

International Conference on Strengthening Cooperation in Preventing Terrorism

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ICJ Statement in Session I: Enhancing international cooperation in developing and undertaking measures to address the conditions conducive to the spread of terrorism

PROMOTING HUMAN RIGHTS AND THE RULE OF LAW

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Distinguished Guests,
Ladies and Gentlemen,

It is my great pleasure to participate as a panellist in this session on enhancing international cooperation in developing and undertaking measures to address the conditions conducive to the spread of terrorism. It was a significant step forward for the Global Counter-Terrorism Strategy to recognise the existence of such conditions and it is critical for a sustainable counter-terrorism strategy that the international community take individual and collective measures to combat those conditions through compliance with and promotion of human rights and the rule of law.

My presentation is structured in three parts:

1. Providing an overview of the obligation to comply with and promote human rights and the rule of law, and its link to combating conditions conducive to the spread of terrorism;
2. Identifying some problematic trends in national counter-terrorism measures that undermine the latter obligation and objective; and
3. Identifying some concrete recommendations for international cooperation aimed at combating the conditions conducive to the spread of terrorism through the promotion of human rights compliant action in the field of countering terrorism.

The obligation to comply with and promote human rights and the rule of law

The requirement to comply with human rights and the rule of law when countering terrorism is a point made clear within the 2006 UN Global Counter-Terrorism Strategy, and repeated in the reaffirmations of the Strategy in 2008, 2010 and 2012. The Global Strategy recalls that all measures to counter terrorism must be compliant with human rights law, international humanitarian law and refugee law. The same requirement is to be found within resolutions of the Security Council on the countering of terrorism, including Security Council Resolution 1624 (2005), paragraph 4 of which stresses that States must ensure that counter-terrorism measures "comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law".

This is also a commitment of OSCE participating States in the 2001 Bucharest Plan of Action for Combating Terrorism. And it should not be forgotten that this reflects the international law obligations of States to comply with their human rights obligations, both as a result of treaty obligations of States parties to international and regional human rights instruments; and by

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application to all States of customary international law obligations concerning human rights, many of which are reflected within the Universal Declaration of Human Rights.

In his now famous statement, former UN Secretary-General Kofi Anan reflected on the three pillars of the UN and wrote in his report *In Larger Freedom* "...we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights". This is mirrored within OSCE and UN language on human rights and counter-terrorism, including in the former UN Secretary-General's proposal for the establishment of a UN Global Strategy on counter-terrorism. The proposal, and the resulting 2006 Strategy, clearly reaffirm that effective counter-terrorism measures and the protection of human rights are not conflicting, but rather complementary and mutually reinforcing goals.

Stemming from this recognised notion, the UN Global Counter-Terrorism Strategy recognises that compliance with human rights is necessary in order to address the long-term conditions conducive to the spread of terrorism. This is reflected in the preamble to the first pillar of the Strategy, and also in the preamble of the Security Council's recent subject-specific resolution on terrorism, Resolution 1963 (2010). While making it clear that none of these conditions can excuse or justify acts of terrorism, these documents acknowledge that certain conditions – including lack of the rule of law, violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalisation and lack of good governance – amount to long-term conditions conducive to the spread of terrorism. Security Council Resolution 1963 expressly recognises that such conditions "offer a viable alternative to those who could be susceptible to terrorist recruitment and to radicalization" (preambular para 4). Counter-terrorism must be tackled through a long-term, sustainable approach.

When talking of international cooperation and national measures of implementation, non-compliance with human rights is: in violation of international law obligations and commitments; inconsistent with the UN Global Strategy and with binding directions of the Security Council; something that presents practical impediments to effective prosecution through, for example, the exclusion of evidence obtained in violation of human rights law; and is in itself something that feeds into the cycle of radicalisation through the creation of conditions conducive to the spread of terrorism. It is therefore counter-productive to the preventive element of national and international counter-terrorism law and practice.

This means that it is only by avoiding the creation or maintenance of conditions conducive to the spread of terrorism and to radicalisation that a sustainable international effort can be achieved to combat terrorism. This must be through international cooperation aimed at ensuring that the implementation of national law and practice complies with human rights and the rule of law.

Negative trends in the national implementation of counter-terrorism obligations

Having concluded that national law and practice must comply with human rights and the rule of law – not only as a matter of international obligation but also in order to address conditions conducive to the spread of terrorism – it is of concern that there are numerous negative trends in the national implementation of counter-terrorism obligations. International cooperative measures must seek to properly address these trends.

An analysis of implementing law, policy and practice discloses that:

1. States have been prepared to combat terrorism outside the rule of law and contrary to human rights law following a radical shift in the years after 9/11 to give absolute priority to security considerations. Various examples have been seen: from the unlawful rendition of terrorist suspects to secret places of detention; to the torture and ill-treatment of detainees during interrogation. Even outside these more obvious and egregious violations, countermeasures adopted to combat terrorism have frequently been designed with insufficient regard to human rights.

2. Most States have resisted adopting a war paradigm and have instead undertaken a careful assessment of applicable law. A worrying number of States have nevertheless paid insufficient regard to applicable legal frameworks and undermined the primacy of the criminal justice system in the combating of terrorism.
3. States have too-easily adopted counter-terrorism measures as exceptional measures, creating measures that go beyond the exigencies of the situation and further undermining the primacy of the criminal justice system.
4. As a result of the lack of a universally agreed upon definition of terrorism, many States have adopted broad, over-reaching definitions of the term linked to terrorism offences; powers of arrest, questioning and investigation; rules concerning detention and trial; the listing of proscribed organisations; and administrative measures such as deportation procedures and the forfeiture of property. This is despite clear elements identified by the Security Council and promoted by the UN Special Rapporteur on counter-terrorism as to the characterisation of the conduct to be suppressed in the fight against terrorism (see Security Council resolution 1566 (2004), para 3, and UN Doc A/HRC/16/51, best practice 7).
5. Human rights violations that have occurred in the name of fighting terrorism have often failed to be accompanied by accountability measures against those responsible. Since accountability for human rights violations is a key aspect of the rule of law, this is considerably worrying for the combating of conditions conducive to the spread of terrorism. It is notable that this is an issue addressed in the most recent report of the UN Special Rapporteur on counter-terrorism (UN Doc A/HRC/22/52 (2013)).
6. Those whose rights have been violated have often not been granted access to effective remedies, including reparation, including through inappropriate use of State secrecy doctrines and other means of preventing disclosure of information to frustrate access to remedies.
7. Victims of terrorism have in large part been inadequately considered in the fight against terrorism.

At the level of mechanisms for national implementation, there are the following additional trends:

8. Especially since 9/11, the speed with which counter-terrorism legislation has been enacted is of great concern, particularly when considering the volume of these legislative texts; the heightened risk that speedy enactment results in laws that are not in compliance with the rule of law and human rights; and the potential replication of exceptional security measures to other non-exceptional areas of law and policy.
9. There has most often been a lack of meaningful reviews of the content, operation and impact of counter-terrorism laws, increasing the concerns about the speedy enactment of legislation on combating terrorism since, once enacted, their provisions are likely to remain in force.
10. Experience has also shown that governments have used counter-terrorism and other emergency laws to extend State powers beyond what is strictly required in the exigencies of the situation, and/or that governments have seized upon such situations as an opportunity to justify the enactment of powers that have been long-sought but would not have been favourably received if proposed in a 'normal' situation.

It is notable that, reflecting on the trends just identified, the former UN Special Rapporteur on human rights and counter-terrorism identified the following best practices in his report to the Human Rights Council in March 2011 (UN Doc A/HRC/16/51):

Practice 1(1) [review of legislative proposals]: Proposals for new legislation or amendments to existing law concerning counter-terrorism should include a statement assessing the compliance of the Bill with the purposes and provisions of norms of international human rights and refugee law that are binding on the State.

Practice 3(1) [principle of normalcy; primacy of the criminal justice system]: To the broadest possible extent, measures against terrorism must be taken by civilian authorities entrusted with functions related to the combating of crime, and in exercise of their ordinary powers.

Practice 4(1) [sunset clauses]: Lapse of counter-terrorism legislation 12 months after entry into force, unless reviewed and renewed by the legislature before then.

Practice 4(2) [operation of law and practice]: Appointment of an independent reviewer of the application and operation of the law relating to terrorism to undertake annual reviews and reports to the executive and legislature.

International cooperation to promote human rights compliance and accountability

When speaking of avoiding the creation or maintenance of conditions conducive to the spread of terrorism in order to achieve a sustainable international effort to combat terrorism, I stated earlier that this must be through international cooperation aimed at ensuring that the implementation of national law and practice complies with human rights and the rule of law.

To that end, I make the following recommendations for collective and individual action by the international community in the area of cooperation:

1. Continue to encourage all States to ratify and implement the universal human rights treaties to which they are not yet parties.
2. Promote the best practices of the former Special Rapporteur on counter-terrorism, including with a view to ensuring that domestic implementing legislation on counter-terrorism is in compliance with, and is applied in a manner consistent with, human rights and the rule of law.
3. Organise and fund structured workshops for judges and lawyers on the question of human rights compliance while countering terrorism, including as this relates to the accountability of perpetrators of human rights violations and access to justice for victims of such violations, including access to effective remedies and reparation.
4. Establish mechanisms through which States can be assisted in undertaking a review of new and existing legislation on counter-terrorism, including with a view to implementing the best practices identified, especially as this affects compliance of legislative measures with human rights obligations, and also with a view to ensuring that legislative measures are clear and precise.