COMPARATIVE APPROACHES TO HUMAN RIGHTS IN THE PREVENTION AND PUNISHMENT OF TERRORISM

Lecture to the LL.M class, *Comparative Human Rights*, University College London, 11 March 2010

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LECTURE OUTLINE

Themes:

1. Emerging trends in legislative responses to terrorism.
2. Domestic approaches to defining terrorism.
3. Use of the 'ticking bomb' argument to justify special interrogation techniques to prevent terrorist acts.
4. Use of diplomatic assurances by the United Kingdom to remove persons posing a threat to national security.

Background reading:

- Presentation notes (attached to this outline).

  These notes are drawn from the concluding chapter of the presenter's book, *Human Rights in the Prevention and Punishment of Terrorism. Commonwealth approaches: the United Kingdom, Canada, Australia and New Zealand* (New York and Berlin: Springer Verlag, 2010). The notes are only lightly referenced. They aim to provide an overview of issues concerning human rights and counter-terrorism in the four countries evaluated in the book.

Essential reading:

- Report of the Special Rapporteur on counter-terrorism (first report to the Human Rights Commission), UN Doc E/CN.4/2006/098 (2005), chapter III.
- Report of the Special Rapporteur on counter-terrorism (mission report, United States of America), UN Doc A/HRC/6/17/Add.3 (2007), chapter IV.
- Report of the Special Rapporteur on counter-terrorism (mission report, Israel), UN Doc A/HRC/6/17/Add.4 (2007), chapter III.
- Report of the Special Rapporteur on torture, UN Doc A/60/316 (2005), chapter III
- Report by the Independent Reviewer Lord Carlile of Berriew QC, The Definition of Terrorism (Presented to Parliament by the Secretary of State for the Home Department, March 2007), pp. 27-34.
- *Public Committee Against Torture v Israel* HCJ 5100/94 (Supreme Court of Israel, sitting as the High Court of Justice).
- *RB v Secretary of State* [2009] UKHL 10.

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PRESENTATION NOTES

The focus of these notes is upon the legislative approaches to counter-terrorism and human rights of Australia, Canada, New Zealand and the United Kingdom. The methodology leading to the concluding chapter on which these notes are based was to examine each subject of counter-terrorism and human rights in isolation first (examining terrorism and counter-terrorism, followed by human rights law) and then to undertake an evaluation of the way counter-terrorism has interacted with human rights in the legislative approaches of each country. While not every aspect of law and practice involving the overlap between these two areas can be covered in these notes, the aim is to identify and provide an overview of those that are most significant.

Terrorism and Counter-Terrorism

Defining terrorism

Depending on how the term is defined, and perhaps even upon the entity using the term, a wide range of conduct may fall within the ambit of a 'terrorist act'.[1] Terrorism will almost invariably involve criminal acts and may also be perpetrated during armed conflict. Terrorism can be distinguished from 'normal' criminal conduct on the basis of various factors. The focus of terrorist acts tends to be continuous, developing and escalating, rather than based upon the quite precise and short-term goals of non-organised criminal conduct. Terrorist organisations operate in a prepared and secure way, while at the same time relying upon wide dissemination of their conduct and ideology, and upon the recruitment of as many followers as possible. While criminal acts are targeted, terrorist ones are often indiscriminate. Relating also to targets, terrorism employs differential targeting whereby the physical targets of an act (people or infrastructure) are often used as tools to manipulate and put pressure upon an entity against whom the action is ultimately being taken (a government or international organisation). Inherent to the term 'terrorism', such acts are usually undertaken with the aim of intimidation or creating a situation of fear. Finally, terrorist acts are motivated by certain ideological, political or religious ideals.

The ideological motivations of terrorism are seen by most as the primary distinguishing feature of terrorist conduct from ordinary criminal offending. This affects the views of the perpetrator of terrorist acts as to the value of and culpability for such acts. On a more precise level, terrorist conduct tends to be motivated by secession, insurgency, regional retribution, and/or the 'global jihad'. Notably, while the particular individual terrorist may be driven by more personal goals, the motivations described are those of the person or entity by whom the individual actor is recruited or directed to act. Furthermore, the vast majority of the international community has been clear in stating that terrorist acts are unjustifiable in all circumstances, no matter what its motivations are.[2]

These various features support a distinct approach to the criminalisation of terrorist conduct. The political interests of most States tend to favour a distinctive approach too. Despite this, there remains no concise, comprehensive and universal legal definition of the term terrorism. Notwithstanding this gap, a comprehensive, concise and human rights-compatible definition is achievable, and not overly difficult for States to employ, and can be restricted to acts of a truly terrorist nature. Not only is such an approach compatible with the human rights obligations of States, but it also lends considerably greater credibility to special counter-terrorist measures adopted by States if it can be shown that these are restricted to terrorism and are not being used as an excuse to abuse or unjustifiably expand upon executive powers. The approach advocated, which is drawn from the views of the UN Special Rapporteur on counter-terrorism, existing international and regional terrorism-related conventions, the

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[1] Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism. Commonwealth approaches: the United Kingdom, Canada, Australia and New Zealand* (Berlin and New York: Springer Verlag, 2010), chapter 2.
[2] See, for example, Security Council resolutions 1373 (2001) para 3(g) and 1566 (2004) para 3(b); and General Assembly resolution 50/53 (1995) para 2.

report of the UN High-Level Panel on Threats, Challenges and Change, and resolutions of the Security Council, can be summarised as follows:[3]

1. Terrorist acts should be restricted to the three cumulative characteristics identified by the Security Council in its resolution 1566 (2004), namely:
   - the taking of hostages, or acts committed with the intention of causing death or serious bodily injury;
   - where such conduct is undertaken for the purpose of either (i) provoking a state of terror, or (ii) compelling a government or international organisation to do or abstain from doing something;
   - and where the conduct falls within the scope of the 'trigger offences' defined in the international terrorism-related conventions.
2. Conduct falling outside the scope of the trigger offences might still be classified as terrorist if such conduct possesses the first two characteristics identified in resolution 1566 (2004) and corresponds to all elements of a serious crime as defined by domestic law.
3. The approaches identified in items 1 and 2 above should apply also to the treatment of conduct in support of terrorist offences.
4. Finally, the definition of terrorist conduct (i) must not be retroactive, and (ii) must be adequately accessible and written with precision so as to amount to a prescription of law.

The international framework for combating terrorism

International law on counter-terrorism is principally based upon treaty law and the action of various agencies of the United Nations.[4] Thirteen specific conventions relating to terrorism aim to either protect potential targets of terrorist conduct (civil aviation, operations at sea, and individual persons), or to suppress access to the means by which terrorist acts are perpetrated or funded (radioactive and nuclear materials, plastic explosives, bombings, and the financing of terrorism).[5] These conventions do not, however, have general application and are limited in their binding nature to those States which have ratified or acceded to them. Having said this, the Suppression of Financing Convention does have potentially wider application in its description of conduct that may not be financed. The four countries in question have signed all thirteen conventions, although the United Kingdom is currently the only one of those countries to have ratified the most recent treaty on countering terrorism, the International

[3] See the report of the Special Rapporteur on counter-terrorism, UN Doc E/CN.4/2006/098 (2005), chapter 4.

[4] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 3.

[5] Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969); Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, opened for signature 24 February 1988, ICAO Doc 9518 (entered into force 6 August 1989); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992); Convention on the Prevention and Punishment of Crimes against International Protected Persons, including Diplomatic Agents, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977); International Convention against the Taking of Hostages, opened for signature 18 December 1979, 1316 UNTS 205 (entered into force 3 June 1983); Convention on the Physical Protection of Nuclear Material, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987); International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the General Assembly and opened for signature on 15 April 2005 under GA Res 59/290, UN GAOR, 59th Sess, 91st Plen Mtg, UN Doc A/Res/59/290 (2005) and entered into force 7 July 2007; Convention on the Marking of Plastic Explosives for the Purpose of Detection, opened for signature 1 March 1991, ICAO Doc 9571 (entered into force 21 June 1998); International Convention for the Suppression of Terrorist Bombing, opened for signature 12 January 1998, 2149 UNTS 286 (entered into force 23 May 2001); and International Convention for the Suppression of the Financing of Terrorism, opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

Convention for the Suppression of Acts of Nuclear Terrorism. All four countries are party to the remaining 12 terrorism-related conventions.

Additional to the terrorism-related conventions, the General Assembly and Security Council have issued numerous resolutions on the topic of counter-terrorism, culminating in the adoption by the General Assembly in September 2006 of the UN Global Counter-Terrorism Strategy. Although resolutions of the General Assembly are not binding, the Assembly has built on various guiding principles and expectations in its declarations on measures to eliminate international terrorism. The Security Council has adopted both binding and recommendatory decisions and has established a number of subsidiary bodies to deal with particular aspects of the fight against international terrorism, including creation of the Counter-Terrorism Committee very soon after the terrorist attacks of September 11, 2001. Three principal resolutions govern the action required by, or recommended to, members of the United Nations:

- Security Council resolution 1267 (1999), which requires members of the United Nations to impose a travel ban and an arms embargo on the Taliban and Al-Qaida, and to freeze funds and other financial resources controlled by or on behalf of the Taliban or any other individuals or entities designated by the Committee.
- Security Council resolution 1373 (2001), which imposes various obligations upon States (mainly focussed upon suppressing the financing of terrorism) and recommends further action.
- Security Council resolution 1624 (2005), which calls on States to adopt measures to prohibit the incitement to commit terrorist acts, and to prevent such conduct.

The challenges faced by the international framework for countering terrorism are many, and are not limited to the inherently difficult nature of defining terrorism. The application and enforceability of international treaties, as opposed to the more general application (but limited scope) of customary international law and obligations under Security Council resolutions, combine to create a complex web of intersecting laws and principles. The magnitude of organisations involved in various aspect of the fight against terrorism, coupled with the vast amount of legal instruments that States are required to implement and report upon, result in the need to take careful, coordinated action which takes capacity-building and technical assistance into account. This has been recognised by the United Nations and other regional organisations, and work is continuing to improve upon this important element of the fight to combat international terrorism.

Domestic approaches to counter-terrorism

Australia, Canada, New Zealand and the United Kingdom are all common law jurisdictions and members of the Commonwealth and the United Nations. Recognising that the geographical distribution of the countries, as well as their political histories, has resulted in a difference in the terrorist threats faced by each country, a question raised is whether counter-terrorism is relevant for all States.[6] Despite differing levels of actual and potential threats faced, as well as diverging experiences of each country in dealing with terrorism, the countering of terrorism is indeed relevant to all four countries, whether as a result of their international legal obligations or their commitments to and support for an international framework on counter-terrorism. Measures to counter international terrorism are also capable of contributing to national interests, such as border security, international transport and external trade.

Taking into account the Counter-Terrorism Committee's survey on the implementation of Security Council resolution 1373 (2001),[7] and the report on practical aspects of implementing counter-terrorism obligations by the resolution 1566 Working Group of the Security Council,[8] it can be concluded that that there is a generally high level of implementation of international counter-terrorism obligations by

[6] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 4.

[7] Survey of the implementation of Security Council resolution 1373 (2001): Report of the Counter-Terrorism Committee, UN Doc S/2008/379 (2008).

[8] Report of the Security Council working group established pursuant to resolution 1566 (2004), UN Doc S/2005/789 (2005).

the four countries.[9] Some issues however, such as preventing public provocation, require further attention. The incitement to terrorism is a matter considered later, both in the context of its criminalisation and the compatibility of this with the freedom of expression.

Also notable within this discussion are a number of trends in the legislative responses to terrorism by the four countries which, in combination, show cause for concern.[10] Legislative packages on counter-terrorism have, more often than not, involved lengthy texts which have received an expedited passage through Parliament, thus reducing the ability of legislators to give careful consideration and debate to provisions which might represent a shift from customary legal restraint. The speedy passage of such laws has also been to the detriment of allowing adequate public consultation. The appearance of counter-terrorism legislation being drawn up in emergency circumstances is misleading. Taking the example of the UK's Prevention of Terrorism (Temporary Provisions) Act 1974, introduced following the Birmingham bombing and passed in just three days, the Home Office has subsequently admitted that the Act was drawn from a Bill drafted in 1973 but not introduced until after the bombing. These factors combined increase the risk of the enactment of anti-terrorism laws which run counter to the establishment under those laws of human rights limitations which are strictly necessary and proportionate. This is particularly problematic for jurisdictions such as Australia, which has no national bill of rights, and New Zealand and the United Kingdom, which can at best declare provisions incompatible with human rights and then leave the matter for consideration by the executive and parliament.

Furthermore, counter-terrorism laws are in some cases not enacted as items of stand-alone legislation, instead establishing special and unusual powers within ordinary Acts, and thereby contributing to the risk of the normalisation of such powers and/or their eventual 'creepage' for use in traditional law enforcement. Of even greater concern is the practice of establishing special powers in terms such that they are not restricted to the countering of terrorism, but are instead applicable to the investigation of ordinary crimes. Cause for concern is in theory alleviated through the inclusion in counter-terrorism legislation of mechanisms such as sunset clauses, parliamentary review mechanisms, or the provision for independent review of legislation. Once laws are in place, however, practice shows that sunset clauses rarely result in a repeal or amendment of legislation, such laws instead often sliding into a state of de facto permanence. Parliamentary review can be an effective tool, but may be thwarted by timetabling issues, or an indifferent treatment of the subject at select committee level. The utility of independent reviews depends upon the terms of appointment of, and resources available to, the independent reviewer, not to mention whether reports of an independent reviewer are linked to a parliamentary select committee which is capable of then triggering debate in parliament.

Human Rights Law

International and regional human rights law

All four case study countries are parties to the International Covenant on Civil and Political Rights (ICCPR) and thus have a common reference point on the question of international human rights obligations. The United Kingdom is also a party to the European Convention on Human Rights (ECHR). International and regional human rights law under the ICCPR and ECHR obliges States to respect, protect and fulfil human rights, which involves not interfering with the enjoyment of rights and also taking steps to ensure that others do not interfere with their enjoyment.[11] To ensure the fulfilment of human rights, States must adopt appropriate measures, including legislative, judicial, administrative or educative measures, in order to fulfil their legal obligations. States may be found responsible for attacks by private persons or entities upon the enjoyment of human rights. Human rights law also places a responsibility upon States to provide effective remedies in the event of violations. It is important to recall that human rights have extraterritorial effect, requiring States to ensure the enjoyment of rights and freedoms by anyone within their power or effective control, even if

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[9] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 4 to 8.
[10] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 4.
[11] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 9.

not situated within their own territory. International human rights law continues to apply in armed conflict.

Without diminishing the importance and application of States' obligations under international human rights law, one must recall the special question of limiting rights.[12] The ICCPR and ECHR are both capable of accommodating rights limitations which pursue democratic objectives or a balancing between individual interests. It must be recognised at the outset, however, that certain rights are not capable of limitation in any circumstance, including a state of emergency, whether expressed in unqualified terms or as a result of their absolute status as norms of *jus cogens* under customary international law. Other than in the case of these absolute and non-derogable rights and freedoms, interference with the unrestricted enjoyment of rights is permitted through two principal means under the ICCPR and the ECHR. The application of certain rights and freedoms may be temporarily suspended during a state of emergency which threatens the life of a nation. Application of this mechanism in the terrorism context is a matter considered later.

Most other rights and freedoms are capable of limitation as a result of the means by which they are expressed in the substantive provisions of the International Covenant and the European Convention. Limitations can arise as a result of the interpretation of terms such as 'fair', 'reasonable' or 'arbitrary', or by application of express limitations provided for within the text of the Covenant or Convention. Express limitations can be either very specific (setting out the precise and limited extent to which a right or freedom may be restricted, resulting in a 'limited right') or more general (explaining that the pursuit of certain objectives can justify interference, thereby creating a 'qualified right').

Any measure seeking to limit rights and freedoms, by whatever mechanism, must conform to three requirements. Limiting measures must be prescribed by national law, requiring the prescription to be accessible and precise. They must be necessary and proportionate and, although inter-linked, distinctive features are attached to each of these terms. Necessity requires any temporary derogation to be limited "to the extent strictly required by the exigencies of the situation". In the context of qualified rights, necessity demands the existence of a rational link between the limitation and the pursuit of one of the permissible objectives allowing for limitation of the right, and often also requires that the limitation is "necessary in a democratic society". Proportionality lies at the heart of any limitation upon rights and freedoms, such that the limiting measure may be no more restrictive than required to achieve the purpose of the limitation. Although proportionality requires a full evaluation of all relevant issues, regard will at least be had to the negative impact of the limiting measure upon the enjoyment of the right and to the ameliorating effects of the limiting measure. Finally, any measure impacting upon the unrestricted enjoyment of rights and freedoms must be non-discriminatory in nature.

When considering recourse to the derogations regimes under article 4 of the ICCPR or article 15 of the ECHR, regard must first be had to whether the right or freedom is capable of temporary suspension. Certain rights are expressly or impliedly non-derogable, or not capable of limitation due to their absolute nature. On the other hand, some non-derogable rights are capable of limitation at any time due to the manner in which they are expressed. In the case of rights that are both derogable and capable of limitation (by interpretation of the substantive provision or by application of an express limitations clause), the State must pursue such limitation before making recourse to the derogations regime. Where recourse to the temporary suspension of a right is available, notice of the derogation must be given to the Secretary-General of the United Nations (or of the Council of Europe in the case of the ECHR) in terms that are at the very least sufficient for the Secretary-General to understand the nature and reasons for the derogation.

Any derogation must then satisfy four substantive conditions: (i) it must be shown that the derogating measures are adopted during a "time of public emergency which threatens the life of the nation"; (ii) the derogating measures must be limited to those "strictly required by the exigencies of the situation" (reflecting the principles of necessity and proportionality); (iii) the measures must not be "inconsistent with [the State's] other obligations under international law"; and (iv) they must not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". As indicated, the application of these substantive conditions in the context of threats posed by terrorism is explained later.

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[12] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 10.

Domestic approaches to human rights

Consideration of the mechanisms in each case study country for the domestic protection of human rights discloses diverse approaches to human rights protection, which present interesting points for comparison.[13] Although Australia's Capital Territory and State of Victoria have enacted human rights legislation, there is no national human rights instrument in Australia. The protection of civil liberties is dependent largely upon the common law, as well as a limited range of expressly recognised rights under the Commonwealth Constitution, and those implied from it. There are no federal mechanisms in Australia dealing specifically with the role of human rights in the enactment of laws, nor is there a generally-applicable right to remedies for violation of human rights. This, combined with a generally legalistic approach to the reception of international human rights law by the judiciary, leaves human rights in a vulnerable position in Australia

In contrast to Australia, Canada has a supreme and entrenched bill of rights under the Canadian Charter of Rights and Freedoms 1982. Canada's Supreme Court is able to invalidate inconsistent legislation, and has developed mechanisms to allow for the interpretation of ordinary law consistent with Charter rights. Federal and provincial mechanisms call for the scrutiny of new legislation to determine their compatibility with the Charter of Rights. While the federal parliament retains its sovereign ability to enact statutes that restrict rights and freedoms, it must do so by express reference to the notwithstanding clause in the Charter and can only effect such restrictions by five-year, renewable, periods. The Charter provides for a broad remedial power and guarantees that the rights and freedoms set out within it may be subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

New Zealand's Bill of Rights Act 1990 is modelled on the Canadian Charter but is weaker in three main respects. The Bill of Rights is not entrenched, nor does it include a remedies clause. It is also an ordinary statute and, by virtue of the 'parliamentary sovereignty clause' in section 4 of the Act, the rights contained in it are capable of limitation or exclusion when in an irreconcilable conflict with another enactment. The judiciary has nevertheless taken a rights-based approach to the application of the Act, developing remedies for the violation of rights, identifying the possibility of making declarations of incompatibility, and requiring provisions which allow for the making of subordinate legislation to be interpreted in a manner consistent with the Bill of Rights where possible. Although deficient in some respects, section 7 of the Act calls for the Attorney General to scrutinise proposed legislation for consistency with the Bill of Rights. Like Canada's Charter, the Bill of Rights includes a mechanism for the limitation of human rights where demonstrably justified in a free and democratic society.

The Human Rights Act 1998 in the United Kingdom is a non-autonomous instrument, incorporating the rights in the European Convention on Human Rights by reference rather than setting them out within the Act. As in New Zealand, the judiciary is unable to invalidate legislation where there is an irreconcilable conflict between it and the Human Rights Act. The judiciary has the express power, however, to make declarations of incompatibility. Remedial orders allow for the subsequent modification of an offending provision to bring it into compliance with Convention rights. The executive government has a role in the scrutiny of, and reporting to parliament on, proposed legislation in a manner similar to Canada and New Zealand. The provision of remedies for the violation of human rights is again linked to the European Convention, as is any question of justifying limitations upon the unrestricted enjoyment of rights in the United Kingdom.

The Impact upon Human Rights of Terrorism and its Prevention and Criminalisation

The dynamic impact of terrorism

Properly defined, a terrorist act will correspond to proscribed conduct under one of the universal terrorism-related conventions, or a serious crime under national law. Depending on the particular circumstances surrounding any given terrorist act, terrorism also impacts upon human rights and the rule of law and may in addition amount to: an act of aggression or use of force within the meaning of

[13] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 11.

article 39 of the UN Charter; an act committed during the course of an armed conflict, and thus impacted upon by international humanitarian law; an international criminal law offence, whether under the universal terrorism-related conventions or the Statute of the International Criminal Court; and/or an act which has the result of precluding the actor's protection under international refugee law.[14] There is therefore a dynamic interaction between terrorism and different, and sometimes overlapping, sets of international law norms. What is clear is that terrorism attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance among people and nations; and the peaceful resolution of conflicts. The Security Council has itself pronounced that terrorism is (or at least may be) a threat to international peace and security and must therefore be suppressed for the maintenance of international peace and security.

Also clear is that terrorism does not create an additional justification for the use of force between States, but can instead be dealt with under the existing international law framework concerning *jus ad bellum*. While States are bound by the *jus cogens* prohibition against the use of force, the UN Charter allows for two exceptions. The first involves military action authorised by the Security Council where it determines that a particular act of terrorism amounts to a threat to the peace, breach of the peace, or act of aggression. The second is where a victim State, or group of States asked by the victim State for assistance, act under the right of individual or collective self-defence, provided that the act of terrorism (which will most likely be perpetrated by a non-State actor) can be attributed to the State against whom the self-defence action is taken. Less clear is the ability of States to take anticipatory self-defence action in the face of a suspicion that terrorist conduct is intended, at the very least not unless there is a necessity of self-defence, which is instant and overwhelming, leaving no choice of means, and no moment for deliberation.

Terrorist acts might amount to a crime against humanity or a war crime under the Rome Statute, depending upon the particular facts and circumstances involved. An act of terrorism might also involve the application of international humanitarian law, if committed during an armed conflict, since that body of law prohibits conduct which may include acts of terrorism. If that is the case, it is now a well-established principle that, regardless of issues of classification, international human rights law continues to apply in armed conflict, subject only to certain permissible limitations in accordance with the strict requirements contained in international human rights treaties.

Human rights compliance while countering terrorism

Given the deleterious impact of terrorism upon human rights, and society more generally, it is clear and undisputed that States have an obligation to protect those within their jurisdiction from acts of terrorism.[15] Regrettably, however, it has been repeatedly noted that some States have engaged in various acts, said to be aimed at combating terrorism, which violate human rights and fundamental freedoms. Some have even argued that this is a necessary evil in the fight against terrorism. Rather than being opposed to each other, however, the aims of countering terrorism and maintaining human rights are complementary and mutually reinforcing. This is the case if one is pursuing a long-term, or even medium-term, goal of countering terrorism. The UN Global Counter-Terrorism Strategy reflects this approach and identifies respect for human rights and the rule of law as the fundamental basis of the fight against terrorism.[16] It dedicates its attention to that subject in one of its four pillars, and it expressly recognises that a lack of the rule of law, and violations of human rights, amount to conditions conducive to the spread of terrorism. Human rights compliance also has practical law-enforcement implications, and avoids a descent into a moral vacuum where checks and balances against government agencies become ineffective such that those agencies threaten the very society they were designed to protect.

Politics and strategies aside, States have international human rights obligations under customary international law, applicable to all States, and international treaties to which they are parties. Human rights compliance is also mandated by the universal terrorism-related conventions. States are directed,

[14] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 12.
[15] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 13.
[16] The United Nations Global Counter-Terrorism Strategy, as adopted in General Assembly resolution 60/288 (2006).

in both mandatory and recommendatory terms, to comply with human rights while countering terrorism by the Security Council, the General Assembly, the Human Rights Council (HRC), and the HRC's predecessor (the Commission on Human Rights).[17] At an institutional level, the General Assembly's reaffirmation in 2008 of the Global Counter-Terrorism Strategy confirms that UN agencies involved in supporting counter-terrorism should continue to facilitate the promotion and protection of human rights while countering terrorism.[18] The Secretary-General has confirmed that this should be the basis of the technical assistance work of the UN Office on Drugs and Crime Terrorism Prevention Branch. The Security Council Counter-Terrorism Committee (CTC) has also made it clear that any measure taken to combat terrorism must comply with human rights, an approach which is now reflected in the CTC's reporting dialogue with UN member States.

Handbook on Human Rights Compliance While Countering Terrorism

Notwithstanding the clear position that measures to combat terrorism must comply with human rights, legislators, policy-makers, and judges are faced with difficult choices in determining the proper boundary between the unlimited enjoyment of human rights and the adoption and implementation of effective counter-terrorism strategies and action. Numerous guidelines, reports and recommendations on the relationship between human rights and counter-terrorism have been adopted since the proliferation of counter-terrorism legislation that followed the shocking events of September 11. Drawing from those documents, and more specific guidance and decisions on particular aspects of international human rights law, a *Handbook on Human Rights Compliance while Countering Terrorism* has been published by the Center on Global Counterterrorism Cooperation in 2008.[19] The Handbook advocates a step-by-step process aimed at guiding decision-makers through all relevant considerations on the subject, enabling him or her to progressively examine the validity of existing or proposed counter-terrorism law and practice. It identifies five cumulative conditions applicable to human rights compliance while countering terrorism.

- Condition 1 begins with the established notion that counter-terrorism law and practice must comply with applicable human rights law.
- Condition 2 draws from the flexibility of international human rights law to explain that, in determining the availability of any measure to combat terrorism which would limit a right or freedom, it must be determined whether the right in question in capable of limitation. Drawing from the discussion in chapter 9, Condition 2 explains the nature of rights, including absolute and non-derogable rights, and the permissible framework for their limitation.
- Condition 3 focuses on the due process and rule of law aspects of permissible rights limitations, namely the requirement that any limitation be prescribed by law; that it respects the principles of non-discrimination and equality before the law; that discretionary powers be subject to appropriate checks and balances; and that counter-terrorism measures be confined to the countering of terrorism.
- Condition 4 concentrates on the principle of necessity, explaining that limitations imposed by measures to combat terrorism must be necessary to pursue a pressing and permissible objective, and that there must be a rational connection between that objective and the limitation imposed.
- The final condition, Condition 5, explains the important principle of proportionality, formulating the test that "having regard to the importance of the right or freedom…, is the effect of the measure or provision upon the right… proportional to the importance of the objective and the effectiveness of the legislative provision or measure?".

[17] See, for example, Security Council resolution 1624 (2005) para 4; the 2005 World Summit Outcome, in General Assembly resolution 60/1 (2005), para 85; Commission on Human Rights resolution 2001/37 (2001) paras 7 and 8; and Human Rights Council resolution 7/7 (2008), para 1.

[18] General Assembly resolution 62/272 (2008) para 7.

[19] Alex Conte, *Handbook on Human Rights Compliance While Countering Terrorism* (New York: Center on Global Counterterrorism Cooperation, 2008, available online at http://www.globalct.org/images/content/pdf/reports/human_rights_handbook.pdf).

Terrorism and the derogation from human rights

Reference is made in Condition 2 of the Handbook to the ability to derogate from certain rights during a state of emergency. As discussed earlier, there are four substantive conditions applicable to any derogation from the ICCPR or ECHR, the first of which is that derogating measures may only be adopted during a time of public emergency which threatens the life of the nation. Terrorism, and the threat of terrorism, can trigger the ability of States to derogate from certain provisions of the ICCPR and ECHR.[20] This will be the case where a State faces an actual or imminent threat of terrorism, deduced from a culmination of factors and available information. The challenge in determining whether or not a State has properly invoked a state of emergency can be alleviated by adopting a two-stage approach. First, by considering whether the State was acting within the margins of its powers when deciding to declare a state of emergency based on the information available to it at the time. This will likely involve a degree of deference to the political judgment made at that time. The second stage would be to examine whether, with the benefit of hindsight and the information available at the time of subsequent review, it is still objectively reasonable to conclude that an actual or imminent threat of terrorism exists which threatens the life of the nation. While the European Court of Human Rights and the Human Rights Committee should act as ultimate arbiters, States can pre-empt this and likely avoid adverse findings by implementing independent domestic review mechanisms which have the ability of accessing and reviewing sensitive information.

On the question of whether a state of emergency exists which threatens the life of the nation, regard must also be had to whether the situation threatens the continuance of the organised life of the community. Threats of terrorism will likely do so, since they more often than not involve threats to the physical safety of the population, or critical infrastructure, and may even involve threats to the political independence or territorial integrity of a State. Forming part of this second substantive condition for a valid derogation from rights, the situation faced by the derogating State must be one that cannot be dealt with by existing law, or by new measures which would be otherwise compatible with rights and freedoms (including through the use of implied or express limitations on rights).

Next, a valid derogation from rights and freedoms must be necessary and proportional, i.e. it must be limited to the extent strictly required by the exigencies of the situation. In this regard, it will be relevant to consider whether the measures could have been adopted through the imposition of limitations consistent with a rights-specific limitations provision; whether safeguards are provided to guard against abuse of derogating measures; as well as the duration of the derogating measures. Finally, derogating measures must be consistent with a State's other international obligations and with the principle of non-discrimination. In the litigation surrounding the indefinite detention of the 'Belmarsh detainees' in the United Kingdom, compliance with the prohibition against non-discrimination was particularly relevant and resulted in the House of Lords declaring that the indefinite detention regime under the Anti-terrorism, Crime and Security Act 2001 was incompatible with the right to liberty and the freedom from discrimination. As concluded by the House of Lords, British terrorists and foreign terrorists could both be involved in international terrorism and there was no way that the differential treatment could be objectively justified.[21]

The criminalisation of terrorism

Domestic definitions of terrorism [22]

A large portion of the terrorism-related offences in the four case study countries relate to one of two features. Many are linked to domestic definitions of "terrorism" (as in the United Kingdom), a "terrorist act" (as in Australia and New Zealand) or "terrorist activity" (as in Canada). It is an offence in Canada, for example, to provide or collect property intending (or knowing) that this is to be used to carry out a "terrorist activity". Publishing a statement intended indirectly to encourage acts of "terrorism" is an offence under section 1 of the UK's Terrorism Act 2006. Other offences are linked to proscribed organisations, the description of which is likewise linked to definitions of terrorism. In

[20] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 17.
[21] *A and Ors v Secretary of State for the Home Department* [2004] UKHL 56, para 68.
[22] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 14.

Australia, for example, an organisation engaged in a "terrorist act" can be listed by the Attorney General as a terrorist organisation, with a range of offences linked to such organisations.

As well as having these important associations with criminal offences, the definitions of terrorism in Australia, Canada, New Zealand and the United Kingdom are also linked to special investigative powers, the cordoning of areas, and powers of detention and of stop and search. The domestic definitions adopted therefore have wide implications for criminal law offences and investigative powers in those countries. One of the problems in this area, as discussed above, is that there is no overwhelming consensus within the international community on a definition of terrorism. This means that individual States have been required to formulate their own definitions of the term.

As also discussed, however, a comprehensive, concise and human rights-compliant approach to defining terrorism is achievable. This relies on the Security Council's identification of three cumulative characteristics of conduct to be suppressed in the fight against terrorism, namely: (i) an intention to hijack, or to cause death or serious bodily injury; (ii) an intention to provoke a state of terror, or to influence a government or international organisation; and (iii) a correlation between the definition and the offences described in the universal terrorism-related conventions. As already indicated, the Special Rapporteur has expressed the view that, as an alternative to the latter 'trigger offence' characteristic, conduct may also be properly described as terrorist in nature if it bears the first two characteristics just mentioned *and* corresponds to the elements of a serious crime under national law.[23]

Two principal approaches to the definition of terrorism emerge in the four case study countries. The first is to equate conduct prohibited under the universal terrorism-related conventions as amounting to terrorism, in and of itself, without any further element of intention (such as an intention to provoke terror or to influence a government or international organisation). This approach is taken by New Zealand and Canada in their definitions of a "terrorist act" and "terrorist activity". While this might seem logical, the problem with this definitional approach is that it is able to capture conduct which does not pass a certain threshold of seriousness, in terms of either intention or effect. This was a criticism of early definitions of terrorism in the United Kingdom.[24] Nor is there a link in these definitions to one of the most commonly understood attributes of terrorist conduct: that it be perpetrated for the purpose of provoking a state of terror, or compelling a government or international organisation to do or abstain from doing something. When compared to Australia and the United Kingdom, New Zealand and Canada are therefore out of step in this approach, not to mention that this fails to correspond to the cumulative characteristics in Security Council resolution 1566 (2004).

The second definitional approach, which is common to all four countries, is to use definitions which comprise the following three elements:

- The first is that the conduct be undertaken for political, religious or ideological purposes. The definition in the United Kingdom also includes conduct undertaken to advance a racial cause. This first element is not included in the Security Council's characterisation of conduct to be suppressed in the fight against terrorism, although it is a commonly understood feature of terrorism. Inclusion of this element is not problematic, since it constitutes a restrictive feature of the definition of terrorism, thus narrowing its potential scope of application.
- The second element common to definitions in Australia, Canada, NZ and the UK is that the conduct must have a coercive or intimidatory character, i.e. undertaken for the purpose of either (i) provoking a state of terror, or (ii) compelling a government or international organisation to do or abstain from doing something. This directly corresponds to the characteristic of terrorism identified in paragraph 3(b) of Security Council resolution 1566 (2004).
- The final common element is the one most problematic for consistency of the definitions with paragraph 3(a) of Security Council resolution 1566 (2004) and with the meaning of terrorism advocated by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The definitions adopted by the case study countries require that the conduct must fall within one of a list of acts, including action which

[23] See, for example, the report of the Special Rapporteur on counter-terrorism, Mission to Spain, UN Doc A/HRC/10/3/Add.2 (2008), para 6.

[24] See, for example, Report by the Independent Reviewer Lord Carlile of Berriew QC, The Definition of Terrorism (Presented to Parliament by the Secretary of State for the Home Department, March 2007), para 8.

causes, or is intended to cause, death or serious bodily injury. While the example just given corresponds to paragraph 3(a) of resolution 1566 (2004), the list of acts included in the domestic definitions of terrorism goes beyond this.

On the latter point, the list of qualifying acts includes conduct which causes a serious risk to the health or safety of the public. As currently expressed, this is overly broad and may capture effects of conduct which, while appropriate to be suppressed and criminalised, is not truly 'terrorist' in nature, i.e. is not intended to cause death or serious bodily injury. This could be easily rectified by linking such conduct to that which is also likely to cause death or serious bodily injury. This would then capture acts, or threats, of biological, chemical, or radiological warfare which are likely to cause death or injury and which are intended to coerce or intimidate. It would retain the objective of protecting the public from acts of terrorism which target the health or safety of the public, while at the same time complying with the recommendation that offences falling outside the scope of the 'trigger offences' in the universal terrorism-related conventions (identified in paragraph 3(c) of resolution 1566) might still be classified as terrorist in nature if they coincide with the first two characteristics in resolution 1566 and if they correspond to elements of a serious crime under national law. Similar observations can be made about the inclusion of conduct which constitutes a serious interference, disruption, or destruction of infrastructure or electronic systems; and conduct which causes substantial property damage. Unique to New Zealand, the list of conduct which would constitute a terrorist act (if accompanied by ideological motives and coercive or intimidatory intent) includes conduct intended to cause economic and environmental damage and the prospect of the release of disease-bearing organisms. While this is perhaps not surprising for a country like New Zealand, which relies so heavily on agricultural exports, these are matters which can, and should, be dealt with as separate offences.

Regrettably, therefore, the domestic definitions of terrorism adopted by all four case study countries go beyond the characteristics of terrorism identified by the Security Council and the definition of terrorism advocated by the UN Special Rapportuer on counter-terrorism. In saying this, it is important to make an important point. That an act is criminal does not, by itself, make it a terrorist act. Nor does a concise human-rights based approach to defining terrorism preclude criminal culpability. The important point, apparently missed by all four countries, is that States must clearly distinguish terrorist conduct from other forms of criminal conduct.

Terrorism offences in the case study countries [25]

The implementation by the case study countries of their international counter-terrorism obligations entails, in part, the criminalisation of certain terrorist and terrorism-related conduct. Criminalisation is not only a legal obligation for States parties to the various terrorism-related treaties, and a response to Security Council decisions, but it is also a prerequisite for effective international cooperation in the form of extradition and mutual legal assistance. One of the common features of the universal terrorism-related conventions is that they not only call for a principal offender to be prosecuted and severely punished, but they also require States parties to criminalise the conduct of those who assist principal offenders, and those who attempt to commit the principal offence. Although this is not problematic by itself, counter-terrorism offences have begun to include 'precursor' offences, such as offences of possession of materials useful to terrorism, or possession of information useful to terrorism. In this regard, the UN Office on Drugs and Crime and the Special Rapporteur on counter-terrorism have acknowledged that preparatory offences constitute a necessary preventive element to a successful counter-terrorism strategy. The Special Rapporteur and others have warned, however, that the definition of terrorism and corresponding offences (including offences relating to preparatory conduct or conduct in support of terrorism), must be precise and must correspond to the cumulative requirements of Security Council resolution 1566 (2004).

Many, but not all, of the terrorism-related offences in the case study countries are directly linked to the universal terrorism-related conventions (e.g. hostage-taking, aircraft hijacking, or the financing of terrorism). Additional offences can be categorised as falling within one of the following categories: (i) those which are not expressly required by terrorism treaties or Security Council resolutions, but are in furtherance of them (such as trafficking in plastic explosives, for example); (ii) offences that act as mechanisms for the enforcement of preventive measures, such as control orders; (iii) some offences

[25] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 14.

which are preventive in nature in their own right (such as the prohibition against communicating safeguarded information to a terrorist group); (iv) a small category of offences that react to emergencies caused by a terrorist act and seek to ensure the effective operation of measures implemented in such emergencies; and (v) offences that do not fall within one of the former categories, but were introduced under counter-terrorism legislation and go beyond the cumulative characterises of terrorism identified in Security Council resolution 1566 (2004). Falling within the latter category are the offences in Australia and New Zealand of committing a terrorist act, problematic because they are directly linked to the overly-broad definitions of terrorism in those countries. While important, bioterrorism offences introduced under New Zealand's Counter-Terrorism Bill 2003 also fail to correspond to the characteristics of terrorism. Some offences in the UK's Terrorism Act 2000 lack any direct link to terrorism, but are instead applicable in many other contexts. It is an offence under section 54 of that Act to provide weapons training, for example, even though that offence is not limited to weapons training to terrorist groups or for terrorist purposes.

Incitement to terrorism [26]

Public provocation to commit acts of terrorism is described by the Security Council Working Group established pursuant to resolution 1566 (2004) as an insidious activity contributing to the spread of the scourge of terrorism. The Security Council has declared that knowingly inciting terrorist acts is contrary to the purposes and principles of the United Nations, and has called on States, under paragraph 1(a) of its resolution 1624 (2005), to prohibit by law incitement to commit a terrorist act or acts. There are two general means by which the incitement to terrorism may be criminalised. The first is by reactive means, whereby a person who has incited or glorified terrorism may be prosecuted as a party to a principal terrorist act. Many jurisdictions provide for the criminal responsibility of parties, through which the conduct of anyone who incites, counsels, or procures any person to commit an offence is also guilty of the offence. This is the case in all four case study countries. The second, proactive, means of criminalisation is one that seeks to create liability without needing to wait for a terrorist act to occur. A 'proactive' offence of this kind criminalises the act of incitement itself as a primary, rather than secondary, offence.

The UN Terrorism Prevention Branch has taken the view that the general obligation of States to abstain from tolerating terrorist activities implies that they must adopt active measures in order to prevent those acts.[27] This is also encouraged within resolutions of the General Assembly and Security Council.[28] Furthermore, article 20(2) of the International Covenant on Civil and Political Rights requires States to prohibit the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Despite this, the United Kingdom is the only one of the four case study countries which has a specific offence of incitement to terrorism. The other countries instead rely on general provisions of law. In New Zealand's case, these provisions are deficient in a number of ways. The incitement offence under the Human Rights Act 1993 (NZ) is limited in its application, by the fact that it does not expressly apply to the incitement of violence, and applies a low level of maximum penalty upon conviction. Party offences under section 66(1)(d) of the Crimes Act 1961 (NZ) are reactive, requiring an actual act of hostility, violence or terrorism to occur before proceedings can commence. Procuring offences under section 311 of the Crimes Act limit the maximum penalty upon conviction to not more than half of the relevant principal offence. Sedition offences under sections 81 and 82 of the Crimes Act have a maximum penalty of two years' imprisonment upon conviction and do not capture a person acting alone to incite terrorism. The 'threat of harm' offence under section 307A of the Crimes Act 1961 is limited in its application, by the reactive approach of the offence, and the fact that it only criminalises acts of incitement that themselves contain threats falling within the scope of section 307A. Furthermore, despite New Zealand's reasonably robust jurisdictional framework, none of the offences described are able to deal with the situation where a person incites others to commit terrorist acts abroad.

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[26] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 14.

[27] United Nations Office on Drugs and Crime, Guide for the Legislative Incorporation and Implementation of the Universal Instruments Against Terrorism (Division of Treaty Affairs, Terrorism Prevention Branch, 2006), para 250.

[28] See, for example, General Assembly resolution 59/80 (2004), paras 1 and 2, and Security Council resolution 1624 (2005), paras 1, 2 and 3.

Special investigative techniques and the role of intelligence agencies [29]

The criminalisation of terrorism has been accompanied by special investigative techniques and rules of criminal procedure, which is most often justified by what are described as the special nature and difficulties in combating terrorist conduct. Notwithstanding this, experiences (including those in Northern Ireland) have shown that special powers may be used in an oppressive manner which impacts upon innocent persons. The implementation of proper checks and balances, compatible with operational needs, is thus essential. This is all the more important due to the tendency of States to introduce special powers, under the guise of counter-terrorism legislation, which are in fact applicable beyond the framework of combating terrorism. The need for checks and balances is further accentuated by the frequent involvement of security intelligence services in the conduct and instigation of criminal investigations. Intelligence services play a vital contributing role to the prevention and investigation of terrorism, but the nature of information from intelligence sources calls for care to be taken.

There should always be a comprehensive legislative framework defining the mandate of intelligence services and the special powers afforded to them. Without such a framework, States are likely *not* to meet their obligation under human rights treaties to respect and ensure the effective enjoyment of human rights. It is crucial, in this regard, that legislation clarifies the threshold criteria which might trigger intrusive actions by intelligence services. Concerning the use of information gathered or analysed by intelligence services, the line between 'strategic intelligence' (information obtained by intelligence agencies for the purposes of policymaking) and probative evidence in criminal proceedings has become blurred in the fight against terrorism. This demands that care be taken by investigation, prosecution and judicial authorities when seeking to rely on information obtained from intelligence agencies, paying particular regard to the sources and nature of such information. It also calls for the prior judicial approval for the use of special investigative techniques in order to make permissible the fruits of such techniques as evidence in court.

Finally, the ex-ante and ex-post-facto oversight and accountability of intelligence services is crucial to ensure that the activities of intelligence agencies in the prevention and criminalisation of terrorism is conducted in a manner which is compatible with States' duty to comply with human rights. A lack of oversight and political and legal accountability can contribute to, and even facilitate, illegal activities by the intelligence community. Several States have devised independent permanent offices, such as inspectors-general, judicial commissioners or auditors, through statutes or administrative arrangements which review whether intelligence agencies comply with their duties. A specific oversight role also falls upon parliament, which in the sphere of intelligence should play its traditional function of holding the executive branch and its agencies accountable to the general public. Parliamentary committees exercising this role should be independent. In the United Kingdom, for example, although the Intelligence Security Committee is composed of sitting parliamentarians, it is appointed by and answerable to the Prime Minister. Ex post facto accountability is equally important. States should create mechanisms through which independent investigations can be conducted into alleged human rights violations by intelligence services.

Sentencing for terrorism offences [30]

The universal instruments related to terrorism specify that the penalties for terrorism offences must be serious, and in conformity with the principle of proportionality as between the gravity of the sanction and the gravity of the act. The UN Office on Drugs and Crime therefore advocates that the system of penalties for terrorism offence must be especially dissuasive and that heavy sentences need to be imposed for perpetrators of such acts.[31] This is reflected in the range of maximum sanctions applicable to terrorism offences in Australia, Canada, New Zealand and the United Kingdom. The latter three countries have also taken the legislative step of directing judges to treat offences involving terrorism as an aggravating feature in the determination of the length of sentence to be imposed. Such directions are not problematic in principle, except that the directions use terms ("terrorist activity", "terrorist act"

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[29] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 15.

[30] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 14.

[31] United Nations Office on Drugs and Crime, Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments (United Nations, New York, 2006), para 245.

and "terrorist connection") which, as identified earlier, are overly broad and not restricted to the characteristics identified in Security Council resolution 1566 (2004).

The right to liberty

The right of every person to be free from restraints on their liberty is fundamental to democratic societies. The right to liberty is not absolute, however, a matter reflected in the ICCPR, the ECHR and the domestic laws of the four case study countries. A number of measures designed to prevent, or to investigate and prosecute, acts of terrorism impact on liberty rights.

Investigative detention [32]

Investigative detention is the detention without charge of a person for the purpose of questioning him or her in the pre-charge process of police investigations. The matter of the arrest and pre-charge detention of persons is well developed in both the United Kingdom and Australia. Special powers of arrest to deal with terrorism were first introduced in the United Kingdom under the Prevention of Terrorism (Emergency Powers) Acts 1974-2001 relating to the troubles in Northern Ireland. The Police and Criminal Evidence Act 1984 (UK) allows for the detention without charge for up to four days of persons suspected of committing indictable offences, which includes various terrorism-related offences. The Terrorism Act 2000 (UK), as amended by the Criminal Justice Act 2003 and the Terrorism Act 2006, now permits a series of police- and judge-authorised extensions of investigative detention up to a total period of 28 days.

The 2000 Terrorism Act authorises police in the United Kingdom to arrest, without warrant, a person reasonably suspected of being a terrorist, linked both to the suspected commission of specific offences under that Act, as well as a much more broad and vague notion of being "*concerned* in the commission, preparation or instigation of acts of terrorism". This departs from the normal constraint that police must have a particular offence in mind when arresting without warrant. It may also open the door for the arrest of persons based not on credible evidence but on more dubious intelligence information, then allowing police to conduct 'fishing' expeditions for evidence during prolonged periods of detention without charge. Investigative detention is also a tool used in Australia, both under the Crimes Act 1914 and the Australian Security Intelligence Organisation Act 1974.

Extended periods of police detention, without bringing a person before a judge, has been a long-standing issue of concern within both common law and civil law countries. Although the European Court of Human Rights has declined to say what the maximum period of detention might be before a person will be considered to have been brought 'promptly' before a judicial authority, it has ruled that a period of four days and six hours is too long. Although untested, it appears that the ability in the United Kingdom to detain persons for up to four days without judicial intervention in the case of suspected indictable offences would not run afoul of the right under articles 9(3) and 5(3) of the ICCPR and ECHR.[33] This will always be a matter to be determined in the particular circumstances of the case, having particular regard to the seriousness of the alleged offence, the strength of evidence against the suspect, and the availability of alternative courses of action which would not prejudice investigations. An all facts considered approach is particularly relevant in the case of the special powers of detention under Australia's Crimes Act 1914 where, although detention may only be up to 24 hours, the application of 'dead time' resulted, in the case of Dr Haneef in 2007, in an overall period of detention without charge of 12 days.[34]

In the case of the United Kingdom's Terrorism Act 2000, and the potential for investigative detention to continue to 28 days, the question of necessity and proportionality arises. Although the Act provides for judicial warrants for extended detention beyond 36 hours, much of the justification for extending periods of pre-charge detention has been premised on the inadmissibility of evidence, particularly intercept evidence, which must be shored up through interrogations conducted during periods of investigative detention. Bringing into question the necessity of prolonged investigative

[32] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 16.
[33] See, for example, *Brogan and others v United Kingdom* [1988] ECHR 24.
[34] Hon John Clarke QC.Report of the Inquiry into the Case of Dr Mohamed Haneef. Australia: Commonwealth of Australia, 2008 online: www.haneefcaseinquiry.gov.au.

detention, however, many have advocated lifting the ban on admitting intercept evidence, as is done in many common law jurisdictions, including Australia, Canada and New Zealand. Furthermore, the proportionality of such measures are not assured, since the Terrorism Act does not expressly require that a detainee be charged as soon as sufficient evidence has been obtained to provide a realistic prospect of conviction.

Finally, the Terrorism Act 2000 may also engage the right of a detainee to consult with legal counsel. The right to consult with counsel may, by a decision of the police, be postponed for 48 hours after arrest. While the grounds upon which postponement can be made appear sound to this presenter, the Human Rights Committee has taken the view that this should never occur even in the context of those arrested or detained on terrorism charges.[35] Consultations between counsel and the detainee may also be monitored. Although the Act protects against the deliberate passing on and use of information subject to legal professional privilege, it does not guard against the inadvertent or bad faith passing on or use of such information. Monitoring should therefore be rare, and it has suggested that monitoring should not occur within hearing of police authorities.

United Kingdom Derogations from the right to liberty [36]

The United Kingdom has derogated from the right to liberty in the context of executive detention powers applying to Northern Ireland, and in conjunction with the establishment of the UK's indefinite detention regime under the Anti-terrorism, Crime and Security Act 2001. It is somewhat surprising that these derogating measures were only taken by the United Kingdom after being found to be in violation of article 5 of the ECHR. In the context of the seven-day executive detention provision in the Prevention of Terrorism (Temporary Provisions) Acts, its seems almost inconceivable that the detention of a person for up to seven days before being brought before a judge could have been considered to satisfy the requirement that persons be brought 'promptly' before a judge or other judicial officer. The six-year and continued detention of Mr Chahal under the Immigration Act 1971 is similarly astonishing, particularly in light of earlier domestic decisions that detention pending removal under the Immigration Act is permissible only for such time as is 'reasonably necessary' for the process of deportation.[37]

In the context of the indefinite detention regime under Part 4 of the Anti-terrorism, Crime and Security Act (ATCS Act), the validity of that regime was challenged by the 'Belmarsh detainees' with the result that, in December 2004, the House of Lords issued a declaration (under section 4 of the Human Rights Act 1998) that section 23 of the ATCS Act was incompatible with the right to liberty and the requirement that any derogation must be non-discriminatory in its effect.[38] Responding to that declaration, Part 4 of the Act was repealed and replaced by a dual approach to dealing with persons suspected of involvement in terrorism: their removal to their country of origin where assurances against ill-treatment can be obtained (discussed below); and control orders (discussed next).

Control orders and their impact on liberty rights [39]

Controls orders in the United Kingdom and Australia aim to deal with persons suspected of involvement in terrorism, against whom there is insufficient admissible evidence to bring criminal proceedings, but in respect of whom there is a perceived risk of harm to the public if left to live in society without restrictions upon them. The mechanisms in both countries are much the same, although the Home Secretary in the UK is vested with much broader authority to make control orders. Furthermore, while the conditions imposed under a control order in Australia must always be compliant with the right to liberty, within the bounds of necessary and proportional limitations, the UK legislation provides for the possibility of making control orders which would be accompanied by derogation from the right to liberty. Also relevant to control orders is their impact on the right to a fair hearing (discussed later).

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[35] Concluding Observations: United Kingdom (n 23) para 19. See also the criticisms of the Parliamentary Assembly of the Council of Europe in its resolution 1634 (2008), para 3.2.

[36] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 17.

[37] *Chahal v United Kingdom* (1996) 23 EHRR 413; *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

[38] *A and Ors v Secretary of State for the Home Department* [2004] UKHL 56.

[39] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 18.

Subject to reservations about the means by which control orders are made, and the cumulative effect of conditions imposed under them, the general concept of control orders as a mechanism to prevent terrorism which falls short of actual detention has been viewed positively. It is implicit in the control order regime that if there is a reasonable prospect of bringing a criminal charge against a person, that person will be prosecuted rather than made the subject of a control order. In the United Kingdom, an evaluation of this question has not been treated as a condition precedent to the making of a control order, but it has been held that the implicit basis for the regime requires the decision to impose a control order to be kept under regular review to ensure that its restrictions are no greater than necessary.[40] Arising from this, the Home Secretary has also been seen as having a continuing duty to provide the police with material in his possession which is or might be relevant to any reconsideration of prosecution. Care must also be taken to ensure that control orders are not imposed contrary to the *ne bis in idem* principle.[41]

Given the context in which the tool of control orders arose (following the declaration by the House of Lords that indefinite detention was incompatible with the European Convention), it is not surprising that control orders have implications for the enjoyment of liberty rights. The wide range of obligations and restrictions that may be imposed under control orders may also impact on other rights and freedoms. On the question of the impact of control orders on the right to liberty, it must be recognised that the deprivation of a person's liberty may take numerous forms other than classic detention in prison or strict arrest. Continuous house arrest will only permissible during the course of a criminal investigation, while awaiting trial, during trial, or as an alternative to a custodial sentence.[42] The imposition of such a condition under a control order would therefore require derogation from the right to liberty if imposed as a condition of the order.

A common condition of control orders imposed in Australia and the United Kingdom is a curfew to remain within particular premises for specified periods. Whether this constitutes a deprivation of liberty requires consideration of the concrete situation of the particular individual so as to assess the cumulative impact of all measures under the control order in the situation of the person subject to those conditions.[43] Account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the measures. While recognising that each situation must consider the cumulative impact upon the controlled person of the measures imposed, it appears that a generally acceptable threshold for a curfew would be one of between 14 and 16 hours (which should include the normal hours of sleep).

In view of the recent revocation of the control order against AF, based on the UK Home Secretary's unwillingness to release evidence which he stated would put the Government's secret intelligence sources at risk, the continuance of the control orders regime is uncertain.

Natural justice and the right to a fair hearing

The right to a fair hearing, aimed at ensuring the proper administration of justice, encompasses a series of individual rights such as equality before the courts and tribunals, and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Open administration of justice

One of the central pillars of a fair hearing is the open administration of justice, important to ensure the transparency of proceedings and thus providing an important safeguard for the interest of the individual and of society at large. While the ICCPR and ECHR permit exclusion of the press and public for reasons of national security, this must occur only to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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[40] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, para 44.

[41] Special Rapporteur on counter-terrorism, Australia: Study on Human Rights Compliance While Countering Terrorism, UN Doc A/HRC/4/26/Add.3, paras 40 and 71. See also Parliament of Australia Department of Library Services, Research Paper: Anti-terrorism control orders in Australia and the United Kingdom: a comparison (2008), pp. 21-22.

[42] Special Rapporteur report on Australia (ibid) para 71.

[43] *Secretary of State for the Home Department v JJ, KK, GG, HH, NN, and LL* [2006] EWHC 1623 (Admin), paras 60-62 and 66; and *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, para 24.

This is an issue which may arise, for example, in control order proceedings where those proceedings involve closed hearings.[44] Should the public and press be excluded from hearings concerning the making, revision or revocation of control orders, it is likely that the condition upon which the public or press may be excluded will be met. It will be important that this is limited to the extent strictly necessary. Mechanisms such as the control orders regime which allow for closed hearings should be accompanied by adequate mechanisms for observation or review to guarantee the fairness of the hearing.[45] Compliance with these aspects will partly depend upon the particular circumstances of each case, although it should be observed that appeals on questions of law are permissible in the case of control orders under both Australian and UK law.

The question of the open administration of justice is also brought to bear in the framework of judicial investigative hearings under Canada's Criminal Code 1985.[46] In the context of excluding the media from investigative hearings, the Supreme Court of Canada has spoken of needing to balance a conflict between the freedom of expression and other important rights and interests.[47] Restricting the openness of an investigative hearing, through conditions imposed on the conduct of such hearings, is permissible but should begin with a presumption against secret hearings. Consideration should be given to available alternatives, and to restricting the investigative hearing order only as much as is required to prevent serious risks to the proper administration of justice and the conduct of investigations.

Disclosure of information

The sensitive nature upon which control orders may be based exposes a common tension between procedural aspects of counter-terrorism laws and the right to a fair hearing: a tension between the protection of information which might be prejudicial to national security, versus the right of all persons to a fair hearing.[48] As well as being relevant to control order proceedings, this tension arises in the course of challenges to security certificates issued in respect of refugees and asylum-seekers, and others in respect of whom deportation might be sought on the basis that they pose a threat to the national security of the host State. To meet that challenge, the control orders regimes in the UK and Australia allow for the non-disclosure of such information. Non-disclosure of classified information is not unique to Australia and the United Kingdom. New Zealand provides for the protection of such information in its law on the designation of terrorist entities.[49] In Canada, the Canada Evidence Act 1985 was amended under counter-terrorism legislation to protect against the disclosure of information which would encroach upon a public interest or be injurious to international relations or national defence or security.

While it has been argued that control orders involve proceedings which are criminal in nature, rather than civil, this distinction is not so important to the question of disclosure of information in control order proceedings, or similar administrative proceedings used in the context of combating terrorism.[50] More important is the question of what protections are required to guarantee that a person receives a 'fair' hearing. The gravity and complexity of the case will impact on what fairness requires. It has been accepted that the right to disclosure of information is a constituent element of the right to a fair hearing in control order proceedings.[51] However, for the purpose of preserving an important public interest such as national security, information may be withheld if necessary and if this is sufficiently counterbalanced by judicial procedures to ensure that, overall, the respondent is able to answer the case against him or her.

Whether a person has enjoyed a fair hearing will always be fact-specific, and will fall into one of three situations.[52] The first, which will be unproblematic, is where a control order is sought largely or completely on the basis of open material so that the controlled person may answer the case against him

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[44] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 18.
[45] Report of the Special Rapporteur on counter-terrorism, UN Doc A/63/223 (2008), paras 30 and 44(c).
[46] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 16.
[47] *Re Vancouver Sun* [2004] 2 SCR 332.
[48] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 17.
[49] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 19.
[50] *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, para 48.
[51] *Secretary of State for the Home Department v AF and another* [2009] UKHL 28, para 57.
[52] *A and others v United Kingdom* [2008] ECHR 113, para 220.

or her. The second, which will require a careful approach to ensure that the essence of the right to a fair hearing is guaranteed, is where much of the material is closed but where the open material (or a redacted summary of the closed material) effectively conveys the thrust of the case against the person. The third and final situation, which will result in a violation of the right to a fair hearing, is where reliance on closed material is so great that the person is confronted by an unsubstantiated assertion which he or she can do no more than deny. The difficulty lies in delineating between the second and third scenarios and, in the context of the second scenario, achieving an objective assessment of whether the open or redacted material 'effectively' conveys the thrust of the case.

The use of special advocates, who receive special security clearance and are able to view closed material after seeking instructions from a respondent, will not change the outcome of the third situation described.[53] The respondent in control order proceedings must always be provided with sufficient information about the allegations to guarantee that he or she is able to give effective instructions to the special advocate. This does not, however, make the role of the special advocate redundant. The special advocate will play an important role during a closed hearing where the open material effectively conveys the thrust of the case against the person. His or her role will be important in testing the evidence and its confidential sources. This will be relevant to whether the information should be treated as prejudicial to national security, i.e. whether the information should be closed or made openly available, and to the question of whether the information may be relied upon as admissible evidence. The latter question will be particularly important where the information may have been obtained through the use of torture.

The role of judges in investigative hearings [54]

As mentioned, Canada's Criminal Code allows for orders to be made compelling a person to attend a judicial hearing on the investigation of terrorist acts. The twin aspects of judicial independence and impartiality require that the judiciary function independently from the executive and legislative branches of government, thereby protecting judges against conflicts of interest and maintaining public confidence in the administration of justice. While the minority of the Supreme Court has taken the view that the mechanism under section 83.28 of the Criminal Code involves relations between the judiciary, police and prosecution which will inevitably lead to abuses and irregularities, and that the matter before it did in fact amount to an abuse of process, the majority has disagreed.[55] Drawing from the routine role played by judges in criminal investigations, including the authorisation of wire taps and search warrants, the majority of seven-to-two concluded that a reasonable and informed person would conclude that a court, when acting under section 83.28, is independent.

The designation of individuals and groups as terrorist entities [56]

The designation and listing of individuals and groups as terrorist entities is an important feature of implementing targeted sanctions against such entities, particularly in the absence of a universal, concise and comprehensive definition of terrorism. Most national measures of this kind are limited to the implementation of sanctions against entities listed in the UN Consolidated List, maintained by the Al-Qaida and Taliban Sanctions Committee. Australia, Canada, New Zealand and the United Kingdom have the capacity to designate individuals or groups outside the UN Consolidated List. In the case of Australia and the United Kingdom, special categories of "terrorist organisations" and "proscribed organisations" have also been established.

On the subject of natural justice and the right to a fair hearing, there has been much criticism over the way in which the Al-Qaida and Taliban Sanctions Committee undertakes its listing and de-listing functions. Despite the fact that the Committee's guidelines have vastly improved since the end of 2008, there remains no independent review of listings at the United Nations level. The UN Special Rapporteur on counter-terrorism has therefore called for access to domestic judicial review of any implementing measures at the national level.[57] The principal human rights implications of designating

[53] Ibid. See also *R (Roberts) v Parole Board* [2005] 2 AC 738, para 60.
[54] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 16.
[55] *Re Application under section 83.28 of the Criminal Code* [2004] 2 SCR 248, cf para 91 with paras 111 and 169.
[56] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 19.
[57] Report of the Special Rapporteur on counter-terrorism, UN Doc A/63/223 (2008), para 16.

individuals and groups as terrorist entities can be explored through undertaking a case study of New Zealand's measures under the Terrorism Suppression Act 2002. Following the reform of the Terrorism Suppression Act in 2007, the designation process in New Zealand is limited to *domestic* designations, while the application of the Act to individuals and entities listed in the UN Consolidated List is automatic and continues until those entities are removed from the Consolidated List. The practical implication of this is that, although section 33 of the Act allows for judicial review of designations made under it, the right to judicial review does not apply in respect of UN-listed individuals and entities. This is in stark contrast to the recommendation for access to domestic judicial review of measures to implement the Consolidated List. Problems arise even where judicial review *is* available, i.e. in the case of a challenge to the designation of an entity not included in the UN Consolidated List. Here, the protection afforded to classified security information, through rules under section 38 of the Act providing for non-disclosure or redacted summaries of such information, have the potential to violate the right to a fair hearing in the same way as does the use of closed material in control order proceedings.

Despite this conclusion, New Zealand courts will be limited in the extent to which they can apply section 38 of the Terrorism Suppression Act in a manner consistent with the right to a fair hearing, which is reliant, in the NZ context, on the natural justice principle of *audi alteram partem* under section 27 of the Bill of Rights Act. Section 38(6) of the Terrorism Suppression Act provides that the protective measures under it are to apply "despite any enactment or rule of law to the contrary" meaning that, notwithstanding any finding that section 38 is inconsistent with the right to natural justice under the NZBORA, section 38 is nevertheless to be applied by virtue of section 4 of the Bill of Rights. Although section 38 need *not* be applied in a manner which violates the right to a fair hearing under article 14(1) of the ICCPR (depending on the nature of the information upon which the designation is based), the combination of section 38(6) of the Terrorism Suppression Act and section 4 of New Zealand's Bill of Rights means that NZ courts will, in such situations, be powerless to act in a human rights-compatible way. The case study thus exposes the vulnerability of human rights in New Zealand to being overridden by ordinary statutes, in this case one which has been enacted for the suppression of terrorism.

The presumption of innocence and privacy rights

The right to be presumed innocent until proven guilty is exercised through the burden upon the Crown throughout all stages of the criminal process, from investigation to conviction, and is guaranteed under human rights instruments, as well as the common law. Associated with this is the right to silence. An accused person has no obligation to give evidence at trial, nor to disprove any allegation against him or her. This is so even where the only person in possession of information relevant to the elements of an offence is the accused. Investigative hearings and special powers of police questioning both impact upon the right not to incriminate oneself, as well as the onus for the granting of bail in terrorism cases.

Privacy is a deeply rooted value in human culture comprising the right of the individual to be left alone, the right of the individual to have control over the dissemination of information about him or her and the access to his or her person and home, and the right to be protected against the unwanted access of the public to the individual. The right to privacy is a matter addressed within the ICCPR, obliging States to both desist from interfering with privacy as well as to legislate in order to protect the privacy rights of those within their jurisdiction.

Privilege against self-incrimination

Intimately linked with the presumption of innocence is the right not to incriminate oneself, a right principally protected by the common law but also, in Canada, by section 7 of the Charter of Rights and Freedoms and, in New Zealand, to a more limited extent by section 23(4) of the Bill of Rights. It is also generally recognised by international standards which lie at the heart of the right to a fair hearing.

Section 198B of the Summary Proceedings Act 1957 (NZ) introduced special powers of questioning by the police, compelling a person to provide assistance to access computer data, or any other information required to access computer data.[58] Section 198B does not limit itself to the investigation

[58] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 15.

of terrorism, but is instead applicable to the investigation of any offence under NZ law which carries a maximum penalty greater than three months imprisonment. The provision does not preserve the right, under either the common law or the NZ Bill of Rights Act, not to incriminate oneself. Nor does it limit the interference with this right by providing for use immunity.

Compelling a person to attend a judicial hearing on the investigation of terrorist acts is provided for in section 83.28 of Canada's Criminal Code 1985, as a result of its amendment under the Anti-terrorism Act 2001.[59] The constitutional challenges posed by this were considered by the Supreme Court of Canada in late 2004. On the question of the privilege against self-incrimination, the Court accepted that the right not to incriminate oneself is a principle of fundamental justice protected by section 7 of the Canadian Charter of Rights and Freedoms. While this right is engaged, however, the Court concluded that it is not infringed by the Criminal Code since section 83.28(10) of the Code guarantees absolute use immunity and derivative use immunity, such that any answer given or thing produced during such hearings cannot be used in criminal proceedings against the person, even if the Crown was to establish that the evidence would have been discovered by alternative means.[60] The Court at the same time noted that section 83.28(10) did not prevent the use of compelled testimony in extradition or deportation hearings. It warned that the issuing of investigative hearing orders should therefore include conditions extending use immunity to extradition or deportation proceedings against the person in respect of whom such an order is made.[61]

Reversal of onus for the granting of bail [62]

In Australia, up to the end of April 2006, 26 persons were charged with various terrorism offences (three had pleaded guilty or been convicted, four had been committed for trial, and 19 were awaiting committal for trial). Of those persons, only four had been granted bail, a reflection of the operation of a new section 15AA of the Crimes Act 1914 (Australia), which prevents a bail authority from granting bail to a person charged with, or convicted of, certain terrorism and other offences unless the bail authority is satisfied that exceptional circumstances exist to justify bail. This not only reverses the burden of establishing the need for detention, but places a very high threshold upon an accused or convicted person to establish exceptional circumstances. The burden should instead be upon the State to establish the need for the detention of an accused person to continue. Where there are essential reasons, such as the suppression of evidence or the commission of further offences, bail may be refused and a person remanded in custody. The classification of an act as a terrorist offence in domestic law should not result in automatic denial of bail, nor in the reversal of onus.[63] Each case must be assessed on its merits, with the burden upon the State for establishing reasons for detention.

The engagement of privacy rights

Privacy rights will be occupied by a host of modern technologies allowing information to be recorded through satellite, aerial, or video surveillance, including by closed-circuit television (CCTV); the interception and recording of communications, whether by telephone or otherwise; and other monitoring tools including electro-optical and radar sensors and facial recognition software. At security checkpoints or border controls, authorities might require a person to provide fingerprints, or to have photographs or retinal scans taken. Machine Readable Travel Documents, such as biometric passports and some forms of national identity cards, have embedded integrated circuits which can process and store data. Widely used commercial technology, such as 'cookies', 'web bugs', and other advertising-supported software that monitor computer and online activities, are also now being used in security strategies. These various examples of security infrastructure technologies involve the recording, collection, and storing of information, all of which must be consistent with the right to privacy, within the scope of permissible limitations.

Particularly relevant to border security is the use of technologies such as whole-body imaging, and Machine Readable Travel Documents (MRTDs) such as biometric passports and visas.[64] The use of

[59] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 16.
[60] *Re Application under section 83.28 of the Criminal Code* [2004] 2 SCR 248, para 72.
[61] Ibid, paras 78-79.
[62] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 15.
[63] Special Rapporteur report on Australia (above) para 34.
[64] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 21.

these technologies is said to increase the efficiency and speed of passenger screening, as well as limiting more intrusive physical searches of passengers in the case of scanning technology. Despite early claims by developers of radio-frequency identification chips, which allow the contact-less reading of the biometric and biographical data of individuals stored on MRTDs, research has shown that these chips can be read from a distance. In pursuit of the obligation upon States to protect individuals from arbitrary or unlawful interference with their privacy, care must therefore be taken by States to ensure that such technologies are not susceptible to unauthorised interception.[65] The right to privacy also demands that personal information collected and analysed by border authorities does not reach the hands of unauthorised persons, and that personal information may never be used for purposes incompatible with human rights or incompatible with the specific purpose for which the information was obtained.

Although the right to privacy may be subject to temporary derogation during genuine emergency situations threatening the life of a nation, surveillance, interception of communications, wire-tapping, and recording of conversations should normally be prohibited.[66] It might be permissible to intercept communications if this has been authorised by an independent, preferably judicial, authority for specific and lawful purposes, with safeguards in place for the safe storage and limited use of the information.[67] This should be limited to circumstances where there are reasonable grounds to believe that a serious crime has been committed or prepared, or is being prepared, and where other less intrusive means of investigation are inadequate.[68] Secret surveillance can, in very exceptional circumstances, be justifiable, although this should be specifically authorised by legislation, and the authorising legislation should be accessible and precise.[69]

Tracking devices [70]

Introduced in New Zealand under the Counter-Terrorism Bill 2003 were provisions now included in the Crimes Act 1961 for attaching tracking devices to people or property. As with special powers of police questioning (discussed earlier), the provisions on tracking devices are applicable to all offences, not just those related to terrorism. Due to the subordinate protection given to privacy rights in New Zealand, they also suffer from a lack of adequate safeguards to sufficiently protect individuals from arbitrary or disproportionate interference with their privacy. Other than in the case of the exclusion of evidence which is obtained through tracking devices outside the directed terms of a warrant, courts have little power to grant a remedy where there are no subsequent proceedings relying on such evidence. Action is limited, for example, where a tracking device is obtained for one purpose, and then subsequently used for a completely different purpose which does not lead to criminal proceedings but nevertheless involves an undue interference with privacy. The civil and criminal liability of police will only follow if the use of a tracking device has been undertaken in bath faith or without reasonable care.

Speech and association

The freedom of expression is a cornerstone of democratic societies, linked to the enjoyment of other rights and freedoms, including the freedom of thought, conscience and religion, and their manifestation through association and assembly rights. The rights of peaceful assembly and

[65] Human Rights Committee General Comment 16, para 10. See also the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS 108, and its Additional Protocol regarding supervisory authorities and transborder data flows, CETS 181.

[66] Human Rights Committee General Comment 16, para 8. *Human Rights in the Prevention and Punishment of Terrorism*, chapter 15.

[67] See, for example: Report of the Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc E/CN.4/2005/103, paras 68 and 69; and *Klass and others v Germany* [1978] ECHR 4, paras 48-49.

[68] See, for example, Recommendation (2005)10 of the Committee of Ministers of the Council of Europe on “special investigation techniques” in relation to serious crimes including acts of terrorism (20 April 2005), paras 4 and 6.

[69] See, for example, Report of the Special Rapporteur on while counter-terrorism, UN Doc A/HRC/6/17/Add.3 (2007), paras 49-50; and *Malone v United Kingdom* [1984] ECHR 10, paras 67-68.

[70] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 15.

association have been considered in the context of the listing and designation of individuals and groups as terrorist entities. Impacting upon the freedom of expression, and of the press, are media control in counter-terrorism operations, and the offence of the incitement to terrorism.

The designation of individuals and groups as terrorist entities [71]

The designation of terrorist entities can justifiably limit the right of peaceful assembly and the freedom of association, provided that the designation process is pursuant to statutory provisions and is itself proper and just. Clear safeguards must be put in place to prevent abuses of designation processes, such as the possibility of their use to prevent membership in organisations simply because they are Islamic. While proscribing membership in organisations is permissible, and not unprecedented, this must (in the context of the designation of individuals and groups as terrorist entities) be limited to the prevention of terrorism, as properly defined, or as a consequence of their inclusion in the UN Consolidated List. In the New Zealand context, this concern had been partly alleviated through the express qualifications within sections 8(2) and 10(2) of the Terrorism Suppression Act, which had made it clear that it is not an offence to provide or collect funds with the intention that they be used, or knowing that they are to be used, for the purposes of advocating democratic government or the protection of human rights, so long as such an organisation is not involved in carrying out terrorist acts. It is therefore regrettable that this safeguard was removed under the Terrorism Suppression Amendment Act 2007.

Incitement to terrorism [72]

Individual and group rights to the freedom of expression, including the freedom of the press, carry special duties and responsibilities and may be limited for the purpose of protecting other important objectives, including national security, public order, or the rights or reputation of others. States parties to the ICCPR have an obligation under article 20(2) to prohibit the incitement to hostility or violence based on national, racial or religious hatred. UN member States also have a duty to prevent the commission of terrorist acts, and have been called on to prohibit the incitement to terrorism. States which have become parties to the Council of Europe Convention on the Prevention of Terrorism are under a specific obligation, under article 5 of the Convention, to establish as an offence the public provocation to commit terrorist acts, a provision which has been identified as best practice in the area.

Given the call for dissuasive penalties to be applied in the sentencing of terrorist offenders, it appears to be prudent for States to criminalise the particular conduct of incitement to terrorism, with an appropriately corresponding range of criminal sanctions, rather than leaving this to a more general prohibition against incitement. Although the formulation of any particular proscription of the incitement to terrorism is a matter for each State to determine, three safeguards or minimum requirements are identified. First, any proscription must be necessary, such that it either falls within the parameters of the obligation under article 20(2) of the ICCPR, or within the scope of permissible limits on the freedom of expression set out in article 19(3) of the Covenant and article 10(2) of the ECHR. The second safeguard for the guarantee of the proper proscription of the incitement to terrorism demands that the offence must be precise and not be so broad as to capture legitimate expressions or peaceful meetings. Legality and precision demand that: (i) the offence be limited to the incitement of conduct which is truly terrorist in nature; (ii) the elements of the offence be precise and avoid using vague terms such as “glorifying” or “promoting” terrorism; (iii) the offence include an element requiring proof that the act of incitement includes an actual risk that the conduct incited will be committed; (iv) the offence, and its application, respect the principle of non-discrimination; and (v) the offence not be retroactive. The final safeguard involves, as an element of best practice, the restriction of the offence of incitement to terrorism to unlawful and intentional incitement, thus preserving any applicable legal defences and expressly incorporating *mens rea* as an element of the offence to require an intention on the part of the person to communicate his or her statement and thereby incite the commission of a terrorist offence.

The United Kingdom’s Terrorism Act 2006 includes the offences of the encouragement of terrorism and the dissemination of terrorist publications. The offences fall within the scope of article 20(2) of

[71] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 19.
[72] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 20.

the ICCPR and the permissible objectives of article 19(3) of the ICCPR and article 10(2) of the ECHR. The offences in the UK are non-retroactive and legal defences are not excluded. Furthermore, although the offences contain (as alternative elements of *mens rea*) precise intent and reckless intent, the combination of common law on the subject, together with accompanying defences, render a satisfactory outcome to the issue of intent. Overall, however, the incitement offences cannot be said to be formulated in proportionate terms. Sections 1 and 2 of the Act fail to meet the requirements of legality and precision since: (i) they lack precision (concerning notices under section 3); (ii) they are not properly confined to the countering of terrorism (by virtue of their linkage to the overly-broad definition of terrorism under section 1 of the Terrorism Act 2000); and (iii) their lack of precision makes them vulnerable to use in a discriminatory manner.

Media control [73]

On the subject of the freedom of the press, which is an integral feature of the right of all members of the public under the freedom of expression, to seek, receive and impart information and opinions, New Zealand's International Terrorism (Emergency Powers) Act 1987 presents a rare example of powers of media control in counter-terrorism law. However, these powers are limited to the pursuit of objectives which fall within the scope of article 19(3) of the ICCPR and the more general notion, under section 5 of the NZ Bill of Rights, of limits demonstrably justifiable in a free and democratic society. The Prime Minister's authority to restrict the media only arises where the information in question would be likely to prejudice the safety of any person involved in dealing with an international terrorist emergency, or measures designed to deal with such emergencies. This authority is also subject to judicial review, thus incorporating a checking mechanism against abuse or over-extension of the powers under the Act. It might be observed that judicial review of the exercise of statutory powers only requires reconsideration of the decision made and might not, therefore, achieve practice which is in fact consistent with the principles of necessity and proportionality. The statutory framework, however, appears sufficient.

Measures to prevent the transboundary movement of terrorists [74]

Measures to prevent the transboundary movement of terrorists is a matter which has been described by the UN Counter-Terrorism Committee and the Security Council's resolution 1566 (2004) Working Group as essential in the fight against terrorism, requiring careful implementation. Numerous issues are raised by this, not all of which are examined. The issues raised can be categorised as falling within one of three phases: (i) measures to prevent the transboundary movement of terrorists at international borders; (ii) measures within the territory of a State including, for example, the detention of non-nationals considered to be a risk to the security of a country; and (iii) measures adopted by States concerning the return and/or transfer of terrorists and terrorist suspects.

Border security

Effective border security is an important aspect in an effective counter-terrorism strategy, and the ability of States to prevent the transboundary movement of terrorists. It is also a condition of Security Council resolution 1373 (2001), paragraph 2(g), and is impacted upon by paragraph 2(b) of the same resolution and paragraph 2 of resolution 1624 (2005). A tool first adopted by the United States in 1990 and now being widely used, including within the four case study countries, is the sharing of information between countries of departure and arrival to enable the advance screening of passenger lists prior to travel commencing. In Australia for example, the Advance Passenger Processing system allows the Department of Immigration and Multicultural Affairs to issue boarding directives to airlines and cruise companies, thereby preventing the boarding of passengers and crew who do not have permission to travel to Australia. While apparently effective as part of a layered approach to prevent the transboundary movement of terrorists, States have been warned that they should be cautious of implementing measures that may effectively prevent persons from exercising the right of every person

[73] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 20.
[74] *Human Rights in the Prevention and Punishment of Terrorism*, chapter 21.

to leave any country, including one's own country, particularly in the context of those fleeing persecution with an intention to seek refugee status elsewhere.[75]

The selection of persons for screening at international borders will either be random or based on profiling, defined as the association of sets of physical, behavioural or psychological characteristics with particular offences of threats and their use as a basis for making law-enforcement decisions. In principle, profiling is a permissible activity, since detailed profiles based on factors that are statistically proven to correlate with certain criminal conduct may be effective tools to better target limited law-enforcement resources. However, profiling can never violate the right to equality and non-discrimination, which will likely occur if profiling is based on ethnic or national origin (racial profiling) or religion (religious profiling), and/or if profiling solely or disproportionately affects a specific part of the population.[76] Profiling may also be prohibited where it is based on a person's country of origin if this is used as a proxy for racial or religious profiling. A difference in treatment based on criteria such as race, ethnicity, national origin or religion will only be compatible with the principle of non-discrimination if it is supported by objective and reasonable grounds. The general position, however, is that racial and religious profiling cannot be justified on objective and reasonable grounds because profiling practices based on ethnicity, national origin and religion have proved to be inaccurate and largely unsuccessful in preventing terrorist activity or in identifying terrorists.[77] The exception to this position is where a terrorist crime has been committed, or is in preparation, and there is clear and specific information raising reasonable grounds to assume that the suspect fits a certain descriptive profile. In these circumstances, reliance on characteristics such as ethnic appearance, national origin or religion is justified.[78]

The treatment of refugees and asylum-seekers

Some of the most potentially serious consequences of counter-terrorism laws, particularly for those labelled as terrorists or suspected terrorists, relate to refugees and asylum-seekers. As in many other countries, Australia undertakes character and security checks of those applying for asylum. Where applications for asylum are refused, and in some cases where they are pending, the applicant will be detained until either he or she can be removed from Australia or until the application process has been finally determined. Detention provisions of this kind are becoming increasingly common in many countries, raising issues related to the necessity and proportionality of such measures, the right to speedy and effective judicial review of any form of detention, the rights of detained persons (including their right to the best attainable health), and possible violations of the prohibition against discrimination. Linked to these concerns is the increasing reliance by countries on intelligence information and the use of 'closed material' by tribunals and courts. In the case of Australia, both the Special Rapporteur and the Human Rights Committee have expressed serious concern over Australia's mandatory detention regime, which can result in the indefinite detention of persons.[79]

Reflecting the 'exclusion clauses' in articles 1F and 33 of the Convention on the Status of Refugees, Australia's Migration Act 1958 allows applications for a protection visa to be refused if the applicant is considered to have been involved in terrorism. In this regard, Australia has taken the position that all offences established by the counter-terrorism instruments to which it is a party are considered by it to be serious non-political offences. However, not all offences under the terrorism-related conventions are serious offences including, for example, some of the offences under the Convention on Offences and certain Other Acts Committed on Board Aircraft. The Special Rapporteur has reminded Australia that the cumulative characterisation of acts to be suppressed when countering terrorism is important to this issue, and has noted that vague or broad definitions of terrorism are extremely problematic in this area and create a real risk of the application, in practice, of overly broad interpretations of the exclusion clauses in the Refugees Convention.[80]

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[75] Special Rapporteur report on Australia (above) para 51.

[76] Report of the Special Rapporteur on counter-terrorism, UN Doc A/HRC/4/26 (2006), paras 36 and 40-42.

[77] Ibid, paras 45-54.

[78] Ibid, para 59.

[79] Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia, UN Doc A/55/40, paras. 526 and 527; Special Rapporteur report on Australia (above) para 59.

[80] Report of the Special Rapporteur on counter-terrorism, UN Doc A/62/263 (2007), paras 66-67.

Diplomatic assurances

Wherever substantial grounds are shown for believing that an individual would face a real risk of torture or ill-treatment if removed to another country, the State seeking the person's removal is under a responsibility to safeguard him or her against such treatment if removal occurs. Some countries, including Canada and the United Kingdom, have sought to discharge this responsibility by seeking what have come to be known as 'diplomatic assurances' from receiving countries that the person would not be subject to ill-treatment. This is a controversial approach, made inherently problematic by the fact that such assurances will be sought in circumstances where there is a clearly acknowledged risk of torture or ill-treatment. Recognising that any assessment of risk will be fact-specific (or, more accurately, country-specific), an approach implicitly accepted by the House of Lords is to measure each situation against four conditions, namely that: (i) the terms of the assurances must be such that, if they are fulfilled, the person returned will not be subjected to torture or ill-treatment; (ii) the assurances are given in good faith; (iii) there is a sound objective basis for believing that the assurances will be fulfilled; and (iv) fulfilment of the assurances is capable of being verified.[81] The House of Lords has taken the view that assurances need not eliminate *all* risk of ill-treatment before they can be relied upon. While noting that assurances should be treated with some scepticism if they are given by a country where inhuman treatment by State agents is endemic, Lord Philipps has instead concluded that if, after consideration of all the relevant circumstances (of which the four conditions just mentioned will be key), there are "no substantial grounds for believing that a deportee will be at real risk of inhuman treatment", there will be no basis for holding that the removal is in violation of the prohibition against torture and ill-treatment.[82]

The UN Special Rapporteur on Torture has instead concluded that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment and that post-return monitoring mechanisms have proven to be no guarantee against ill-treatment.[83] Non-governmental organisations have noted that torture and ill-treatment are practices in secret and occur within a highly sophisticated system specifically designed to avoid detection of abuses. Effective verification of assurances is made more difficult given that a person in detention may be understandably reluctant to complain to a person tasked with monitoring the assurances given. Notwithstanding the decision of the House of Lords, or of application of the four conditions mentioned, it must therefore be concluded that diplomatic assurances present a substantial risk of individuals actually being tortured.

[81] *RB and another v Secretary of State for the Home Department* [2009] UKHL 10, para 23.
[82] Ibid, para 114.
[83] Report of the Special Rapporteur on Torture UN Doc A/60/316 (2005), para 51.