

Advisory Council of Jurists

Asia Pacific Forum of National Human Rights Institutions

Reference on the Rule of Law in Countering Terrorism

Addendum:

Update to the Background Paper

January 2004

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Australia

“Terrorist organisation”

The *Criminal Code Act 1995* was amended on 7 November 2003 to refer not only to ‘Hizballah organisation’ but also to ‘ Hamas organisation’ and ‘Lashkar-e-Tayyiba organisation’ as organisations considered “terrorist” for the purposes of the *Criminal Code Act*.¹

This latest designation of “terrorist organisations” for the purposes of the *Criminal Code Act* are in addition to those organisations already listed, namely:

- Abu Sayyaf Group
- Al Gaida
- Ansar Al-Islam
- Armed Islamic Group
- Asbat al-Ansar
- Egyptian Islamic Jihad
- Hamas
- Harazat UI0Mujahideen
- Hizballah External Security Organisation
- Islamic Army of Aden
- Islamic Movement of Uzbekistan
- Jaish-i-Mohammed
- Jemmah Islamiyah
- Lashkar-e-Tayyiba
- Lashkar I Jhangvi
- Salafist Group for Call and Combat

ASIO legislation amendments

A regulation was adopted on 11 September 2003 which sets out the circumstances in which lawyers who are appealing the issuance of a warrant for questioning on behalf of the subject of the warrant may be denied access to information. Regulation 3 stipulates that the lawyer must either have gained security clearance from the Attorney-General’s Department or the Secretary of the Department must be satisfied

¹ *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003*.
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that giving the lawyer access to the information will not be prejudicial to the interests of security.²

On 5 December 2003 the Federal Parliament further amended the *Australian Security Intelligence Organisation Act* in four principle ways³:

- Section 34HB now provides for the person exercising authority under a warrant to extend the time for questioning in the case of a person who requires an interpreter. The effect of the amendment is to extend the maximum period for which a person can be questioned from 24 hours to 48 hours;
- Section 34JC was introduced requiring a person the subject of a warrant to relinquish all passports that have been issued to that person. The passport is to be returned to them “as soon as practicable” after the end of the period specified in the warrant;
- Section 34JD prohibits a person the subject of a warrant from leaving Australia unless that person has prior written authorisation from the Director-General; and
- Section 34VAA makes it an offence to disclose information of an ‘operational’ nature that is contained in a warrant. This prohibition attracts strict liability in the case of the person specified in the warrant or a lawyer who has been in contact with that person for the purposes of giving legal advice.

² Australian Security Intelligence Organisation Amendment Regulations 2003 (No.1), Statutory Rules 2003 No. 233.

³ Australian Security Intelligence Organisation Amendment Act 2003, No. 143 of 2003.

India

Amnesty International published a recent report about the practical application of the *Prevention of Terrorism Act ('POTA')* entitled, 'India: Abuse of the Law in Gujarat: Muslims detained illegally in Ahmedabad', AI Index: ASA 20/029/2003. The focus of the report is on the state of Gujarat in which there has been heightened unrest and conflict between Muslims and Hindus.

The report is based on the practices of one police station, Gayakwad Haveli Police Station, which, the report argues, may represent the general practise in the state insofar as the implementation of the POTA is concerned.

Amnesty cites allegations of torture, mistreatment, failure to allow family visits, failure to provide access to legal counsel, failure on the part of the courts to investigate claims of human rights violations by the police, coercion by the police in attempts to stop family members complaining to the courts or human rights organisations and the discriminatory application of the POTA against Muslims.

In its report, Amnesty also acknowledges the role of the National Human Rights Commission ('NHRC') in bringing particular cases of abuse to the attention of the authorities. In one case in August 2003, the NHRC filed a Special Leave Petition in the case of five individuals charged under the POTA. In order to help ensure the individuals received a fair trial, the NHRC sought leave to have the trial of the five individuals heard outside Gujarat.

The Asian Centre for Human Rights ('ACHR') released a report on 1 January 2004 about the application of the POTA⁴. According to the ACHR, in the state of Jharkhand there has been public concern against the use of the POTA against victims as young as 12 years and as old as 81 years. In response to public concerns, the Jharkhand government requested that its Crime Investigation Department ('CID') review the cases filed by the Jharkhand Police.

⁴ 'Interpreters of the Draconian: An analysis of the POTA judgement and POTA Amendment Bill 2003', ACHR Features, ACHRF/01/2004, 1 January 2004.

At the time of the release of the ACHR report, 84 cases, involving 1109 individuals, out of a total of 142 cases had been reviewed. Of those cases reviewed, CID found insufficient evidence in 41 cases and 114 individuals were discharged.

In further developments, on 16 December 2003 the Supreme Court issued its decision in an appeal against the constitutionality of POTA. In its judgment the Court upheld the constitutionality of the legislation but clarified that in the case of the offence of speaking in support of terrorist organisations, the offence will only be made out if the person had the intent of committing a terrorist offence. An example of when a person may benefit from such a defence is if they were not aware the organisation they were speaking about was classified as a terrorist organisation.

Indonesia

Amrozi bin Nurhasyim was sentenced on 8 August 2003 for his part in the bombings in Bali, Indonesia on 12 October 2003. His conviction and death sentence were appealed to the Supreme Court on the basis that the anti-terrorism laws were unconstitutional because they had retrospective effect.

The anti-terrorism regulation Perpu 1/2002, was issued by President Megawati on 18 October 2003, six days after the bombings in Bali. The regulation was a revised version of an anti-terrorism bill previously debated by the Indonesian Parliament, the Dewan Perwakilan Rakyat. The law was finally passed in Parliament in March 2003 and became the Law 15/2003. The law was given specific retrospective effect by regulation Perpu 2/2002 for the purpose of convicting those individuals found guilty of the bombings in Bali.

Article 28I(1) of the Constitution of Indonesia was introduced as part of a general reform of the Indonesian Constitution in 2000. Article 28I(1) states as follows:

...the right not to be prosecuted under retrospective laws [is a] basic human right that may not be diminished under any circumstances at all.⁵

The rule against retrospectivity is recognised in the ICCPR. In particular, Article 6(2) states as follows:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Article 15(1) also states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

It may be therefore, that the Indonesian Anti-terrorism law as it is applied in the cases of persons charged with offences relating to the bombings in Bali, is contrary to international law and/or Indonesia's constitution.

The prohibition on retrospectivity set out in Article 15 of the ICCPR only applies when the offence in question did not exist at the time of the commission of the crime. It can be safely assumed that a crime relating to murder, including aiding and abetting murder as in the case of Amrozi bin Nurhasyim, existed in Indonesia at the time of the bombings in Bali. Consequently, Article 15 would not prohibit the enforcement of the Anti-terrorism laws in this case.

Article 6(2), however, refers only to 'in accordance with the law in force at the time of the commission of the crime'. The law under which Indonesian authorities propose to execute Amrozi was not in force at the time of the commission of the crime and may therefore be found to contravene Article 6(2) of the ICCPR. Indonesia, however, has not ratified this Covenant.

Article 28I(1) of the Indonesian Constitution states that the principle against retrospectivity 'may not be diminished under any circumstances'. Consequently, the exceptions set out in Article 15 of the ICCPR have not been replicated in the Indonesian Constitution and were not available to the authorities as a reason for upholding the validity of sentence against Amrozi as the Anti-terrorism law under

⁵ This is not an official translation but quoted from Angus Martyn, 'The Amrozi Bali Bombing Case: is Indonesia's Anti-terrorism Law Unconstitutional?', *Research Note*, Department of the Parliamentary Library, No. 14, 3 October 2003.

which he was charged was not in existence at the time of the bombings in Bali or the events leading to the bombings.

Amrozi's sentence was upheld on initial appeal to the High Court in September 2003 on the basis that the constitutional principle against retrospectivity must be read in conjunction with Article 28J of the Constitution which states that:

Each person is obliged to respect the basic human rights of others in orderly life as a community, as a people, and as a nation.⁶

The bombings in Bali were such a flagrant violation of human rights, so the High Court argued, the relative weight of Article 28J of the Constitution was paramount over considerations of retrospectivity in Article 28I.

The Supreme Court, on 7 January 2004 also upheld Amrozi's death sentence.

It is understood that Amrozi may seek a presidential pardon.

⁶ This is not an official translation but quoted from Angus Martyn, 'The Amrozi Bali Bombing Case: is Indonesia's Anti-terrorism Law Unconstitutional?', *Research Note*, Department of the Parliamentary Library, No. 14, 3 October 2003.

Malaysia

In November 2003, the Malaysian Human Rights commission (SUHAKAM) called on authorities not to misuse the *Internal Security Act* ('ISA') and, in particular, to complete investigations into those held under the Act expeditiously and in good faith. The statement by SUHAKAM followed the arrest of thirteen students under the ISA which allows for indefinite detention without charge or trial. At the time, early November 2003, there were 94 alleged Islamic militants detained under the ISA without charge or trial. Some had been held since July 2000.

The students arrested in November included minors aged 17 years of age.

According to Amnesty International⁷, those detained under the ISA in the past have been denied access to lawyers and their families, and have been held in solitary confinement for up to 60 days. The Amnesty Urgent Action dated 11 November 2003 goes on to say:

Detainees have reported being physically assaulted, forced to strip, deprived of sleep, food and water, and told their families would be harmed. They have been reports of the use of prolonged aggressive interrogation techniques, used in order to coerce a confession or to elicit information, that amount to torture or ill-treatment. The detainee's vulnerability is increased by the fact that judicial or legal intervention is highly restricted, and when granted usually proves ineffective.

⁷ 'Fear of torture or ill-treatment/incommunicado detention', Urgent Action 323/03, AI Index: ASA 28/027/2003, 11 November 2003.

New Zealand

The *Counter Terrorism Bill* was passed in October 2003. The Act implements in domestic law the requirements of the final two international Terrorism Conventions that New Zealand had not yet become a party to: the Physical Protection of Nuclear Material (1980) and on the Marking of Plastic Explosives for the Purposes of Detection (1991). New Zealand deposited its instrument of accession to the Plastic Explosives Convention on 19 December 2003, which will take effect on 17 February 2004.⁸

The Bill created the following new offences:⁹

- Harbours or concealing a person knowing that person has carried out, or intends to carry out, terrorist activity;
- Causing sickness or disease in animals, intending to cause serious risk to the animal population of New Zealand and major damage to the New Zealand economy, or being reckless as to whether such an outcome occurs;
- Contaminating products (food, water, crops) intended for human consumption, intending or being reckless as to whether one of the following results: harm to one or more persons, major economic loss to a person, or major damage to the national economy;
- Threatening to do an act that is likely to cause risk to the health or safety of one or more persons, or major property damage, or major economic loss to a person, or major damage to the national economy, or communicating information that is known or believed to be false about one of those outcomes, intending to significantly disrupt the civilian population, or an infrastructure facility, or the administration of government, or commercial interests.

⁸ According to the International Atomic Energy Agency status of ratification form last updated on 10 December 2003, New Zealand has not yet deposited its instrument of ratification to the convention on the Physical Protection of Nuclear Material.

⁹ The final copy of the Counter Terrorism Act 2003 is yet to be published on the New Zealand legislation web site. Consequently, the references made to the content of the Bill in this update are based on the 'Report of New Zealand to the Security Council Committee of the Security Council', S/2003/860, 5 September 2003.

The Bill made terrorism an aggravating factor for sentencing purposes, and provided that when murder occurs in the course of a “terrorist act” as defined in section 5 of the *Terrorism Suppression Act*, there will be a presumption in favour of 17 years minimum non-parole.

The Bill also provided for the following investigative powers that are not necessarily terrorism-specific but are deemed necessary to address serious criminal offences in general, including in cases of terrorism:

- The use of tracking devices by Police and Customs officers (subject to safeguards, such as warrant requirements and reporting obligations);
- A requirement which “may require a specified person to provide information or assistance that is reasonable and necessary to allow the (Police) to access data held in, or accessible from, a computer that is on premises named in the warrant”;
- Provides that when evidence of a serious criminal offence (such as drug related, serious violence and terrorist offences) is fortuitously discovered in the course of investigating a different serious offence under an interception warrant (such a warrant allows the interception of oral communications by means of listening devices), evidence of the first offence will be admissible.

Republic of Korea

In October 2003 Amnesty International issued a news release about the revised Terrorism Prevention Bill which was due to be presented to Parliament in that same month.¹⁰ There is no information currently available to confirm whether the Bill has been passed.

The Bill has been revised since it was first drafted and no-longer extends the application of the death penalty. Amnesty, however, still has several concerns about the human rights implications of the Bill.

The Bill increases the mandate of the National Intelligence Service ('NIS') by establishing a Counter-Terrorism Centre under the command of the NIS in accordance with Article 4 of the Bill. This is an issue to Amnesty because of its long-standing concern about the operation of the NIS in its application of the National Security Law.

Amnesty also expresses concern about Article 8 of the Bill which would allow Korean authorities to deport an asylum seeker suspected of being a terrorist. The asylum seeker's claim would not be considered and the suspicions that the individual is a terrorist need not be substantiated. Amnesty considers that such a provision raises the risk of refoulement in breach of South Korea's obligations under the Refugee Convention of 1951 and the Convention Against Torture, both of which South Korea has ratified.

¹⁰ 'Republic of Korea (South Korea): The revised Terrorism Prevention Bill: fear of increased human rights abuses', AI Index: ASA 25/004/2003, 10 October 2003.

Sri Lanka

Sri Lanka submitted its third report to the Counter-Terrorism Committee of the Security Council on 13 August 2003. In that report, Sri Lanka refers to the *Immigration Act* that is to be presented to Parliament. The primary purpose of the legislation, according to the report, is to create an offence of human smuggling. The report explains the relevance of the Act to terrorism as follows:

Human smuggling operations particularly to European countries have provided a ready reservoir for fund raising by terrorist groups and front organizations. Such activities take place, through extortion, directly from victims of human trafficking, as well as from their next of kin and relatives who are left behind in Sri Lanka.¹¹

The Asian Centre for Human Rights ('ACHR') on 31 October 2003 released a report about the human rights situation in Sri Lanka as an alternate report to the United Nations Human Rights Committee on the fourth periodic report of Sri Lanka (CCPR/C/LKA/2002/4).¹² In that report, the ACHR sets out various case studies of individuals detained in accordance with the *Prevention of Terrorism Act* ('PTA').

According to the ACHR individuals have been detained, sometimes without charge, prosecution or conviction, for up to seven years; 'confessions' have been obtained as a result of torture; family members have not been informed of the whereabouts of relatives detained; and individuals arrested are often not told of the reasons for their arrest. In one case, an individual claims to have been forced to sign a confession written in a language he did not understand.

In one of the seven cases referred to in the report, the Supreme Court in January 2002 ordered the government to pay compensation to a man who suffered torture at the hands of the police. The person had been arrested under the PTA in July 2001 and was severely tortured by the police Counter Subversive Unit.

¹¹ 'Report of Sri Lanka to the Security Council Committee of the Security Council', S/2003/840, 27 August 2003.

¹² 'Sri Lanka: Time for Overhauling Human Rights Mechanisms', Asian Centre for Human Rights, 31 October 2003.

In a second case also in January 2002, the High Court ordered the release of a man who was found by the Judicial Medical Officer to have suffered torture while in detention. The individual had been arrested under the PTA in January 1998.

Thailand

On 11 August 2003 the amendments to the Penal Code came into effect as the result of an Emergency Decree issued by the government.

The enacted version of the Penal Code now states relevantly as follows:¹³

Section 7

Whoever commits the following offences outside the Kingdom shall be punished in the Kingdom, namely:

1. Offences relating to the Security of the Kingdom as provided in Section 107 to 129;
 - i Offences relating to terrorism as provided in Section 135/1, 135/2, 135/3 and 135/4;
2. Offences relating to Counterfeiting and Alteration as provided in Sections 240 to 249, Section 256, Section 257, and Section 266/3 and 266/4;
3. Offence relating to Robbery as provided in Section 339, and Offence relating to Gang-Robbery as provided in Section 240, which is committed on the high seas.

Section 135/1

Whoever commits any of the following criminal offences:

1. an act of violence or any act to cause death or serious injury to the life and freedom of an individual;
2. an act causing serious damage to a public transportation system, a telecommunication system, or an infrastructure facility of public use;
3. an act causing damage to property belonging to a State or an individual, or the environment, resulting or likely to result in major economic loss.

if the commission of the offence is intended to threaten or coerce the Royal Thai Government, or any foreign government, or an international organization, to do or abstain from doing any act which causes serious damage, or is intended to raise unrest so as to intimidate a population, that person is said to commit a terrorist act and shall be punished with death, imprisonment for life, or imprisonment of three to twenty years and fine of sixty thousand to one million baht.

¹³ The quoted portions of the amended Penal Code are quoted from the 'Report of Thailand to the Counter-Terrorism Committee of the Security Council', S/2003/915, 25 September 2003.

Any demonstration, gathering, protest, objection or movement that calls for the government's assistance or for fair treatment, as an exercise of their freedom under the Thai Constitution, shall not be regarded as a terrorist offence.

Section 135/2

Whoever:

1. threatens to commit a terrorist act by demonstrating behaviour which leads to a reasonable belief that the person will do as threatened;
2. collects forces or arms, provides or compiles any assets, gives or receives training relating to terrorism, makes preparations or conspires to commit a terrorist act, or commits any offence which is part of the plot to commit a terrorist act, or instigate the people to partake in committing a terrorist act, or does any act to conceal the knowledge of the commission of a terrorist act,

shall be punished with imprisonment of two to ten years and fine of forty thousand to two hundred thousand baht.

Section 135/3

Whoever being a supporter to commit any offence mentioned in Section 135/1 or 135/2, shall be liable to the same punishment as a principal in such offence.

Section 135/4

A person who is a member of a group designated by a United Nations Security Council resolution or declaration as a group committing an act of terrorism, which resolution or declaration has been endorsed by the Royal Thai Government, shall be liable to imprisonment not exceeding seven years and to fine not exceeding one hundred forty thousand baht.

The enacted version of the legislation is substantially the same as the version provided in the Background Paper with two exceptions:

- Section 135/1 has been changed, most importantly in the removal of the requirement of 'intention' in section 135/1(3); and
- similarly, Section 135/1(2) no-longer contains a reference to the 'intent' of the accused to cause serious damage.