

ICJ Report on Counter–Terrorism and Human Rights
Speech delivered at United Nations Youth Association Schools Summit
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Thank you for inviting me to speak to you. It is wonderful to see young people engaged in such important issues and very encouraging for the future of our planet. I have been asked to speak to you about a major international report on counter-terrorism laws and human rights.

Since the events of 11 September 2001, combating terrorism has become a major priority world wide; and so it should be. The terrorist attacks aimed to destabilise Western democracies and undermine respect for diversity and human rights. However many counter-terrorism measures may themselves, unfortunately, threaten the international framework of Human Rights Law.

The International Commission of Jurists, the ICJ, is an independent organisation which aims to promote and encourage international understanding of and commitment to the Rule of Law and the protection of Human Rights. In 2004 the ICJ adopted the *Berlin Declaration on Upholding Human Rights while Combating Terrorism*. In doing so they resolved to establish an international panel of jurists to research the impact of counter-terrorism measures on the protection of human rights. The report, *‘Assessing Damage, Urging Action’* details the Panel’s findings from conducting sixteen hearings covering forty countries.

Today I will highlight the findings that I think might be of most interest to you. In particular I will summarise the report’s findings regarding

human rights, the role of intelligence agencies, counter-terrorism measures, and the criminal justice system.

It is first important to understand the meaning of the term ‘terrorism’. The panel adopted the definition of terrorism from the United Nations Security Council Resolution 1566 of 2004. It describes terrorism as:

“... criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or abstain from doing any act”¹

Any individual, group or a Nation State can commit a terrorist act. The act itself is important, and the actor or the legitimacy of any aim is irrelevant.

HUMAN RIGHTS

The panel heard a general consensus amongst States that terrorism cannot be addressed while also adhering to international human rights law. However, the Panel asserts that human rights and counter-terrorism measures are not mutually exclusive.

After World War Two there was an international consensus that the horrors experienced must never occur again. There was a need for a declaration that placed the protection of human rights and dignity as a

¹ UN Security Council Resolution 1566 (2004), adopted on 8 October 2004, UN Doc. S/RES/1566 (2004).

paramount concern. In 1948 nations around the world adopted the *Universal Declaration of Human Rights*.² The preamble of the Declaration recognises the inherent dignity and the equal inalienable rights of all human beings. It also acknowledges that the disregard and contempt for human rights resulted in barbarous acts which outraged the conscience of humankind. The Panel's report emphasises that the Declaration was established *because* of the international need for security *and* the protection of human rights.

There is a clear duty on all States to prevent terrorism and punish terrorist acts, however the Panel asserts that States also have a duty to uphold the human rights of all human beings, including those suspected or convicted of terrorism. The Panel reports that many States hold the belief that human rights law must necessarily be dispensed with when responding to terrorism.

However, the Panel argues that international human rights declarations and instruments are flexible and can accommodate such emergencies. First, the Universal Declaration of Human Rights was specifically drafted in the wake of an emergency situation. Second, while rights including the right to life, the prohibition on torture and other cruel inhuman and degrading treatment are absolute,³ human rights law acknowledges that certain rights may be suspended in legitimate situations. However the report argues that States do not have the legitimate power to determine what constitutes an emergency, and which rights of which people can be dispensed with and for how long. States have an obligation to register their intention to derogate from human rights provisions and must

² Universal Declaration of Human Rights, 10 December 1948.

³ International Covenant on Civil and Political Rights (1966), Article 4 (2).

formally explain to the international community the exceptional nature of the emergency; the derogation must be of a temporary nature; and specific legal measures, safeguards, and reporting systems come into play.⁴

The panel reports that regardless of the whether the threat of terrorism is exceptional, there is no evidence justifying any breach of human rights law. The findings indicate that the climate of fear has been used to justify extreme counter-terrorism measures which are not in proportion to the threat faced.

INTELLIGENCE ORGANISATIONS

The Panel does not dispute the role of intelligence agencies in investigating, understanding, and analysing terrorist threats. However, the Panel was alarmed by the increasingly central role of intelligence agencies in countering terrorism since 11 September 2001.

The Panel found that powers of intelligence agencies in relation to surveillance, information gathering and arrest, detention and interrogation have increased. For example in Australia, ASIO has the power to issue questioning and detention warrants. This power not only relates to terrorist suspects but also to those believed to hold information that will substantially assist to gather further information about suspected terrorist

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See *Report of the Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/103, 17 February 2005, para. 12, stating that: "The jurisprudence of the Human Rights Committee and regional supervisory bodies indicates that derogations are always exceptional and temporary measures. Accordingly, such measures should be lifted as soon as the emergency which justified their imposition no longer exists or can be managed by less intrusive means under the relevant instrument. This jurisprudence also suggests that as the underlying purpose of such measures is to permit States to protect democratic institutions, the rule of law and the enjoyment of basic freedoms, such measures cannot lawfully be undertaken to weaken or destroy them".

activities.⁵ Under the ASIO laws, officers may question individuals in the absence of a lawyer; a lawyer may only intervene to clarify unclear questions; the right to choose one's own lawyer may be limited; and the right to communicate in confidence with a lawyer is limited.⁶

The Panel reports an increased reliance on co-operation and information sharing between States in order to address terrorism. However many States reportedly obtain information from States who do not protect human rights sufficiently or in fact have a serious history of human rights violations. There is no guarantee that the information shared is reliable or obtained through proper means. One example reported by the Panel was that of Mr Maher Arar, a citizen of Canada and Syria. It is likely that the United States government acted on incorrect Canadian information regarding Mr Arar. The US wrongly suspected Mr Arar of being associated with al-Qaeda. He was arrested and interrogated, denied access to a lawyer and detained for 12 days. US authorities removed him to Syria despite Mr Arar objecting on the basis that he would be subjected to torture. Mr Arar was held in Syria for one year and was tortured repeatedly. There is grave concern that the US arranged the Syrian interrogations. A Canadian Commission of Inquiry cleared Mr Arar's name and confirmed the torture.

The Panel reports that the need to conduct secret operations must be balanced with the rule of law which requires transparency in terms of who makes decisions, how they are made and what accountability

⁵ *Australian Security Intelligence Organisation Legislation amendment (Terrorism) Act 2003* (Cth).

⁶ *Australian Security Intelligence Organisation Legislation amendment (Terrorism) Act 2003* (Cth), s 34.

measures exist to ensure powers are not abused. Intelligence agencies must not become a State within a State, and answerable to no one.

COUNTER TERRORISM MEASURES

Two examples of specific counter-terrorism measures are security certificates and administrative detention.

In many countries, “security certificates” may be issued to detain non-citizens pending deportation. They are held without charge or trial. The Panel heard evidence that in Canada six Muslim men have been detained on security certificates for up to six years. In the case of *Charkaoui v Canada*,⁷ the Supreme Court of Canada held that the regime did not provide sufficient due process protections and hence was unconstitutional.

Administrative detention on the grounds of national security is used to justify the detention of people alleged to pose a security threat. In Australia the Commonwealth Government introduced a system of preventative detention orders.⁸ Federal administrative detention is allowed for up to 48 hours⁹ and States may detain people for up to 14 days.¹⁰ The Panel heard concerns in Australia about that under these laws judicial review of the detention is limited while the order is in force, limited information is available to those detained and their legal representative, communication with the outside world is seriously restricted, and communications between the detainee and his or her

⁷ [2007] 1 S.C.R. 350, 2007 SCC 9.

⁸ *Criminal Code Act 1995* (Cth), Division 105.

⁹ *Criminal Code Act 1995* (Cth), Division 105.

¹⁰ See for example *Terrorism (Preventative Detention) Act 2005* (Qld), s 12.

lawyer may be monitored by police.¹¹ The Panel noted that while the Government justifies the detention as a preventative measure, the powers are actually used for investigative purposes. Despite this, detainees are often denied access to lawyers on the basis that they have not been accused of a crime and hence do not have the right to a lawyer.

CRIMINAL JUSTICE SYSTEM

The Panel asserts that terrorist acts, for example, murder and violence, are crimes which should be dealt with in the mainstream criminal justice system. However many States expressed the view to the Panel that terrorism cannot be dealt with appropriately in the criminal justice system and instead the emphasis should be on the preventative intelligence and administrative detention measures previously discussed.

The Panel expressed concern at a number of ‘special measures’ adopted. For example, the creation of new offences specifically created to target terrorism; limited access to lawyers; the use of special military courts; and lowering evidentiary standards required to prove guilt.

It is fundamental to the Rule of Law that laws are clear and certain so that everyone understands the basis on which he or she can be prosecuted. However some laws currently in force have broad and ambiguous definitions of ‘terrorism’. It is not uncommon for laws to criminalise the expression of controversial ideas and freedom of association. For example in Uganda it is a criminal offence to establish, run or support any institution which ‘promotes’ terrorism. It is also an offence to publish and disseminate news or materials promoting terrorism. These are crimes

¹¹ See for example *Criminal Code Act 1995* (Cth) ss 105.34 and 105.35.

punishable by the death penalty,¹² and it is not a requirement that there be any imminent threat of a terrorist attack. The Panel was told of reports that journalists had been detained on the basis that they were promoting terrorism by publishing material relating to terrorism.

In Nepal legislation criminalises the association with terrorism.¹³ The evidence of one participant indicated that the definition of a terrorist act was so broad and ambiguous that civilians and lawyers working for detained suspected terrorists and even judges were classed as terrorists.

The Panel raised concerns that in many States suspected terrorists are tried by military or other special courts. These courts do not adhere to the same rules or standards of evidence which exist in the mainstream criminal justice system. For example, the right to appeal decisions and access to legal representation is limited. Furthermore, the onus of proof is often reversed so that the defendant in some cases must prove his or her innocence on some elements of a charge.¹⁴

The Panel found that almost all people accused for terrorism offences are denied bail and remanded for long periods of time. In Australia people charged with terrorism offences are automatically denied bail unless exceptional circumstances exist. A ‘terrorism offence’ includes being a member of a terrorist organisation.¹⁵ The evidence heard by the Panel indicates that people charged with terrorism offences are not provided the benefit of ‘innocent until proven guilty’.

¹² *Anti-Terrorism Act 2002* (Uganda), s 9.

¹³ *The Terrorist and Disruptive Activities (Control and Punishment) Ordinance 2001* (this ordinance lapsed in 2006 resulting in hundreds of people being released).

¹⁴ See for example *Criminal Code of Australia*, s 102.3.

¹⁵ *Crimes Act 1914* (Cth), s 15AA (1).

It is lawful in many countries to withhold evidence from the defence, therefore denying the defendant a fair and open trial. In Australia the Attorney-General has the power to issue certificates ordering the non-disclosure of information if it is believed to prejudice national security or law enforcement interests. The scope of the information that can be withheld is very broad.¹⁶ The Panel raised concerns that laws of this nature clearly limit the extent to which the defence can mount a strong case.

CONCLUSION

In conclusion, some of the key findings of the Panel are as follows:

- Terrorism is a clear and real threat world wide. Governments are entitled to, and in fact have a duty to adopt counter terrorism measures. However, in the Panels' view many of the measures currently in force are illegal and breach human rights law.
- The Panel emphasises that the framework of human rights law that existed prior to 11 September 2001 is not only adequate but is the most appropriate framework to respond to current threats.
- The fear of terrorism is being used to legitimise counter-terrorism measures which undermine human rights law. The Panel found that there is no reasonable justification for this.
- Liberal Democratic Nations that publicly promote the protection of human rights, are in fact leading the way in eroding basic human rights principles.

¹⁶ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 7.

- The powers of intelligence agencies have dramatically increased since 11 September. However, they are not accountable for their actions and the appropriate safeguards are not in place.
- The criminal justice system with adherence to the principles of a fair trial and due process is the most appropriate way to address terrorism.

I encourage you to read the report *Assessing Damage, Urging Action* for yourselves and congratulate you for taking an interest in this and other important global issues.