

**CTITF Working Group on
Protecting Human Rights while Countering Terrorism
Expert Symposium
On ‘Securing the Fundamental Principles of a Fair Trial
for Persons Accused of Terrorist Offences’
Bangkok, Thailand**

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KEYNOTE STATEMENT

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Chairman of the CTITF Working Group on protecting
human rights while countering terrorism**

“The Human Rights Challenges of Terrorism Trials”

Excellencies,
Distinguished experts,
Ladies and Gentlemen,

It is a pleasure to be here today to open this regional symposium on “Securing the Principle of Fair Trial for Persons Accused of Terrorist Offenses”. This is the first in a series of such regional meetings planned by the Counter-Terrorism Implementation Task Force (CTITF) and its Working Group on ‘Protecting human rights while countering terrorism,’ chaired by the Office of the UN High Commissioner for Human Rights (OHCHR).

Given the close cooperation that OHCHR has with the countries of the region, much of which is facilitated by our regional office in Bangkok, I am particularly pleased that the first regional Symposium is taking place here.

From a more personal standpoint, securing the right to a fair trial is a topic I feel very strongly about. As a law school professor, I would highlight the necessary elements of the independence and impartiality of the judiciary in my lectures and as Minister of Justice, I worked on improving access to justice and ensuring that the conditions for a right to a fair trial were guaranteed. I am therefore particularly pleased to be here today, as Chair of the CTITF Working Group on protecting human rights while countering terrorism, to have this chance to look at the issue from both a broader regional and international perspective, as well as a more focused one, through the lens of countering terrorism.

The human cost of terrorism has been felt in every corner of the globe, and this region is unfortunately no exception. The UN family itself has suffered tragic losses as a result of terrorist acts, including our own High Commissioner for Human Rights, Sergio Viera de Mello.

Let me be clear: there can be absolutely no excuse for resorting to acts of terrorism. Terrorism represents the complete negation of human rights.

As noted unanimously by all Members State of the United Nations in the Global Counter-Terrorism Strategy in 2006, “acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments”.

Today, I would like to address two main issues with you. First, the perceived conflict between security and human rights in the context of the right to a fair trial. Second, key challenges posed by the right to a fair trial as applied to people who are accused of acts of terrorism.

1. Perceived conflict between security and human rights

Human rights and security are two complementary aspects of the protection afforded by the State

Since 2001, it has often been argued that in order to protect society from acts of terrorism, human rights need to be subject to certain restrictions or derogations. Human rights and security are seen as being at two opposite ends of a spectrum that cannot be reconciled, and each specific human right or fundamental freedom has to be balanced against a specific security requirement. According to this view, people cannot demand - and governments cannot deliver - at the same time: security and freedom of expression, religion and belief; protection from acts of terrorism and freedom from torture and other ill treatment, *habeas corpus* and the presumption of innocence.

This reasoning fundamentally ignores two facts: Firstly, the international protection of human rights derives from a need for security and serves to enhance security. Secondly, the provision of security to individuals under their jurisdiction is itself a duty of States under human rights law. It is part of one of the most basic human rights obligations: the protection of the right to life.

Countering terrorism is therefore, in itself, a human rights objective. The provision of human rights protection and the provision of security are not competing, but complementary obligations; not subsequent, but simultaneous obligations. They should be part of the same strategy to effectively protect the population, and part of the same obligation of the State to provide human security.

This was recognised by all member States in the Global Counter-Terrorism Strategy. The strategy reaffirms the inextricable links between human rights and counter-terrorism. It states that “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but are mutually reinforcing”.

The current UN High Commissioner for Human Rights, Navi Pillay, made the point very well when she said: “protecting human rights while countering terrorism is an inescapable imperative. Indeed, human rights law offers a framework that satisfies both public security concerns, and protects human dignity and the rule of law”.

To respect, protect and promote human rights contributes to an effective fight against terrorism

But a further point needs to be made. Not only is there no contradiction between protecting human rights and countering terrorism, but protecting human rights itself actively contributes to the countering of terrorist activity. The Global Counter-Terrorism Strategy makes this clear by placing human rights squarely at the centre of the fight against terrorism. It emphasises that measures taken to counter terrorism must comply with international human rights law. It states that respect for all human rights and the rule of law is the basis of the fight against terrorism. And, tellingly, it states that denial of human rights and the rule of law can, in themselves, create conditions which are conducive to terrorism.

In 2009, speaking to the Counter-Terrorism Committee, the High Commissioner stressed that some measures taken to counter terrorism pose grave challenges to the protection and promotion of human rights, and can be self-defeating. Measures that violate human rights risk undermining the very goals that States seek to achieve in countering terrorism, and can even increase radicalization. Failure by states to safeguard rights can lead to increased instability and decreased legitimacy of governments which terrorists can exploit.

Last September, the Security Council recognized that terrorism could not be defeated by military force, law enforcement measures and intelligence operations alone. For the first time, the Council underlined the need to address conditions conducive to the spread of terrorism, and emphasized the need to promote the rule of law, to protect human rights and fundamental freedoms. It also highlighted the need to foster good governance, tolerance and inclusiveness in order to offer a viable alternative to those who could be susceptible to terrorist recruitment and radicalization leading to violence. This strong support for the Global Strategy is to be welcomed.

The flexibility of the human rights framework accommodates the security needs of a state

Over the past ten years, some have argued that, unless they adopt extraordinary measures, States lack the necessary tools to fight the threat of terrorism effectively. They say that, in order to address transnational terrorism, we must operate outside

of our agreed human rights framework, for example by authorizing “enhanced” investigation and interrogation techniques. Some States have questioned the necessity of respecting key principles of international human rights law, including the absolute prohibition of torture and non-refoulement, *habeas corpus* and the right of access to courts. In some cases, laws contrary to fundamental human rights principles have been enacted. In others, counter-terrorism practices have developed outside of the legal framework altogether.

It is clear that ensuring both the promotion and protection of human rights and effective counter-terrorism measures can raise serious practical challenges for States. Yet the international human rights legal framework does allow States the flexibility to respond to exceptional circumstances and temporarily restrict the enjoyment of certain rights, provided a number of conditions are respected, including compliance with the principles of necessity, proportionality, equality and non-discrimination.

Under a very limited set of circumstances, States may even take temporary measures to derogate from certain human rights provisions under international human rights law. Such circumstances are highly exceptional, arising only where a public emergency and a threat to the life of a nation genuinely exists, and has been officially declared. It is important to note that, even then, some fundamental rights can never be derogated from - for example, the presumption of innocence and the right to be free from torture or cruel, inhuman or degrading treatment. Respect for the conditions set out above are important safeguards for the protection of individual rights.

2. Key challenges posed by the right to a fair trial as applied to people who are accused of acts of terrorism

Let me now turn to the issue which we will be addressing over the next two days: the specific challenges in the context of the right to a fair trial for those accused of acts of terrorism.

In the Global Strategy’s Plan of Action, States undertake to ‘make every effort to develop and maintain an effective and rule of law-based national criminal justice system’ to ensure that ‘any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms’.

The right to a fair trial is one of the fundamental principles of human rights and humanitarian law which encompasses various inter-related aspects. Various elements of the right to a fair trial are also part of international customary law.

The Universal Declaration on Human Rights refers to the importance of civil liberties and due process. The International Covenant on Civil and Political Rights (ICCPR) addresses in greater detail the requirements of the right to a fair trial under

international law. These requirements apply for terrorist suspects in the same way as they apply for all others accused of crimes.

International humanitarian law provides similar protections when it comes to the trial of persons in the context of an armed conflict, as set out in the Geneva Conventions. Armed conflict does not negate the right to a fair trial.

For its part, the Human Rights Committee - the body in charge of interpreting the ICCPR and providing advice and guidance to States on compliance - has clarified that some fair trial requirements must be respected at all times, including during a state of emergency. The protection of the right to a fair trial from derogations ensures the protection of other non-derogable rights.

Challenges to the primacy of criminal justice: use of administrative measures

In the past years, many States have sought to bypass the criminal justice system to deal with counter-terrorism cases through the use of administrative counter-terrorism measures, including administrative detention, (sometimes indefinite) control orders, terrorist listings and the use of immigration and deportation laws. These administrative measures are used in lieu of the 'normal' criminal justice system and criminal prosecutions where terrorist acts have occurred, or as preventive measures against individuals seen as posing a threat.

These practices seek to circumvent the right of access to a competent court and several aspects of the right to a fair trial and a fair hearing. International human rights law protects the right of access to courts in the determination of criminal charges, applicable to all individuals. The right to be brought before a court, including any appeals, must be guaranteed 'without undue delay'.

Increased reliance on intelligence information

Another challenge is the increased reliance on intelligence information. While the use of accurate intelligence is essential to preventing terrorist acts and bringing terrorist suspects to justice, increased reliance on intelligence information, without sufficient consideration for safeguards against abuses, represents a serious challenge to the right to a fair trial. In particular, problems arise when the need for State secrecy is used to avoid disclosing information, when secret information is used as evidence, and when anonymous witnesses are used.

Intelligence information is most often classified. Where intelligence information is used as the basis for detaining an individual, neither the detainee nor his defence counsel have access to that information. This hinders their ability to contest the detention before a court and have it reviewed on substantive grounds. It also limits the ability of the court to review evidence and order the release of the detainee.

Furthermore, increased reliance on intelligence information has been accompanied by increased intelligence sharing and cooperation between States. Sometimes, this is

done without regard to the origin of the intelligence information and can even include information obtained through torture and other ill-treatment. Such evidence should be considered inadmissible in any criminal proceedings. Indeed, in addition to being illegal and unreliable as a source of information, intelligence information obtained through torture or ill-treatment seriously impedes criminal proceedings, whereas legally obtained evidence enables the criminal justice system to work effectively to counter-terrorism.

Another concern about the reliance on intelligence for the purposes of criminal justice relates to differences in evidentiary standards. The procedures for gathering of intelligence are generally subject to lower thresholds than those governing the collection of evidence for criminal proceedings. It is important to remember that acts of terrorism are criminal offences and, as such, the investigation, prosecution and judging of acts of terrorism should benefit from the same degree of rigour as any other criminal offence. In particular, any lowering of the standard of proof must be avoided where this could result in detention or application of the death penalty.

Other key challenges

In view of the limitations on our time today, I will just mention one other challenge that we need to consider, namely recourse to military or special courts. The Human Rights Committee has noted that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. The High Commissioner has stated that she fundamentally disagrees that special courts with special procedures can be more suitable than existing safeguards associated with the right to a fair trial in prosecuting terrorist crimes, as this insufficiently recognises the ultimately criminal character of terrorist acts.

3. Conclusion

All of these measures and practices seriously limit the possibility of bringing alleged terrorists to justice, which can in turn result in a denial of the right to fair trial for those accused of acts of terrorism, and a lack of justice for the victims of terrorism.

In contrast, upholding human rights has the opposite effect, creating a climate of trust between States and those under their jurisdiction, which is the very foundation of effective responses to global challenges such as terrorism. This increases both the legitimacy and the effectiveness of counter-terrorism measures, while upholding human dignity. Ultimately, this was the core commitment that States signalled when they adopted the Global Counter-Terrorism Strategy, and the fundamental objective of all States, striving to provide security to all those in their territory.

Before handing the floor over to you, I would like to end by saying a few words about the objective of this symposium. We hope this meeting will provide us with an opportunity to assess and analyse the obstacles and challenges to implementing fair trials according to international human rights norms, and to identify other rights that

are key in securing the fundamental requirements of the right to a fair trial in the context of counter-terrorism. As I noted earlier, there *are* challenges, but there are also human rights-compatible solutions to those challenges. We need to identify good practices so that these can be applied elsewhere.

While this symposium is taking place at the regional level, with more to follow in other regions, the topic is universal, and therefore the conclusions and recommendations that emerge from the next two days of discussions should be as well. A report on the outcome of the meeting will be produced, with a view to providing guidance to all Member States on how the right to a fair trial can best be protected. My hope is that at the end of this process, we will be better able to assist all Member States in the implementation of their obligations both to protect human rights and to counter terrorism.

I thank you, and wish us all a productive symposium.