

FAIR TRIAL AND TERRORISM UNDER THE REALM OF INTERNATIONAL AND INDIAN MILIEU

Written by Ritupriya Gurtoo

*Assistant Professor, Department of Law, Prestige Institute of Management and Research,
Indore*

Terrorism has a direct impact on the enjoyment of a number of human rights, in particular the rights to life, liberty and physical integrity. Terrorist acts can destabilize Governments, undermine civil society, jeopardize peace and security, threaten social and economic development, and may especially negatively affect certain groups. All of these have a direct impact on the enjoyment of fundamental human rights.

Terrorism, in modern times, clearly has a very real and direct impact on human rights, with devastating consequences for the enjoyment of the right to life, liberty and physical integrity of the victims. In addition to these individual costs, terrorism has the potential to destabilize Governments, undermine civil society, jeopardize peace and security, and threaten social and economic development. All of these also have a real impact on the enjoyment of human rights of the victims.

Security of the individual is one of the basic human rights and the protection of individuals is, accordingly, a fundamental obligation of Government. States therefore have an absolute obligation to ensure the human rights of their nationals and others by taking positive measures to protect them against the threat of terrorist acts and bringing the perpetrators of such acts to justice. In recent years, however, the stringent measures adopted by States to counter terrorism have themselves often posed serious challenges to human rights and the rule of law. Some States have engaged in certain activities like torture and other ill-treatment to counter terrorism, while the legal and practical safeguards available to prevent torture, such as regular and independent monitoring of detention centers, and have often been disregarded. Other States have extradited persons suspected of engaging in terrorist activities to countries where they

face a real risk of torture or other serious human rights abuse, thereby violating the international legal obligation of non-refoulement.

The independence of the judiciary has often been undermined, in some places, while the use of exceptional courts to try civilians has had a big impact on the effectiveness of regular court systems. Repressive measures have been used to stifle the voices of human rights defenders, journalists, minorities, indigenous groups and civil society.

These practices, particularly when assemble together, have a corrosive effect on the rule of law, good governance and human rights. They are also counterproductive to national and international efforts to combat terrorism. Respect for human rights and the rule of law must be the bedrock of the global fight against terrorism. This requires the development of national counter-terrorism strategies that seek to prevent acts of terrorism, prosecute those responsible for such criminal acts, and promote and protect human rights and the rule of law. It also implies measures to address the conditions conducive to the spread of terrorism, including the lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, and socio-economic marginalization; to foster the active participation and leadership of civil society; to condemn human rights violations, prohibit them in national law, promptly investigate and prosecute them, and prevent them; and to give due attention to the rights of victims of human rights violations, for instance through restitution and compensation.

Terrorism Perspectives through Lens of International Law

Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims. In legal terms, the international community has yet to adopt a comprehensive definition of terrorism. Martin Scheinin, United Nations special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has highlighted the risks of codifying vague and overly broad definitions of terrorism and related terms into law.¹

¹ UN Commission on Human Rights, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin," E/CN.4/2006/98, December 28, 2005, http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_terrorism/3_CODEXTER/Working_Documents/2006/Sheinin%20E-CN.4-2006-98.pdf

He notes that in many countries, such overbroad definitions are used by government authorities “to stigmatize political, ethnic, regional or other movements they simply do not like,” even though United Nations Security Council Resolution 1456 confirms that states must ensure that measures adopted to combat terrorism “comply with all their obligations under international law ... in particular international human rights, refugee and humanitarian law.”²

In order to ensure that only conduct of a terrorist nature is covered by counterterrorism measures, the special rapporteur recommends that any definition of terrorism contain the following three cumulative characteristics³:

- The acts are committed with the intention of causing death or serious bodily injury (and not just property damage).
- The acts are committed for the purpose of provoking terror in the general public or part of it, intimidating a population, or compelling a government or an international organization to do or refrain from doing any act.
- The acts constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism.

The United Nations General Assembly adopted its first resolution on the subject of international terrorism in 1972.⁴ Professor Tomuschat has recently pointed out that already the title of this Resolution indicates the extent to which the world community was divided over the subject. Resolution 3034 (XXVII) of 18 December 1972 is entitled: “Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes”.⁵ Operative paragraph four of the resolution even goes further in expressly condemning “the

² Ibid., para. 56; United Nations Security Council, Resolution 1456 (2003), S/RES/1456 (2003), <http://www.unhcr.org/refworld/docid/3f45dbdb0.html>

³ UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, E/CN.4/2006/98, December 28, 2005,

⁴ See in respect, J. Dugard, Towards the Definition of International Terrorism, Proceedings of the American Society of International Law 67 (1973), 94 ff. (96); Franck/Lockwood, note 33, 71

⁵ *ibid*

continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms".

On 9 December 1994, General Assembly adopted a "***Declaration on Measures to Eliminate International Terrorism***".⁶ In this declaration the General Assembly not only condemned "all acts, methods and practices of terrorism" by adding the formula "wherever and by whoever committed" but even more specifically pointed out that "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."⁷

United Nations General Assembly adopted on 15th December 1997, the International Convention for the Suppression of Terrorist Bombings. India has been a party to this Convention, ever since the Union Cabinet approved it on 5th of August, 1999 and India formally ratified it on 17th of September 1999. This Convention creates a broad platform for international cooperation to suppress and deal with unlawful and international use of explosives and other lethal devices in various public places with the intention to cause serious bodily damage and extensive destruction. The Convention thus fills up a huge void in international law by expanding the legal framework and enabling several States to cooperate in the investigation, prosecution and extradition of several persons who are engaged in such international terrorism. It is of utmost importance as it strengthens international law enforcement in controlling international terrorism.

Several universal terrorism-related conventions also require compliance with the right to a fair trial and the rule of law. In the context of the *International Convention for the Suppression of the Financing of Terrorism*, for example, article 17 requires that the fair treatment of any person taken into custody, includes enjoyment of all rights which are guaranteed under applicable international human rights law making it clear that the Convention does not affect the enjoyment of other human rights, obligations and responsibilities of States parties.

⁶ General Assembly Resolution. 49/60 of 17 February 1995

⁷ *ibid*

Norms of Fair Trial in International Conventions in relation to Terrorism cases

The right to a fair trial is an umbrella right encompassing several sub-rights of any person who is subjected to criminal proceedings,⁸ can be divided into three stages such as:

A. PRE-TRIAL RIGHTS

- i. The prohibition on arbitrary arrest and detention⁹
- ii. The right to know the reasons for arrest¹⁰
- iii. The right to legal counsel¹¹
- iv. The right to protection against arbitrary imprisonment and to challenge the lawfulness of one's detention as well as the right to be brought promptly before a judge.¹²
- v. Right for protection against torture.¹³
- vi. The prohibition on incommunicado detention¹⁴

⁸ L. Doswald-Beck, *Human rights in Times of Conflict and Terrorism*, 2011, pp.251-372

⁹ Under Article 9(1) of ICCPR "No one shall be subjected to arbitrary arrest or detention" and "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

¹⁰ Article 9(2) of the ICCPR¹³ provides that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

¹¹ Principle 1 of the Basic Principles on Lawyers states that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." This right is particularly relevant in case of pre-trial detention. This was reiterated in the Report of the Special Rapporteur on the Independence of Judges and Lawyers regarding the Mission of the Special Rapporteur to the United Kingdom, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 47.

¹² Article 9(3) of ICCPR

¹³ Article 7 of the ICCPR prohibits torture or cruel, inhuman or degrading treatment or punishment; Article 2(2) of the Torture Convention 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 a justification of torture.; Body of Principles, Principle 6: "No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment." See further Code of Conduct for Law Enforcement Officials, supra note 6, Article 5: "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."

¹⁴ See e.g., Human Rights Commission Resolution 1997/38 para 20 holding that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment." Article 7 of the ICCPR which prohibits torture, inhuman, cruel and degrading treatment. Principle 19 of the Body of Principles states that a "detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful

B. AT THE TIME OF HEARING

1. Right to equal access to court.¹⁵
2. the right to equality of arms before a court, which has to be competent, independent, impartial and established by law;¹⁶
3. the right to a public hearing and a public pronouncement of the judgment;¹⁷
4. the right to be presumed innocent until guilt is proven according to the law¹⁸ and the right not to be compelled to testify against oneself;¹⁹
5. the right to be informed of the charge and to have adequate time and facilities to prepare one's defence including the right to have access to the proceedings and to the relevant documents supporting the charges, to choose a lawyer (if necessary, free of charge) and to communicate with him confidentially;²⁰
6. the right to be tried without undue delay within a reasonable time;²¹
7. the right to be assisted by an interpreter if necessary;²²
8. The right not to be tried twice for the same offence and the prohibition of retrospective legislation.²³

C. POST TRIAL RIGHTS

regulations. Principle 16 of the Body of Principles requires that the family of any arrested or detained person must be notified promptly of the arrest and the location of their family member. If the detainee is moved to another facility the family must be notified of that change.

¹⁵ Article 14(1) of ICCPR

¹⁶ *ibid*

¹⁷ ARTICLE 10 OF UDHR

¹⁸ Article 14(2) of ICCPR

¹⁹ Article 11 of UDHR; Article 14(3)(g) of ICCPR

²⁰ Article 14(3)(a),(b),(d),(e) of ICCPR

²¹ Article 14(3)(c) of ICCPR; Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary (N.P. Engel, Arlington: 1993) [hereinafter Nowak Commentary], at 244

²² Article 14(3)(f) of ICCPR 7; Principle 14 of the Body of Principles sets out the right to an interpreter in all legal proceedings subsequent to arrest. Article 67(1)(f) of the ICC Statute guarantees the right to a "competent" interpreter

²³ Article 14(6) of ICCPR

- The right to have a convicting judgment reviewed by a higher court and to demand compensation for miscarriages of justice.²⁴

Due to the specifics of each individual case and the interests of monitoring organizations, a detailed rendition of trial observation aims is not feasible. The key general goals as given by International Commission of Jurists (ICJ) on Guidelines for ICJ Observers to Trials may be summarized as follows²⁵:

- To make known to the court, the authorities of the country and to the general public the interest in and concern for the trial in question;
- To encourage a court to give the accused a fair trial;
- To obtain more information about the conduct of the trial, the nature of the case against the accused and the legislation under which s/he is being tried; and
- To collect general background information about the political and legal circumstances leading to the trial and possibly affecting its outcome.

The standards against which a trial is to be tested in terms of fairness are numerous, complex and continuously evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But, they may also be found in documents which, though not formally binding, can be taken to express the direction in which the law is evolving.²⁶ In order to avoid possible challenges to the legal nature of the standards employed in evaluating the fairness of a trial, monitors should refer to norms of undisputedly legal origin.

These are:

²⁴ Article 14(5) of ICCPR; The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal. The review undertaken by such a tribunal must be genuine. This, among other things, means that appeal proceedings confined only to a scrutiny of issues of law raised by a first instance judgement might not always meet that criterion. See for example the concerns of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions in his 1993 Report (7 December 1993, UN Doc E/CN.4/1994/7 at paras 113 and 404.

²⁵See International Commission of Jurists (ICJ), “Guidelines for ICJ Observers to Trials”

²⁶ Non-binding documents of relevance to the conduct of criminal proceedings and to ascertaining fair trial standards include: the Basic Principles for the Treatment of Prisoners, UN General Assembly resolution 45/111, December 14, 1990 [hereinafter Basic Principles on Prisoners]; Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31, 1957 and resolution 2076 (LXII)

- i. The laws of the country in which the trial is being held;
- ii. The human rights treaties to which that country is a party, and
- iii. Norms of customary international law.²⁷

Before observing a trial, a monitor should read relevant materials pertaining to domestic legislation. Due to the various legal systems and legal orders involved, as well as the differing stages of their development, it is not possible to devise a comprehensive list of essential texts. A minimum list would comprise: *i) a state's Constitution, especially its provisions on human rights and the judicial system; ii) its Criminal Code and Code of Criminal Procedure; statutes on the establishment and jurisdiction of the courts and on the public prosecutor's office, and iii) landmark court decisions pertaining to human rights, particularly in common law countries.*

The Right to a Fair Trial in Times of Terrorism: Indian Perspective

To ensure a fair trial even in the absence of any specific provision in any enactment the Court has inherent power to order that no witness who has to give evidence should be present when the deposition of the other witnesses are being taken until he himself is examined as a witness. In criminal trials, a prosecutory is entitled to remain in Court only in his capacity as prosecutor and if he is witness also, he may be ordered to retire.²⁸

Court held that the prosecutor ought not to be allowed to frame questions in such a manner, which the witness may answer in 'yes' or 'no' so as to enable him to elicit such answers, which he expects or desires. It also held that allowing such leading questions would offend the right of the accused to fair trial enshrined in Article 21 of the Constitution of India.²⁹

²⁷ The provisions of the Universal Declaration of Human Rights, (UN General Assembly resolution 217A (III), December 10, 1948 [hereinafter UDHR]), are for the most part considered declarative of customary international law and may be of paramount importance if a state has not ratified or acceded to the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (UN General Assembly resolution 39/46, December 10, 1984, entered into force June 26, 1987 [hereinafter Torture Convention]), or any regional human rights instrument. The most directly relevant articles of the UDHR are 5, 9, 10 and 11. As customary international law will most probably be used as a supplementary source of a state's obligations in ensuring the right to a fair trial, it will not be further considered.

²⁸ Dr. Kasi Iyer Vs. State of Kerala AIR.2004. SC 1280,

²⁹ Varkey Joseph v. State of Kerela [AIR 1993 SC 1892]

In investigation, fairness is necessity and fairness in investigation and trial is a human right of an accused. Prosecution must also be fair to accused and state cannot suppress any vital document from court only because the same would support the case of the accused.³⁰ In india we have had the following legislation to deals with terrorism. These were:

The Unlawful Activities (Prevention) Act 1967

The UAPA was designed to deal with associations and activities that questioned the territorial integrity of India. The Act was a self-contained code of provisions for declaring terrorist associations as unlawful, adjudication by a tribunal, control of funds and places of work of unlawful associations, penalties for their members etc.

Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA)

It came on 3 September 1987 was The Terrorist & Disruptive Activities (Prevention) Act 1987 and it was much more stringent provisions then the UAPA. It was specifically designed to deal with terrorist activities in India. When TADA was enacted its constitutionality was challenged which was upheld by court.³¹ The rigorous provisions contained in the statute came to be abused in the hands of law enforcement officials. TADA lapsed in 1995.

The Prevention of Terrorism Act, 2002 (POTA)

Court upheld the constitutional validity of the various provisions of the Act³² including defining terrorist act³³, possession of certain unauthorized arms³⁴, funding terrorist organization³⁵, admission to police amounting to confession³⁶ etc.

The Unlawful Activities (Prevention) Act, 2004

³⁰ Samadhan dhudaka Koli vs. State of Maharastra 2010 4 SCC (crl) 62.

³¹ Kartar Singh vs State of Punjab (1994) 3 SCC 569.

³² People's Union for Civil Liberties Vs. Union of India (UOI) (2004) 9 SCC 580

³³ Section 3(a) of POTA

³⁴ Section 4 of POTA

³⁵ Section 21 of POTA

³⁶ Section 32 of POTA

Finally on September 17, 2004 the Union Cabinet in keeping with the UPA government's Common Minimum Programme, approved ordinances to repeal the controversial Prevention of Terrorism Act, 2002 and amend the Unlawful Activities (Prevention) Act, 1967.

Some of the clauses contained in POTA, which will be completely dropped in the amended Unlawful Activities Act, are: the onus on the accused to prove his innocence, compulsory denial of bail to accused and admission as evidence in the court of law the confession made by the accused before the police officer. In another major departure from POTA, the government has removed all traces of strict liability. Meaning, the burden of proof has shifted from the accused to the police. There is no presumption of guilt under UAPA. Like under any other ordinary criminal law, the police will have to establish that the accused person had a criminal intention for committing the offence in question. Another glaring shortcoming in the law pertained to the dichotomy in the provision for banning terrorist organisations and unlawful organisations. UAPA was originally meant only for banning unlawful organisations. Now it has a separate chapter for banning terrorist organisations as well. Thus, the procedures prescribed by the same law for the two kinds of bans are different. The government cannot, for instance, ban any group for unlawful activities without having its decision ratified within six months by a judicial tribunal headed by a sitting high court judge. There is no such requirement if the ban is on the charge of terrorism. This anomaly has arisen because of the strategy adopted by the UPA government to hide special provisions in an ordinary law.

The National Investigation Agency Act (NIAA)

The National Investigation Agency Act (NIAA) creates a specialized federal police agency authorized to investigate certain crimes, including offenses under the UAPA.³⁷ It remains to be seen how the NIA will function in practice, but it is immediately concerning that the NIAA authorizes the creation of Special Courts to try numerous offenses, including “terrorism offenses” under UAPA.³⁸

In India, fair trial is seen in Code of Criminal Procedure, the prosecutor cannot withdraw the case without the consent of the court³⁹, the court has been empowered to examine any accused

³⁷ National Investigative Agency Act 2008, No. 75 of 2008; NIAA, secs. 3-5.

³⁸ NIAA SECTION 11-12

³⁹ Section 228 of CrPc

at any point of time to get explanation⁴⁰, judge should not be in any manner related to the prosecution⁴¹, venue of trial⁴², right of accused to know accusation⁴³, interpretation of evidence to accused⁴⁴, accused to have expeditious trial⁴⁵, evidence to be taken in presence of accused, right against double jeopardy⁴⁶, free legal aid to accused⁴⁷, right of accused to examine witnesses⁴⁸.

Role of Indian Judiciary in Protecting the Rights of Terrorists Via Fair Trial

Though Indian judiciary has always maintained the stand that the accused, irrespective of the status, has always been given a fair trial, in spite of the reality is somewhat different. The right to a fair trial is one of the fundamental guarantees of human rights and the rule of law, aimed at ensuring the proper administration of justice. Indian judiciary ensures that Justice is administered in a way that achieves fairness for all, regardless of the identity of the parties to the proceedings or the nature of the proceedings themselves. Criminal charges are always determined by a competent, independent and impartial tribunal established by law. India is wedded to the concept of rule of law. State power is divided amongst the three chief organs, the Legislature, the Executive and the Judiciary. The role and responsibility of each has been properly defined and circumscribed, the Judiciary being given the prime place, and planted as the instrumentality of the Constitution to test the validity of acts of each organ through the concept of judicial review; the foremost reason for this scheme of things being the view that rule of law is the sole *raison d'etre* for the survival of human rights which India is determined to conserve and preserve.⁴⁹ Yet, there have been cases where it is alleged by the human rights protector that judiciary has overlooked certain perspectives of Fair trial in cases involving terrorism. Taking the case of *Mohammed Ajmal Amir Kasab's*⁵⁰ involvement in the terrorist

⁴⁰ Section 313 of CrPc

⁴¹ Section 479 of CrPc

⁴² Section 177 to 189 of CrPc

⁴³ Section 211-224

⁴⁴ Section 279

⁴⁵ Section 309(1)

⁴⁶ Section 300(3)

⁴⁷ Section 304

⁴⁸ Section 230,231 and section 242

⁴⁹ Justice Y. K. Sabharwal, Chief Justice of India, *Meeting The Challenge Of Terrorism - Indian Model (Experiments In India)*

⁵⁰ *Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v. State of Maharashtra* AIR 2012 SC 356

attacks in Mumbai in November 2008 is an open-and-shut case for some as it took nearly four years to conclude because of India's commitment to the rule of law and the due process of law. However, allegation of due process not being followed meticulously on the grounds that his actual age was in contention which was rejected by court nor sufficient time was not given to Kasab lawyer to study the chargesheet. Kasab initial lawyer Mr Kazmi, was replaced by the court on account of him being not cooperative. This was done after Mr Kazmi had examined 250 witnesses. Under the Code of Criminal Procedure, a judge does not have the power to dismiss a lawyer. Kazmi's dismissal. Mere non-cooperation is no grounds for removing the lawyer when the accused has his confidence in him, and this may perhaps vitiate the final verdict in the case.⁵¹ Amicus Curiae Raju Ramachandran, Senior Advocate in the Supreme Court did not feel the need to meet Kasab even once to take instructions from his client before arguing his case before the Supreme Court. The reason, according to him, was that the case records from the trial court and the High Court were fairly exhaustive and there was no occasion to meet Kasab.⁵²

In *State (N.C.T. of Delhi) vs. Navjot Sandhu @ Afsan Guru*⁵³, where afzal guru along with 9 other terrorist attacked parliament in 2001 was another case where allegations of shoddy investigation had surfaced. Allegations were alleged that he had been awarded the death sentence entirely on the basis of circumstantial evidence, without any proper defence lawyer

In another case of *State of Punjab v. Davinder Pal Singh Bhullar and Ors. etc*⁵⁴ who was sentenced in 2001 by a trial court, under Terrorist and Disruptive Activities (Prevention) Act (TADA), for plotting terror attacks on Punjab Senior Superintendent of Police Sumedh Singh Saini in 1991 and Youth Congress leader M.S Bitta in 1993, in which nine people were killed. The manner in which his death sentence was executed, like confession made before police; excessive torture, gave an indication in international scenario that it was an unfair trial which is a violation of the right to life.

⁵¹ *Gaps in Kasab case*, V. Venkatesan, Frontline, Volume 29, Issue 22, Nov. 03-16, 2012

⁵² *ibid*

⁵³ AIR 2005 SC 3820

⁵⁴ *State of Punjab v. Davinder Pal Singh Bhullar and Ors. etc* AIR 2012 SC 364

Taking all the above things into consideration, Human Rights watch legal concerns with respect to key aspects of India's new counterterrorism laws are now drawing favour from the public. Several recommendations have been floated are⁵⁵:

- Expand the vague and overbroad definition of terrorism under existing Indian law to encompass a wide range of non-violent political activity, including political protest by minority populations and civil society groups.
- Strengthen the existing power of the government to ban an organization on limited evidence and with limited rights to judicial review, and to make membership of summarily proscribed groups a criminal offense.
- Authorize warrant-less search, seizure and arrest with wide authority and few safeguards, and compulsion of information from third parties without a court order.
- Allow detention without charge of up to 180 days, including up to 30 days in police custody, and create a strong presumption against bail.
- Create a presumption of guilt for terrorism offenses where certain kinds of evidence are found, without a showing of criminal intent.
- Authorize the creation of special courts at the state and federal level, with wide discretion to hold in camera (closed) hearings and use secret witnesses.
- Contain no sunset provisions or mandatory periodic review schedule that could help safeguard against abuse.

⁵⁵ Human Rights Watch , *Back To Future: India's 2008 Counterterrorism Laws*, July 2010

Conclusion

India continues to face serious threats of terrorist attacks in spite having stringent legislations. However, resuscitating counterterrorism measures have already shown to the government that it had failed; it violates fundamental human rights guarantees and is not a sound or effective response.

A human rights analysis of the impact of these counter-terrorism have to measures merits particularly consideration in the light of the serious consequences they may have for the individual, as well as for his or her family and community. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between 'may be' and 'must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. The right to a fair trial involves the right to a public hearing. Any restrictions on the public nature of a trial, including for the protection of national security, must be both necessary and proportionate, as assessed on a case-by-case basis. Any such restrictions should be accompanied by adequate mechanisms for observation or review to guarantee the fairness of the hearing. The protection and promotion of human rights while countering terrorism is both an obligation of States and a condition for an effective and sustainable counter-terrorism strategy. All counter-terrorism measures must comply fully with States' international human rights obligations, including the right to a fair trial.

In order to counter terrorism there is an urgent need to revise the law envisaging the definition of terrorism to be consistent with the recommendations of the UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, notably that it cover only those acts that are committed with the intention of causing death or serious injury; are committed for the purpose of provoking terror or coercing the government to do or refrain from doing any act; and are in line with international conventions relating to terrorism. A fair balance has to be struck between Human Rights norms and the need to tackle transnational crime. There is an absolute search for a fair balance between the

demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier, faster and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would only results in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in cases involving terrorism

