

**Executive Summary of the South Asia Hearing**  
**New Delhi, India**  
**27 February – 1 March 2007**

*“The Commission is of the firm view that though nothing justifies terrorism, far too many people live in conditions where it can breed...It cannot be denied that disillusionment with a society where there is exploitation and massive inequalities and whose systems fail to provide any hope for justice are fertile breeding grounds for terrorism...Proper observance of human rights is not a hindrance to the promotion of peace and security. Rather, it is an essential element in any worthwhile strategy to preserve peace and security and to defeat terrorism.”*

(Written submission by National Human Rights Commission of India)

From 27 February to 1 March 2007, the Panel, represented by Justice Arthur Chaskalson and Professor Vitit Muntarbhorn, held a sub-regional Hearing on the South Asian experience of terrorism and counter-terrorism, covering India, Nepal, Sri Lanka, Bangladesh, and the Maldives. During the public sessions of the Hearing organised by the Institute of Social Sciences (ISS), the Panel heard testimonies from current and former state officials, leading advocates, senior retired judges, representatives of bar associations, journalists, and national and international civil society organisations. The Panel members also held private meetings with senior governmental officials of India, including the Home Minister, the National Security Advisor to the Prime Minister, the Director General of the Border Security Force, the Special Representative to the Government of India for Jammu and Kashmir Dialogue and the Acting Chairperson of the National Human Rights Commission of India.

**1. Overview of the threat of terrorism and States’ responses in South Asia**

The countries of South Asia have long experiences of terrorist acts, often committed in the context of internal armed conflicts with ethnic, economic, social and other causes. Many counter-terrorism laws and policies in the region thus predate the events of 11 September 2001. However, the testimonies from participants from many of these countries highlighted the fact that the changed international climate since 2001 has had an impact on the policies and practices of these countries, giving new legitimacy to existing security laws and practices or leading to their revival.

**Indian** participants emphasised that since early in its post-colonial history and long before 2001, India has experienced violence related to separatist or insurgent movements involving terrorist acts in various parts of its territory, including a Sikh separatist movement in Punjab in the early 1980s to the early 1990s, the on-going cross-border insurgency in Jammu and Kashmir since 1989, and secessionist movements in the North-eastern states such as Assam and Manipur. India has also recently seen a significant rise in violence related to the left-wing extremist movement called “Naxalites”. Most of these threats have led to the enactment of special laws at the state and/or federal level. Many participants stressed that while the international efforts against international terrorism since 2001 had been used to justify new anti-terrorism law and practices, many forms of “terrorism” in India were of longstanding and local character and criticised the trend of branding them together as “terrorists”.

Since the 1970s, **Sri Lanka** has been involved in an internal armed conflict with Tamil separatist groups, notably the Liberation Tigers of Tamil Eelam (LTTE), with a fluctuating level of intensity. The violence had been largely dealt with by military action as well the use of a stringent anti-terrorism law in place since 1979 and a series of emergency regulations. After a period of relative stability and a peace process that followed the Ceasefire Agreement in February 2002, violence has increased since April 2004 with the introduction of a new Government which has taken a more hard-line attitude toward the conflict. All participants from Sri Lanka were unanimous in their view that there had been a significant deterioration in the general human rights situation and a notable increase in serious abuses by both sides, including abductions, enforced disappearances, killings of civilians, extortions, and recruitment of child soldiers. Many participants objected to the treatment of the ethnic conflict as one of “terrorism” and “counter-terrorism,” which, in their view, ignored the complexities of the situation in Sri Lanka. Several participants also expressed concern that the Government has used Sri Lanka’s international obligations to prevent and suppress terrorism, in particular, under the Security Council Resolution 1373 (2001), to justify the re-introduction of far-reaching emergency regulations.<sup>1</sup>

Participants from **Nepal** noted that the use of violence by political parties to bring about social, economic and political changes had been common since its independence and that already in 1996, armed activities of the Communist Party of Nepal (Maoists) (*hereinafter*: CPN (M) or the Maoists) had started to pose a serious challenge to the Nepali Government. Nepali participants argued that the 9/11 attacks in the United States gave a pretext for the Government to take a more coercive approach toward the CPN (M), leading to the mobilisation of the military in November 2001 and the subsequent promulgation of the anti-terrorism ordinance and law. Many participants also noted that the threat of “terrorism” was abused by the King of Nepal to legitimatise the dissolution of the Parliament and the assumption of direct power in October 2002. Participants stressed during the conflict there were serious abuses committed by both security forces and the CPN (M), including killings of civilians, enforced disappearances and torture. After the reinstatement of the Parliament in April 2006, the CPN (M) called the ceasefire and became part of the interim Government. The Panel was told that the country was currently engaged in a process of establishing a new constitutional order and discussing how to deal with accountability for past abuses.<sup>2</sup>

*“The activities of Communist Party of Nepal (Maoist) were initiated in 1996 and until 2001 were dealt under the existing legislation and conventional offences. However, given the level and scale of disturbed activities, the Government was forced to opt for special measures and thus promulgated Terrorist and Disruptive Activities Control and Punishment Ordinance (TADO) in 2001. It was mainly a political decision. The disruptive*

<sup>1</sup> Article 5 of the Emergency (Prevention of Terrorism and Specified Terrorist Activities) Regulations No. 7 (ER 2006) promulgated on 6 December 2006 provides: “Being mindful, of the need to efficaciously give effect to obligations cast on the Democratic Socialist Republic of Sri Lanka by international Conventions and other legally binding international legal instruments relating to the prevention and suppression of terrorism to which Sri Lanka is a Party to, including in particular the United Nations Security Council Resolution No. 1373 (2001) adopted on September 28, 2001 under Chapter VII of the United Nations Charter it became obligatory for the Government to take meaningful measures to prevent and suppress terrorism.”

<sup>2</sup> As a result of the election held in April 2008, the CPN (M) became the biggest party in the Constituent Assembly, tasked to draft a new Constitution as well as to act as the legislature for two years. The leader of the CPN (M) Prachanda became the Prime Minister in August 2008.

*activities began before the 9/11 incident. However, US Policy indirectly or directly pushed the Nepal Government to initiate strong legal measures in the background of disruptive activities going on in Nepal..." (Oral testimony by Chet nath Ghimeri, Deputy Attorney General, Attorney General's Office, Nepal)*

During the 1970s and 1980s, **Bangladesh** experienced armed activities by tribal groups in Chittagong Hill Tracts in resistance to the settlements by Bengali people and the Government's attempts to suppress them, including through the use of the army and repressive national security and anti-terrorism laws. While the violence in the region has subsided since the conclusion of a peace treaty in 1997, participants noted that the country has recently seen a rise of violent attacks by Islamic fundamental groups, mainly targeting the judiciary, intellectuals and the independent media.<sup>3</sup> Participants alleged that due to the alliance between the Bangladesh Nationalist Party (BNP), one of the two major political parties in Bangladesh, and Jamaat-e-Islami, the biggest Islamist political party accused of sponsoring these groups, the BNP-led Government in power from 2001-2006 had failed to take strong action against terrorism until the 2005 serial bomb attacks in 63 out of 64 districts in Bangladesh. While Bangladesh had not enacted special anti-terrorism legislation since 2001, the Assistant Attorney General of Bangladesh stressed that many suspected terrorists had been successfully arrested and tried under existing law. She also referred to the plan for a new anti-terrorism ordinance to be introduced by the caretaker Government, established after the declaration of a state of emergency to deal with street violence ahead of a general election scheduled in January 2007.<sup>4</sup>

In November 1988, the **Maldives** experienced a violent coup plot involving Sri Lankan mercenaries, leading to the promulgation of the 1990 anti-terrorism law. While the Assistant Attorney General from the Maldives argued that there were groups using religion as a tool to solicit support for terrorist activities that needed to be tackled, members of civil society pointed out that there had been no recent terrorist attacks or plots in the Maldives and questioned the existence of a terrorism threat in the country.

## **2. Special counter-terrorism laws and their abuses**

Nearly all anti-terrorism laws in the region, adopted both before and after 2001, are characterised by broadly defined offences, extended powers of law enforcement agencies to search, arrest, and detain suspects, more relaxed rules governing trial of such offences and reduced mechanisms of oversight or accountability.

### **2.1. Broadly defined terrorism offences**

In **India**, it has been a common practice for different states affected by insurgency or separatist movements to enact special security laws applicable to their territory. The first anti-terrorism legislation at the federal level was the 1987 Terrorist and

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<sup>3</sup> For example, Sumi Khan from *Weekly Ekattor*, told the Panel that she had been victim of harassment and death threats for writing about the activities of Islamic fundamentalist groups such as Jamaat-ul-Mujahideen Bangladesh (JMB) under the shelter of Jamaat-e-Islami.

<sup>4</sup> A state of emergency was declared in January 2007 to tackle violence ahead of a scheduled general election following accusations of rigging. The caretaker Government has since given priorities to hold free and fair general elections and to fight corruption, detaining both the leader of the BNP, Khaleda Zia, and the leader of the Awami League, Sheikh Hasina Wajed, on corruption charges for a year. The state of emergency was lifted on 18 December 2008 ahead of the general election held on 29 December 2008. The election resulted in a landslide victory for the alliance led by the Awami League.

Disruptive Activities (Prevention) Act (TADA), enacted in response to the Sikh separatist movements mainly in the state of Punjab. Participants argued that due to the broad definitions of the offences and weak oversight over the law enforcement authorities, the TADA was largely used for non-terrorist acts against trade unionists, university students and other opponents of the Government, often in a discriminatory manner. For instance, the TADA criminalised unauthorised possession of arms, including pistols and revolvers, or ammunitions in “notified areas”, regardless of the intent to further a terrorist act, which could be punished by up to life imprisonment.<sup>5</sup> The Panel was informed that according to the National Human Rights Commission report, of the 65,000 individuals detained under the TADA between 1985 and 1995, 19,000 of them were reportedly in Gujarat, a state without any significant terrorism problem, rather than in Punjab, Kashmir or North Eastern states. After repeated renewals, mostly with little parliamentary debate, the TADA was allowed to lapse in 1995 due to the strong opposition against its abuses and to the decline of violence in Punjab.

In October 2001, shortly after the 9/11 attacks in the US, the Government promulgated the Prevention of Terrorism Ordinance (POTO) by Presidential decree, reintroducing many aspects of the TADA. Following the attacks on the Jammu & Kashmir Assembly and the Indian Parliament buildings in December 2001, the Parliament affirmed the POTO and replaced it with the Prevention of Terrorism Act (POTA) in March 2002. Many participants testified that similar to the TADA, the POTA created broadly defined “terrorism act” and related offences, which encouraged their arbitrary and discriminatory application. According to the Commonwealth Human Rights Initiative, in the state of Jharkhand, it was widely used against tribals and lower caste Dalits who were alleged to be Maoists, often on the basis of suspected actions or association of family members. Many participants, such as Colin Gonslaves from Human Rights Law Network, also made reference to the events in the state of Gujarat in 2002 as an example of discriminatory application of the POTA. Whereas Muslims suspected of involvement in a train fire killing 49 Hindu passengers were charged under the POTA, ordinary criminal law was applied to Hindus suspects of subsequent communal violence during which hundreds of Muslims were tortured and killed.<sup>6</sup> Several participants also noted that the POTA had been abused against political opponents, such as Vaiko, a prominent Tamil politician accused of supporting the LTTE. While the POTA was repealed in response to strong opposition in 2004, serious concern was raised that many of the broadly defined terrorism offences had been incorporated into the amendments to the 1967 Unlawful Activities (Prevention) Act (UAPA), introduced immediately after the repeal of the POTA.<sup>7</sup>

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<sup>5</sup> Section 5 of the TADA provided: “Where any person is in possession of any arms and ammunition specified in Columns 2 and 3 of Category I or Category III (a) of Schedule I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.” Section 4 of the POTA contained a similar provision.

<sup>6</sup> In April 2006, the POTA Review Committee established following the repeal of the POTA, recommended that all the 120 charged under the POTA be tried under relevant sections of the Indian Penal Code for murder, arson and rioting. While the state of Gujarat had refused to implement the recommendations, the Supreme Court of India in October 2008 rejected its argument that the recommendations were non-binding.

<sup>7</sup> Shortly after the Mumbai terrorist attacks of 26-29 November 2008, in which about 170 people were killed, the Indian Government introduced and the Parliament passed two new anti-terrorism bills, the National Investigating Agency (NIA) Bill, 2008 and the Unlawful Activities (Prevention) Amendment

*"In the legislation like TADA and POTA, misuse is inevitable in their implementation whatever the provision may say. There is a provision in TADA which needs to be interpreted that unless there is active element of incitement it is incorrect to term an act as a terrorist act. Otherwise many fundamental rights like freedom of speech also will be curtailed. Even with all these safeguards I must admit that the minority community, the Muslims, had to face lot of problems. Even POTA has certain provisions to exercise internal control on the excesses done. But in practice the misuse is rampant. Counter terrorism measures are used to dub a political opponent or political dissent as a terrorist."*  
(Oral testimony by Soli Sorabjee, former Attorney General of India)

In **Sri Lanka**, in addition to emergency regulations periodically promulgated since 1971, the Government has used a stringent anti-terrorism law, the 1979 Prevention of Terrorism Act (PTA), in its conflict with the LTTE. The offences under the PTA are broadly defined and include a wide variety of acts, ranging from violent crimes like murder and robbery, to petty crimes like mischief to public property, interference with public signs and notices, and the speaking or writing of religious, racial or communally divisive language.<sup>8</sup> Participants pointed out that the application of the PTA had been subject to four-year suspension pursuant to the 2002 ceasefire agreement. However, the emergency regulations promulgated after the August 2005 declaration of a state of emergency have given government forces powers equivalent to those under the PTA.<sup>9</sup> Particular attention was drawn to the Emergency (Prevention of Terrorism and Specified Terrorist Activities) Regulations No. 7 (ER 2006) promulgated on 6 December 2006, which introduced a broad definition of "terrorism" and a long list of terrorism related offences, including offences under the PTA.<sup>10</sup> Participants raised serious concerns that the regulations could cover not only ordinary crimes but also legitimate activities, such as democratic and humanitarian work, and would lead to further polarisation of society.

*"...in Sri Lanka the regulations introduced under the declared state of emergency created the first definition of terrorism in that country. This definition is so broad that it defines all acts by Tamil separatists as terrorist. This hugely ignores the complexity of the situation in Sri Lanka and the fact that some of these actions are legitimate political dissent and some are more appropriately considered as traditional criminal activities."* (Oral testimony by Tessa Boyd-Caine, CHOGM Coordinator, Commonwealth Human Rights Initiative)

*"The anti-terror regulations of December 2006 and the rhetoric of "terrorism" have both affected the ability of NGOs to do humanitarian work...The polarizing character of "terrorism" is that it also allows the non-state force to argue that it is either "terrorism" or "national liberation". The options in the middle in relation to democratisation and human rights protection are disregarded."*  
(Oral testimony by Ahilan Kadirgamar, human rights activist, Sri Lanka)

Similarly, in **Nepal**, the Terrorist and Destructive Activities (Control and

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(UAPA) Bill, 2008. The latter broadened the definition of a terrorist act under the UAPA and created additional terrorist offences.

<sup>8</sup> Section 2 of the PTA.

<sup>9</sup> Since its promulgation on 12 August 2005, the state of emergency in Sri Lanka has been extended every month with the approval of the Parliament.

<sup>10</sup> Since the Government formally withdrew from the 2002 ceasefire in 16 January 2008, the entire provisions of the PTA are now back in force.

Punishment) Ordinance (TADO) promulgated by the King on 26 November 2001 contained a broad definition of a “terrorist and destructive activity,” covering, among others, “any act which causes damage or destroys property at any place by using any kind of arms, bombs, explosive substances or other equipment or goods” committed with intent to “jeopardise or undermine the sovereignty, integrity, security or peace and order of the Kingdom or any part thereof...”. The definition also included acts of “abetting, knowingly and directly or indirectly, persons or groups involved in terrorist and disruptive activities by providing financial or material support or shelter.”<sup>11</sup> The Panel was told that under this broad definition, even lawyers representing detainees were detained under the TADO.

*“When the 9/11 incident occurred the Government introduced anti-terrorist legislation through an ordinance. (...) The definition of terrorist acts was so ambiguous anything and everything was covered under the definition. Any direct or indirect services provided to the terrorist like providing forced shelter, food are also considered as acts of terrorism. Hundreds of people were detained in military barracks. The detainees were denied basic rights and access to their lawyers and family members. Lawyers were particularly targeted and we had to relocate a number of lawyers. Lawyers who were working for the detainees and even judges were considered as terrorists and the military detained them. Nobody could access these barracks. So the society became silent. Human rights activists, lawyers providing legal aid to the detainees were threatened by the security forces and the Maoists as well. Even women and children were targeted and accused of spying by the Maoists. Journalists who wrote about these illegal detentions were targeted.”*

(Oral testimony by Mandira Sharma, Secretary General, Advocacy Forum, Nepal)

Participants criticised the 1990 **Maldives’** Prevention of Terrorism Act (PTA) as containing an extremely broad definition of a terrorist act. The definition encompasses a broad range of acts, from killing and kidnapping to storage of any explosive substance, ammunition or firearms and “making threats to cause harm or damage to person(s) or property orally or in writing or other means”, mostly with no additional element to distinguish them from ordinary offences, such as the purpose of spreading terror among the population. The offences under the PTA are punishable by harsh penalties, ranging from life imprisonment to the death penalty and imprisonment with hard labour.<sup>12</sup> Husnu Al Suood, Maldives Centre for Human Rights & Democracy, discussed two cases in which the PTA was abused to suppress political dissent and in which he had acted as a defence lawyer. In the case of Ms. Jennifer Latheef, daughter of a Maldivian politician in exile in Sri Lanka, she was charged and convicted under PTA for throwing a stone at the police while participating in the protests against the killing of several inmates in a prison by the security forces. Mohammed Nasheed, the chairperson of the Maldivian Democratic Party, the major opposition party, was placed under house arrest and charged under the PTA for leading a demonstration on the anniversary of the violent crack down of the democracy movement in the previous year.<sup>13</sup> The Government representative at the Hearing admitted the deficiencies of the 1990 PTA and noted that the Government planned to replace it with new anti-terrorism legislation.<sup>14</sup>

<sup>11</sup> Section 3 of the TADO (original in Nepali, unofficial translation by the ICJ).

<sup>12</sup> Sections 2 and 3 of the PTA.

<sup>13</sup> Mohamed Nasheed won the Presidential election held in October 2008, bringing an end to the 30 year rule by Maumoon Abdul Gayoom. The terrorism charge against him was dropped in September 2008 during his presidential election campaign.

<sup>14</sup> As of January 2009, no amendment to the 1990 Act or new anti-terrorism legislation has been introduced.

*“The definition of “terrorism” provided in the Law is so absurdly wide as to mean anything. In its current form it would include domestic violence, street and school fights, and other ordinary criminal offences. Many people have been charged and convicted under this Law for committing petty crimes such as throwing a piece of stone at a police officer and lighting fire at a small uninhabited cottage and soiling a jetty with fish oil. They are offences, but whether those acts amount to terrorism is doubtful.”*

(Written submission by Husnu Al Suood, Maldives Centre for Human Rights & Democracy, the Maldives)

With regard to the draft anti-terrorism ordinance of **Bangladesh**, several participants expressed concerns that it reportedly contained broad definitions of terrorism, which would allow its application for the purpose of suppressing legitimate political and other activities.<sup>15</sup>

## 2.2. Extended powers of law enforcement agencies

### *Prolonged detention without charge or trial*

In **India**, both the TADA and the POTA allowed for a prolonged period (up to a year under TADA and 180 days under the POTA as opposed to 90 days under ordinary law) of pre-charge detention, albeit with some judicial supervision.<sup>16</sup> Participants pointed out that due also to the strict restrictions on bail<sup>17</sup>, the majority of those arrested were detained until the end of the maximum limit of pre-charge detention and then simply released without charge. In addition, many of those finally charged, including with relatively minor offences, were placed under prolonged detention pending trial. These special procedures were abolished with the repeal of the POTA.<sup>18</sup>

*“In one of the laws the provision is for 6 months and it can be extend up to maximum for one year. Accused can get bail provided there are no reasonable grounds to prove that the accused has committed the offence. If the accused is not informed of the charges against him, then how can he prove that there are no reasonable grounds to prove him guilty? So the basic philosophy is to combine that degree of law and that degree of liberty so that neither the law becomes tyranny nor the liberty becomes license.”*

(Oral testimony by Justice J.S. Verma, Former Chief Justice of India, Former Chairperson of the National Human Rights Commission, India)

<sup>15</sup> After the Hearing, on 18 May 2008, the Council of Advisors approved the draft of an ordinance to combat terrorism and protect the integrity, solidarity, security and sovereignty of the State of Bangladesh. The definition of terrorist act reportedly includes not only violence against persons, but also “damage to any property of any person” if they are carried out for a specified purpose.

<sup>16</sup> After the police initially produce an accused individual before a magistrate, the magistrate may then remand the individual to police custody for up to 60 days under TADA and 30 days under POTA (rather than 15 days under ordinary law) and thereafter may order judicial custody for up to 180 days under TADA and 90 days under POTA. The special court may order additional detention in judicial custody for up to a year under TADA and 180 days under POTA if the prosecutor informs the court that the additional time is necessary to complete the investigation.

<sup>17</sup> If the prosecutor opposed bail, for one year the court could only release the accused if there were reasonable grounds to believe that the accused was not guilty of the alleged offence and not likely to commit any offence while on bail.

<sup>18</sup> The Unlawful Activities (Prevention) Amendment (UAPA) Bill, 2008 introduced special procedures similar to those contained in the POTA, allowing up to 180-day detention without charge, 30-day police custody, and denial of bail if a *prima facie* case exists.

In **Sri Lanka**, the PTA gives the police broad powers to conduct activities such as arrests, search and seizure without warrant and gives the Defence Minister the power to order administrative detention for up to 18 months, with a possibility of challenging such order only before an administrative Advisory Board.<sup>19</sup> Due to the mandatory detention on remand pending trial upon application by a senior police officer, the Panel heard that people arrested in 2002 were still languishing in jails. It was observed that many of the legal safeguards contained in ordinary law were similarly denied in law or in practice to those arrested under the Emergency Regulations.

In **Nepal**, under the TADO, a “security official”, including the Chief District Officer, rather than a court, was given the power to issue order to arrest or search to prevent a “terrorist or disruptive offence”.<sup>20</sup> Participants told the Panel that the majority of the TADO detainees were held under such preventive detention orders, which were often prolonged for years. Many detainees were reportedly held in multiple places of detention, including unofficial places such as army barracks or base camps before being transferred to official places of detention (jails or so called “high security centers”).<sup>21</sup> While the representative of the interim Government justified the detention in military barracks as necessary due to the attacks by the Maoists against the police posts, many participants considered that this practice led to serious violations, including torture and enforced disappearances.

In **Bangladesh**, the 1974 Special Powers Act (SPA) allows the Government to detain individuals with a view to preventing them from doing a “prejudicial act” for up to 120 days and with approval of an advisory board consisting of two judges and a senior Government official and subject to six-month periodic reviews, indefinitely. Concern was raised about the broad definition of “prejudicial act,” which includes an act intended or likely to “prejudice the sovereignty of Bangladesh”, “threaten the maintenance of friendly relations with Bangladesh”, “threaten the maintenance of the public order and public safety”, and “create feelings of enmity or hatred among different sections of the society”. It was also noted that the Emergency Powers Ordinance 2007, promulgated after the declaration of a state of emergency in January 2007, those accused of breaching the Ordinance could be arrested without warrant and subjected to preventive detention under the SPA.

The **Maldives’** PTA only creates terrorist offences, without providing for any special procedural or evidentiary rules. However, Husnu Al Suood, Maldives Centre for Human Rights & Democracy, pointed out that the ordinary criminal procedure in the Maldives permits prolonged detention in police custody for up to 30 days before being brought before a judge appointed by the President. Furthermore, the judge can authorise another 30 days of detention without charge, renewable for unlimited times. While the representative of the Attorney General’s office noted that the Government plans to reform the criminal procedure to incorporate more safeguards, Mr. Suood expressed doubts as to the practical impact of such reforms.<sup>22</sup>

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<sup>19</sup> Section 6(1) of the PTA.

<sup>20</sup> Section 5 of the TADO.

<sup>21</sup> All the pre-trial detainees were released at the end of the 2006 as the Government decided to withdraw the cases against all the Maoist detainees following a peace agreement.

<sup>22</sup> The new Constitution of the Maldives made existing criminal procedures unconstitutional. To fill the gap, a draft new Criminal Procedures Code – still in development since 2006 – was attached to an Enabling Bill, which allows a series of regulations to stay in force for a transitional period. Changes introduced by the new code include, for instance, access to a lawyer within 24 hours of arrest.

### *Relaxed rules of evidence*

In **India**, both the TADA and the POTA contained changes to the rules of evidence and admitted confessions made to the police officer of certain rank, which would ordinarily be inadmissible under the India Evidence Act. While a former Director of the National Police Academy justified this change by referring to the difficulty in obtaining witness testimonies in terrorism cases, many Indian participants objected that it had encouraged the use of torture and other ill-treatment during police interrogation. With regard to the POTA, it was also noted that this risk of ill-treatment was exacerbated by the removal of the right to have a lawyer present “throughout the period of interrogation.”<sup>23</sup> The majority of participants thus welcomed the fact that the amendments to the UAPA did not include the admissibility of confessions.

Similarly, **Sri Lanka’s** PTA admits as evidence confessions made to a police officer above the rank of Assistant Superintendent, which is ordinarily inadmissible. The PTA also placed on the accused the burden of proving that they were “irrelevant” under section 24 of the Evidence Ordinance as they were extracted by “inducement, threat or promise”. Participants criticised that this encouraged the use of torture and other ill-treatment during police custody and allowed individuals to be convicted on the basis of confessions obtained by coercion.

*“This law (PTA) permits confessions made before police officers admissible as evidence. It is not permissible under regular laws. Burden of proof that the confessions are made under duress and pressure is on the accused. Confessions were written in a language not known to the accused. Confessions were written in Sinhalese, a language not familiar to a person detained from Tamil community.”*

(Oral testimony by Desmond Fernando, Barrister, Honorary Member of the ICJ, Sri Lanka)

### *Special courts*

**Indian** participants noted that TADA and POTA cases were tried by special Designated Courts, constituted by the Central or a State Government, which had discretion to hold the trial *in camera*, to withhold the identity and addresses of witnesses and to conduct a summary trial. Following the repeal of the POTA, terrorism offences under the UAPA are tried by ordinary courts in accordance with ordinary criminal procedures, with the exception of rules regarding *in camera* proceedings and the use of anonymous witnesses.<sup>24</sup> Given the extremely low conviction rates before special courts, several participants took the view that the creation of a separate track of justice had been unnecessary.<sup>25</sup>

<sup>23</sup> The POTA did require the police to inform individuals of their right to counsel upon arrest and to permit the accused to meet with counsel.

<sup>24</sup> Under Section 44 (2) of the amended UAPA, the identity and address of witnesses may be kept secret upon application by a witness or the Public Prosecutor and if the court is satisfied that the life of such witness is in danger.

<sup>25</sup> The National Investigating Agency (NIA) Bill, 2008 and the Unlawful Activities (Prevention) Amendment (UAPA) Bill, 2008 reintroduced the use of special courts for trial of terrorism offences.

### 3. Extrajudicial practices, including enforced disappearances and extrajudicial killings

Participants at the Hearing argued that repressive anti-terrorism laws tended not only to be applied in an arbitrary fashion but also encourage extrajudicial practices by the police and security forces, including torture, ill-treatment, extrajudicial killings and enforced disappearances, which had already been common in these countries. This was largely attributed to the lack of effective accountability and oversight, due in part to the immunity provisions included in existing criminal law or special laws. Many also emphasised the heightened risk of abuses when the military and paramilitary forces are deployed to counter terrorism. While militarised policing has been common in this region, participants raised serious concerns that the post-2001 international climate, in particular, the rhetoric of the “war on terror”, had lent legitimacy to a more hard-line, militarised approach to what the Government called “terrorism,” including long-standing insurgencies as well as expressions of political or other dissent. Such an approach has often led to serious human rights violations in many countries in the region.

In **India**, the Criminal Procedure Code contains a requirement for a sanction by the central Government to institute prosecution of police officers, creating a hurdle to hold them accountable for their illegal actions.<sup>26</sup> In addition, all terrorism legislations, including the TADA, the POTA and the amended UAPA, have given governmental authorities immunity from prosecution or other legal proceeding for “anything which is in good faith done or purported to be done in pursuance of” these Acts.<sup>27</sup> Participants argued that it was difficult to prove the lack of good faith on the part of government officials and that while hundreds of complaints against the police had been officially investigated, the majority of cases did not proceed to prosecution because of the refusal by the central government to sanction such action.

*“...things have indeed changed for the better since the TADA and POTA days. The new laws although retaining some of vague definitions of terrorism have done away with procedural irregularities. (However,) the practice on the ground has remained unchanged, especially because of two factors: one is the de facto legal immunity which the law enforcement agencies enjoy under these laws, which is no civil suit or no prosecution can be launched against any officer who has acted in good faith without the sanction of the Government and its hard to prove bad faith in such cases. Sanction is very difficult to come by in these situations because the Government believes it would lower the morale of the agencies which are working in such difficult situations. So the practice remains unchanged and torture continues. The second thing is that because everything has become militarised, it has become very difficult for people even to talk about human rights in certain areas like Jammu and Kashmir and North-East.”*

(Oral testimony by Tessa Boyd-Caine, Commonwealth Heads of Government Meeting (CHOGM) Coordinator, Commonwealth Human Rights Initiative)

Many participants from the North East of India criticised the 1958 Armed Forces Special Powers Act (AFSPA), which gives military officers broad powers to use lethal force, arrest and search without warrant. They argued that the AFSPA had been widely abused to arrest individuals with no connection with violent activities and had encouraged serious violations such as extrajudicial killings, enforced

<sup>26</sup> Section 197 of Criminal Procedure Code of India.

<sup>27</sup> Section 26 of the TADA, Section 57 of the POTA, Section 49 of the Amended UAPA.

disappearances, torture and custodial death to be committed with impunity.<sup>28</sup> While the Supreme Court issued a set of Dos and Don'ts to prevent abuses when upholding the AFSPA in 1997, participants argued that these instructions were not respected in practice because of the lack of effective accountability and oversight mechanisms. It was noted that the Government rarely sanctioned institution of prosecution against members of the armed forces as required by the Act<sup>29</sup> and that the National Human Rights Commission had little power to monitor the activities of the armed forces as opposed to those of the police. Participants from North Eastern states also alleged that even judges have faced raids and threats by the Army for issuing unfavourable judgments.

Several Indian participants also pointed out that in the North East and Jammu and Kashmir, not only armed forces, but also the Border Security Force, the Assam Rifles and other paramilitary groups had been exercising powers of arrest and detention in place of the civilian police. It was alleged that members of these forces have been implicated in numerous abuses, including enforced disappearances and extrajudicial executions staged as "encounter killings". It was argued that the use of agencies other than the police made it difficult to ensure accountability for counter-terrorism operations because there were no established mechanisms of oversight and clear regulations governing their activities.

**Sri Lankan** participants stressed that since the *de facto* breakdown of the ceasefire in 2005, there has been a marked increase in extrajudicial practices, including arbitrary arrests, detentions, disappearances, abductions and extrajudicial killings by Government forces, often in collusion with paramilitary groups such as the Karuna group, a spit away faction of the LTTE. In their opinion, these illegal practices, rather than anti-terrorism laws, currently constituted the primary tool for countering terrorism in Sri Lanka. Participants argued that immunity provisions in the PTA and the 2006 Emergency Regulations similar to those contained in Indian anti-terrorism laws contributed to such illegal practices by shielding state agents from accountability.<sup>30</sup> Participants also expressed serious concerns that the independence of the judiciary and other oversight bodies such as the National Human Rights Commission and the Police Commission had been curtailed by political interference and appointments, preventing them from acting as a check against Government excesses.

In **Nepal**, following the declaration of a State of Emergency and the promulgation of the TADO in November 2001, for the first time in the history of Maoist insurgency,

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<sup>28</sup> The AFSPA allows a police officer to "if he is of opinion that it is necessary so to do for the maintenance of Public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances".

<sup>29</sup> Section 6 of the AFSPA provides: "No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act."

<sup>30</sup> Section 26 of the PTA provides: "No suit, prosecution or other proceeding, civil or criminal, shall lie against any officer or person for any act or thing in good faith done or purported to be done in pursuance or supposed pursuance of any order made or direction given under this Act." Section 19 of the 2006 Regulations provides: "No action or suit shall lie against any Public Servant or any other person specifically authorised by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties."

the army was mobilised against the Maoist. The police, armed police and army were brought together under the umbrella of “Unified Command” for the joint operations against the Maoists. Nepali participants, including the Deputy Attorney General of the interim Government, noted that the deployment of the military and the promulgation of the TADO led to a large number of abuses, including arbitrary arrests and detention, extrajudicial killings, enforced disappearances, torture and other forms of ill-treatment. While the Supreme Court and appellate courts made some attempts to curb such abuses, such as by issuing writs of *habeas corpus*, the military often ignored these decisions and even rearrested on the court premises many detainees ordered released by courts. The President of the Nepal Bar Association argued that the independence and impartiality of courts were compromised by the threats from both security forces and the Maoists and criticised the reluctance of courts to deal with issues of re-arrest and disappearances during the conflict. He also highlighted the impact of the conflict on the legal profession, noting that a number of lawyers left the areas affected by the conflict, partly due to the parallel existence of the so-called Peoples’ courts operated by the Maoists and partly due to the physical threat from both the security forces and the Maoists.

*“The stringent provisions of the TADO, its unchecked use without periodic evaluation, lack of implementation of the grievances hearing mechanism(s) of the implementation of TADO and less judicial intervention made the position of rule of law and human rights weak in the context of Nepal while countering terrorism.”*  
(Oral testimony by Bishwa Kanta Mainali, President, Nepal Bar Association, Nepal)

The Panel heard that in **Bangladesh**, some 400,000 members of the armed forces had been deployed between October 2002 and January 2003 to conduct the “Operation Clean Heart”, an anti-crime and anti-terrorism operation, during which hundreds of individuals have allegedly been subjected to arbitrary arrests, detention, torture, and extrajudicial killings. Participants criticised the fact that no one had been held accountable for these abuses because of a Joint Drive Indemnity Act 2003, providing members of the armed forces or Government officials with immunity from prosecution for activities during the operation. It was also pointed out that since the inception in 2003 of the Rapid Action Battalion (RAB), an anti-crime and anti-terrorism force consisting of military and civilian personnel, there had been a dramatic increase in the number of arbitrary arrests, torture, custodial death, disappearances and extrajudicial killings or so-called “encounter” or “cross-fire” killings. While the Assistant Attorney General of Bangladesh claimed that the number of “encounter” or “cross-fire” killings had decreased, several representatives of local and international NGOs expressed concern that these serious violations still continued, including as part of the anti-corruption drive led by the caretaker Government.

It was also noted that in Bangladesh, the Constitution empowers the Government to extend impunity from prosecution to any state officer on any grounds<sup>31</sup>, and the Special Powers Act<sup>32</sup> and the Code of Criminal Procedure 1898<sup>33</sup> both include immunity provisions similar to the laws of its neighboring countries. It was argued that these legal obstacles in combination with the fear of retribution had prevented victims from filing complaints against the police and government agents,

<sup>31</sup> Section 46 of the Constitution of Bangladesh.

<sup>32</sup> Section 34 of the SPA.

<sup>33</sup> Section 132 and 197 of the Code of Criminal Procedure.

encouraging further human rights violations.<sup>34</sup>

As regards the **Maldives**, it was argued that abuses of the 1990 Prevention of Terrorism Act were due to various factors, including the lack of an independent judiciary, which is under the control of the President in the current constitutional and legal framework, the shortage of properly trained legal practitioners and laws giving law enforcement officials broad investigative powers. The representative of the Attorney General's Office stated that the Government was engaged in the process of legal reforms that seek to establish an independent judiciary and guarantee the right to a fair trial in accordance with international standards.<sup>35</sup>

#### **4. Lessons from South Asia**

##### **4.1. Need for special laws**

Participants expressed divergent opinions about the need for and the appropriateness of enacting special laws giving more powers to the State authorities to counter terrorism. Some argued that sophisticated technology available to contemporary terrorist groups made old laws inadequate to counter threats posed by such groups. Many participants from various countries, including former police officers, also pointed out that the lack of functioning and effective law enforcement and criminal justice systems tended to create a perception that the laws were inadequate. State authorities were often placed under strong public pressure to take prompt action against terrorism, including by the introduction of special laws. While acknowledging the need for institutional reforms, some considered that special laws were necessary to deal with the immediate exigencies of the situation as well as to prevent excesses of security forces.

*"Some of the reasons for human rights violations by the security agencies are firstly malfunctioning or failure of the criminal justice system. Terrorists are not getting punishment. Several cases are pending in courts for a long period. One of the reasons for malfunctioning of criminal justice system is lack of witness protection, no witnesses are coming forward to depose before courts. This creates pressure on security forces for resorting to quick fix solutions, and attempting to take law in to their own hands and go overboard and commit violations like fake encounters, extra judicial killings, disappearances. (...) Effective police training, improving the legal systems and procedures are definitely required as the long term goal, but to deal with the current situation the police do require some special laws and special powers."*

<sup>34</sup> Under Section 132 of the Code of Criminal Procedure 1989, no criminal complaint can be lodged against any official without prior sanction from the Government. Section 197 provides: "(1) When any person who is a Judge within the meaning of section 19 of the [Penal Code], or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the [Government], is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the [previous sanction of the Government]; (2) [The Government] may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judge, [Magistrate] or public servant is to be conducted, and may specify the Court before which the trial is to be held."

<sup>35</sup> After the EJP Hearing, a new Constitution was adopted by the Constituent Assembly in June 2008 and ratified by the President on 7 August 2008. It establishes separation of powers and recognises the independence of the judiciary. It also contains provisions for the establishment of a Supreme Court and the post of a Prosecutor General. Furthermore, the Constitution provides for the creation of a Judicial Service Commission, an independent body which will decide on appointment, dismissal and discipline for judges.

(Oral testimony by Sankar Sen, Senior Fellow, the Institute of Social Sciences, former Director of the SVP National Police Academy, former Director General of the National Human Rights Commission, India)

*“These technical and tactical approaches to counter-insurgency require new comprehensive laws and standard operation procedures. I know and most of us agree that making new laws does not always solve the problems. But if we do not make any new law for special purposes, the security forces will abuse the situation. They will go berserk. There will be no control. If we give them something in their hands to use, the tools, it will be useful for them. If we don’t give them, then what will happen? The security forces will have nothing to control them, they will use their own mindset and they may make the situation even worse.”*

(Oral testimony by Govind Thapa, former Assistant Inspector General of Police, Nepal)

Others argued that the enactment of special laws giving broad powers to the security forces led to widespread abuse for purposes other than counter-terrorism and often proved ineffective in achieving the stated purpose. For instance, Rohit Prajapathi, Activist, Documentation and Study Centre for Action, Vadodara, from **India** pointed out that according to the Minister of State for Home Affairs, of a total of 67,059 persons reportedly detained under TADA from its enactment in 1987 to August 1994, only 8,000 had been tried, 725 (0.81%) convicted and the rest acquitted for “want of evidence”. The review committees of the TADA established by the Government subsequently found in 5,000 cases that the TADA had been inappropriately applied. Chaman Lal, former Director General of Police of **India** also noted that the majority of cases under the TADA were not for “terrorist activities” under Section 3 or “disruptive activities” under Section 4 but for the offence of unlawful possession of arms and ammunitions under Section 5, which could have easily been dealt with under the normal laws. Many Indian participants thus stressed the need to build up the technological, professional, and financial capacity and resources of the ordinary systems, rather than enacting laws such as the TADA and the POTA to shortcut the systemic problems. The majority of **Nepali** participants, including the representative of the interim Government, also took the view that in light of widespread abuses of the TADO, the use of ordinary law was in principle preferable when dealing with terrorism.

There was broad agreement among participants that special laws should be strictly temporary and that their application should be subject to effective oversight and accountability mechanisms, including internal oversight of police and the armed forces as well as external controls, through courts, national human rights institutions and other independent mechanisms, in order to minimise the risk of abuses.

*“...when a situation arises as in the case of Punjab, then existing laws are not sufficient but special laws are required. (...) But one important thing to be observed is that these special laws are temporary deviations. These laws should not be made permanent. Special laws are made with safeguards and checks and balances, unfortunately these safeguards are not respected by the enforcing agencies. (...) I personally oppose the continuation of these special laws like TADA and POTA not based on their Constitutional validity but because they are not successful to achieve the intended purposes for which they have been enacted. Conviction rate is less than 1 percent for TADA. It was not used against terrorist activities under Section 3, or disruptive activities under Section 4. It was largely used against*

*possession of illegal arms under Section 5<sup>36</sup> which could have easily dealt under the normal laws. We brought this realisation that TADA was not required because we did not use it.”*  
(Oral testimony by Chaman Lal, former Special Rapporteur of the National Human Rights Commission and former Director General of Police, India)

*“In the beginning the Maoists’ activities were dealt under the security legislation such as Public Security Act, Explosive Substances Act, Arms and Ammunition Act and so on. However, when Maoists became bold, the Government used the state of emergency and TADO with more power to deal with the Maoists. This eventually led to more rights violations like killings, illegal detention, torture, disappearances and so on. In this point, I submit that the lessons learnt is better not to have the situation where the Government should be in a position to mobilise security forces. (...) We promulgated TADO and its use was necessary, but the misuse is widely reported. It is better to have ordinary laws in place rather than special measures like TADO.”*  
(Oral testimony by Chet nath Ghimeri, Deputy Attorney General, Attorney General’s Office, Nepal)

#### **4.2. Long-term impact of counter-terrorism measures on society and the rule of law**

Several participants pointed to the danger that special laws may have a prolonged impact on society and the legal system of the State. Temporary laws, enacted in most cases in emotional periods following particular crises, have often been repeatedly renewed or incorporated in whole or in part into permanent legislation. It was also pointed out that despite the improvements in law as a result of court intervention or opposition by civil society, the practice of state agents often remained largely unchanged.

While a number of **Indian** participants expressed pride in the strong and vibrant civil society and the independent judiciary which had successfully led to the lapse or the repeal of anti-terrorism laws, such as the TADA and the POTA, some expressed concerns that several problematic features of the POTA such as the nearly identical broad definitions of “terrorist act”<sup>37</sup> and other related offences, banning of a “terrorist organisation” without opportunity for judicial review, and immunity for good faith action have been incorporated into the amendments to the UAPA, which is a permanent legislation not subject to periodic reviews like the TADA or the POTA and applicable to the whole territory. Participants also observed that due partly to the lack of accountability, illegal practice such as arbitrary arrests, detention, torture and cruel, inhuman or degrading treatment which had become common under the TADA and the POTA remained widespread despite the improvements in the laws.

*“[at the] very time the Ordinance repealing POTA was passed, an ordinance amending UAPA was passed simultaneously. By this, these provisions of POTA were imported into UAPA. (...) what is important to emphasise is that UAPA is not a special law. It is not subject to periodic review. It is not a law that is going to be only imposed in certain*

<sup>36</sup> Section 5 of the TADA criminalised the possession of certain arms and ammunition in a specified area regardless of the intention of the possessor to employ them in furtherance of a disruptive or terrorist act.

<sup>37</sup> Section of 15 of UAPA defines a “terrorist act” in almost identical terms as Section 3 of the POTA. Unlike the POTA, however, there is no additional section that characterises unlawful possession of arms and ammunitions in a notified area as “terrorist act”.

*disturbed areas. It is a law that is there permanently on the statute book, it is a law that is applicable across the board, across the country. And therefore, perhaps in many ways, much much more pernicious than POTA or TADA that came up for legislative review. The provisions that have been retained interestingly continue with the definition of conspiracy, of supporting a terrorist organisation, with very all-inclusive and all-embracing words (...). Not only is UAPA very much on the statute book, but it has actually been used in instances where booksellers have been arrested by police under this provision for selling books that are not banned books but books by Karl Marx etc.”*  
(Oral testimony by Vrinda Grover, Lawyer and Activist, India)

**Indian** participants also pointed out that, two years and half since the repeal of the POTA in 2004, there were still people detained pending trial for offences under the POTA.<sup>38</sup> It was noted that even where the Review Committee had recommended that a case be tried pursuant to ordinary law, state governments had been slow in implementing such recommendations, contesting the binding nature of such recommendations. Some considered that this was because the only piece of evidence was often confessions to the police inadmissible under ordinary law, leaving limited prospects for successful prosecution.<sup>39</sup>

Similarly, Rhoderick Chalmers, Deputy South Asia Project Director, the International Crisis Group, observed that in **Nepal**, despite the end of the conflict between the Government and the Maoists, abusive practices such as arbitrary use of preventive detention laws, torture and ill-treatment by the police remained common.

*“Nepal is in the midst of a peaceful political transition phase: with in one year from an all-out conflict to a stage where a ceasefire and plan for a Constitutional change has been agreed by the major political stakeholders and an agreement to hold elections in June 2007 to the constituent assembly. [This is] a major opportunity not only to reshape the structures of the state but also to address some of the long standing issues, grievances, demands that fuelled the conflict in the first place and also to have some accountability for the abuses that have occurred during the last ten years of the conflict in the name of terrorism, counter terrorism. (...) At the same time the continuity in practices are quite remarkable. The laws, the police practices are the same although the police force has been demoralised. The laws that government has been resorted to like laws enabling preventive detention have been invoked by the democratic government just as quickly as they are invoked by the Royalist government. It is clear that the powerful inertia that is there in the bureaucratic, judiciary and other administrative institutions is hard to reform.”* (Oral testimony by Rhoderick Chalmers, Deputy South Asia Project Director, International Crisis Group)

#### **4.3. The importance of a comprehensive approach to counter-terrorism and counter-productive effects of repressive laws and practices**

There was wide consensus among the participants from different countries that excessive counter-terrorism laws and practices lead to serious grievances, thereby exacerbating rather than reducing tensions and violence. Many, including former

<sup>38</sup> According to Section 2(1) of the 2004 Prevention of Terrorism (Repeal) Ordinance, cases pending at the time of repeal was allowed to continue subject to review by the Central POTA Review Committee, which was given responsibility to determine whether any prima facie case exists for proceeding under the POTA.

<sup>39</sup> The Supreme Court of India held on 22 October 2008 that the recommendations of the POTA Review Committee were binding on states.

law enforcement officials, also pointed out that abuses tended to alienate communities and hinder efforts to gather good intelligence, which is crucial for effective counter-terrorism. Many participants at the Hearing also emphasised the need to integrate efforts to deal with underlying causes such as economic deprivation, political exclusion and long-standing conflicts in any counter-terrorism policy. Some participants additionally stressed the importance of promoting friendly relations with neighbouring countries in order to effectively counter cross-border terrorist activities widely seen in the region.

Many **Indian** participants argued that the majority of what the Government calls “terrorism” was largely armed struggle against the State by parts of the population suffering from deprivation of rights, denial of access to democratic processes and courts or long-standing armed conflicts with ethnic, religious or political causes. In their view, such activities could not be countered solely by the use of the law enforcement, the military or special laws. The National Human Rights Commission of India, in particular, stressed the importance of protecting and promoting economic, cultural and social rights (ECSR), noting that systemic denials of ECSR, such as the right to food, health and education, are often the root causes of conflicts and terrorism.

Many, including former police officers, also stressed that the experience in places such as Jammu & Kashmir had demonstrated the counter-productive effects of repressive laws. It was argued that such laws and human rights violations resulting thereof tended to alienate the public from the State, help terrorist recruitment and diminish public cooperation with counter-terrorism efforts.

*“Excesses fuel discontent and excesses on the victims only help to swell the rank of terrorists. That is what has been largely seen in Jammu & Kashmir. A large number of victimised families feel that we have to become terrorists to settle scores with security forces. These kind of heartless excesses only help to swell the rank of terrorists. (...) Second is the alienation from the public. After all, success of counter-terrorist operations lies in how much support, how much help you can get from the public. If there is alienation from the public, you are not going get proper information from them. Information is the key. You will not get information from the public unless and until there is support and cooperation from the public. High-handedness of security forces invariably has been found to alienate the public and hamper counter-terrorist operations.”*

(Oral testimony by Sankar Sen, Senior Fellow, Institute of Social Sciences, former Director of the National Police Academy and former Director General of the National Human Rights Commission, India)

*“Fighting terrorism and fighting the terrorist are two separate things. We have to fight against the terrorists, that is making situations difficult for them to operate, we have to send a firm message that violence will not be tolerated, but we cannot undertake fighting terrorism because that is to deal with underlying causes like economic deprivation, political exclusion, mis-governance, and prolonged unresolved conflicts which have to be dealt with appropriately but not as a law enforcement problem. That is where things go wrong when security and law enforcement people undertake the responsibility of fighting the underlying causes. (...)”*

(Oral testimony by Chaman Lal, former Special Rapporteur, National Human Rights Commission and former Director General of Police)

Participants from **Nepal** expressed their views that the rise of the Maoists was due

to the failure of the State to address the issue of impunity for violations of human rights during the revolution and disappearances in the 1980s and to implement institutional reforms after the establishment of a democratic framework in 1990. Many emphasised that coercive measures, in particular, the use of the military forces, were not the appropriate approach toward a conflict with economic, social and political causes and considered that dialogue and negotiation, maintained behind the scenes even at the height of the conflict, were essential for bringing an end to the active hostilities in Nepal. The representative of the interim Government also noted that the presence of human rights organisations, including the Office of High Commissioner for Human Rights (OHCHR), which made an impartial assessment of the situation, helped both sides of the conflict to choose a middle course of dialogue. Many stressed the importance of addressing the issue of accountability for past abuses, committed both before and during the conflict, in order to prevent resumption of violence.

*"[The] most serious problem we have is that if impunity will continue, violence can erupt again. (...) I have two examples when I went on behalf of the bar to document a film about arbitrary killing, and both of the family members said, "we want justice, if we could not get it, obviously, we'd be compelled to raise our own arms."*

(Oral testimony by Satish Kharel, Advocate, former Secretary General of the Nepal Bar Association, Nepal)

Participants from **Sri Lanka** affirmed that both the PTA and the emergency regulations focused on short-term disruption of violence, rather than addressing underlying grievances, had the effects of alienating Tamil people and turning what has started as non-violent protests to win equal rights for the Tamils into an armed struggle for the establishment of an independent state. Ahilan Kadirgamar, an expatriate Tamil human rights activist, also stressed that the LTTE systematically suppressed dissent within the Tamil community, exposing the Tamils to both "internal terror" by the LTTE and "external terror" of states' repression. This further diminishes the space for peaceful middle course. Rohan Edrisinha, Director of the Legal and Constitutional Unit, Centre for Policy Alternatives, noted that while many Tamil people had reservations about the activities of the LTTE, the Government's failure to properly address their grievances led to ambivalent attitudes toward the LTTE.

*"What started as a passive resistance in the 1950s in the form of demonstrations, hunger strikes and protest meetings by the political parties to win the language rights and equal treatment for the Tamil people turned into armed struggle when the State responded with crude and massive use of military force and an unimaginative policy on the ethnic question. (...) Successive Sri Lankan governments resorted to suppress political agitation instead of addressing the genuine grievances of the Tamil minority. Tougher laws and regulations were enacted to arrest and detain persons for prolonged periods without committing to trial (...) These Laws which were ostensibly meant to be for the eradication of violent forms of agitation in fact helped to fuel the unrest and existing dissatisfaction against the State. The number of persons joining the rebel groups vastly increased from the sections of the people who suffered at the hands of the Sri Lankan Forces. A rag-tag group developed into a formidable and most feared military outfit holding substantial areas of land under its control and operating a parallel government not answerable to the Central Authorities."*

(Written submission, K. S. Ratnavale, Lawyer and Governor, Centre for Human Rights and Development, Sri Lanka)

## 5. Information about the Hearing

5.1. [Agenda of the Hearing](#) (link)

5.2. [Press release at the conclusion of the Hearing](#) (link)

### 5.3. Participants at the public Hearing in New Delhi, India

#### *India*

- Lokendra Arabam, Executive Chairperson, United Nations Association, Manipur;
- S. Bhattacharjee, President, People’s Union for Civil Liberties, Jharkhand;
- Colin Gonsalves, Senior Advocate, Executive Director, Human Rights Law Network;
- Vrinda Grover, Supreme Court lawyer;
- A R. Hanjura, General Secretary, Yateem Trust, Jammu & Kashmir;
- K. G. Kannabiran, President, People’s Union for Civil Liberties;
- Chaman Lal, former Special Rapporteur, National Human Rights Commission, and former Director General of Police;
- Babloo Loitongbam, Executive Director, Human Rights Alert, Manipur;
- Fali S. Nariman, Senior Advocate, Honorary Member of the ICJ;
- Najrees Nawab, Lawyer, Jammu & Kashmir;
- George Mathew, Director, Institute of Social Sciences;
- Rohit Prajapati, Documentation & Study Centre for Action, Gujarat;
- Pushkar Raj, Secretary, People’s Union for Civil Liberties, Chattisgarh;
- Rajendra Sail, President, People’s Union for Civil Liberties, Chattisgarh;
- Vikram Singh, Indian Police Service, Addl. Director General, Central Industrial Security Force;
- Justice Rajinder Sachar, former Chief Justice, Delhi High Court;
- Sankar Sen, Senior Fellow, Institute of Social Sciences, former Director of the National Police Academy and former Director General, National Human Rights Commission;
- Soli Sorabjee, Senior Advocate, former Attorney General;
- S.V.M. Tripathi, Member of State Human Rights Commission, Uttar Pradesh, former Director General of Police;
- J.S.Verma, Former Chief Justice of India and former Chairperson of Indian National Human Rights Commission.

#### *Nepal*

- Yak Raj Bhandari, Legal Adviser/Representative, Communist Party of Nepal (Maoist);
- Chet Nath Ghimire, Deputy Attorney General, Attorney General’s Office;
- Satish Kharel, Advocate, former Secretary General of the Nepal Bar Association;
- Bishwa Kanta Mainali, President, Nepal Bar Association;
- Mandira Sharma, Secretary General, Advocacy Forum;
- Govinda Thapa, former Assistant Inspector General of Police.

#### *Sri Lanka*

- Rohan Edrisinha, Director of the Legal and Constitutional Unit, Centre for Policy Alternatives;
- Desmond Fernando, Barristor, Honorary Member of the ICJ;
- Ahilan Kadirgamar, activist;
- K.S. Ratnavale, Governor, Centre for Human Rights and Development.

### ***Bangladesh***

- Mubina Asaf, Assistant Attorney General, Attorney General’s Office;
- Sumi Khan, Regional Editor, *Weekly Ekattor*;
- Farhad Mazhar, Odhikar.

### ***Maldives***

- Aishath Bisham, Senior State Attorney, Attorney General’s Office;
- Husnu Al Suood, Maldives Centre for Human Rights & Democracy.

### ***International NGOs***

- Tessa Boyd-Caine, Commonwealth Heads of Government Meeting (CHOGM) Coordinator, Commonwealth Human Rights Initiative;
- Rhoderick Chalmers, Deputy South Asia Project Director, International Crisis Group.

## **5.4. Government representatives met at private meetings**

- Honorable Justice Shivraj V. Patil, judge of the Supreme Court of India and Acting Chairperson of the National Human Rights Commission;
- Shri N.N. Vohra, Indian Administration Service, Special Representative to the Government of India for Jammu and Kashmir Dialogue;
- Shri A.K. Mitra, Director General, Border Security Force;
- Shri M.K. Narayanan, National Security Advisor, Special Advisor to the Prime Minister;
- Justice Ranganath Misra, former Chief Justice of India, former Chairperson, National Human Rights Commission;
- Shivraj V. Patil, Minister of Home Affairs, Ministry of Home Affairs, Government of India.

## **5.5. Written submissions**

### ***South Asia***

- Commonwealth Human Rights Initiative, “Submission to the International Commission of Jurists Eminent Jurists Panel on Terrorism Counter-Terrorism and Human Rights”.

### ***India***

- Rohit Prajapati, Documentation & Study Centre for Action, “So-Called Anti-Terrorism Laws are Tools of State Terrorism”;
- Babloo Loitongbam, Executive Director, Human Rights Alert, “North-east India Experience”;
- Institute of Social Sciences, “Terrorism, counter-terrorism and human rights”
- Fali S. Nariman, Senior Advocate, Honorary Member of the ICJ;
- Iqbal A. Annsari, Minorities Council;
- A.R. Hanjura, advocate, “Impact of violence in Kashmir”;

- People’s Union for Civil Liberties, Chhattisgarh State Unit, “Violations of human rights in Salwa Judum”;
- National Human Rights Commission.

### *Nepal*

- Nepal Bar Association, Bishow Kanta Mainali, “Human rights aspects of counter-terrorism measures in Nepal: Experience of the judiciary and legal profession”.

### *Sri Lanka*

- K.S. Ratnavale, Advocate, Centre for Human Rights and Development, “Challenges to a fair administration of justice in terrorism related cases”.

### *Bangladesh*

- Ain o Salish Kendra (ASK), Md. Nur Khan, “Impact of Terrorism and Counter Terrorism on Human Rights”.

### *Maldives*

- Husnu Al Suood, Maldives Centre for Human Rights & Democracy, “Misuse of anti-terrorism laws in the Maldives”.