

COMMONWEALTH LEGAL RESPONSE TO TERRORISM
Furthering the work mandated by Heads of Government

1. As detailed in the related information paper (LMM(02)13), pursuant to the Commonwealth Heads of Government Statement of 25 October 2001 and the subsequent Plan of Action adopted at Coolum, several activities have been undertaken to provide assistance to member countries with implementation of Security Council Resolution 1373 (*Annex A*) and the existing counter terrorism conventions.
2. Law Ministers may wish to discuss other ways in which the Commonwealth legal response to terrorism can be enhanced and provide guidance as to further types of assistance that may be beneficial to member countries.
3. To facilitate the discussion, this paper outlines some possible areas where Law Ministers may wish to agree to particular action or recommend future work by the Secretariat.

INTERNATIONAL CO-OPERATION

4. All states are obligated under the Security Council Resolution to “deny safe haven to those who finance, plan, support or commit terrorist acts or provide safe haven” and to “afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts”. These obligations are directly related to regimes for international co-operation, in particular extradition and mutual legal assistance.
5. Heads of Government in their statement on terrorism called for greater international co-operation and underscored “the important role which can be played by the Association due to our similar legal systems and in particular through Commonwealth schemes for mutual assistance to counter crime.”
6. Within the Commonwealth, the London Scheme for the Rendition of Fugitive Offenders and the Harare Scheme for Mutual Assistance in Criminal Matters reflect the agreement of Law Ministers that member countries will extradite and provide mutual assistance to each other in accordance with the provisions of the Schemes and without the requirement for a treaty. Member countries therefore require domestic legislation to implement the Schemes accordingly.
7. Specific reference to the Commonwealth Schemes is also made in the Commonwealth Plan of Action on Terrorism as being of particular importance in terms of the need for enhanced international co-operation to combat terrorism. With reference to the London Scheme, the Plan of Action notes that while most countries do have implementing legislation for this Scheme, some of it is quite dated. Therefore, Heads of Government urged member countries to “review their domestic laws for extradition and rendition to determine if they are sufficient to fully implement the obligations under the London Scheme and to allow for effective extradition between member countries.”
8. With reference to the Harare Scheme for Mutual Assistance in Criminal Matters, the Plan of Action recognizes that “despite ongoing efforts to encourage the adoption of domestic legislation, many member countries have yet to enact mutual assistance legislation to fully implement the Harare Scheme”. Given the importance of effective international evidence gathering to terrorist case investigations and prosecutions, the Plan of Action stresses the need for urgent action to implement the scheme under domestic law and requests that Law Ministers follow up on the issue.

9. Law Ministers may wish to discuss the opportunities for collaboration, co-operation and assistance between member countries to facilitate the enactment of domestic legislation to implement fully the Schemes so that countries can comply with the obligations under Resolution 1373 to remove safe havens and to afford international assistance to other countries.

LONDON SCHEME AND THE POLITICAL OFFENCE EXCEPTION

10 Under this agenda item Law Ministers have before them a proposed revised London Scheme for the Rendition of Fugitive Offenders (**Paper LMM(02)15**). Several of the recommended changes are directly relevant to the issue of terrorism, such as the application of the Scheme to extraterritorial offences and the enhanced “conduct based” approach to dual criminality. In addition to those recommended amendments, Law Ministers may wish to discuss further changes or additions to the London Scheme, in particular with respect to the application of the political offence exception.

11. Security Council Resolution 1373 calls on states to ensure, in conformity with international law, that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists. The London Scheme provides for the refusal of rendition where the offence is of a political character. It further states that this ground of refusal does not apply to:

“offences established under any multilateral international convention to which the requesting and the requested countries are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition.”

12. The Scheme goes on to provide that countries may choose to expand on the list of offences that are excluded from the application of the political offence exception, but this aspect of the Scheme is entirely discretionary.

13. Senior officials considered this issue in their November meeting concluding that the provisions of the Scheme were sufficient to meet this particular requirement of the Resolution. However, they did not have before them at the time the report of the Expert Working Group and its analysis of the requirements of the Resolution and the Commonwealth Committee on Terrorism had yet to meet. The Commonwealth Plan of Action on Terrorism recommended by the Committee makes specific reference to the issue of the political offence and Law Ministers are asked to have special regard to those aspects of the scheme dealing with refusal of extradition on the basis of the political offence exception, to ensure that extradition of a person for alleged terrorist activity could not be refused on that basis.

14. Therefore, Law Ministers may wish to consider the provisions of the Scheme relating to this issue (attached as *Annex B*) and discuss if they are fully compliant with the statement in the Security Council Resolution, particularly given that many terrorist acts and the general “support” offences mandated by Resolution 1373, do not constitute offences established under a multilateral convention. Further, it is only the very recent multilateral conventions that “declare” the offences established under it not to be regarded as political offences for the purpose of extradition. If Law Ministers determine that a further amendment to the Scheme is required to make it fully compliant with this very particular obligation under the Security Council Resolution, a possible text of an amendment is attached as *Annex C*.

MISUSE OF INFORMATION TECHNOLOGY

15. One of the critical areas of concern in the context of terrorist activity is the misuse of information technology either through terrorist attacks on information systems or terrorist use of such technology to facilitate the commission and financing of such acts through enhanced communication and support networks.

16. The model legislation on Computer and Computer Related Crime, which is before Law Ministers (LMM(02)17), is intended to assist member countries with the development of legislative structures that will enhance capacity generally with respect to crime relating to computer systems and in terms of gathering evidence generated through technology. As such it will be applicable and relevant in the context of terrorist activities.

17. Law Ministers may wish to discuss and recommend additional activity that will enhance the capacity of member countries to develop and protect technology systems and infrastructure such as:

- development of law enforcement networks for information exchange and co-operation;
- relevant training programs

18. As well, Law Ministers may wish to examine the specific issue of data preservation both in terms of domestic law and international co-operation. At their meeting in London in November 2001, Senior Officials briefly considered possible amendments to the Harare Scheme relating to interception of communications, including computer communications and preservation of computer data. Senior Officials were of the view that these issues required further study before any action could be taken. They asked the Secretariat to continue examination of these issues and to provide member countries with information on recent initiatives in this field. In light of the relevance of these developing areas to investigations and prosecutions relating to terrorist activities, Law Ministers may wish to consider if particular directed action in this area needs to be undertaken on an urgent basis.

REGIMES RELATING TO ASSET RESTRAINT AND FORFEITURE

19. On the important related subject of the freezing, seizure and confiscation of proceeds of crime and terrorist funds, considerable general work has been done to assist member countries with the development of effective laws and practice in this area. Under Resolution 1373, countries are required to “freeze assets of persons or groups identified by the Security Council as being involved in terrorist activity”. This has created unique challenges for all countries and Law Ministers may wish to share experience on this topic.

20. In addition to special freezing powers, member countries need to determine if existing proceeds of crime laws are sufficiently broad to cover the assets of terrorists, their agents, sponsors and supporters and are generally effective. Law Ministers may wish to consider what assistance might be provided to member countries in this context. Possible recommended action could include:

- model legislative provisions for civil forfeiture regimes;
- training of investigators and prosecutors;
- possible consideration of changes or additions to the existing provisions of the Harare Scheme for Mutual Assistance (Clauses 26-28) on proceeds of crime to strengthen co-operation in cases of cross border restraint and forfeiture.

ADDITIONAL WORK ON SECURITY COUNCIL RESOLUTION 1373

21. Law Ministers may wish to consider if there are other aspects of the Resolution where it would be useful and appropriate to work on implementation within a Commonwealth context and, if so, what forms of assistance would be most beneficial. Some topics for consideration would be:

- (a) exchange of operational information;
- (b) co-operation in the prevention of terrorist acts;
- (c) enhancement of border controls and the prevention of counterfeiting, forgery or fraudulent use of identity papers and travel documents;
- (d) measures for the protection of critical infrastructure;
- (e) preventing abuse of refugee systems.

UNITED NATIONS SECURITY COUNCIL RESOLUTION 1373

“The Security Council,

“Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

“Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

“Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

“Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

“Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

“Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

“Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

“Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

“Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

“Acting under Chapter VII of the Charter of the United Nations,

“1. Decides that all States shall:

“(a) Prevent and suppress the financing of terrorist acts;

“(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

“(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

- “(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;
2. *Decides also* that all States shall:
- “(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- “(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- “(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- “(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- “(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
- “(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
- “(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;
- “3. *Calls upon* all States to:
- “(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;
- “(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;
- “(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;
- “(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;
- “(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

- “(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;
- “(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

“4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

“5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

“6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

“7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

“8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

“9. *Decides* to remain seized of this matter.”

28 September 2001

POLITICAL OFFENCE EXCEPTION
The current provision in the London Scheme

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;
- (b) Sub paragraph (a) shall not apply to offences established under any multilateral international convention to which the requesting and the requested countries are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition.
- (c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.
- (2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including:
- (i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence),
 - (ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above,
 - (iii) murder, or any related offence as described above,
 - (iv) an act declared to constitute an offence under a multilateral international convention the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought,
 - (v) any other offence that a country considers appropriate.
- (b) A country may restrict the application of any of the provisions made under sub paragraph (a) to a request from a country which has made similar provisions in its laws.

POLITICAL OFFENCE EXCEPTION

Suggested provision for inclusion in the London Scheme in place of the proposed Paragraph 12

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;
- (b) Sub paragraph (a) shall not apply to:
- (i) offences established under any multilateral international convention to which the requesting and the requested countries are parties, the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought;
- (ii) offences for which the political offence or offence of political character ground of refusal is not applicable under international law.
- (c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.
- (2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including:
- (i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence),
- (ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above,
- (iii) murder, or any related offence as described above,
- (iv) [SUBPARAGRAPH 2(A)IV TO BE DELETED - COVERED BY NEW SUBPARAGRAPH 1(B) i]
- (v) any other offence that a country considers appropriate.
- (b) A country may restrict the application of any of the provisions made under sub paragraph (b) to a request from a country which has made similar provisions in its laws.