 300 people have been arrested under this legislation of which approx 40 have been charged, mostly with immigration-related offences. Three have been convicted for membership of a banned organisation, but none to date for membership or association in a banned Islamic group or organisation. See Human Rights Watch Report, *supra* note 46.

¹⁷⁷ Human Rights Watch Report, *supra* note 4.

custodial interrogations without access to counsel, prolonged detention without charge, executive decisions overriding judicial orders to release detainees on bond during immigration proceedings, and unnecessarily restrictive conditions – including solitary confinement – under which some "special interest" detainees were held. They have also raised concern about the Guantanamo Bay detainees.¹⁷⁸ Since September 11, the American government has transferred men captured in connection with the Afghan war or who are suspected of links to al-Qaeda to the US military base at Guantanamo Bay. According to press reports, the detainees spend 24 hours a day in small single-person cells, except for one 15 min period of solitary exercise a week, as well as interrogation sessions.¹⁷⁹

2.4 Questioning suspects and the right to counsel and privilege against self-incrimination

Certain counter-terrorist measures have limited or suspended the right to legal counsel and the privilege against self-incrimination particularly in cases where the executive branch and / or judicial branch have been given expanded powers to affix labels of suspected terrorist or membership in a suspected terrorist group. In the United States, the use of the label “material witness” or “enemy combatant” has resulted in the suspension of access to counsel.¹⁸⁰ Other counter-terrorism measures include new investigative techniques, such as the use of investigative hearings.¹⁸¹ These measures are considered a substantial departure from the ordinary measures used to address crime. Some counter-terrorism measures allow for police and prosecutors to detain individuals without access to counsel. Other measures restrict counsel to that of the State’s choosing or limited to those vetted by the State. For example, in the United Kingdom, a detainee under certain sections of the anti-terrorist legislation can be represented by a court appointed “special advocate”.¹⁸²

There are a number of rights that apply during the questioning of suspects, including the right to legal counsel and the right against self-incrimination. Often, the right to silence and the right against self-incrimination is seen as an aspect of the presumption of innocence. The *ICCPR* explicitly provides for the presumption of innocence and the right not to be compelled to testify against oneself.¹⁸³ However, the Covenant does not explicitly provide for right to remain silent.¹⁸⁴ Underlying these rights are the broader rights of the protection of dignity and fairness in criminal due process. Being treated as innocent is fundamental to a fair trial and intrinsically related to the protection of human dignity. It also guarantees against abuse of power by those in authority and ensures the preservation of the basic concepts of justice and fairness. The rules of evidence and the conduct of a trial must ensure that the prosecution bears the burden of proof

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

¹⁸⁰ In the United States, the use of the material witness statute which allowed detention of potential material witnesses to be held indefinitely without prosecuting was held in the Padilla case to be inappropriate. He has since been redesignated an “enemy combatant” and turned over to the Defence Department where he has been denied access to counsel during his interrogation. See Michael Kelly, *supra* note 27.

¹⁸¹ For example see the *Anti-Terrorist Act*, Bill C-36, *supra* note 23.

¹⁸² *Anti-Terrorism, Crime and Security Act 2001*, *supra* note 23.

¹⁸³ *ICCPR* art 14(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Art 14(3)(g) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (g) not to be compelled to testify against himself or to confess guilt.

¹⁸⁴ Eileen Skinnider and Frances Gordon, “*The Right to Silence – International Norms and Domestic Realities*” in The International Centre for Criminal Law Reform and Criminal Justice Police, *Breaking New Ground: A Collection of Papers in the International Centre’s Canada-China Cooperation Programme* (2002) at 163.

through out the trial. Intertwined with the presumption of innocence is the right not to be compelled to testify against oneself or confess guilt. This means that authorities are prohibited from engaging in any form of coercion, whether direct or indirect, physical or psychological. Also, judicial sanctions cannot be imposed to compel the accused to testify.¹⁸⁵ Recent international law, such as the *Rome Statute* and the International Criminal Tribunals of the Former Yugoslavia and Rwanda's Rules of Evidence and Procedure, explicitly includes the right to remain silent.¹⁸⁶ This indicates the movement of the position that any procedural measures which have the effect of pressuring suspects and accused persons into speaking against their will would be a violation of international human rights standards.

Investigative hearings raise the concern regarding infringement on the right to remain silent. In the Canadian legislation, there are some safeguards provided for the provisions of investigative hearings, such as the requirement of the Attorney General's consent; with a policy and briefing protocol; independent judicial authorisation to begin an evidence gathering procedure; the judge hearing the application must be satisfied on reasonable grounds; the evidence cannot be used against the person and derivative use immunity is provided; and the right to counsel is provided throughout the proceeding.¹⁸⁷ However, despite the safeguards, commentators feel that this is a significant shift that needs to be monitored closely.¹⁸⁸

While the treaty-bodies have not reviewed the issue of government "special advocates", the Human Rights Committee has examined the scope of the right to legal counsel. The Committee has held that States cannot substitute the defendant's lawyer for one chosen by the court.¹⁸⁹ However, the accused is not entitled to choose counsel where one has been provided to him through legal aid by the State.¹⁹⁰ In another case, the Human Rights Committee held that the lawyer assigned to the accused must provide effective representation.¹⁹¹ In that case, the attorney had not discussed the case with the accused, nor had he prepared his case thoroughly. The court refused to appoint an alternative counsel at the request of the accused. The Human Rights Committee held that the accused had been effectively without legal representation, and should have had another lawyer appointed, or been allowed to represent himself at the appeal hearing. In justifying government appointed lawyers or denial of the right to counsel, States have argued that the suspect might use his or her counsel as an unknowing conduit to carry messages to terrorist groups or that a successful interrogation takes a long time and could be broken if the suspect is allowed to meet with counsel.¹⁹² An important safeguard to ensure the

¹⁸⁵ The information in this paragraph is from Eileen Skinnider "Case Study on the Right to Fair Trial" for the China International Standards Project (1999).

¹⁸⁶ The *Rome Statute*, *supra* note 73 and *International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence*, adopted on 29 June 1995 and amended thereafter, consolidated text dated 31 May 2000 (found at www.icttr.org) and *International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence*, last amended 12 April 2001 (found at www.un.org/icty/basic.htm).

¹⁸⁷ *Anti-Terrorism Act*, Bill C-36, *supra* note 23.

¹⁸⁸ Canadian Bar Association Report, *supra* note 68.

¹⁸⁹ *Burgoe v Uruguay*, (comm No 223/1987) 30 March 1989.

¹⁹⁰ *Acosta v Uruguay* (comm No 110/1981), 29 March 1984.

¹⁹¹ *Reid v Jamaica* (comm No 250/1987) 20 July 1990.

¹⁹² In the Padilla case, an American citizen was arrested at an airport in the US unarmed but on suspicion that he was planning a terrorist attack, however still no charges have been filed against him. In his case, a federal court ruled that he had a right to present facts to argue his detention and that the best way for him to do that would be through counsel. The US government objected that Padilla might use his lawyer as unknowing conduits to messages to terrorist groups. In response the judge ordered the parties to confer to secure conditions on his consultations that would minimise such risks. The government then argued that Padilla has intelligence on terrorist activities in the US and successful interrogations take a long time (he has already been detained for over 9 months at this point in time) and could be broke if the suspect is allowed to meet with lawyers. The judge found this plausible, however also equally plausible that Padilla, after consulting with lawyers might decide to cooperate. In any event the judge ruled that he could not be denied his right to habeas corpus simply because it might interfere with interrogations. The government has appealed this ruling. For further discussion see Michael Kelly, *supra* note 27.

ability to exercise the right to liberty is the right to have access to counsel of one's choosing. The Committee against Torture has stated that persons taken into police custody should have access to a lawyer from the outset as a safeguard against torture.¹⁹³

The European Court on Human Rights has also looked at the right to counsel in a number of cases. Denial of legal advice for 48 hours and being interrogated 12 times without access to legal counsel when there is risk of adverse inference when remaining silent was held to contravene the *ECHR*.¹⁹⁴ In the same case, the European Court found that the use of inference from silence as permitted under United Kingdom law was a common sense implication where the accused failed to provide an innocent explanation for his actions. There were sufficient safeguards to comply with fairness and the presumption of innocence, as the legal burden of proof still remained with the prosecution. The European Court disregarded the applicant's arguments that it was unfair to draw inferences from silence, but the Court found in favour of his argument that he should have had access to legal advice to warn him of the dangers of his silence.

2.5 Refoulement, extradition and deportation

Cooperation between States, in particular on extradition, has become an important factor in the prosecution of suspected terrorists. However, some States try to get around extradition procedures using deportation or *refoulement*, using methods that violate international law. The Human Rights Committee has observed that before expelling an alien, the State Party should provide him or her with sufficient safeguards and an effective remedy, in conformity with the *ICCPR*.¹⁹⁵ In one case between France and Spain where there was a direct handover between police to police, without the intervention of a judicial authority and without the possibility for the author to contact his family or his lawyer, the Human Rights Committee found that the *ICCPR* had been violated.¹⁹⁶

Some States use extradition procedures that may not comply with criminal law or international human rights law. Some of them argue that since terrorism is not considered a political crime by extradition treaties, the principle of *non-refoulement* does not apply.¹⁹⁷ However the Human Rights Committee in its General Comment on torture and ill treatment provides that this obligation against *refoulement* was inherent in article 7 of *ICCPR*.¹⁹⁸ The Human Rights Committee has expressed concern at Canada's position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture, inhuman or degrading treatment.¹⁹⁹ This policy may also violate *Canadian Charter*

¹⁹³ Committee against Torture as discussed in the Inter-American Commission on Human Rights report, *supra* note 15.

¹⁹⁴ *John Murray v The United Kingdom*, European Court of Human Rights (8 February 1996), 22 EHRR 29.

¹⁹⁵ *ICCPR* art 13 An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority. See also Human Rights Committee, *General Comment 15, the position of aliens under the Covenant*, 11 April 1986.

¹⁹⁶ *Josu Arkauz Arana v France* (comm No 63/1997) 9 November 1999 and discussed in International Commission of Jurists Report, *supra* note 69.

¹⁹⁷ International Commission of Jurists Report, *supra* note 69.

¹⁹⁸ Human Rights Committee, *General Comment 20 Article 7* (Forty-Fourth Session, 1992) found at www1.umn.edu/humanrts/gencom20.htm.

¹⁹⁹ *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/79/Add. 105, 7 April 1999 and also the International Commission of Jurists Report, *supra* note 69.

on Rights and Freedoms (the *Charter*).²⁰⁰ A recent Supreme Court of Canada case held that extradition to face the death penalty violates section 7 of the *Charter*.²⁰¹ Deportation to face torture also violates the *Charter*.²⁰² In both cases the Supreme Court of Canada resisted the temptation to minimise Canadian responsibility for what will happen to a fugitive removed from its shores.²⁰³ The recent British legislation on anti-terrorism allows for the indefinite detention of international terrorists who cannot otherwise be deported. This has been controversial and discussed under the section dealing with derogation from fair trial rights. Previous court decisions declaring that people can never be deported to face torture resulted in this approach.²⁰⁴

²⁰⁰ *Canadian Charter of Rights and Freedoms* (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act (U.K.)), c. 11.

²⁰¹ *The United States v Burns and Rafay*, (2001) 1 S.C.R. 283 (SCC).

²⁰² *Suresh v Canada (Minister of Citizenship and Immigration)*, (2002) 208 D.L.R. (4th) 1 (SCC).

²⁰³ Kent Roach, *supra* note 92.

²⁰⁴ *ibid.*

3. Trial issues

3.1 Preparation for trial and the right to adequate time and facilities

Various counter-terrorism provisions provide for the use of secret evidence and testimony. This has been motivated by an apprehension of the potential harm to national security. However, it is difficult to imagine how an accused individual could counter such secret evidence. In order to ensure that the right to defence and fair trial is meaningful, anyone accused of a criminal offence must have adequate time and facilities to prepare the defence.²⁰⁵ This right requires that the accused and his or her counsel must be granted access to appropriate information, including documents, information and other evidence that might help the accused prepare his or her case, exonerate him or her or if necessary mitigate a penalty. This is an important aspect of the fundamental principle of “equality of arms”. Equality of arms means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case. It means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage as compared to the opposing party. In criminal trials, where the prosecution has all the machinery of the State behind it, the principle of equality of arms ensures that the defence has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution.²⁰⁶

The *Basic Principles on the Independence of the Judiciary* requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.²⁰⁷ Each party to a case should have an equal opportunity to put its points and to respond to the arguments of the other.²⁰⁸ A court should not decide a case on the basis of submissions from one side, which the other has not had an opportunity to respond to. The Human Rights Committee held that an important element of a fair trial is that the defence should have an opportunity to view the documentary evidence against the accused.²⁰⁹

The European Court on Human Rights, in a number of cases, elaborated on this aspect of fair trial. It found that preparation of the case is a key aspect to “equality of arms”, which has been viewed by the court as a key element of fair procedure.²¹⁰ The accused should not be placed in a position where he or she is at a substantial disadvantage in presenting his or her case compared to the prosecutor. Notice of five days to prepare for a hearing was found to be inadequate and in violation of the right to adequate facilities.²¹¹ This right also includes a requirement for the prosecution to disclose all evidence relating to the defence, be it for or

²⁰⁵ ICCPR article 14(3)(b) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

²⁰⁶ The information in this paragraph is from Eileen Skinnider, *supra* note 185.

²⁰⁷ *Basic Principles on the Independence of the Judiciary*, Seventh UN Congress on the Prevention of Crime and Treatment of Offenders, Milan, August 1985, UN DOC A/CONF.121/22/Rev.1 (1985) found at www1.umn.edu/humanrts/instree/1%bpij.htm.

principle 6: The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and the rights of the parties are respected.

²⁰⁸ *Neumeister v Austria*, (No 1) European Court of Human Rights (27 June 1968) A-8; 1 EHRR 91.

²⁰⁹ *Harward v Norway* (comm No 451/1991) 15 July 1994.

²¹⁰ *Delcourt v Belgium* European Court of Human Rights (17 January 1970) A-11, 1 EHRR 355.

²¹¹ *Campbell & Fell v The United Kingdom*, European Court of Human Rights (28 June 1984) A-80, 7 EHRR 145.

against the accused.²¹² Whether or not a failure to do so prejudices proceedings will depend upon the proceedings as a whole. In one case the European Court held failure to disclose that a witness had failed to identify the applicant from a police photo album and the existence of fingerprints at the crime scene was a procedural defect, but that this had been cured by an independent inquiry, followed by a Court of Appeal hearing. Following this line of reasoning, one commentator on the American measures suggests that the use of undisclosed information in a hearing should be presumptively unconstitutional, except in the most extraordinary circumstances.²¹³ Courts in the United States have made such remarks in connection with the special structures set up for deporting aliens.²¹⁴ They argue that such measures undermine the adversarial system and the purpose underlying the legal system, namely, the discovery of the truth.²¹⁵

In some countries, government officials can establish certificates or other form of labelling, which places individuals and entities on a “list of terrorists”.²¹⁶ The authorities generally rely on secret evidence to place individuals on such lists. Such a procedure may be seen as primarily an administrative process but it has significant consequences, exposing individuals to serious criminal liability. A safeguard normally provided is that such a procedure by the government authorities is subject to judicial review. How meaningful the judicial review needs to be to ensure that there is no violation has not been clearly defined. In one country, a judge may hear all or part of the evidence or information in the absence of the accused and any counsel representing him or her, if the judge is of the opinion that the disclosure of the information would injure the national security or endanger the safety of any person.²¹⁷ Can this be described as substantive oversight or meeting evidentiary standards? One commentator raises the concern that the judicial review process provides for “mere window dressing, lacking the essential elements of fairness and due process”.²¹⁸ The same secret evidence used to place individuals on the list could also be used to arrest, charge, convict and imprison such people. Such a procedure denies the individual to see and challenge the evidence against them, as well as undermining the presumption of innocence.

3.2 Right to an independent and impartial tribunal

In some countries, counter-terrorism provisions have established special courts to deal with such crimes.²¹⁹ Some provisions establish tribunals with secret judges closed to the public on

²¹² *Edwards v The United Kingdom*, European Court of Human Rights (28 November 1992) A-247-B, 15 EHRR 74.

²¹³ In 1996, when the United States enacted the *Antiterrorism and Effective Death Penalty Act* and the *Illegal Immigration Responsibility Act*, it created a special court that is entitled to make use of secrete testimony and secret evidence to deport aliens charged with terrorist offences. Emanuel Gross, *supra* note 96.

²¹⁴ In the case of *Rafedie v INS* (880 F. 2d 506, DC Cir 1989) the court said that “...only if he can rebut the undisclosed evidence against him, ie prove that he is not a terrorist regardless of what might be implied by the government’s confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden”. In the case of *American-Arab Anti-Discrimination Committee v Reno* (70 F 3d 1045, 9th Cir 1995) the court stated “Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the Mathews balancing suggest that the use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process” Interestingly in that case, when the courts ordered disclosure of the secret evidence and allowed the defendants to provide evidence in rebuttal, no connection was found between the evidence and the defendants. Discussion summarised from Emanuel Gross, *supra* note 96.

²¹⁵ *ibid.*

²¹⁶ Examples can be found in the American, Canadian and British anti-terrorist legislation, *supra* note 23.

²¹⁷ *Anti-Terrorism Act*, Bill C-36, *supra* note 23.

²¹⁸ Coalition of Muslim Organisations, *supra* note 90.

²¹⁹ In the United States there has been the creation of special courts for deporting aliens, see *supra* note 213 as well as the creation of military commissions, *supra* note 1. The following discussion are taken from examples found in the *Special Rapporteur on Terrorism and Human Rights Progress Report*, *supra* note 65 and the *International Commission of Jurists Report*, *supra* note 69.

the basis of protecting the identity of witnesses and judges. Other provisions have extended military jurisdiction over non-military criminal conduct with no right of appeal to a civilian court. Some countries have established military commissions which try suspects of international terrorism and declare that such crimes will not proceed through the normal courts. Some proposed military commissions will have jurisdiction not only over those offences established as war crimes under international law, but also a broad range of offences that have traditionally been prosecuted under the domestic criminal jurisdiction of States. Some regard these commissions as pseudo-judicial organs which are no more than organs of the executive branch with judicial powers.²²⁰ For example, the Military Order of the United States President of 13 November 2001 establishes military commission and specifically excludes any right of access to any court in the United States or elsewhere.²²¹ These military commissions are entirely in the hands of the executive branch of government, from their initial detention, prosecution, determination of guilt, through to any appeals and execution of sentence.²²²

A fundamental principle and prerequisite of a fair trial is that the tribunal charged with the responsibility of making decisions in a case must be established by law and must be competent, independent and impartial.²²³ This right is broadly considered indispensable to the proper administration of justice and the protection of fundamental human rights. A tribunal “established by law” is aimed to ensure that tribunals are not set up to decide a particular individual case. A “competent” tribunal is one which has been given that power by law and has jurisdiction over the subject matter and the person. An “independent” tribunal means that decision-makers in a given case are free to decide matters before them impartially, on the basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere. It also means that the people appointed as judges are selected primarily on the basis of their legal expertise. An “impartial” tribunal demands that each of the decision-makers, whether they are professional or lay judges or juries, be unbiased, having no interest or stake in the case. Actual impartiality and the appearance of impartiality are both fundamental for maintaining respect for the administration of justice.²²⁴

The factors which influence the independence of the judiciary are set out in the *Basic Principle on the Independence of the Judiciary*. They include the separation of powers, which protects the judiciary from undue external influence or interference. Other factors are the practical safeguards of independence such as technical competence and security of tenure for judges. The judiciary as a whole and each judge must be free from interference either by the State or by private individuals. Principle 4 clearly sets out that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.²²⁵ Another important principle is that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any

²²⁰ International Commission of Jurists Report, *supra* note 69.

²²¹ Military Order, *supra* note 1.

²²² Anja Seibert-Fohr, *supra* note 19.

²²³ ICCPR article 14(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

²²⁴ The information in this paragraph is from Eileen Skinnider, *supra* note 185.

²²⁵ *Basic Principle on the Independence of the Judiciary*, *supra* note 207, Principle 4.

restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.²²⁶ Judges must be completely autonomous from those responsible for prosecutions. Judges should not be selected for improper motives and should be properly qualified. States must ensure adequate resources to enable the judiciary to perform its functions.

Tribunals charged with judging the substantiation of any accusation of a criminal nature or with the determination of people's rights must respect certain conditions and standards. Providing a better understanding of these conditions and standards in relation to the various counter-terrorism measures, it is useful to review the Inter-American jurisprudence in this matter. The Inter-American Commission and Court have expounded on the right to trial by a competent, independent and impartial tribunal in a number of decisions addressing certain specific practices by which Member States have attempted to respond to terrorist and other threats.²²⁷ The Inter-American Court has long denounced the creation of special courts or tribunals that displace the jurisdiction belonging to the ordinary courts or judicial tribunals and that do not use the duly established procedures of the legal process.²²⁸ These include the use of *ad hoc* or special courts or military tribunals which prosecute civilians for security offences in times of emergency. The Commission and Court criticise the lack of independence of tribunals established by the Executive, since these tribunals are generally subordinate to the Ministry of Defence, and there is an absence of minimal due process and fair trial guarantees in their processes.²²⁹

As stated by the Human Rights Committee in their general comment on states of emergency, "only a court of law may try and convict a person for a criminal offence".²³⁰ The United Nations Commission on Human Rights recommend States take account the principles listed in the draft Universal Declaration on the Independence of Justice, expound that "no *ad hoc* tribunals shall be established to displace jurisdiction properly vested in the courts.... and in such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts".²³¹ A review of country observations made by the Human Rights Committee illustrates the concern of independence and impartiality of judges from military courts try civilians.²³² Particularly they point out that military tribunals lack supervision by ordinary courts; members lack legal training; there is a lack of separation of military personnel that detains and charges the accused and those that try them; and a lack of provisions for sentences to be reviewed by a higher tribunal.

The Special Rapporteur on the independence of judges and lawyers concludes that there appears to be a consensus developing in international law that the use of military tribunals to try civilians needs to be drastically restricted or even prohibited.²³³ The United Nations Working Group on Arbitrary Detention sets out four rules to meet if some form of military justice is to continue to exist: (i) it should be incompetent to try civilians; (ii) it should be

²²⁶ *Basic Principle on the Independence of the Judiciary*, *supra* note 207, Principle 2.

²²⁷ Inter-American Commission on Human Rights Report, *supra* note 15.

²²⁸ *ibid.*

²²⁹ *ibid.*

²³⁰ *General Comment 29*, *supra* note 34.

²³¹ United Nations Commission on Human Rights, resolution 1989/32 found at www.unhcr.ch/huridocda/huridoca.nsf/0.98234556.htm.

²³² This review is found in the International Commission of Jurists Report, *supra* note 69.

²³³ *Report of the Special Rapporteur on the independence of judges and lawyers*, E/CN.4/1998/39/Add.1, 19 February 1998.

incompetent to try military personnel if the victims include civilians; (iii) it should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardises or involves risk of jeopardising a democratic regime; and (iv) it should be prohibited from imposing the death penalty under any circumstances.²³⁴

The jurisprudence of the European Court on Human Rights provides some guidance as to the scope of this right in relation to military tribunals. In one case, the presence of a military judge on the State Security Court was contrary to the principles of independence and impartiality, which are essential prerequisites for a fair trial.²³⁵ In military tribunals where the prosecuting officer has the same rank or higher rank than the members of the tribunal and had the authority of the confirming officer who could modify whatever sentence was handed down, was held to be a violation of the principles of independence and impartiality.²³⁶

Military tribunals are part of the Executive branch and not part of the independent civilian judiciary. The fundamental purpose of military tribunals is to maintain order and discipline by punishing military offences committed by members of the military.²³⁷ Military officers assume the role of judges while at the same time remaining subordinate to their superiors in keeping with the established military hierarchy. By its very nature, military tribunals for civilians do not satisfy the requirements of independent and impartial courts. Although certain human rights supervisory bodies have found that in exceptional circumstances, military tribunals might be used to try civilians however this is only where the minimum requirements of due process are guaranteed.²³⁸ Certain provisions establishing military commissions provide a number of procedural safeguards, such as presumption of innocence and the burden of proof beyond a reasonable doubt placed on the prosecution, the right against self-incrimination and rules allowing for the presentation of defence evidence and provisions for the cross-examination of witnesses. While these are necessary, some organisations find that they are not sufficient to ensure a fair trial.²³⁹ The absence of the right to have detention judicially reviewed, *habeas corpus*, and the right to counsel of one's choice raises issues of non-compliance with the right to fair trial. Military commissions provide such a concentration of power within one branch of government which some commentators note seems not only a violation of the right to an independent and impartial tribunal but also an obvious breach of the long-established doctrine of the separation of powers accepted by democratic societies.²⁴⁰ Also as one commentator observes the failure to use ordinary courts sets a dangerous precedent that judicial processes are unfit to achieve justice in the war against terror.²⁴¹

The Inter-American system has also reviewed the use of “faceless” justice systems, when the prosecutors, judges and witnesses remain anonymous to the defendant.²⁴² An accused individual in such circumstances does not know who is judging or accusing him or her and therefore cannot know whether that person is qualified to do so or whether there may be

²³⁴ Report of the United Nations Working Group on Arbitrary Detention, E/CN.4/1999/63, 18 December 1998.

²³⁵ *Incal v Turkey*, as cited in the International Commission of Jurists Report, *supra* note 69.

²³⁶ *Findlay v The United Kingdom*, European Court of Human Rights (25 February 1997) I-30.

²³⁷ Inter-American Commission on Human Rights Report, *supra* note 15.

²³⁸ *ibid.*

²³⁹ *ibid.*

²⁴⁰ JUSTICE “Briefing on the Proposed Use of Military Commissions to try Detainees at Guantanamo Bay, Cuba” (24 July 2003) found at www.icj.org/news.php3?id_article=2983&lang=en.

²⁴¹ International Commission of Jurists, *supra* note 69.

²⁴² Inter-American Commission on Human Rights Report, *supra* note 15.

reasons to request the judge to recuse him or herself based on incompetence or lack of impartiality. The accused is also prevented from carrying out any effective examination of the opposing witnesses. The Inter-American Court has found that the use of secret justice systems constitute a flagrant violation of the right to be judge by an independent and impartial tribunal.²⁴³ The Commission and Court recognise the difficulties in investigating and prosecuting terrorist threats which may render judges and prosecutors vulnerable to threats to their lives or integrity.²⁴⁴ States may take necessary measures to prevent violence against judges and others involved in the administration of justice, but such measures must not derogate from the non-derogable right to be tried by a competent, independent and impartial tribunal.

In Canada, the provisions in the new anti-terrorist legislation could place judges in situations where they may make a decision to uphold the listing of an organisation as a terrorist group without disclosure of even a summary of the evidence to the defence but also the judge must consider evidence conditionally offered by the government on an *ex parte* and secret basis.²⁴⁵ This appears to contradict the general rule of ensuring independence and impartiality of the tribunal in providing that counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other party to the case. Another general rule is that a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views. Whether or not such provisions violate the principles of judicial independence has not yet been the subject of judicial review.

3.3 Presumption of innocence

Some of the counter-terrorism measures already reviewed above may impact on the principle of the presumption of innocence. For example, the presumption of innocence may be considered violated where a person is held in connection with criminal charges for a prolonged period of time in preventative detention without proper justification. Such detention becomes a punitive rather than precautionary measure that is tantamount to anticipating a sentence.

It is the right of every person charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial.²⁴⁶ The presumption of innocence and being treated as innocent is fundamental to a fair trial. Rooted in the presumption of innocence is the right not to be compelled to testify against oneself or confess guilt and the related right of silence. Also, in accordance with the presumption of innocence, the rules of evidence and the conduct of a trial must ensure that the prosecution bears the burden of proof throughout the

²⁴³ *ibid.*

²⁴⁴ *ibid.*

²⁴⁵ *Anti-Terrorist Act* (Bill C-36) *supra* note 23 and Kent Roach, *supra* note 92: "Bill C-36 vests the Federal Court, which is primarily an administrative court, with extensive and, at times, exclusive duties of judicial review. Such judicial review is with respect to decisions such as the listing of an organisation as a terrorist group and the review of the Attorney General's power to prohibit disclosure of information in court proceedings. Also in some provisions, the Solicitor General is empowered to make *ex parte* motions to require the judge in a private hearing to consider information obtained in confidence from a government, an institution or an agency of a foreign state. The judge can use the information in determining the reasonableness of the government's decision to list a group as a terrorist group, but only if the judge decides not even to summarise the information for the listed entity seeking judicial review of the government's decision. If the judge decides that the information should at least be summarised for the listed entity, the Solicitor General can simply pull the information, with the judge being instructed by the Act not to consider the information."

²⁴⁶ *ICCPR* article 14(2).

trial.²⁴⁷ While the *ICCPR* does not specifically set out the standard of proof, the Human Rights Committee has stated that “by reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond a reasonable doubt”.²⁴⁸ As one can see, this presumption of innocence has enormous impact at a criminal trial. The Inter-American Commission has long emphasised the self-evident nature of the presumption of innocence to criminal proceedings.²⁴⁹ States are called upon to ensure that it is expressly provided for in their domestic laws.

3.4 Right to counsel

The section on questioning suspects addressed, to some extent, the right to legal advice when individuals have been arrested or detained. Therefore this section will focus more on the right to counsel at trial or hearings. Some counter-terrorist measures deny access to counsel or provide for special government vetted counsel. Other counter-terrorism measures may place limits on lawyers who represent suspected terrorists thereby rendering the right to counsel meaningless. This may include situations where legal counsel could be caught under broad definitions of terrorism for assisting known terrorists.²⁵⁰ Other provisions have introduced duties on legal counsel to disclose information pertinent to national security.²⁵¹

Everyone charged with a criminal offence has the right to defend themselves in person or through a lawyer.²⁵² They have the right to be assisted by a lawyer of their choice, or to have a lawyer assigned to them in the interests of justice, free of charge if they cannot afford to pay. The assistance of counsel is a primary means of ensuring the protection of the human rights of individuals accused of criminal offences and in particular their right to a fair trial. The right to be represented by a lawyer of one’s own choosing relates to the importance of trust and confidence between the accused and their lawyer. The right to counsel includes the right to speak with counsel secure in the knowledge that what is said will be held in confidence. An accused does not have an unrestricted right to choose assigned counsel, particularly if the State is paying the costs. The State is required to provide counsel free of charge if the interests of justice require that counsel be appointed and that the accused does not have sufficient funds to pay for a lawyer. In the determination of whether the interests of justice require appointment of counsel is based primarily on the seriousness of the offence, the issues at stake, including the potential sentence, and the complexity of the issues.²⁵³ The European jurisprudence provides some guidance as to the scope of this right. Incompetence of State provided counsel might

²⁴⁷ The information in this paragraph is from Eileen Skinnider, *supra* note 185.

²⁴⁸ Human Rights Committee *General Comment 13 (article 14)* 12 April 1983 found at <http://lawhk/hku.hk/demo/unhrdocs/hrge13.htm>.

²⁴⁹ Inter-American Commission on Human Rights Report, *supra* note 15.

²⁵⁰ This was one of the concerns expressed by the Canadian Bar Association during public debates on the draft anti-terrorism law in Canada, *supra* note 68.

²⁵¹ *U.S.A. Patriot Act*, *supra* note 23 and Lawyers Committee for Human Rights, *supra* note 101.

²⁵² *ICCPR* article 14(3)(d) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

²⁵³ The information in this paragraph is from Eileen Skinnider, *supra* note 185.

result in a violation of the right to a fair trial.²⁵⁴ The accused has a right to confidential communications with their lawyer while awaiting trial.²⁵⁵

In the United States, there have been a number of cases where the federal courts have ordered the government to allow detainees access to counsel.²⁵⁶ In refusing to comply and in its appeal, the government has argued the need to protect classified information. In one case, the federal court of appeal agreed with the government that one such suspect could be held indefinitely as an enemy combatant by the military, effectively without access to counsel, based solely on the government's assertion that he is an enemy combatant.²⁵⁷ The court noted that under the Constitution, the President is given deference in times of war.

In some countries, counter-terrorism measures limit suspected terrorists from retaining legal counsel, rendering the right to counsel meaningless. For example in the Canadian Anti-Terrorism legislation, broad definitions of terrorist activities could subject lawyers providing services to those accused of terrorism, to prosecution.²⁵⁸ Lawyers should not be required to expose themselves to the risk of prosecution for fulfilling their professional obligations of advising and representing clients. This may make it very difficult for individuals or organisations subject to the provisions of counter-terrorism measures to find legal representation.

In addition to the right to counsel is the aspect of the independence of the legal profession and its role in the proper administration of justice. This includes the important confidentiality of solicitor-client communications which has long been recognised by international standards, in the *Basic Principles on the Role of Lawyers*.²⁵⁹ Certain counter-terrorist provisions require lawyers to disclose confidential solicitor-client information to the State or permit the search of lawyer's offices pursuant to search warrants. Other provisions compel individuals who police believe have information concerning terrorism offences that have committed, or will be committed, or information that reveals the whereabouts of a person suspected of having committed a terrorism offence, to appear before a judge to answer questions and/or produce materials. One commentator raises the concern that this would conscript lawyers, as agents of the State, against their clients and make it impossible for lawyers to act as independent legal advisors with undivided loyalty to their clients, thereby seriously impairing the functioning of our justice system.²⁶⁰ One would need to review the safeguards in place in such provisions that would protect solicitor-client communication. There should be a process for determining this claim privilege.

²⁵⁴ *Artico v Italy* European Court of Human Rights (13 May 1980), A-37, 3 EHRR 1.

²⁵⁵ *S v Switzerland* European Court of Human Rights (28 November 1991), A-220, 14 EHRR 670.

²⁵⁶ Such as the Hamdi case, discussed in Michael Kelly, *supra* note 27.

²⁵⁷ *ibid.*

²⁵⁸ Offence to make financial or other related services available knowing that the services will be used by or will benefit a terrorist group. Other related services is not defined, concern that it could include legal services. The Bill could subject the lawyers providing the services to prosecution. Also an offence to knowingly participate in or contribute to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of the group to carry out terrorist activity. The meaning of participating in or contributing to is further defined to include providing a skill or an expertise for the benefit of, at the direction of, or in association with a terrorist group. Could this include lawyers representing such groups, especially if a lawyer has a retainer. From the comments by the Federation of Law Societies of Canada, *supra* note 90.

²⁵⁹ *Basic Principles on the Role of Lawyers*, Eighth UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, UN Doc A/CONF.144/28/Rev.1 (1990) found at www1.umn.edu/humarts/instree/i3bpri.htm.

²⁶⁰ Federation of Law Societies of Canada, *supra* note 90.

3.5 Presence of the accused in court and admissibility of evidence

Some counter-terrorism measures have created special judicial forums with special legal procedures which depart from the ordinary procedures. Some may not permit the accused to exercise the right of cross-examination. Others enable a conviction on the basis of evidence kept secret for reasons of national security.²⁶¹ The justification behind this is that terrorism is such an exceptional phenomenon that the usual process of the legal system is not suitable due to the danger of disclosing information and allowing the suspected terrorist to exploit a public trial into a platform. One commentator challenges that assumption, saying that terrorism is essentially no different from any other criminal offence.²⁶²

International human rights law provides that everyone charged with a criminal offence has the right to be tried in their presence, in order to hear the prosecution case and present a defence.²⁶³ The right to be present at trial is an integral part of the right to defend oneself. A literal reading of article 14(3)(d) of the *ICCPR* would not seem to permit trials to proceed *in absentia*. However, the Human Rights Committee has held that in exceptional circumstances this may be permitted.²⁶⁴ All people charged with a criminal offence also have the right to call witnesses on their behalf and to examine, or have examined, witnesses against them.²⁶⁵ This right is a fundamental principle of equality of arms and is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining witnesses as are available to the prosecution. Although the concept of equality of arms is not expressly referred to in the *ICCPR*, the Human Rights Committee stated that it was one of the elements which was central to the notion of a “fair trial”.²⁶⁶ There are limitations on the examination of prosecution witnesses, for example when witnesses fear reprisal or have become unavailable. The rights of victims and other witnesses to be protected from reprisals and from unnecessary anguish have to be balanced against the right of the accused to a fair trial.

The jurisprudence of the European Commission and Court provides some guidance regarding the presence of the accused in court as well as the use of evidence. The Commission stated that the rights of the defence could not possibly be respected if the accused had not been given the “possibility” of attending.²⁶⁷ Any waiver of the accused should be expressed, not implicit. The accused’s refusal to speak Turkish at trial could not constitute a waiver of his rights to attend.²⁶⁸ All evidence must be produced in the presence of the accused at a public hearing. Use of anonymous witnesses is contrary to the Convention.²⁶⁹ The use of statements in absence of oral testimony is not *per se* incompatible with the Convention, but it must be compatible with fairness generally. The accused must be given a proper opportunity to challenge a witness

²⁶¹ Discussed in article by Emanuel Gross, *supra* note 96.

²⁶² *ibid.*

²⁶³ *ICCPR* article 14(3)(d).

²⁶⁴ *General Comment 13*, *supra* note 248.

²⁶⁵ *ICCPR* article 14(3)(e) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

²⁶⁶ *Fei v Columbia* (comm No 514/1992) 4 April 1995.

²⁶⁷ *Colozza and Rubinat v Italy*, European Court of Human Rights (12 February 1985) A-89, 7 EHRR 516.

²⁶⁸ *Zana v Turkey*, European Court of Human Rights (25 November 1997) RJ D 1997-VII, No 57.

²⁶⁹ *Windisch v Austria*, European Court of Human Rights (27 September 1990) A-186, 13 EHRR 281.

statement.²⁷⁰ Courts are allowed a certain level of discretion in governing which witnesses are called and how “relevant” their testimony will be to the case in question. Only if the judicial intervention renders the proceedings as unfair will the court be in breach of the right to a fair trial.

The *ECHR* does not prohibit the use of illegally obtained evidence. The court must examine whether admitting such evidence would impair the fairness of the trial as a whole.²⁷¹ The *Guidelines on the Role of Prosecutors* provides that when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture, they are to refuse to use such evidence against anyone other than those who used such methods.²⁷²

One example of counter-terrorism measures that appear to modify the type of evidence admissible in a legal proceeding is that of the British legislation.²⁷³ Where an individual is suspected of being a member of a terrorist organisation, this provision allows a police officer to testify that in his opinion, the accused belongs to or had belonged to an organisation, which is specified. This testimony and the contents of the statement is admissible and can be used as evidence, although a person cannot be convicted merely on the basis of a police officer’s testimony. As a result of this provision, the police officer is transformed into an expert witness, who is not only entitled to testify as to the facts, but may also give interpretations and opinions.²⁷⁴

The issue of using secret evidence raises all sorts of concerns regarding fair trial issues. As already discussed, some counter-terrorism provisions allow the prosecution to keep the evidence secret and still make use of it. The prosecution can present the evidence to the judges but not disclose the existence of such evidence to the accused and counsel, if any. This evidence is likely to have significant influence on the judgement of the court, without allowing the accused an opportunity to cast doubt on the reliability and relevance of the evidence.

²⁷⁰ *Unterpertinger v Austria*, European Court of Human Rights (24 November 1986) A-110; 13 EHRR 175.

²⁷¹ *Schenk v Switzerland*, European Court of Human Rights (12 July 1988) A-1140, 13 EHRR 242.

²⁷² The *Guidelines on the Role of Prosecutors*, Eighth UN Congress, Havana, UN Doc. A/CONF.144/28/Rev.1 (1990) found at www1.umn.edu/humanrts/instreet/i4grp.htm, Guideline 16.

²⁷³ *Criminal Justice (Terrorism and Conspiracy) Act of 1998* as discussed in Emanuel Gross, *supra* note 96.

²⁷⁴ Emanuel Gross, *supra* note 96.

Conclusion

The interpretation of the role and application of international human rights law in the context of terrorist threats must recognise as fundamental the obligation to which States are bound to respect in good faith and at all times. These obligations must inform the manner in which States respond to terrorist threats. Even regarding rights that may be restricted or derogated from, States must comply strictly with the conditions set out in the treaties that permit such limitations or derogations. These conditions are based upon the fundamental principles of necessity, proportionality and non-discrimination.

As stated at the outset, it may be too early to tell how the various counter-terrorism measures will be reviewed by the human rights bodies. This paper has tried to add to the understanding of how the scope of human rights in the criminal justice field has been effected by the events of September 11.