INTERNATIONAL CO-OPERATION TO COMBAT CRIME IN THE 21st CENTURY: THE ROLE OF THE COMMONWEALTH IN DETERMINING A BALANCE BETWEEN INDIVIDUAL RIGHTS AND GLOBAL INTERESTS

A Paper by the Commonwealth Secretariat

INTRODUCTION

1. The search for the appropriate balance between peoples' desire for individual freedom and their need for social cohesion, responsibility and the minimum order which enables freedom to be enjoyed is not new. However, since the end of the relatively static era of the Cold War, there has been a heightened demand for political and economic freedom for individual actors, both human and corporate, that has coincided with a re-ordering of state power, and the combination has given a fresh urgency to the search for that balance which is being undertaken in a much more complex, contradictory and unstable environment. The unrestrained assertion of individual and corporate interests which is often associated with modern technology, and an open-ended morality has exposed people to previously unimagined forms of environmental and ecological dangers, to terrorism, to the potential, or actual, massive economic and social instability associated with new forms on a magnified scale of anti-social behaviour, such as money laundering or drug trafficking, or more simply, to the perils of abuses of the free market.

2. At the same time the potential of state power to impose either particularised repression or overarching authority on a grand scale has multiplied exponentially. Often this has been exaggerated by the revival of nationalist, ethnic, sectarian and chauvinistic zeal. Combined with modern technology and weaponry, and all acting under the licence which still attaches to sovereignty, it is a potent threat to individual liberty.

3. Such state power, even in so-called "failed States", has frequently been exaggerated by the increasingly unrestrained competition for diminishing resources and the desperation of a world distorted by bizarre inequalities no longer mitigated by a sufficient sense of common humanity. The particular difficulty posed by these two tendencies is that they have burgeoned contemporaneously. But they do not exhibit themselves identically either temporarily or geographically. Consequently a co-ordinated strategy to find a proper balance between them has not been sufficiently considered.

4. The last decade has been a period of development and growth of measures designed to meet the needs of societies to combat serious crime. National, bilateral and multilateral efforts have sought to ensure that criminals cannot use national boundaries, differences in legal systems and varying economic policies to enhance the success of criminal enterprises and diminish the likelihood of evading justice.

5. During this period the world has also seen increased concern for the protection of individuals rights and liberties with the result that there is now an unprecedented range of review mechanisms which allow those accused and those convicted of crimes to challenge the extent to which law makers and law enforcers may use modern methods of detecting and punishing crime.

6. The parallel development of these two streams appears to have produced a tension which has resulted in ad hoc revision of both institutional and individual rights, power and duties. The tension, and the structural changes introduced to alleviate it appear to have created two "forces". The first force is a concern to protect society as a whole from the undesirable and corrosive effects of criminal activity; and the second is a concern to maintain the traditional values underpinning criminal justice systems and to protect the individual from the might of the state and its overwhelming power. Not infrequently the two forces are found in one persona - for example - in a Minister of Justice or an Attorney-General who has responsibility for ensuring the protection of both interests in one society. The dilemma facing such a person is self-evident.

7. While each of these "forces" is a legitimate and fundamental value of good governance, the conflict could be seen as diminishing the credibility of governments. Any diminution of credibility probably results from a perceived failure, to a greater or lesser degree, to respond effectively to real problems - those attributable to crime and those arising from a real or perceived diminution of

individual protection from unwarranted interference by the state.

8. The conflict should be resolved if society is to protect and further develop both legitimate interests. But realistic prospects of resolving the conflict are unlikely to be found so long as governments, and in particular law officers, are forced by circumstance to react quickly, often in high profile situations, to both the increased sophistication in the activities of criminal and the growing public expression of concern by those who see individual rights being threatened.

CURRENT ISSUES

9. These issues manifest themselves clearly in purely national criminal cases where challenges to criminal investigation and prosecution methods based on protections enshrined in constitutions, bills of rights and similar instruments are familiar. From around the Commonwealth examples can be found. The Constitutional Court of South Africa, in *Zuma v. the State*[1] dealt with the constitutionality of a reverse onus of proof provision. A similar issue was dealt with by the Supreme Court of Gibraltar in *R. v. Reina and Peralta*[2]. The question of the extent to which a restraint order could require the giving of information which could incriminate a defendant was the subject of a judgment by the Queen's Bench Division in *In re C (Restraint Orders: Identification)*[3] while the Court of Appeal for Ontario in *R. v. S*[4] considered whether the principles of fundamental justice were violated by a Crown subpoena of a co-accused to give evidence in a separate trial of the accused. In each of these 1995 cases the decision favoured the citizen over the state. The issue of confiscation orders which could have, in part, retrospective effect was considered by the European Court of Human Rights in *Welch v. United Kingdom*[5]. In Western Samoa the Court of Appeal determined that a provision which stated that a scientific report on narcotic drugs was conclusive proof of the truth of its contents and that there was no need to call the person who made the report was unconstitutional (*Police v. Stehlin*)[6].

10. While recognising that the major impact of challenges to new statutory provisions facilitating the investigation or prosecution of crime or the recovery of proceeds of crime falls in domestic criminal cases, the Commonwealth Secretariat is conscious that there is an equally prevalent trend in cases involving extradition, mutual assistance in criminal matters and transfer of prisoners. It is this development of jurisprudence in the fields international co-operation which may be of particular interest to an international group of law makers with a well established history of tackling and solving legal problems common to many (or most) of the members of the group.

11. In recent years courts have dealt with a number of extradition cases which, in one way or another, have challenged some of the long accepted practices applied in these cases. Ministers who take the final decision to surrender are being required, in some cases, to take into account matters not dealt with in extradition treaties. Fine lines are being drawn in cases where the fugitive finds himself or herself in the requesting state otherwise than completely voluntarily. The phrase "abuse of process" appears regularly in reports of extradition cases.

12. The Queen's Bench Division considered the question whether alleged illegality and breach of sovereignty in the collection of evidence tendered at an extradition hearing meant that the making of an application for extradition was an abuse of process (*R. v. Governor of Pentonville Prison: ex parte Chinoy*)[7]. Various cases on the question of delay in making extradition requests have changed what practitioners believed was the case under extradition treaties - that is that delay was not a ground for refusing surrender unless the treaty expressly or impliedly so provided. The Federal Court of Australia in *Forest v. St Leger Kelly (Special Magistrate) and the Attorney-General of the Commonwealth of Australia*[8] held that the court did not have power to stay an extradition application because of delay by the country seeking extradition but stated obiter that the Attorney-General may take delay into account in determining whether to surrender. The UK cases of *R. v. Secretary of State for the Home Department ex parte Sinclair*[9] and *R. v. Secretary of State for the Home Department ex parte Patel*[10] resulted in similar conclusions by the courts. These decisions do not however ensure that a fugitive will defeat extradition. In the United States case of *Martin v. Warden, Atlanta Penitentiary*[11] the court decided that there was no constitutional right to a speedy extradition.

13. Illegal rendition cases have featured strongly in recent jurisprudence. Starting with the 1991 South African decision in *State v. Ebrahimi*[12] the principle that a court has no jurisdiction to try a person abducted from another state by agents of the state where jurisdiction is sought to be exercised

was laid down. It was applied by the House of Lords decision in *R. v. Horseferry Road Magistrates Court ex parte Bennett*[13]. Interestingly the principle does not apply in the requested state so that a person taken by force on the high seas to a place from capture so as to defeat extradition (*R. v. the Stipendiary Magistrate ex parte Newall*[14] - Supreme Court of Gibraltar). Neither does the principle apply in cases where the accused is tricked into entering the jurisdiction from which extradition is sought for the court has no inherent supervisory power over the extradition process (*In re Schmidt*[15]).

14. "Death penalty cases" have added to extradition jurisprudence in recent years. The first prominent decision was that of the European Court of Human Rights in *Soering v. United Kingdom*[16] where it was decided that a state party to the European Human Rights Convention has a duty not to extradite a person to a jurisdiction where there are substantial grounds for believing that s/he would face a real risk of being subjected to inhuman treatment within the meaning of Article 3 of the Convention. The United Nations Human Rights Committee in *Ng, Charles Chitat v. Canada*[17] reached the conclusion that Canada ought to have sought assurances from the requesting state on the imposition of the death penalty and on issues relating to methods of execution before taking a decision to extradite.

15. The jurisprudence in mutual assistance cases is developing slowly. The Queen's Bench Division in *R. v. Secretary of State for the Home Department ex parte Propend Finance Pty Ltd and Others*[18] concluded, in effect, that the Secretary of State must, in deciding to grant a request for the production of documents also determine the means by which the assistance is to be granted and must not delegate such decision to the police. There are, however, recent decisions on the use of special investigative powers by regulatory and prosecution authorities which could be increasingly relevant in mutual assistance cases or in criminal proceedings relying on evidence obtained under such provisions. In *Saunders v. United Kingdom*[19] the European Commission of Human Rights found that statements obtained using compulsory powers under the Companies Act had resulted in a violation of the applicant's right to a fair trial. Decisions in cases on world-wide Mareva injunctions which are sometimes used in fraud and proceeds of crime cases are also relevant to the development of international assistance practice and procedure.

16. Law Ministers and their officials in Central Authorities and prosecution agencies will undoubtedly be aware of other cases in which the decision to grant or refuse co-operation to another country has been affected by concern over matters not contemplated when extradition or mutual assistance arrangements were being concluded or when the relevant Commonwealth Schemes were being developed.

17. In addition to the changes being required by wide-ranging decisions on issues arising under bills or charters of rights and constitutions, changing national perceptions of what governments ought to do may be well ahead of international developments. For example, the Torture Convention, for all states parties, operates as an amendment to its earlier bilateral and multilateral extradition arrangements so as to require refusal of surrender if the person sought could be subjected to any form of punishment contemplated in the Convention. While this is a welcome advance for states parties it is an advance which may not go far enough for other countries. Either way, the Torture Convention provides an example of yet another potentially fertile ground upon which a fugitive could challenge surrender.

A ROLE FOR THE COMMONWEALTH?

18. The Commonwealth could play an important role in developing and promulgating a vision for the 21st Century aimed at enhancing the role of international co-operation. Such a vision would maintain (and hopefully strengthen) fundamental values, including the rule of law and the rule of international law, both reflected in the Harare Declaration, while protecting society from the corrosive and divisive effects of serious and organised crime.

19. As the largest intergovernmental body to address legal issues and develop common solutions, the Commonwealth has pioneered multilateral strategies for international co-operation to combat crime. It has also set standards for national laws developed for the same purpose. This has been done in the context of shared political and legal values and, in particular, in a way which has always reflected members' commitments to the rule of law.

20. The Commonwealth has special expertise in areas relevant to this issue. Its contribution to the entrenchment of democratic values, independent judiciaries and constitutional protections for individual rights is long standing. It has collective

experience in problem solving in the legal field at national level. Added to that, Commonwealth strategies in the field of extradition and mutual assistance in criminal matters were ground breaking initiatives. The ideas and experience flowing from these schemes have strongly influenced the development of instruments such as the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the model United Nations extradition and mutual assistance in criminal matters treaties.

21. Over the past 30 years the Commonwealth has made every effort to ensure that its collective capacity to deal with the international aspects of crime has been kept up to date. To do this it has reacted to threats to the maintenance of law and order as and when they have arisen or appeared on the horizon as likely threats. The changes which have been made to the London Scheme on the Rendition of Fugitive Offenders and the Harare Scheme on Mutual Assistance in Criminal Matters have invariably had immediate and significant positive impact on the problems sought to be addressed. Invariably that success has been followed by a period in which new problems arise. These problems have various causes. In some cases criminals invent new ways of conducting their criminal enterprises. In other cases defence lawyers devise new, and often successful, arguments to defeat attempts to bring their clients to justice.

22. The courts which attempt to resolve the conflicts can only do so on a case by case basis and then generally only do so when the contentious issues are raised in argument before them. The judges are faced with cases in which they must decide whether an established principle of justice best satisfies the needs of a thoroughly modern society where it could be argued that technology and mobility have rendered such a principle one of limited rather than universal application. The answers given by the courts show little consistency with the result that uncertainty grows in the community.

23. Ad hoc revision of the criminal law and international co-operation to enforce it can never be avoided. It is necessary to meet short term needs and solve immediate problems. It should not, however, be regarded as the only method of review of the internationalised criminal justice systems of nations. Along side such day-to-day problem solving there needs to be high level multilateral consideration of optimum future directions for national contributions to the global solution of the wider problem. This consideration should include review of the relationship between individual rights and the national/international interest in combating crime. It should work to balance the constitutional protections afforded to citizens with the need to enhance national and global security. In so doing it may need to seriously question the existing order and the premises underlying it.

A POSSIBLE STRATEGY

24. The Commonwealth has the capacity to look at the issues which have arisen in the context of experience in international co-operation. To achieve the maximum possible recognition of such work, it may be desirable for the Secretary-General personally to appoint a high level group to consider the issues and formulate a policy, consistent with the Harare Declaration, for maximum Commonwealth contribution to the rule of law, the rule of international law and the protection of personal freedoms. Launching a Commonwealth policy for criminal justice co-operation in the 21st Century, on the eve of the new Century, would give the Commonwealth, its member governments, their Law Ministers and judiciaries (together with the wider international community) a basis for ongoing work to maintain both the relevance and integrity of Commonwealth contribution to the global order.

25. Ideally the members of such a high-level group should be former Attorneys-General or other high ranking law officers of Commonwealth countries who have experience in the consensus building role of the Commonwealth - both as participants at Law Ministers Meetings and in other Commonwealth bodies or groups. A regionally representative group of approximately eight such eminent persons could be invited by the Secretary-General to report by 1999 which would allow Law Ministers and CHOGM to consider the report on the question of enhancing international efforts to combat crime in a manner consistent with the protection of both fundamental freedoms and liberties and the maintenance of democracy and the rule of law.

26. Any high-level group would need support and advice from practitioners in the area. Such support could be provided by convening a limited number of small groups of experts who have significant experience in relevant areas. The experts, working both individually and as a group or groups, could compile reports which would form the basis of consideration of a 21st Century policy by the high-level group of eminent Commonwealth lawyers.

27. Commonwealth experts would desirably have the opportunity to exchange experience and views with a limited number of experts from outside the Commonwealth. Optimally, representatives from the United Nations Crime Prevention and Criminal Justice Branch, the United Nations Inter-regional Crime and Justice Research Institute, the Council of Europe and the Organisation of American States would contribute to deliberations of expert groups. Involving a small but representative group of experts from outside the Commonwealth would ensure three things. First, that the Commonwealth policy will contribute to the global effort in this field by taking account of relevant developments outside its membership. Second, that experience in other countries can be taken into account and finally, to entrench the Commonwealth's role as an innovative and valuable contributor to global policy making.

28. Law Ministers could consider asking the Secretary-General to invite eminent persons to join a high-level group and to have the Secretariat convene the small expert group meetings to undertake the preparatory work for the high-level group. If Ministers were so minded they would need to recognise that such an exercise may not be able to be undertaken unless the groups were largely self-funded - that is funded by the governments of participating countries. The Secretariat anticipates that the costs of such an exercise would not be significant - amounting perhaps to two meetings each over a three year period for each expert group and for the high-level group.

Endnotes

1. Constitutional Court, South Africa, unreported, 5 April 1995
2. Supreme Court, Gibraltar, unreported, 7 March 1995
3. Queen's Bench Division, UK, The Times 21 April 1995
4. Court of Appeal for Ontario, Canada, 12 O.R. 774
5. European Court of Human Rights, (1995) 20 EHRR 247
6. Court of Appeal, Western Samoa, (1980-1993) Western Samoa Law Reports 568
7. Queen's Bench Division, [1992] 1 All ER 317.
8. Federal Court of Australia, 6 February 1992.
9. [1992] Imm. A.R. 293
10. Queen's Bench Division, The Times, February 1994.
11. F. 2d 2270 (11th Circuit 1993) USA
12. Supreme Court (Appellate Division), South Africa, 16 February 1991: 31 ILM 888 (1992)
13. House of Lords, 24 June 1993.
14. Supreme Court, Gibraltar, 7 October 1993.
15. House of Lords, U.K., [1994] 3 WLR 228; [1994] 2 All ER 65.
16. European Court of Human Rights, Case No. 1/1989/161/217 of 7 July 1989: The Times, 8 July 1989.

17. United Nations Human Rights Committee, 5 November 1993 (Communication No. 469/1991)

18. Queen's Bench Division, 17 March 1994.

19. European Commission of Human Rights, 1994 (The Independent: 30 September 1994)

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March 1996

TERMS OF REFERENCE FOR A HIGH LEVEL GROUP TO CONSIDER THE BALANCE BETWEEN INDIVIDUAL RIGHTS AND GLOBAL INTERESTS IN INTERNATIONAL CO-OPERATION TO COMBAT CRIME

Commonwealth Law Ministers recognised that they were faced with the ever increasing frequency and complexity of transnational crime and were concerned that existing arrangements for mutual assistance in the administration of justice may not be sufficient, in their present form, to fully satisfy the needs of member countries as we enter the 21st Century.

They expressed their belief that the Commonwealth has an important role to play in developing and promulgating a vision for the twenty-first Century encompassing an enhancement of the role of international co-operation. Such a vision would maintain and strengthen fundamental values, including the rule of law and the rule of international law, both reflected in the Harare Declaration, while protecting society from the corrosive and divisive effects of serious and organised crime. It would seek to ensure that an appropriate balance was maintained between the needs of nations, individually and collectively to secure the safety of citizens and their protection from the effects of criminal activity and the fundamental rights of the individual.

To address these issues they resolved to adopt terms of reference for a group of eminent Commonwealth persons which they request the Secretary-General of the Commonwealth to appoint, following appropriate consultations with member countries.

The Group, should be assisted in the preparation of materials by acknowledged experts from member countries and other relevant intergovernmental bodies. It would review the adequacy and effectiveness of arrangements for international co-operation in the administration of justice to meet the existing and prospective volume and sophistication of international criminal activity. In so doing it would:

(a) consider the emerging issues facing Commonwealth governments in seeking to balance the need for effective law enforcement with the human rights norms cherished by the Commonwealth;

(b) review developments and experiences in the law and practice of international legal assistance with particular reference to the decade past. In the course of such a review the Group could consider whether opportunities had been taken to use existing arrangements to maximum benefit;

(c) review the impact of recent jurisprudence on international legal co-operation and assess the effect of decisions of courts on the ability of countries to respond effectively to requests for assistance;

(d) consider the actual and potential impact of developments in the spheres of privacy, data protection and freedom of information on the efficacy of Commonwealth arrangements; and

(e) address the challenges to Commonwealth co-operation posed by technological and political and socio-economic structural change.

As part of its report the Group should produce for consideration by Law Ministers and Heads of Government as appropriate:

(a) recommendations on a possible Commonwealth statement of principles on all forms of international co-operation to combat crime taking into account the commitments of the Commonwealth to the rule of law, the rule of international law and the protection and promotion of human rights;

(b) recommendations on a possible Commonwealth role in the development of global norms in the field of international co-operation to combat crime by working towards acceptance of the principles by the wider global community, for example, in relevant United Nations fora.

(c) recommendations on any desirable modification of Commonwealth practice and of the Commonwealth schemes which will enhance international co-operation.

(d) recommendations as to fresh Commonwealth initiatives for co-operation in response to new and anticipated patterns of criminal activity;

In undertaking its work the group would be expected to examine material which would include

existing Commonwealth law and practice on co-operation to combat crime together with those Commonwealth declarations and international instruments setting out relevant human rights norms.

The group would submit an interim report to the next meeting of Senior Officials and should complete its work by the end of 1998.