The Secretary
Parliamentary Joint Committee on
ASIO, ASIS and DSD
Parliament House
Canberra ACT 2600

20 May 2005

Dear Secretary,

Supplementary submission to Submission 67 dated 23 March 2005 for Review of the Australian Security Intelligence Organisation (ASIO) Questioning and Detention Powers by the Parliamentary Joint Committee on ASIO, ASIS and DSD

At pages 8-9 of my submission dated 23 March 2005 (Submission 67) I refer to the recent usages by the Hon P Ruddock, Commonwealth Attorney-General, of the term "human security" and the citation of two Canadian commentators, the Canadian Attorney-General and Minister for Justice, Irwin Cotler (also Professor of Law, McGill University) and the UN High Commissioner for Human Rights (and former Justice of the Supreme Court of Canada), Louise Arbour, in support of the certain claims.

A close and fuller examination of relevant writings of Cotler and Arbour supports my submission (at page 9 of Submission 67) that the concept of "human security" in relation to counter-terrorism laws as presented is both tendentious and contentious. There is no necessary or automatic connection between the protection of national security and the protection of human rights generally, including the various non-derogable human rights.

Both Canadian commentators must be read in context. Both favour a panoply of rigorous accountability mechanisms or practices to reinforce democratic institutions and human rights culture in enacting counter-terrorism laws and in providing an effective long term response to terrorism.

It is this systematic integration of rule of law principles into new legislative measures that seeks to produce "human security". Enactment of counter-terrorism questioning and detention powers *per se* does not produce *human* security and that argument is starkly at odds with conventional rule of law concepts – indeed it is *state* centred, rather than *human* centred, concentrating largely, if not exclusively, on accretions of executive power.

Inadequately checked executive power creates the risk of incrementally, if unconsciously, accumulating the characteristics of an authoritarian state, mirroring the authoritarian ideology of terrorist groups.

The writings of Cotler and Arbour support measures compatible with a continuing oversight and review role, linked to a legislative sunset clause, for the Joint Parliamentary Committee in relation to the questioning and detention powers under Division 3 of Part III of the *ASIO Act 1979* (Cth).That role is compelling in that the

powers under the Australian legislation are more extensive than those available under the relevant Canadian legislation, the reference point for these two Canadian commentators.

Indeed, the present safeguards built around the questioning and detention provisions of the *ASIO Act 1979* (Cth) fall considerably short of the conditions set down by Cotler and Arbour as conducive to the rule of law and *human* security in counter-terrorism legislative responses:

. Irwin Cotler: "Thinking Outside the Box" in Daniels, Macklem and Roach (eds) *The Security of Freedom* at page 121 (extract attached):

Principle 13: The Oversight Principle

An appropriate oversight framework is germane to the integrity and efficacy of anti-terrorist legislation, and should include the following instruments and mechanisms for monitoring, review and redress:

. Application of the *Canadian Charter of Rights and Freedoms;*
. Enhanced capacity for judicial review;
. Annual Report by the Attorney-General to Parliament on the operation of the Act;
. A Parliamentary Officer in the ongoing monitoring and supervision of the legislation, or perhaps more preferably, a review by SIRC (the Security Intelligence Review Committee) which has developed a repository of experience and expertise in these security-related matters;
. Sunset clauses for the provisions respecting preventive arrest and judicial investigative hearings;
. Media scrutiny and sunshine;
. NGO monitoring; and,
. An engaged civil society

. Louise Arbour: "Security Under The Rule of Law": Address of Louise Arbour UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists (Berlin) 27 August 2004 at Http://www.unhchr.ch/huricane/huricane.nsf/view01/3485B28EDDA173FOC1256EF (accessed 17 May 2005) **(extract attached)**

> In reaching our decision (referring to litigation before the Supreme Court of Canada challenging the constitutionality of the *Anti-Terrorism Act 2001* investigative hearings mechanism) we underscored that the challenge for democracies in the battle against terrorism is to balance an effective response with fundamental democratic values that respect the importance of human life, liberty and the rule of law. We said that, "Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law."
>
> I firmly believe that terrorism must be confronted in a manner that respects human rights law. Insisting on a human rights-based approach and a rule of law approach to countering terrorism is imperative. It is particularly critical, in time of crisis, when clarity of vision may be

lacking and when institutions may appear to be failing, that all branches of governance be called upon to play their proper role and that none abdicate to the superior claim of another.

Put bluntly, the judiciary should not surrender its sober, long-term, principled analysis of issues to a call by the executive for extraordinary measures grounded in information that cannot be shared, to achieve results that cannot be measured. This is of course not to suggest that the judiciary should play an obstructionist role when the government is under pressure to react to an unprecedented, acute and immediate crisis. But it is for judges, relying on legal principles, to articulate and apply the parameters of deference when human rights are in jeopardy. Over the long term, a commitment to uphold respect for human rights and rule of law will be one of the keys to success in countering terrorism – not an impediment blocking our way.

For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually works to improve human security. Societies that respect the rule of law do not provide the executive a blanket authority even in dealing with exceptional situations. They embrace the vital roles of the judiciary and the legislature in ensuring that governments take a balanced and lawful approach to complex issues of national interest. A well-honed system of checks and balances provides the orderly expression of conflicting views within a country and increases confidence that the government is responsive to the interest of the public rather than to the whim of the executive. Ultimately, respect for the rule of law lessens the likelihood of social upheaval, creating greater stability both for a given society and its neighbours.

In fact, human rights law makes ample provision for effective counter-terrorism action even in the most dire of circumstances....Because of the existence of this legal framework, it is essential that measures taken in the context of counter-terrorism be subject to proper review. Counter terrorism initiatives are rarely submitted, in a real time environment, to public debate and the scrutiny of the media, except in an abstract and theoretical fashion. The only effective form of scrutiny for compliance with legal imperatives is in the form of judicial review.

I hope this information is of assistance to the Joint Parliamentary Committee in its deliberations.

Yours faithfully

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Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy

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Introduction

It has been said that the world changed on September 11. I do not know whether the world changed – or whether the darker side of the universe was exposed – but what is clear is that September 11 was a transformative event, impacting on our psyches as well as on our politics, on our priorities as on our purposes. It has been a central motif of public and Parliamentary discourse – whether in the public square or the halls of Parliament – while the 'war on terrorism' has become a centrepiece of the daily media.

Indeed, while the threat of terrorism – or any legislative response to it – was not even on the Parliamentary or political radar screen before September 11, not a day has passed since Parliament convened on September 17 that has not been dominated by the cataclysmic events of September 11. Every party caucus, every meeting of the House Standing Committee on Justice and Human Rights, every Question Period, has been organized around the terrorist threat and the appropriate response. If nothing else – and at the risk of extrapolating irony from this horrific tragedy – September 11 has clearly raised the level of political and Parliamentary discourse, if not also that of the media, academe, and civil society in general.

As it happens, however, the discourse and discussion of Bill C-36 (the proposed *Anti-terrorism Law*, hereinafter referred to as 'the Bill') in the public square and before our Commons Justice and Human Rights Committee – some of which has been very good indeed – has been

somewhat beset, if not burdened, by a 'conventional wisdom' perspective in what is an unconventional, if not extraordinary, time. In particular, analysis of the legislation has often proceeded from the juridical optic of the domestic criminal law/due process model, while a more inclusive model would be that of an international criminal justice system counteracting a transnational and existential threat. Similarly, the legislation has been characterized, if not sometimes mischaracterized, in terms of national security versus civil liberties – a zero sum analysis – when what is involved here is 'human security' legislation that purports to protect both national security and civil liberties.

Accordingly, an analysis of the proposed Bill invites us to 'think outside the box' – to go beyond the conventional domestic optics, to rethink and re-configure the legislation in terms of a converging and inclusive domestic and international perspective anchored in the notion of human security – itself a people-centred rather than State-centred approach. This paper, then, will be organized around two parts: first, the analysis of the foundational principles that underpin the Bill; second, the identification of the rights-based concerns generated by this *projet de loi*, while offering recommendations that seek to address, if not redress, these legitimate civil libertarian concerns.

I. Foundational Principles Underpinning the Counter-Terrorism Law

Principle 1: Human Security Legislation

The configurative analysis of this Bill in terms of national security versus civil liberties may be as misleading as it is inappropriate in its framing of the issues. It appears to suggest – however inadvertently – that those who are against the legislation are the true civil libertarians, while those in favour of it are somehow indifferent to, if not insensitive to, civil liberties. The point is that there are good civil libertarians on both sides of the issue – and the civil libertarian issues should be considered on the merits and not as a function of the labelling of one's position as being for or against the legislation.

The better approach from a conceptual and foundational point of view is to regard the legislation as human security legislation, which seeks to protect both national security – or the security of democracy if not democracy itself – and civil liberties. As the United Nations puts it, terrorism constitutes a fundamental assault on human rights and, as such,

a threat to international peace and security, while counter-terrorism law involves the protection of the most fundamental of rights, the right to life, liberty, and the security of the person, as well as the collective right to peace.

This does not mean that the legislation raises no civil liberties concerns, or that it cannot be critiqued from a human rights perspective. On the contrary, in Part Two of this paper – *The Civil Liberties Principle* – I will identify 11 rights-based concerns; but these concerns must be examined within the framework of these foundational principles, and in particular, this generic principle of human security.

Principle 2: Jettisoning 'false moral equivalencies': Towards a 'Zero Tolerance' Principle re Transnational Terrorism

One of the more important, yet oft ignored, dynamics inhibiting the development of a counter-terrorism law and policy has been the blurring of the moral and juridical divides occasioned by the mantra that 'one person's terrorist is another person's freedom fighter.' Indeed, the repeated invocation of this moral and legal shibboleth has not only undermined intellectual inquiry, but its moral relativism, or false moral equivalence, has blunted the justificatory basis for a clear and principled counter-terrorism law.

In a word, the underlying principle here should be that terrorism from whatever quarter, for whatever purpose, is unacceptable; that there must be a Zero Tolerance Principle for transnational terrorism, just as there is a Zero Tolerance Principle for racism.

Also, the oft-invoked analogy with the proclamation of the *War Measures Act* in 1970 – suggesting that this Bill is a replay of the repressive content and context of the 'war measures' attending that proclamation – is as inappropriate as it is inapplicable. There was no *Canadian Charter of Rights and Freedoms* as a constitutional filter to pre-test the proclamation of the *War Measures Act* in 1970 and the issuance of *Public Order Regulations* pursuant thereto; equally, the new legal regime occasioned by the proclamation of a state of emergency was unfettered by any Charter accountability. There was no capacity for principled judicial review of this exercise of State power, nor were there any restraints or safeguards on the exercise of executive, as distinct from Parliamentary, power, such as the *Public Order Regulations* authorizing prolonged preventive detention for up to seven days, and with authorization for further prolongation for up to 21 days. Nor, from the point of view of

Principle 11: The Anti-Hate Principle

The Bill includes important provisions that would allow the courts to order the deletion of publicly available hate propaganda from computer systems such as an Internet site. As well, there are *Criminal Code* amendments that would create a new offence of mischief motivated by bias, prejudice or hate based on religion, race, colour, or national or ethnic origin committed against a place of religious worship or associated religious property.

In addition, there are amendments to the *Canadian Human Rights Act* to make it clear that using telephone, Internet, or other communications tools for hatred purposes or discrimination is prohibited. As the Canadian Human Rights Commission enunciated in its testimony before the Standing Committee on Justice and Human Rights, 'We strongly support the proposed amendments to section 13 of the *Canadian Human Rights Act* ... the Internet has fast become a forum for hate – extending the potential reach of hate messages to millions. For a number of years, the Canadian Human Rights Commission has been interpreting the *Canadian Human Rights Act* to include hate messages over the Internet and we are pleased that Bill C-36 makes this explicit.'

The Commission added:

> The Commission is also pleased that the Bill proposes to extend the hate propaganda provisions of section 320 of the *Criminal Code* to allow for a court to order the removal of hateful material on the Internet pending a final decision by the Court. Although these new Criminal Code provisions would operate outside the complaints procedures of the *Canadian Human Rights Act* they would allow potential complainants to seek interlocutory removal of alleged hate messages, and we support this change.

Principle 12: The Chartering of Rights

The proposed anti-terrorism legislation has been 'pre-tested' under the Charter. This does not mean that the legislation is 'Charter-proof' as much as it means that the legislation is Charter bound. In a word, the legislation is not immune from a Charter challenge, and any limitation on a Charter right will have to comport with the requirements of Section 1 and the proportionality test as developed by the courts, and summarized earlier under Principle 4.

Principle 13: The Oversight Principle

An appropriate oversight framework is germane to the integrity and efficacy of anti-terrorist legislation, and should include the following instruments and mechanisms for monitoring, review, and redress:

- Application of the *Canadian Charter of Rights and Freedoms*;
- Enhanced capacity for judicial review;
- Annual Report by the Attorney General to Parliament on the operation of the Act;
- A Parliamentary Officer in the ongoing monitoring and supervision of the legislation, or perhaps more preferably, a review by SIRC (the Security Intelligence Review Committee) which has developed a repository of experience and expertise in these security-related matters;
- Sunset clauses for the provisions respecting preventive arrest and judicial investigative hearings;
- Media scrutiny and sunshine;
- NGO monitoring; and,
- An engaged civil society.

II Rights-Based Concerns: The Civil Liberties Principle

While the Bill may be said to be inspired by, and anchored in, the principle of human security – both domestic and international – and while the Bill was subjected to a rigorous Charter scrutiny, this does not obviate civil libertarian concerns as set forth below, all of which were referred to in the course of witness testimony before the Justice and Human Rights Committee.

1. Definition of 'Terrorist Activity'

A persistent and pervasive concern adduced before the Justice Committee related to the arguable overbreadth of the definition of terrorist activity as set forth in s.83.01(2) in the Bill. A 'terrorist activity' is defined as an action that takes place either in or outside Canada, 'committed in whole or in part for a political, religious or ideological purpose, objective or cause' and intended to intimidate the public 'with regard to its security, including its economic security' or compelling people, governments or

UNITED NATIONS HIGH COMMISSIONER
FOR HUMAN RIGHTS

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Address of Louise Arbour UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists (Berlin)

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27 August 2004

SECURITY UNDER THE RULE OF LAW

Dear friends and colleagues,

Thank you for inviting me to your meeting here in Berlin. It is a pleasure for me to join this distinguished gathering of judges, lawyers, academics and human rights defenders to discuss one of the most compelling human rights issues today. The International Commission of Jurists (ICJ) has always been at the forefront of addressing current and future challenges. Your pioneering work for over 50 years to define the parameters of the rule of law, the independence of the judiciary and the role of lawyers in a changing world, has inspired countless legal practitioners throughout the world. I share your ideals and commitment to advance the legal protection of all human rights.

It will not surprise you to hear that I believe firmly in the role of law to guide us through difficult societal challenges. Law is the premise on which I would like to exercise my mandate as High Commissioner for Human Rights. For it is law, after all, that evens the playing field between the State, with its legitimate interests including national security, and the individual, with his or her legitimate interest in liberty and personal security. But when I speak about the law, I do not mean of course any law. Law, as any other institution, is subject to abuse. Apartheid South Africa was governed by laws that regulated oppression and led to horrific denial of dignity. The law that must guide us is that law which is capable of delivering justice and providing remedies for grievances. It is a dynamic and reliable institution that is capable of preserving the rights of all while adapting itself to the needs of a changing world. This is the role of human rights law – the body of law that my colleagues and I are entrusted with promoting and protecting on behalf of the international community.

Some say that the main problem with human rights law is its weak enforcement mechanisms. I think this assumption is less true than it once was. To start with, as lawyers we should be proud of our collective achievements in turning human rights ideals into legal obligations that most States now voluntarily accept at the international and domestic levels. Through the ratification of human rights treaties and their incorporation into domestic constitutional and legal systems, individuals have been able to assert and claim their rights. We have seen inspiring judgments from courts at all levels in all continents that turn human rights into a reality for ordinary people across the globe. These are not small accomplishments.

At the international level too, I feel that every day we are moving closer to making international human rights law a universally enforceable branch of international law. While the implementation of human rights law rests ultimately in the hands of states, the creation of the International Criminal Court (ICC) under the Rome Statute, now ratified by 94 States, provides a new legal infrastructure for acknowledging the personal criminal responsibility of those who plan, instigate or perpetrate genocide, war crimes or crimes against humanity. The ICC is an historic advance in international law. It will no doubt build on the contribution of the two ad hoc tribunals for the former Yugoslavia and Rwanda that articulated many essential aspects of international criminal law, including the elements of crimes such as genocide, torture, and rape as an act of genocide or as a crime against humanity; the complex regime of command responsibility for those crimes; the elaboration of appropriate witness protection measures; and the essential need for proper legal defence for those accused of committing these most serious crimes.

Human rights law has also advanced as a factor in examining major conflicts that affect international peace and security. Certainly the increased visibility of human rights on the Security Council agenda is significant, although I believe we can still make more progress. The endorsement of the human rights law approach by all the judges in the recent Advisory Opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* has highlighted the increasing significance of this body of law. 1 / Yet, I acknowledge that

we have far to go before achieving the full acceptance of international law, including human rights law, as the main instrument to guide international relations, and in particular peace and security issues. And the challenge of implementing judgments of the World Court is less than the one we face in Geneva, to ensure the impact of quasi-judicial mechanisms such as the treaty bodies that monitor application of the UN human rights conventions. One of my main goals as High Commissioner is therefore to contribute to strengthening of the rule of law at both the national and international levels.

This brings me to the very timely subject of this conference: human rights and counter-terrorism.

Last week, in Geneva, the Secretary-General led the United Nations family in a moving memorial to the victims of the attack on the UN headquarters in Baghdad of 19 August 2003 that claimed the life of my predecessor, Sergio Vieira de Mello, and 21 other men and women, and injured over 150 others, some very seriously. The families of the victims and the survivors expressed not only grief and sorrow, but also dignity and a quest for justice. I was struck once again by the intensity of the need to know and to understand what happened to victims of violence and by the intensity of the desire for justice by victims of crime.

Although terrorism is not new in our lives, many domestic and international policies are now focused on how to deal with this menace. These policies beg key legal questions that need to be addressed. The first one is: what is terrorism? In its popular understanding, the term "terrorism" seems to refer to an act that is wrong, evil, illegitimate, illegal, a crime – even an international crime. For legal purposes, we need of course a somewhat tighter definition. For example, we may need a strict definition to satisfy the principle of *nullum crimen sine lege*. Many claim that there is too much room for abusing the term "terrorism" in the absence of a universally-agreed definition. This is true to a point. Yet many of the elements of the crime of terrorism are already established. The International Convention for the Suppression of the Financing of Terrorism, which has been ratified by 120 States, defines terrorism, for the purposes of the treaty, to include "any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.2/

The International Criminal Tribunal for the Former Yugoslavia referred to this definition when, on 3 December 2003, it convicted an individual for the first time for the crime of terror, committed in this case against the civilian population of Sarajevo. The Majority considered this to be a war crime covered by article 3 of its Statute. It rejected claims that convicting a person on the basis of this crime violated the principle of *nullum crimen sine lege*. The Majority concluded in this case, known as3/ that the crime of terror against the civilian population is constituted of elements common to other war crimes, in addition to further elements that it drew from the Financing of Terrorism Convention.4/

This is a landmark judgment, although it only addresses the crime of terror as a war crime. During the elaboration of the Rome Statute, several delegations argued for the inclusion of the crime of terrorism in the jurisdiction of the ICC as a separate crime. The majority of States disagreed, however, precisely because of the issue of the definition. The Final Act of the Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC, adopted in Rome on 17 July 1998, recommended that a Review Conference of the Rome Statute, which may take place seven years following the entry into force of the Statute, namely in 2009, should consider the inclusion of several crimes within the jurisdiction of the Court, including terrorism, with a view to arriving at an acceptable definition.

Based on the Rome Statute, some also argued that certain acts of terrorism may already constitute crimes against humanity when they meet the Statute's thresholds. They considered that the horrific attacks of September 11, and other attacks by groups such as Al-Qaida, may fall within these criteria because they are acts of murder committed as part of a widespread or systematic attack directed against civilian populations with knowledge of the attack.

These questions underscore why it is important that the UN Security Council reacted swiftly and with such vigour in the aftermath of 11 September in developing an approach to dealing with terrorism. Security Council resolution 1373 established a legal framework for international cooperation and common approaches to the threat of terrorism in such areas as preventing the financing of terrorism, reducing the risk that would-be terrorists might acquire weapons of mass destruction, and improving cross-border information sharing by law enforcement authorities. The resolution also set up the Counter-Terrorism Committee to supervise the implementation of these measures. Regional approaches have been developed in the context of the Arab League, the Organization of the Islamic Conference, the African Union, the European Union, the Organization of American States, and elsewhere.

Let us be clear: there is no doubt that States are obliged to protect their citizens from terrorist acts. The most important human right is the right to life. States not only have the right, but also the duty to secure this right by putting in place effective measures to prevent and deter the commission of acts of terrorism. This has been the consistent view of regional human rights courts and international quasi-judicial bodies. But counter-terrorism measures cannot be taken at any cost. This is one reason we continue to believe that the Counter-Terrorism Committee should consider, not only the implementation of counter-terrorism measures, but also their impact on human rights.

In one of the last cases in which I participated as a member of the Supreme Court of Canada, we were called to rule on the lawfulness of a new provision of the Criminal Code that took effect as part of Canada's Anti-Terrorism Act of 2001, which was itself enacted in response to the September 11 attacks.5/ The challenged provision, section 83.28, authorizes so-called "judicial investigative hearings" in which persons believed to have information relevant to acts of terrorism may be compelled to testify under immunity. The case concerned an attempt by the Crown to obtain information from the Appellant relating to an ongoing prosecution for the Air India bombings of 23 June 1985: in one attack, a bomb exploded at Narita Airport in Japan, killing two baggage handlers and injuring four others, while a second bomb less than an hour later exploded on board Air India Flight 182 off the west coast of Ireland, causing it to crash into the sea and killing all 329 passengers and crew.

We had before us several questions, including the role of the judge in the investigative hearing, the need for secrecy of such hearings, the role of counsel for the person subjected to the hearing, and the threshold of relevance and admissibility applicable in such a hearing where information, rather than evidence, is sought. We decided to take a "broad and purposive interpretation of s. 83.28" which accorded with the presumption of constitutionality.6/ We therefore found the challenged provisions of the Act to be constitutional and not in violation of the Canadian Charter of Rights and Freedoms (although we did say that the immunity protections should apply -- not only to criminal prosecution -- but also to extradition and deportation proceedings). In reaching our decision, we underscored that the challenge for democracies in the battle against terrorism is to balance an effective response with fundamental democratic values that respect the importance of human life, liberty and the rule of law. We said that, "Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law."

I firmly believe that terrorism must be confronted in a manner that respects human rights law. Insisting on a human rights-based approach and a rule of law approach to countering terrorism is imperative. It is particularly critical, in time of crisis, when clarity of vision may be lacking and when institutions may appear to be failing, that all branches of governance be called upon to play their proper role and that none abdicate to the superior claim of another.

Put bluntly, the judiciary should not surrender its sober, long-term, principled analysis of issues to a call by the executive for extraordinary measures grounded in information that cannot be shared, to achieve results that cannot be measured. This is of course not to suggest that the judiciary should play an obstructionist role when the government is under pressure to react to an unprecedented, acute and immediate crisis. But it is for judges, relying on legal principles, to articulate and apply the parameters of deference when human rights are in jeopardy. Over the long term, a commitment to uphold respect for human rights and rule of law will be one of the keys to success in countering terrorism – not an impediment blocking our way.

For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually works to improve human security. Societies that respect the rule of law do not provide the executive a blanket authority even in dealing with exceptional situations. They embrace the vital roles of the judiciary and the legislature in ensuring that governments take a balanced and lawful approach to complex issues of national interest. A well-honed system of checks and balances provides the orderly expression of conflicting views within a country and increases confidence that the government is responsive to the interest of the public rather than to the whim of the executive. Ultimately, respect for the rule of law lessens the likelihood of social upheaval, creating greater stability both for a given society and its neighbours.

In fact, human rights law makes ample provision for effective counter-terrorism action even in the most dire of circumstances. Article 4 of the International Covenant on Civil and Political Rights was crafted precisely to afford States the leeway they would need to deal with truly exceptional situations while remaining within a legal framework. Its provisions are for exceptional situations only, namely, those in which "the life of the nation" is threatened. In such situations a State may take emergency measures, provided they are limited to the extent strictly required by the exigencies of the situation, are not inconsistent with the State's other international obligations, and do not discriminate on specified grounds. Certain rights are of course never subject to derogation, regardless of the nature of

the emergency.

Because of the existence of this legal framework, it is essential that measures taken in the context of counter-terrorism be subject to proper review. Counter terrorism initiatives are rarely submitted, in a real time environment, to public debate and the scrutiny of the media, except in an abstract and theoretical fashion. The only effective form of scrutiny for compliance with legal imperatives is in the form of judicial review.

This is what the UN Human Rights Committee insisted upon, for example, with respect to the question of detention. The key consideration is that of remedy: an opportunity for meaningful review and possible release through a procedure that respects due process. No one should be held in indefinite confinement without access to counsel and the courts. In its General Comment No. 29 of 2001, in which it considered States' obligations under emergency situations, the Committee said the following: "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.7/

In many countries, courts have been ruling on counter-terrorism measures, frequently validating the views of human rights lawyers on troubling features of their legality or application. These include questions of arrest, deportation, incommunicado detention, prolonged detention without charge or trial, and retroactivity of criminal law.

In the United States, the principle of access to the courts was recently vindicated by the Supreme Court in the *Hamdi* and *Rasul* decisions. In the *Hamdi* case, concerning a U.S. citizen detained in Afghanistan and held in a military prison in the U.S., the Court trod carefully with regard to the prerogative of the Executive to exercise authority over foreign policy and, in particular, the conduct of hostilities.8/ Yet, as Justice O'Connor stated in her plurality opinion, "as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."

The Court, in deciding to apply a balancing test under the Due Process Clause of the US Constitution, recognized that vital interests were at stake on both sides of the equation. Justice O'Connor said, "Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." The Court held that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's assertions before a neutral decision maker. As the Court resoundingly declared, "[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

You are also no doubt aware of the other important U.S. decision known as *Rasul*, concerning detainees at Guantanamo.9/ In that case, the Supreme Court took the view that detainees must be given access to the courts, despite the fact that the camp is situated outside of the United States. The Court stated that "[w]hat is ... at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." This, it answered in the affirmative, notwithstanding the camp's location in Cuba and the fact the petitioners were non-citizens.

The Court's decision in *Rasul* coincided almost exactly with the issuance by our Human Rights Committee of its General Comment No. 31, on the meaning of article 2 of the International Covenant on Civil and Political Rights. In that analysis, for which ICJ member present here today Sir Nigel Rodley was rapporteur, the Committee underscored that a State party to the Covenant "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.10/ The *Rasul* decision also overlapped in some respects with an opinion of the UN Working Group on Arbitrary Detention,