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INDIA
Briefing on the Prevention of Terrorism Ordinance

INTRODUCTION

Successive Indian governments have introduced or attempted to introduce legislation to cover offences linked to "terrorist activities". In 1987 the Terrorist and Disruptive Activities (Prevention) Act (TADA) was enacted. It remained in force till May 1995. During those eight years, thousands of people were arbitrarily arrested, detained and tortured under it. TADA was used to crack down on political opponents and human rights defenders. It was finally allowed to lapse, following widespread allegations of misuse and harsh criticism from national and international human rights organizations, United Nations (UN) human rights mechanisms, the National Human Rights Commission (NHRC), lawyers and even government ministers and officials themselves.

Since then, several attempts have been made by successive governments to introduce new pieces of legislation intended to deal with the "terrorism" threat.[1] In 1999 the Government of India requested the Law Commission of India to "undertake a fresh examination of the issue of a suitable legislation for combatting terrorism and other anti-national activities." In late 1999 the Law Commission took a stand in favour of new legislation and in April 2000 it produced, as part of its 173rd Report, draft legislation under the name of *Prevention of Terrorism Bill, 2000* (POTB).[2] This bill faced stiff opposition from the human right movement, political parties and the NHRC and as a result it was never introduced in parliament.

Amnesty International is concerned that the lessons of both the implementation of TADA and the failure of POTB have not been learnt.[3] In the wake of the attacks on Washington and New York and in the context of international calls for a "war against terrorism", in fact, the Central Government on 15 October 2001 approved a new ordinance, the Prevention of Terrorism Ordinance (POTO), which gives Indian police sweeping powers of arrest and detention and, if enacted, would reinstate a modified version of TADA. The POTO was signed by the President of India on 24 October. From that date the Ordinance is temporarily enforceable. It will be presented in parliament for discussion in the winter session, beginning on 19 November. If approved by the parliament, it would then become an Act enforceable initially for a period of five years.

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[1] Although TADA lapsed in 1995, hundreds of people remain detained under the Act awaiting trial and despite government statements to the contrary, individuals in Jammu and Kashmir continue to be detained under the Act in connection with cases filed before its lapse.

[2] AI set out its main concerns on the Prevention of Terrorism Bill last year (see *The Prevention of Terrorism Bill 2000: Past abuses revisited?*, June 2000, AI Index: ASA 20/22/00).

[3] The findings of the various Review Committees set up in 1994 to review all TADA cases, for example, have not fed into the debate surrounding the framing of future anti-terrorist legislation in order to prevent the re-enactment of provisions which were found to have led to widespread abuses.

The organization has been concerned by the lack of consultation with which the Ordinance has been implemented:

< One of the reasons given by the government for issuing the Ordinance instead of a bill, was that the parliament was not in session at that time (16 October 2001), and the matter was considered urgent. However the parliament is due to reconvene on 19 November. The move of implementing such a stringent text in form of an ordinance therefore seemed more intended to avoid a public debate on the issue.

< The use of this fast track procedure has also meant that the government has not had to present the text to the National Human Rights Commission (NHRC) for comments. The NHRC expressed its negative opinion on the similar text of the POTB in July 2000, affirming

"that there is no need to enact a law based on the Draft Prevention of Terrorism Bill, 2000 and the needed solution can be found under the existing laws, if properly enforced and implemented, and amended, if necessary. The proposed Bill, if enacted, would have the ill-effect of providing unintentionally a strong weapon capable of gross misuse and violation of human rights which must be avoided particularly in view of the experience of the misuse in the recent past of TADA."[4]

Although the NHRC was never given a formal occasion of presenting its concerns to the government, there are indications that this position will be consistently maintained by the Commission with regard to the present Ordinance.

< The text of the Ordinance was made public only some days after the President signed it. The Indian human rights and civil liberties movement was not offered a formal opportunity to comment on the text, although leading Indian civil rights groups, academics, lawyers, opposition parties, media organizations, and both religious and secular institutions strongly criticized it. This lack of consultation has been the object of strong criticism from, among others, the NHRC.

In publishing its concerns about the POTO, Amnesty International is adding its voice to the concerns of many domestic human rights organizations which have carefully studied the Ordinance and are presently producing their comments, many on the basis of their experience of abuses under TADA. As an international human rights organization, Amnesty International's concerns in this document focus primarily on the Ordinance's incompatibility with international human rights treaties, particularly the International Covenant on Civil and Political Rights (ICCPR), to which India is a party, but also the range of non-treaty human rights standards which together constitute an international framework for human rights protection. India has also signed the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and is therefore bound under international law not to do anything that would defeat the object and purpose of the treaty, even though this treaty has not yet been ratified. The organization does not believe that the proposed legislation provides sufficient safeguards as recommended in those texts in order to prevent human rights violations.

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[4] National Human Rights Commission: "Opinion in regard: The Prevention of Terrorism Bill, 2000", July 2000.

The relevance of international human rights standards has been highlighted by the Supreme Court of India, in Vishaka & Others vs. State of Rajasthan & Others (1997(6)SCC 24, when the Court took the view that it was "...now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."

Again, in Apparel Export Promotion vs. A.K. Chopra (1999(1) SCC 759) the Supreme Court held that "In cases involving violation of human rights, the courts must ever remain alive to the international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field."[5]

Many of the rights established in the ICCPR are reflected in the Constitution of India. The NHRC has observed for example that "the meaning of the 'right to life with dignity' in Article 21 of the Constitution of India must include the provisions of the international instruments on the subject because there is no inconsistency between them and the domestic law."[6]

The Constitution guarantees also the fundamental right of every citizen to be treated in accordance with the law. Article 14 of the Constitution lays down that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Amnesty International believes that the proposed legislation will suspend certain safeguards to protection of the law to those detained under it and that it is therefore incompatible with this fundamental right.

Amnesty International acknowledges that governments have a right and duty to protect the rights and safety of people within their territory. The organization shares concerns about abuses of human rights by non-state actors and has repeatedly called on armed groups to abide by international humanitarian law. However, any legislation or action taken must be in full conformity with international human rights standards. Similar concerns have been expressed by the organization regarding other pieces of legislation aimed at fighting the threat of armed opposition in different countries, among which the United Kingdom (United Kingdom: Briefing on the Terrorism Bill AI Index EUR/45/43/00, April 2000, United Kingdom : Emergency legislation : trial not indefinite detention is the answer, AI Index EUR 45/018/2001, November 2001) and Canada (Canada: Protecting Human Rights and Providing Security, November 2001).

Amnesty International's main concerns on POTO include the following issues:

1.The principle of certainty in criminal law:

< vague definition of membership of "terrorist organizations"
< vague definition of support to "terrorist organizations".

[5]Both these statements of the Supreme Court have been highlighted also by the NHRC in its "Opinion on the Prevention of Terrorism Bill, 2000."

[6] See NHRC, "Opinion on the Prevention of Terrorism Ordinance, 2001."

2. Pre-trial safeguards:

< insufficient safeguards on arrest
< the risk of torture
< obstacles to confidential communications with counsel
< virtual impossibility to obtain bail.

3. Rights at trial

< insufficient independence of the Special Courts from the executive power
< insufficient safeguards for the principles of presumption of innocence
< discretionary *in camera* trial
< secrecy of witnesses' identity
< insufficient safeguards for interception of communications
< insufficient opportunities for review and redress
< the death penalty
<

4. Listing of banned groups

5. Threats to the freedom of association

6.Threats to the freedom of expression

1. THE PRINCIPLE OF CERTAINTY IN CRIMINAL LAW

Membership of "terrorist organizations"

Amnesty International is concerned that **section 3(5)** of the Ordinance, which criminalizes membership of a "terrorist gang" or a "terrorist organization", may violate international standards regarding the requirement of certainty in criminal law. The section does not define clearly what constitutes "membership" of a "terrorist gang" or a "terrorist organization". It does not, for instance, require evidence to prove that the person accused of being a member has been involved in any illegal act such as a killing. The crime in fact is considered complete upon proof of membership, which is not defined. This means that people may be criminalized inadvertently, without being aware that what they are doing is unlawful.

The criminalization of membership of "terrorist organizations" may also imply a violation of the right to freedom of association enshrined in Article 22 of the ICCPR: the wording of the section, in fact, could be interpreted to include not only the act of taking part in what can properly be termed "criminal acts" such as killings, but also expressing political opinions by joining an association.

It is to be welcomed that in **section 20** of the Ordinance some exceptions are provided for members of a "terrorist organization" who have not taken part in its activities and for members of an organization declared as "terrorist" after they became its members. Amnesty International believes however that additional safeguards to protect the right to express political

views peacefully should be clearly established in both **sections 3(5) and 20** of the Ordinance. The organization is also concerned that section 20 clearly reverses the burden of proof so that it is on the accused, who has to prove that his case falls in the exceptions spelt out in the text (see below under the heading Burden of proof).

Support to "terrorist organizations"

Amnesty International believes that prohibited acts must be recognizably criminal offences. Prosecution for offences which are not clearly defined or are defined in such a way that they can potentially be used to criminalize peaceful activities are of serious concern. It is important to define precisely all criminal offences by law in the interest of legal certainty - so that everyone can modify their behaviour or know whether this behaviour is lawful or not - and avoid the application of criminal laws from being extended by analogy.

Amnesty International is concerned that in **section 21** of the Ordinance the act of "inviting support" for a "terrorist organization" is made an offence, without a definition of what this act may include. The organization notes that "inviting support" may not involve any encouragement to commit violent and criminal acts. On the contrary it might include the peaceful, private discussion of political ideas. The wording of this section could lead to violations of the rights of freedom of expression established in article 19 of the ICCPR (see below under the heading Freedom of expression), and thus needs to be clarified.

2. PRE-TRIAL SAFEGUARDS

Arrest

The Ordinance (**section 48(2)**) allows for people to be detained for 90 days in police custody without charge or trial. This period can be extended to 180 days on application by the Public Prosecutor to the Special Court, in order to allow the investigations to be completed. Amnesty International believes that this provision of the Ordinance contravenes Articles 9(2) and 9(3) of the ICCPR which require that all arrested persons be promptly informed of the charges against them and that they be entitled to trial within a reasonable time or release. The organization also fears that the possibility of long periods of detention without charge or trial provided by this section might lead to its misuse by the police for aims of preventive detention. This happened in the case of a similar provision of the TADA, and led to a very low percentage of cases of arrest coming to trial. According to reports received by the organization, in fact, the police apparently arrested persons knowing that there was an insufficient basis to justify the arrest under the Act, and detained them up to the maximum period allowed as a form of intimidation. In these cases the investigations were simply not completed and the person was released without charge.

Amnesty International notes the inclusion of certain safeguards under **section 51(1), (2) and (3)** of the Ordinance, providing for the immediate communication about an arrest to be made to a family member or relative, the preparation of a custody memo and the right for the person arrested to meet their legal representative during interrogation. The organization welcomes these safeguards, several of which have been made law through the Supreme Court's judgement in the case of *D.K. Basu vs State of West Bengal* in 1996. However, such

safeguards continue to be widely violated. Therefore it believes that penalties for non-compliance should be clearly set out and disciplinary or criminal proceedings enacted for failure to comply with these requirements.

The organization believes that the same safeguards should also be strengthened. For example, the accused could be required to sign and make a note of the date and time in the custody memo and the custody memo could then be produced for inspection by the legal representative on request and copies made available. The provision for meeting with a lawyer during interrogation, in addition, presupposes that there is a system by which people who do not have sufficient means will be appointed competent, experienced and effective defence counsel to represent them, including during questioning, free of charge as provided for in Article 14(3)(d) of the ICCPR. The possibility for the accused to have access to free legal aid should be clearly restated in section 51.

Amnesty International is concerned by the fact that, while the Ordinance provides for the meeting of the arrested person with a legal practitioner during the interrogation (**section 51(4)**), the same subsection clarifies that "nothing in this sub-section shall entitle the legal practitioner to remain present throughout the period of interrogation". This provision, as it stands, is inconsistent with international standards including the UN Basic Principles on the Role of Lawyers (article 1) and the (UN) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which establish the right of all detained people to have access to a lawyer during pre-trial detention and investigation. The UN Human Rights Committee and the Committee against Torture have also urged all governments to remove all restrictions on immediate access to lawyers and on lawyers being present during interrogation. The Statute of the International Tribunal for Rwanda and the Statute of the International Tribunal for the former Yugoslavia provide that suspects have the right to have legal counsel when questioned by the prosecutor. Amnesty International believes that the Ordinance should state clearly the right of the arrested person to the assistance of a lawyer at all stages of criminal proceedings, including interrogations.

Risk of torture

Section 48(2) of the Ordinance provides, as highlighted above, for 90 days' detention in police custody without charge or trial by order only of a judicial magistrate, which can be extended to 180 days in some cases. The provision for remand also includes the possibility for police to request the transfer of an accused person from judicial to police custody for a period of time for the purposes of further investigation. Amnesty International considers that the periods for which an arrested person may be kept in police custody specified by this legislation are dangerously long. Torture in police custody is in fact acknowledged by the authorities to be widespread.

Some safeguards for arrest have been established under **section 51 (1), (2) (3) and (4)** (see above under the heading Arrest), which if implemented would have also the effect of limiting the use of torture in police custody. The organization believes that the clear establishment under the Ordinance of disciplinary or criminal proceedings for police officers who fail to comply with these requirements would be a clear signal that the use of faulty procedures which facilitate the use of torture will not be tolerated. In addition, subsection 4 should be

amended in order to allow the presence of a lawyer during the whole period of interrogation of a suspect, as it has been widely recognized that prompt and regular access to a lawyer for a suspect functions also as an important safeguard against torture, coerced confessions and other violations of human rights.[7]

The organization is extremely concerned to note the inclusion in the Ordinance of **section 32,** which provides for confessions made to a police officer to be admissible in trial. Confessions in police custody in India are widely documented to be extracted through torture. The Indian Evidence Act excludes such confessions from evidence at trial. On the contrary, section 32 of the Ordinance risks sending a signal that the use of torture to extract confessions would be acceptable in a certain class of cases.

Much has already been said about the dangers of abuse under a similar provision in the TADA. The decision of the Supreme Court bench to uphold this provision of TADA in 1994 was not unanimous. One Supreme Court judge found the section to be "unfair, unjust and unconscionable, offending Article 14 and 21 of the Constitution" (guaranteeing respectively the right to equality before the law and the right to life and personal liberty).

Expressing its view on an identical section (section 27) contained in the Prevention of Terrorism Bill, 2000, the NHRC stated that

"this would increase the possibility of coercion and torture in securing confessions and thus be inconsistent with Article 14(3) (f) of the ICCPR which requires that everyone shall be entitled to the guarantee of not being compelled to testify against himself or to confess guilt. This provision [of the ICCPR] is consistent with Article 20(3) of the Constitution of India. Making confessions before a police officer admissible in evidence would also imperil respect for Article 7 of the ICCPR which categorically asserts "no one shall be subjected to torture or to inhuman or degrading treatment or punishment.""

In **section 32** additional provisions (**sub-sections (2), (3), (4) and (5)**) have been included, designed to provide safeguards for detainees against the possibility of being subjected to torture during interrogations in police custody. The organization welcomes that sub-section 4 requires that a person from whom a confession has been recorded should be produced before a magistrate within 48 hours of the confession having been made. Amnesty International considers that this could be a safeguard to ensure that the accused is being properly treated, and also to ensure that the confession was given willingly and without the use of torture or cruel, inhuman or degrading treatment. However, it is still concerned that 48 hours is a dangerously long period of time and that it should be further limited.

A time limit should be fixed also in sub section 5, for the referral of the detainee complaining of torture to a Medical Officer. Articles 2 and 16 of the UN Convention against Torture require that wherever there is reasonable ground to believe that an act of torture or cruel, inhuman or degrading treatment or punishment has been committed, a prompt and impartial investigation be initiated.

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[7] Human Rights Committee General Comment 20, para.11 ; Report of the UN Special Rapporteur on Torture, (E/CN.4/1992/17), 17 December 1991, para. 284.

In addition, under the same sub-section 5, magistrates should be obliged to ask the detainee about his treatment rather than placing the onus on the detainee to say that he or she has been tortured. It is common for police to threaten detainees to remain silent while being brought before magistrates. According to reports received by Amnesty International, also, when detainees are brought before magistrates, magistrates regularly do not even look up from their work to view the detainee and do not ask questions of the detainee. This means that sometimes the magistrates are unaware that the police have in fact brought someone other than the detainee in question before the court in order to hide marks of torture. Amnesty International believes that these unlawful but common practices need to be addressed and prevented in any new legislation. The organization also notes that in this section, as in the case of section 51, there is no apparent provision for sanctions against police where the safeguards presented above are not complied with.

Section 27 of the Ordinance, provides for samples such as blood, semen or hair to be given by the accused to the investigating officer under a direction of the Court and with the consent of the accused. However, it also provides for such samples to be given by the accused person "through a medical practitioner or otherwise". Amnesty International believes that section 27 should specify that the intervention of a medical officer or other person in order to collect such samples should take place only with the written consent of the accused, to avoid the possibility that torture or cruel, inhuman or degrading treatment is used to obtain samples.

Section 56 of the Ordinance provides for immunity from prosecution for "any authority on whom powers have been conferred under this Ordinance, for anything which is in good faith done". Amnesty International is concerned that this provision effectively results in being an offer of impunity to police officers who use torture or cruel, inhuman or degrading treatment during interrogations. The term "good faith" in fact is extremely wide ranging and vague and it is not clear who should bear the burden of proving it. It could be claimed that even torture of an arrested person suspected of "terrorist activities" is an act done in good faith, for example for the purpose of the fight against "terrorism". On the contrary article 2(2) of the CAT explicitly says that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification of torture". Amnesty International believes that if the use of torture is to be eradicated from the practices of law enforcement officers, any official on whom powers are conferred under this or other pieces of legislation should be held accountable for his or her actions.

All the provisions highlighted in this chapter appear inconsistent with the Government of India's repeated statements that it is committed to eradicating torture. They are also inconsistent with its signature of the CAT, which obliges India, even before the ratification of the treaty, not to do anything which is inconsistent with its object and purpose.[8] The prohibition of torture is absolute and may not be suspended no matter how heinous the crime for which someone has been arrested. It is a right from which, under Article 4 of the ICCPR, the Government of India is not permitted to derogate, even in situations of emergency.

[8] The Government of India signed the Convention in October 1997.

Confidential communication with counsel

Section 14 of the Ordinance allows the investigating officer to require any person to furnish information considered by the officer to be relevant to the purposes of the Ordinance. This section does not exclude lawyers explicitly from the obligation to disclose information obtained from their clients (in contradiction with **section 3(8)** of the Ordinance[9], where the exception is clearly spelt out in the case of lawyers). Amnesty International believes that **section 14** should explicitly exclude defence lawyers from having to comply with such an order. This would assure consistency of the mentioned section with principle 22 of the Basic Principles on the Role of Lawyers, stating that "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within the professional relationship are confidential."

Bail

Amnesty International is concerned by the fact that **section 48(6) and (7)** of the Ordinance effectively give the power of determination of bail to the public prosecutor rather than the court. It provides that no person accused of an offence should be released on bail unless the public prosecutor has been given an opportunity to oppose the application for such release and that where the public prosecutor opposes bail, it should not be granted unless "the court is satisfied that there are grounds for believing that the accused is not guilty of committing such offence".

Subsection 7 is clearly not in conformity with the right of presumption of innocence enshrined in Article 14(2) of the ICCPR, as the granting of bail becomes effectively dependant on a *prima facie* assessment of guilt or innocence by the court and the failure of a court to grant bail can be considered as an assumption of guilt. In addition, this would happen at a stage in the proceedings when the prosecution are not obliged to disclose evidence against the accused. Amnesty International believes that all courts must conduct trials without previously having formed an opinion on the guilt or innocence of the accused. It is of particular concern that the bail procedure set out above would apply during the whole of the first year of detention. The organization considers this to be an extremely long period, particularly given that the ICCPR, in Article 9(3) provides that it shall not be the general rule that persons are detained prior to trial. Release pending trial, on the contrary, may be conditional on guarantees to appear for trial or other compelling circumstances, such as to ensure that witnesses or the evidence are not interfered with, or if the accused poses a serious risk to the society which cannot be contained by other means.

Section 48(9) of the Ordinance is of concern to Amnesty International as it states that "no bail shall be granted to a person [...] if he is not an Indian citizen and has entered the country unauthorizedly or illegally". This provision appears to violate article 14(1) of the ICCPR affirming that "all persons shall be equal before the courts and tribunals". It would result, if implemented, in a discriminatory procedure for granting of bail: in this case release pending trial would in fact be conditional on citizenship and based on the assumption that a person who

[9]Section 3(8) require any person in possession of information on a terrorist act to disclose it to the police.

entered the country illegally would continue to act illegally. Granting of bail, Amnesty International believes, should be made conditional on guarantees to appear for trial.

3. RIGHTS AT TRIAL

Jurisdiction and composition of Special Courts: their independence from the executive power

Most international standards do not prohibit *per se* the establishment of special courts. What is required, however, is that such courts are competent, independent and impartial, and that they afford applicable judicial guarantees so as to ensure that the proceedings are fair. The Human Rights Committee has clarified that while the ICCPR does not prohibit trials of civilians in special courts, "the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14 [of the ICCPR].[10] Amnesty International believes that these criteria are not fully met in chapter IV of the Ordinance.

Section 23(3) of the Ordinance provides that determination of issues relating to the jurisdiction of Special Courts is decided by the executive and not by law or the judiciary. This provision is inconsistent with the right to a trial before a competent, independent and impartial tribunal and Principle 3 of the Basic Principles on the Independence of the Judiciary which states that "The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."

Subsections 4 and 5 of section 23, which provide for the appointment of judges by the Central or State Government "with the concurrence of the Chief Justice of the High Court" are equally inconsistent with the above mentioned right to a trial before a competent, independent and impartial tribunal, particularly if judges are selected to try cases in Special Courts set up for individual cases. Under Principle 14 of the Basic Principles on the Independence of the Judiciary, the assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Presumption of innocence and burden of proof

Amnesty International is concerned that several provisions of the Ordinance undermine the principle of presumption of innocence, namely:

- **Section 4** of the Ordinance seeks to re-enact the section 5 of TADA which was widely abused and criticised. It raises an irrebuttable presumption that if a person is found in unauthorised possession of arms in a "notified area", such possession is automatically connected with "terrorist acts" and the offence, normally punishable under the Arms Act, becomes triable under the Ordinance's special provisions, where few legal safeguards and heavier sentences upon conviction apply. This provision was widely used and abused under TADA and it is important to note that one of the Supreme Court judges in *Kartar Singh vs.*

[10] Human Rights Committee General Comment 13, para. 4.

State of Punjab gave a dissenting opinion when this section of TADA was upheld by the Court.

< **Section 27(2)** establishes that if an accused refuses to give samples of his hand writing, finger prints, foot prints, photographs, blood, saliva, semen, voice, hair or blood, the court shall "draw adverse inference" against the accused. Amnesty International observes that the accused might not whish to give the requested samples, especially the most intimate ones, for all sorts of reasons, including reasons not linked to the trial proceedings.

< Similarly, **Section 52** obliges the Special Court to "draw adverse inference" against the accused if arms are recovered from the possession of the accused and there is reason to believe that they were used in the commission of an offence and if an expert finds fingerprints of the accused on the site of the offence or on anything used in connection with the offence. However, the organization believes that the possession of an weapon cannot imply the involvement of its owner in an offence unless this is proved by the prosecution. The same section doesn't clarify whether the prosecution or the accused will bear the burden of proof in these cases. Amnesty International considers that, in accordance with the principle of presumption of innocence, the rules of evidence must ensure that the prosecution bears the burden of proof throughout the trial, and this should be stated clearly in section 52.

< **Subsections (6) and (7) of section 48** of the Ordinance are clearly not in conformity with the right of presumption of innocence by providing that bail cannot be granted if opposed by the Public Prosecutor "until the court is satisfied that there are grounds for believing that he is not guilty of committing such offence" (see above under the heading Bail).

< For the violation of the principle of presumption of innocence in **section 18** (proscribing a number of organizations through naming them in a list) and the reversal of the burden of proof in **section 20** (offence relating to membership of "terrorist organizations"), see below under the heading Listing of banned groups. For the violation of the same principle under **Section 48 (6), (7) and (9)** (modified application of provisions on bail) see above under the heading Bail.

Amnesty International believes that everyone has the right to be presumed innocent, and treated as innocent, until and unless they are convicted according to law. This principle is upheld in several international human rights standards, such as the Universal Declaration of Human Rights (article 11), the ICCPR (article 14(2)) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (principle 36(1)).

Public trial

Section 30(1) of the Ordinance provides for trial *in camera* if the Special Court "so desires", with the reasons to be given in writing. Amnesty International believes that this section is in violation of Article 14(1) of the ICCPR as the decision to hold the trial *in camera* is based solely on the discretion of the court trying the case without reference to clearly defined criteria. International standards including the Universal Declaration of Human Rights (article 10 and 11) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (principle 36(1)), require that except in narrowly defined circumstances, all court hearings and judgements, including criminal proceedings, must be public.

Witnesses

Sections 30(2) and (3) of the Ordinance allow for the identity and address of witnesses to be kept secret on the court's own initiative or on application of the witness or the public prosecutor, if satisfied that the life of a witness is in danger. There is no procedure to hear the accused on this issue. This denies the accused the rights adequately to prepare his or her defence, to obtain the necessary information to challenge the witness's reliability and to examine witnesses on the same terms as the prosecution as guaranteed by Articles 14(3)(b) and 14(3)(e) of the ICCPR. This provision, which was included in TADA, was criticized by the Supreme Court in the *Kartar Singh* case: "Whatever may be the reasons for the non-disclosure of witnesses, the fact remains that the accused persons to be put up for trial under this Act which provides severe punishments, will be put to disadvantage to effective cross-examining and exposing the previous conduct and character of the witnesses."

International standards require that the rights of victims and other witnesses to be protected from reprisals and from unnecessary anguish have to be balanced against the right of the accused to a fair trial. One of the fundamental principles set out in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is that "the views and concerns of victims [should] be presented and considered at appropriate stages of the proceedings... without prejudice to the accused and consistent with the relevant national criminal justice system."

Safeguards for interception of communications

Section 44 of the Ordinance provides, as a safeguard for the accused, that the evidence collected through an authorized interception of his or her communications will be admissible in court only if the accused is furnished with a copy of the order of the Competent Authority and accompanying application. Amnesty International believes that the accused and his or her lawyer should also be given the opportunity to review the content of the evidence in this way collected, so that this can be challenged during the trial if needed.

The organization believes also that an exception should be clearly made in **sections 37, 42 and 44** so that the interception of communications between an accused person and his or her lawyer will not be authorisable and will not be accepted as evidence in court. Principle 22 of the Basic Principles on the Role of Lawyers states that "governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential".

Review and redress

The provision for "Review Committees" contained in **section 59** does not, in Amnesty International's view, ensure sufficient independent supervision of the procedures established by the Ordinance as envisaged in international standards. The Review Committees make decisions about the denotification[11] of "terrorist organizations" and the interception of communications,

[11] Denotification is the term used in the text of the POTO and refers to the removal of an organization from the list of organizations declared "terrorist."

which have a bearing on assessments of guilt or innocence and the admissibility of evidence and thus should be subject to all the guarantees of independence applicable to the judiciary. Section 59 does not contain detailed guidelines concerning the operation of these committees. It appears that they are made up on personnel appointed directly by the executive and that there is no mention of the right of the detainee to make a representation before a Review Committee. In addition, there are no provisions setting out the powers of such Committees, including for instance whether or not they would have the power to review whether the application of the Act is justified in terms of the objectives or lawful in terms of procedure. No periodicity is established for their reviews and it is not clear whether they would have the powers to discontinue a case if they consider it necessary.

Impunity

Section 56 of the Ordinance provides for immunity from legal proceedings and prosecutions for the Central and State governments and officials acting "in good faith" under the legislation. Amnesty International has for many years repeated its concerns about impunity for human rights violations in India. In particular it has expressed concerns about provisions replicated in numerous laws which restrict the right of individuals to challenge the actions of the government. Article 2(3) of the ICCPR establishes that each State Party to that Covenant undertakes “to ensure that any person whose rights or freedoms [...] are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

The organization is particularly concerned to note that a further provision of section 56 refers to immunity for "any serving member or retired member of the Armed Forces or other para-military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combatting terrorism". This extremely broadly formulated provision which does not even limit its remit to actions taken in good faith under the Act but to undefined "operations directed towards combatting terrorism", in Amnesty International's view amounts to a blanket immunity for abuses by security forces and substantially undermines the safeguards in the Ordinance.

The NHRC expressed its view on an identical section of the POTB as follows: “Clearly, too, such a provision would adversely affect the already limited jurisdiction of the National Human Rights Commission under Section 19 of the Protection of Human Rights Act, 1993 to deal with complaints alleging the violation of human rights by members of the Armed Forces and, in consequence, further militate against the express purpose of that Act that the Commission should ensure the "better protection" of human rights in the country.[12]”

While Amnesty International acknowledges that **section 57** of the Ordinance provides for the possibility of punishment of a police officer for corrupt or malicious proceedings, it believes that this provision is not sufficient to guard against impunity. As seen in this chapter, in fact, important limitations exist in the Ordinance against challenging the actions of not only police officers but other executive and judicial officials involved in the arrest and detention process.

[12] See NHRC, “Opinion on the Prevention of Terrorism Ordinance, 2001.”

Death penalty

Amnesty International opposes the death penalty unconditionally on the grounds that it is the ultimate form of cruel, inhuman or degrading punishment and a violation of the right to life. The organization is thus concerned to note the provision of the penalty of death under **section 3(2)(i)** for "terrorist" offences which result in death, which is potentially a wide class of offences. Currently Indian law only applies the death penalty for convictions for murder. Therefore implementing this provision could extend the potential use of this punishment. The UN Commission on Human Rights's resolution (2000/65) of April 2000, on the contrary**,** calls on all States that still maintain the death penalty to "progressively restrict the number of offences for which the death penalty may be imposed; to establish a moratorium on executions, with a view to completely abolishing the death penalty; and to make available to the public information with regard to the imposition of the death penalty".

The Human Rights Committee when examining India's third periodic report under the ICCPR in 1997 recommended that the number of offences carrying the death penalty be reduced with a view to its ultimate abolition. Amnesty International's concern about including provisions allowing for the death penalty in this Ordinance are heightened by its belief that provisions of the Ordinance provide for the possibility of unfair trials.

4. LISTING OF BANNED GROUPS

Amnesty International is concerned by the fact that the Ordinance contains, in a schedule attached to **section 18**, a list of organizations which are declared as "terrorist" and that the procedure for inclusion or removal of an organization from that list might violate the principle of presumption of innocence. It appears in fact that section 18 provides for the possibility of appeal against the inclusion of an organization on the list only after that organization has been put on it and therefore after it has been criminalized. This is particularly worrying as membership of such organizations is made an offence in itself in section 3(5) and in section 20. The inclusion of an organization on the list would thus imply the automatic criminalization even of those of its members who might not have taken part in criminal acts such as killings.

The inclusion on a public list - like the one contained in the Ordinance - of certain organizations which are identified by public opinion with specific communities or ethnic groups may risk labelling these communities or ethnic groups as "terrorist", thus opening up the possibility of their victimization by the general public.

In addition, **section 19** of the Ordinance (to be read together with **section 59**) leaves the entire procedure for the denotification of a "terrorist organization" from the mentioned list dependant from the discretion of the central government. The first application for denotification must in fact be submitted directly to the central government, while the second would go to the Review Committee. However the members of the Review Committee, while not being themselves government officers, are nevertheless appointed by the central or the state government, and might be subject to pressures from these institutions.

Finally, **section 53** of the Ordinance excludes the possibility of a judicial review of the decisions of the Review Committee (on both the denotification of an organization from the list

and the interception of communications) by the ordinary civil courts. Amnesty International considers that this procedure excludes a genuine option for appeal on matters relating to criminal charges and will not ensure sufficient independent supervision as envisaged in international standards. (See above under the heading Review and redress).

Amnesty International believes the identification of "terrorist organizations" should take place through the establishment of tight criteria for the definition of a "terrorist organization" and of membership of a "terrorist organization", rather than by publicly targeting specific organizations through naming them in a list. This would avoid the violation of the principle of presumption of innocence, the criminalization of members of "terrorist organizations" not involved in criminal acts and the risk of victimization of certain communities or ethnic groups.

5. FREEDOM OF ASSOCIATION

The powers to proscribe organizations also criminalize, in **section 21(2)**, anyone "arranging, managing or assisting in arranging or managing" a meeting where a member of a "terrorist organization" is speaking. The "meeting" could consist of three people "whether or not the public are admitted", including in this way also private meetings and discussions. This would mean that any journalist, researcher, human rights activist or other professional meeting with any member, even if inactive, of a "terrorist organization" - also for a peaceful purpose different from supporting the "terrorist organization" - would be guilty under the Ordinance. The penalty for the latter offence would be imprisonment for up to 10 years. Amnesty International is concerned that these powers may infringe on the rights to freedom of association and, if anyone were to be imprisoned only for arranging such a meeting in such circumstances, the organization would consider him or her to be a prisoner of conscience.

6. FREEDOM OF EXPRESSION

Amnesty International is concerned that **section 3(8)** of the Ordinance (which provides for punishment for those in possession of information known to be of material assistance in preventing a "terrorist act" or in securing the apprehension, prosecution or conviction of a person for an offence under the Ordinance), could be used against journalists and others investigating and reporting on the activities of individuals under suspicion of the state and would directly impair their right to freedom of expression. This threat to the right to freedom of expression is reinforced by **section 14** of the Ordinance which gives powers to investigating officers to require individuals to furnish information in their possession and provides for punishment of up to three years' imprisonment for failure to do so. The NHRC, commenting on an almost identical section of the POTO, affirmed that it "would have a chilling effect on human rights" and "could gravely jeopardize the work of professionals such as journalists. The provision would also run counter to Article 19 of the ICCPR dealing with the right to the freedom of expression, which includes the right "to seek, receive and impart information and ideas of all kinds".

Amnesty International notices that very similar provisions are contained in other "anti-terrorism" laws or emergency powers in other countries, and that these provisions have shown to have led to abuses. In the United Kingdom, for example, police have used emergency powers (later made permanent in the *Terrorism Act, 2000*) to obtain court orders to force journalists to hand over to the police information in their possession which the police claim may be useful

to their investigation. These powers are believed by Amnesty International to have been used by the police in order to intimidate journalists from pursuing certain lines of inquiry which may be embarrassing for the authorities; these cases have mainly involved investigative journalists who have refused to hand over information which was obtained in confidence from their sources or who have refused to reveal the name of their source. These journalists were exposing possible human rights violations by agents of the state and the attempts by the authorities to force journalists to reveal their sources or confidential information could have a adverse effect on freedom of expression. Amnesty International considered that such journalists, if imprisoned, would have been prisoners of conscience.

CONCLUSION

As a party to the ICCPR, the Government of India cannot derogate from rights set out within the treaty without officially declaring a state of emergency.[13] Certain rights within the ICCPR are non-derogable under any circumstances.[14] These include the right not to be subjected to torture, which Amnesty International believes is threatened by provisions of the Ordinance. In hearing India's second periodic report of measures taken to implement the government's obligations under the ICCPR, members of the Human Rights Committee expressed concern that TADA abrogated rights within the ICCPR, by in effect establishing a continuing state of emergency. They further expressed concern that no emergency had been formally declared by the Government of India as required under the ICCPR and that no time limit had been indicated for the term of such a situation of emergency. The latter concern is particularly relevant in light of the fact that the POTO is proposed for a five-year term (as opposed to TADA which had a two-year term).

Amnesty International believes that in discussing the enactment of this Ordinance, Members of Parliament should be mindful of India's obligations under human rights treaties as well as its obligations to the people of India under the Constitution. By enacting the POTO as it now stands, Parliament would be giving its assent to the violation of articles of the ICCPR set out above as well as articles of its own Constitution.

Amnesty International believes that Members of Parliament, while forming their opinion on the issue, should keep in mind the constructive stand the NHRC took in July 2000 at the occasion of the discussion on the POTB. At that occasion the NHRC affirmed that in its opinion a new text aimed to prevent “terrorist activities” was not needed in India. All the actions and offences covered by the POTB, in fact, were already covered by a large number of other security laws as well as by ordinary law.

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[13] Article 4(1) of the ICCPR states that "In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"

[14] Article 4(2) clarifies that no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made.

The NHRC further affirmed that the solution for the problems of effectively securing convictions for "terrorists" under the criminal justice system and of the great delay of trials - presented by the government as a justification for having a new law - were to be solved through the strengthening of the criminal justice system rather than through the promulgation of a new law:

"There are three stages at which remedial measures need to be taken on an urgent basis by the Government to strengthen the criminal justice system:

The stage of investigation: unless investigation is carried out speedily and efficiently, it is not possible to have a speedy and effective trial leading to conviction. The investigation machinery must be independent and free from political or any other kind of interference, an imperative to which NHRC has drawn attention in successive Annual Reports to the Parliament. Unfortunately, as various Police Commission Reports and the experience of the NHRC have shown, constant political interference with the police force has seriously impaired the ability of the police to investigate crimes freely and efficiently. There is also a need for giving proper training for efficient and effective investigation, including improvement of forensic skills and laboratories, another matter to which the National Human Rights Commission has repeatedly drawn attention. Such training and facilities are at present sadly lacking. ... There is, therefore, an urgent need to have independent and well-trained investigation machinery to investigate crimes, particularly, crimes related to terrorism.

There must also be efficient prosecution on behalf of the State, of all such crimes. Once again in the above case [Veneet Naraian & Ors. Vs. Union of India &Ors. (1998) 1 SCC 226], the Supreme Court has observed: "The recent experience in the field of prosecution is also discouraging ... discharge of the accused on filing of the charge-sheet indicates, irrespective of the ultimate outcome of the matters pending in the higher courts, that the trial court at least was not satisfied that a prima facie case was made out by the investigation. These facts are sufficient to indicate that either the investigation or the prosecution or both were lacking ... Investigation and prosecution are interrelated and improvement of investigation without improving the prosecution machinery is of no practical significance. It is, therefore, essential that experienced Public Prosecutors are appointed to prosecute crimes involving terrorism and that they are appointed in sufficient numbers."

The delays in criminal courts are also undermining the criminal justice system. One of the main causes of delay is shortage of courts. It is necessary to create many more Sessions Courts, provide the necessary infrastructure to these Courts and to appoint many more Sessions Judges who are competent and possess integrity. The judiciary can be requested to give training or refresher courses to these Sessions Judges at the various Judicial Academies of the various States for speedy disposal of cases before them without undermining judicial adjudication. Criminal trials especially those dealing with serious offences which are tried by the Court of Sessions need to be speedily conducted and disposed of. There can be no doubt that amongst these cases, those dealing with acts of terrorism must be given preference for early disposal (preferably within six months). But, for this purpose, it is essential that depending upon the number of such crimes in each State, and bearing in mind the average disposal per Judge, adequate numbers of

additional Sessions Judges are appointed in each State, along with adequate numbers of Public Prosecutors who will prosecute the cases before them and additional courts are accordingly set up with the necessary infrastructure. This has to be done on an urgent footing. When this is done, crimes connected with terrorist activities should be given priority before the Sessions Courts in those States where such additional Sessions Courts are set up along with all the above concomitants. Obviously in those States where terrorism is rampant, additional courts will have to be set up as early as possible and the Union Government should, wherever necessary, assist the State Government in financing such additional courts.

The correct remedy for speedy trial and punishment of crimes connected with terrorism in India - the NHRC concluded - *is proper strengthening of the crime investigation and prosecution machinery and criminal justice system. If there are a large number of acquittals today, it is not for lack of any laws but for lack of proper utilisation of these laws, lack of proper investigation and prosecution, and lack of adequate number of courts to try the offences. Unless this root problem is redressed, adopting draconian laws will only lead to their grave misuse as has been the case with the previous TADA law.*"

Amnesty International believes that the above commentary by the NHRC on the POTB also applies to the POTO. The organization appeals to all the Members of Parliament to keep in mind, while forming their opinion on the POTO, this constructive suggestion of the NHRC, as well as the inconsistency of the POTO with international human rights standards to which India is a party.