



Assessing Damage, Urging Action

Report of the Eminent Jurists Panel
on Terrorism, Counter-terrorism
and Human Rights

EXECUTIVE SUMMARY

An initiative of the
International Commission of Jurists



INTERNATIONAL
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This report of the Eminent Jurists Panel, based on one of the most comprehensive surveys on counter-terrorism and human rights to date, illustrates the extent to which the responses to the events of 11 September 2001 have changed the legal landscape in countries around the world.

Terrorism sows terror, and many States have fallen into a trap set by the terrorists. Ignoring lessons from the past, they have allowed themselves to be rushed into hasty responses, introducing an array of measures which undermine cherished values as well as the international legal framework carefully developed since the Second World War. These measures have resulted in human rights violations, including torture, enforced disappearances, secret and arbitrary detentions, and unfair trials. There has been little accountability for these abuses or justice for their victims.

The Panel addresses the consequences of pursuing counter-terrorism within a war paradigm, the increasing importance of intelligence, the use of preventive mechanisms and the role of the criminal justice system in counter-terrorism. Seven years after 9/11, and sixty years after the adoption of the Universal Declaration of Human Rights, it is time for the international community to re-group, take remedial action, and reassert core values and principles of international law. Those values and principles were intended to withstand crises, and they provide a robust and effective framework from within which to tackle terrorism. It is clear that the threat from terrorism is likely to be a long-term one, and solid long-term responses are now needed.

The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, composed of eight distinguished jurists from different parts of the world, is an independent panel commissioned by the ICJ to report on the global impact of terrorism on human rights. The present report is based on a process of sixteen Hearings around the world covering more than forty countries in different parts of the world.



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International Commission of Jurists

The International Commission of Jurists (ICJ) is a non-governmental organisation devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. It is headquartered in Geneva, Switzerland, and has many national sections and affiliated organisations. It enjoys consultative status in the United Nations Economic and Social Council, UNESCO, the Council of Europe and the African Union. The ICJ maintains cooperative relations with various bodies of the Organization of American States.

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The Eminent Jurists Panel

The Panel is composed of eight judges, lawyers and academics from all regions of the world.

- Justice Arthur Chaskalson (South Africa), former Chief Justice of South Africa and first President of South Africa's Constitutional Court (Panel Chair);
- Georges Abi-Saab (Egypt), Emeritus Professor of International Law at Graduate Institute of International and Development Studies, Geneva, former appeals judge at the International Criminal Tribunals for the former Yugoslavia and Rwanda, and member of the World Trade Organization Appellate Body;
- Robert K. Goldman (USA), Professor of Law at American University Washington College of Law, former President of the Inter-American Commission on Human Rights, and former UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism;
- Hina Jilani (Pakistan), lawyer before the Supreme Court of Pakistan and former UN Secretary General's Special Representative on the situation of human rights defenders;
- Vitit Muntarbhorn (Thailand), Professor of Law at Chulalongkorn University, Bangkok, and UN Human Rights Council's Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea;
- Mary Robinson (Ireland), President of Realizing Rights: the Ethical Globalization Initiative, former UN High Commissioner for Human Rights and former President of Ireland;
- Stefan Trechsel (Switzerland), judge *ad litem* at the International Criminal Tribunal for the former Yugoslavia, former President of the European Commission on Human Rights and Emeritus Professor of Law at University of Zurich; and
- Justice Raúl Zaffaroni (Argentina), judge at the Supreme Court of Argentina, Emeritus Professor at the University of Buenos Aires, and former Director of the UN's Latin American Institute for the Prevention of Crime and the Treatment of Offenders.

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Introduction

This report catalogues, with deep concern, the extent to which the responses to the events of 11 September 2001 have changed the legal landscape in countries around the world. It documents how States have reacted to the threat posed by terrorism and concludes that as a result of the cumulative impact of counter-terrorism policies that are being pursued, the international legal order based on respect for human rights, built up painstakingly during the second half of the last century, is in jeopardy. The report reflects this concern and the urgent need for action by governments to repair the damage that has been done.

The report is the result of a global study carried out over three years by an eight-member panel of jurists (the Eminent Jurists Panel). The initiative to convene the Panel came from the International Commission of Jurists (ICJ), but the Panel is entirely independent. The Panel's mandate was to examine the compatibility of laws, policies and practices adopted to counter terrorism with the rule of law, international human rights law and, where applicable, international humanitarian law (the laws of war). The panellists have no doubt that there are real and substantial threats of terrorism in different parts of the world. They heard directly from experts to this effect and they heard victims who testified to the grievous human rights abuses suffered by civilian populations at the hands of terrorists. The duty of States to protect all within their jurisdiction against such threats is beyond dispute. International law requires that States take all measures appropriate to guarantee the right to life, and other essential freedoms, to all within their jurisdiction. In face of the real threats that exist, States are legally bound to take appropriate counter-terrorist measures.

Resolutions of the Security Council and the General Assembly of the United Nations required Member States to take appropriate action to counter terrorism, and to do so in accordance with the requirements of international law, including in particular human rights law, refugee law and international humanitarian law. Regional organisations, such as the Organization of American States and the Council of Europe, also adopted resolutions reaffirming the importance of protecting human rights in the struggle against terrorism.

What has happened, however, is that in the formulation and implementation of counter-terrorist policies, established principles of international human rights and humanitarian law are being questioned and at times ignored, not only by regimes whose record for doing so is well known, but also by liberal democracies that used to be in the forefront of promoting and protecting human rights.

The report looks at methods used to counter terrorism including administrative measures and the criminal justice system. It draws attention to the increasing power of intelligence agencies and the central role that they have in counter-terrorist policies; to the use of unsubstantiated and possibly faulty intelligence to take action against individuals and organisations that can have devastating consequences for them; to the cloak of secrecy that surrounds detention and interrogation to gather

intelligence; to methods used for that purpose including torture and cruel, inhuman or degrading treatment; and to the impunity allowed to those who engage in these practices. These are methods that have been tried in the past and found wanting. They focus on short term gains, curtailing hard won rights, and pursuing practices that have long been prohibited by international law. They ignore the human cost of doing so, and the long term consequences for societies in which such practices are tolerated. What came as a surprise to the panellists was how little attention seems to have been paid to the lessons of the past, and to the harm done by these methods when they were used by various countries in South America and elsewhere, to counter what was perceived then to be threats to the security of those States. A chapter of the report is devoted to lessons from the past, and to the consequences for those societies in which the methods which are now being used by other countries, were once employed.

Another chapter of the report is devoted to the war paradigm which is the basis of the counter-terrorism policy of the United States (US), and the harm it has done not only to the country's reputation, but to the international legal order as well. This is a matter of particular concern to the Panel because of the leadership role that the United States plays in the international community. In the report the Panel calls upon the incoming United States administration to reverse this policy and resume a leadership role in promoting and upholding human rights.

Seven years after September 11, it is time to take stock, take remedial action, and begin anew. The Panel is aware that there is a vigorous debate already underway in several countries in this regard: the way is open for States – at the international, regional and national levels – to reassert the primacy of the rule of law, particularly of international human rights and humanitarian law, when addressing terrorism. The report makes a number of detailed recommendations to this effect.

Methodology

The Panel engaged in a broad-based consultative process to learn directly about the impact of terrorism and counter-terrorism measures on human rights and the rule of law around the world. Members of the Panel travelled to take testimony directly from witnesses in sixteen regional, sub-regional and national Hearings from around the world – that is, Australia, Canada, Colombia, East Africa (Kenya, Tanzania and Uganda), the European Union and its Member States, Israel and the Occupied Palestinian Territory, the Middle East (Egypt, Jordan, Syria and Yemen), North Africa (Algeria, Morocco and Tunisia), Pakistan, the Russian Federation, South Asia (Bangladesh, India, the Maldives, Nepal and Sri Lanka), South-East Asia (Indonesia, Malaysia, the Philippines and Thailand), the Southern Cone countries of Latin America (Argentina, Brazil, Chile, Paraguay and Uruguay, on lessons from the past), the United Kingdom (one Hearing in London on current counter-terrorism policies, and another in Belfast on the lessons from the past) and in the United States of America.

Evidence relating to more than forty countries was considered. Most of the Hearings were public, but several sessions were private. Members of the Panel met with politicians, governmental officials, non-governmental organisations, judges and lawyers, journalists, intelligence and security personnel, and victims of both terrorist violence and counter-terrorism measures. Written submissions were received. Material from the Hearings is drawn on extensively in the final report of the Panel and a more detailed record of the individual Hearings is available on the ICJ website www.icj.org.

Defining terrorism

It was not part of the Panel's mandate to attempt to provide a comprehensive definition of terrorism, an endeavour which has until now eluded the international community. There is, however, wide agreement internationally that the core elements of terrorism consist of criminal acts committed with the intent to cause death or serious bodily injury with the purpose of provoking terror in order to compel governments or international organisations to do or abstain from doing any act. The Panel takes the view that in principle anyone can commit terrorist acts: it is important, therefore, to focus on the act itself and not the actor.

Overall findings

- Terrorism is a reality and States have a duty to counter the threat posed, but many current counter-terrorist measures are illegal and even counter-productive;
- The legal framework that existed prior to 9/11 is extremely robust and effective: international human rights and international humanitarian law were elaborated precisely to guarantee people's security. The Panel concluded that this legal framework is sufficiently adaptable to meet the current threats;
- However, the Panel found that the framework of international law is being actively undermined, and many States are reneging on their treaty or customary law obligations. The failure of States to comply with their legal duties is creating a dangerous situation wherein terrorism, and the fear of terrorism, are undermining basic principles of international human rights law;
- The Panel was particularly concerned at the evidence worldwide showing that the erosion of international law principles is being led by some of those liberal democratic States that in the past have loudly proclaimed the importance of human rights;
- Specifically, the Panel rejects the claim that any "war" on terror excuses States from abiding by international human rights law and, in armed conflict

situations, international humanitarian law, or allows them to tinker with the rules that these frameworks provide;

- Intelligence agencies around the world have acquired new powers and resources, but legal and political accountability have often not kept pace;
- The criminal law is the primary vehicle to be used to address terrorism. Whilst some preventive measures may conform to international human rights principles, such measures are easily abused. States that have allowed administrative detention should modify their laws and prevent abuse. States should not permit preventive detention without exhausting all other options.

Detailed findings

The report “Assessing Damage, Urging Action” draws on extensive testimony from across the globe and organises its detailed findings under the following rubrics:

- human rights;
- learning from the past;
- the war paradigm;
- intelligence;
- preventive measures;
- and criminal justice.

On the basis of these findings, the Panel derives a series of conclusions and recommendations. This executive summary restricts itself to the Panel’s key findings and recommendations; the full report sets out the extensive data that led the Panel to its conclusions, and provides a series of more detailed recommendations.

Human Rights

The *Universal Declaration of Human Rights* (UDHR) was adopted sixty years ago in the wake of the horrors of World War II. It opens with two assertions:

- Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;
- Disregard and contempt for human rights have resulted in barbarous acts that have outraged the conscience of humanity.

After the deliberate extermination of millions of people on grounds of their race, religion, sexual orientation, or other status, and after a war killing millions more, the world community committed itself to an international legal order based on the centrality of human dignity. Human rights protections were not considered incidental luxuries, but rather the cornerstone upon which to build freedom, justice and peace for all. Human rights violations were seen as feeding and fuelling violence and conflict.

In addition, there was a commitment to “*a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised*”, Article 28, and the limitations which would be allowed were circumscribed in careful language: “*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*”, Article 29 (2). On the basis of these commitments, legally binding treaties were subsequently negotiated and set in place during the second half of the last century.

The body of international human rights law developed during this period was made by the States themselves. It was designed to stand societies in good stead when under attack, and makes provision for flexibility in responding to emergencies. Yet, the Panel saw these hard-won human rights principles being jettisoned.

The Panel heard evidence that:

- Individuals have been abducted and held in secret prisons, where they have been tortured and ill-treated;
- Terrorist suspects are held *incommunicado* for extended periods before being charged and before they have access to lawyers, courts and the outside world in conditions that are conducive to, and have led to, torture and cruel, inhuman and degrading treatment;
- Individuals charged with terrorism are often tried before special or military courts, which lack the requisite guarantees of independence and impartiality, and do not offer essential fair trial guarantees;
- Deportation, detention and administrative measures adversely affecting persons suspected of being involved in or supporting terrorism are often ordered on the basis of secret intelligence which is not disclosed to the affected persons;
- Broadly framed anti-terrorist legislation has encroached upon fundamental freedoms of speech, opinion and assembly;
- Many counter-terrorist measures lack basic safeguards such as due process and adequate oversight mechanisms;
- A culture of secrecy is becoming pervasive and, in the case of secret detentions, suspects are being placed beyond the basic protections afforded by human rights standards, international humanitarian law and all domestic constitutional guarantees;

- The secrecy demanded for the work of the intelligence and security bodies frequently amounts to impunity for wrong-doing, and innocent victims of human rights violations find themselves with no avenue for redress.

A worrying feature of the testimony received was the potential impact of some of the measures. Extraordinary measures to address terrorism (for example, increased reliance on secret information that is difficult to challenge) are already seeping into the normal functioning of the State and the ordinary justice system, with long-term consequences for the rule of law and respect for human rights. The problem is all the more grave because departures from accepted human rights standards are taking place in States which have traditionally articulated their value. Moreover, States that routinely violated human rights now compare themselves favourably to governments that previously criticised them. International law needs the active commitment of governments – this is not happening.

Counter-terrorism measures resulting in serious human rights violations were sometimes justified on the grounds of “the greater good” of gathering intelligence or taking other measures to prevent terrorist acts. The Panel recognises that States are obliged in law to protect their populations and may be facing new threats: they did not, however, receive testimony that persuaded them that the departures from established international human rights and humanitarian law now underway are indispensable or even effective. The Panel agrees with the statement in the *ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (annexed to the report) that “safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the State”. The international legal framework has been developed precisely on the premise that emergencies will occur, and that basic civil liberties may on occasion be curtailed. That same framework does, however, also clearly set out minimal safeguards that must be upheld whatever the supposed threat. The *Universal Declaration of Human Rights* reminds us of the risks run if we ignore these safeguards.

The Panel makes a number of recommendations throughout the report to ensure a return to and a re-assertion of the fundamental values of respect for human dignity which lie at the heart of international human rights law.

Learning from the past

Many jurisdictions around the world have previously experienced long and intense periods of political violence, terrorism and counter-terrorism. While recognising that there are elements of the current terrorist threat that are new, members of the Panel travelled to a number of jurisdictions to see if there was anything to learn from the past that was relevant to current debates. The exchanges proved fruitful.

The Panel received extensive evidence to the effect that past threats were frequently characterised as exceptional and unprecedented. The exceptional nature of the threat invariably then provided a supposed justification for a departure from normal

legal processes – whether by introducing special laws, or resorting to extra-legal means. Sometimes past threats were grave in terms of the numbers of people involved: thousands of atrocities were committed in Peru in the 1980s, and in Algeria in the 1990s. Sometimes emergency situations were very protracted: the Panel looked at prolonged emergencies in Europe, Latin America, the Middle East and North Africa, as well as South Asia. The report documents how, as well as overlooking the relevance of the war-torn origin of the commitments made in the UDHR, States are ignoring valuable lessons from even more recent history.

A clear parallel from recent history was the claim (then and now) that States were facing a unique threat requiring exceptional measures. The Panel was made aware that a doctrine of “exceptionalism” risks justifying unacceptable measures, and can blind States to learning from the past. Whilst there are some new aspects to the current situation, mostly due to technological advances available to both terrorists and those involved in counter-terrorism, the Panel found nothing so qualitatively and quantitatively different that justified a departure from previously agreed norms.

Another parallel from the past is the risk of privileging military responses to terrorism. The report details several examples of the use of the armed forces in counter-terrorism, especially the military response throughout much of Latin America in the 1960s-1980s with the then all-pervasive “national security doctrine”. The privileging of military responses commonly led to the adoption of parallel justice systems, with military or special courts established to try those accused of terrorism. Previously, these systems facilitated human rights abuses and encouraged impunity and appear to be doing the same nowadays in those countries that have resorted to such measures.

In the past, as now, there was great reliance on special counter-terrorism laws. States, sometimes under great pressure to take action to combat terrorism, often introduce new legislation in a hurry, even if it duplicates provisions already available and is not self-evidently necessary. The report details numerous instances where counter-terrorism legislation has in the past contained vaguely defined offences, given wide discretionary powers to law enforcement agencies, and reduced basic safeguards such as access to lawyers and judicial oversight. Serious human rights violations, including disappearances, torture, and prolonged administrative detention followed.

Witnesses argued that special counter-terrorist legislation, introduced for a short-term emergency, all too easily becomes entrenched and has an insidious impact on the rule of law more generally. Executives accrue more power, to the detriment of the legislature and the judiciary, which should act as bulwarks against the excessive centralisation of power. There is a risk of seepage of special laws into normal legal procedures and practices.

The Panel also received testimony regarding the human and social damage caused by past counter-terrorist strategies. By “dehumanising” persons suspected of

being involved in terrorism (or – as in the past – the communist, or the nationalist, or the non-believer), some individuals are put outside of the UDHR’s basic tenet that “*all human beings are born free and equal in dignity and rights*”. This exclusionary process has led to the rights of minority groups coming under attack and whole communities being rendered suspect. The Panel heard extensive testimony suggesting that history is indeed repeating itself as people drew parallels between past experiences and current counter-terrorism measures. These parallels were very evident to the Panel in other Hearings where members of minority groups (most particularly Muslims in countries with a non-Muslim majority) reported that they have become the target (intended or not) of many of the counter-terrorist measures. This targeting has led to grievous individual abuses and has meant that communities live in fear of their treatment by the wider society. The space for public debate and dialogue (for media, non-governmental organisations, ethnic minority groups or those associated with other “unpopular” causes) appears to be narrowing. States are not heeding the lessons of the past.

Evidence given at the Southern Cone Hearing drew comparisons between the “national security doctrine” and the “war on terror”, with particular reference to clandestine detention centres, the use of torture to extract information, and the extension of military jurisdiction to try suspected terrorists. These experiences are a forceful reminder of how easily human rights protections can become subordinated to an all-encompassing notion of national security.

The Panel concluded that there were many valuable lessons offered by a study of past counter-terrorist responses, and it has incorporated this learning into the report’s recommendations as and when appropriate.

War paradigm

In the past States have used war analogies as a way of securing public support for dramatic measures – legal, financial, or other. There have been wars on drugs, on organised crime, and on poverty, but the terminology has served a largely rhetorical purpose. The description of the current phase of counter-terrorism efforts as a “war on terror”, however, differs from the rhetorical flourishes of the past. The United States, in particular, has adopted a war paradigm in the expectation that this provides a legal justification for setting aside criminal law and human rights law safeguards, to be replaced by the extraordinary powers that are supposedly conferred under international humanitarian law (laws of war). In doing so it has done immense damage in the last seven years to a previously shared international consensus on the legal framework underlying both human rights and humanitarian law, and has given a spurious justification to a range of serious human rights and humanitarian law violations.

The report explores important legal issues raised by the war paradigm applied by the US in the current struggle against terrorism. The Panel believes that this paradigm, by conflating acts of terrorism with acts of war, is legally flawed and sets a

dangerous precedent. The laws of war only apply when there is a situation of armed conflict according to objective criteria recognised under international law. Thus, when terrorist acts are committed outside of such situations, they are not governed by international humanitarian law, but by domestic criminal law and international human rights law and, perhaps, international criminal law. Accordingly, individuals who are suspected of terrorist offences committed outside of situations of armed conflict cannot legally be labelled, tried, and/or targeted as combatants. Where terrorist acts trigger or occur during an armed conflict, such acts may well constitute war crimes, and they are governed by international humanitarian law, together with international human rights law. Persons suspected of having perpetrated such offences during an armed conflict cannot legally be placed beyond the protection of the law. As a minimum, they must be treated in accordance with non-derogable human rights guarantees as well as with the customary law standards embodied in Common Article 3 of the *Geneva Conventions of 1949* and Article 75 of *Additional Protocol I*, or Articles 4 and 6 of *Additional Protocol II*, of 1977.

The US's war paradigm has created fundamental problems. Among the most serious is that the US has applied war rules to persons not involved in situations of armed conflict, and in genuine situations of warfare, it has distorted, selectively applied and ignored otherwise binding rules, including fundamental guarantees of human rights laws. This has not only had draconian consequences for the persons concerned, but also has utterly distorted humanitarian law's customary and treaty-based field of application.

Another fundamental problem has been serious human rights violations directly flowing from policies and practices associated with this putative "war on terror". Testimony to the Panel relating to renditions, secret detentions, and transnational cooperation in dubious clandestine operations was detailed and credible. Many of these allegations have been documented by international and domestic governmental and non-governmental agencies.

The Panel noted that it was only in the US itself that officials expounded the claim that the laws of war may be invoked outside of an armed conflict in counter-terrorism efforts. Elsewhere, whilst the language of "war" was often used, no-one sought to make a legal argument that the laws of war could or should be applied to the current terrorist threat. The war paradigm as applied by the United States has however had a detrimental impact around the globe. In many Hearings, the Panel learnt that governments elsewhere appear to relativise or justify their own wrong-doing by comparisons with the US. Some countries have sought opportunistically to re-define long-standing internal armed conflicts as part of the worldwide "war on terror" (the report notes an example of this in relation to Colombia). Elsewhere – particularly at its Hearings in Canada and the European Union – the Panel learnt of the alleged complicity of numerous States in practices such as extraordinary renditions.

The Panel recommends that the incoming US administration, repeal all laws, policies and practices associated with the war paradigm where they are inconsistent with the

country's obligations under international human rights and humanitarian law. Other countries that have been complicit in human rights violations arising from the war paradigm should similarly repudiate such behaviour and review legislation, policies and practices to prevent any such repetition in future.

Intelligence

The growing importance of intelligence in the fight against terrorism is apparent. The Panel found that a common theme in many Hearings was the new centrality accorded to the role of intelligence, and the increased powers and resources that appear to be dedicated to intelligence efforts. Whereas there are some parallels with past experience, the impact of new technology, and the extensive transnational nature of cooperation between intelligence agencies are striking. Ensuring that legal and democratic oversight mechanisms keep pace with changes in intelligence-gathering, storing and sharing creates new challenges for all States.

Government officials stressed to the Panel the importance of intelligence, and of being able to share intelligence between countries, particularly with a view to identifying and disrupting the possibility of terrorist acts before they are committed. The Panel was informed that this trend often results in government action being taken on the basis of unsubstantiated intelligence (sometimes gathered by dubious or unlawful methods), and that many abuses have been documented.

There is a genuine problem involved. The prevention of terrorist acts relies on good intelligence, and intelligence gathering by its very nature requires some degree of secrecy. Sometimes to reveal covert intelligence-gathering methods, or the extent of what is already known or not known, will undermine the effectiveness of the operation and put lives at risk. At the same time, secrecy can sometimes be no more than a cloak to avoid proper accountability. The Panel was provided many examples of the latter. The rule of law requires that appropriate safeguards apply to all aspects of a State's operations – including its intelligence work.

The Panel received disturbing evidence that in many countries intelligence agencies have acquired new powers of surveillance, and even powers of arrest, detention and interrogation, in both criminal and non-criminal contexts. As a result, the work of the intelligence sector is increasingly overlapping with, or supplanting, the duties normally performed by law enforcement bodies, without being subject to the corresponding accountability and oversight mechanisms. This point was driven home in many Hearings including those on the Middle East, North Africa, Pakistan, and the Russian Federation. In some instances, it was difficult to avoid the conclusion that States are bolstering the role of intelligence agencies in preference to traditional law enforcement agencies, precisely because the latter have well-defined lines of accountability to the legislature and judiciary as well as the executive. Witnesses reported many abuses.

The transnational character of the current terrorist threat means that intelligence agencies in liberal democratic countries are increasingly cooperating with, and frequently are dependent on information from, their foreign counterparts, including those with known records of human rights violations. The Panel received evidence concerning increased powers of surveillance and data-collection, storage, and information sharing, often with insufficient safeguards built in to protect against an erosion of privacy rights. The cooperation has also extended to such illicit practices as extraordinary renditions, secret detentions, enforced disappearances, torture and other proscribed ill-treatment. The Panel's Hearings revealed that while most States accept that intelligence obtained by torture may not be used in legal proceedings, they sometimes seem ready to use such intelligence for operational purposes in order to prevent terrorist attacks. The distinction between legal and operational use of such information obtained by torture and other illicit treatment suggests that the receipt of intelligence information is frequently not subject to any meaningful restraint, so long as it is not used in legal proceedings. The Panel is concerned that the regular reliance on and acceptance of such "tainted" information implies an encouragement of and even complicity in internationally prohibited practices.

The need for secrecy cannot excuse these or other grave human rights violations. Yet the Panel received evidence that intelligence services worldwide effectively enjoy impunity for human rights violations because of a lack of meaningful civilian oversight and/or a lack of political will by governments to investigate and prosecute State agents involved in such abuses. In addition, legal doctrines such as state secrecy or public interest immunity have been used to foreclose civil suits and hence remedies to the victims of such abuses.

The Panel concluded that there is no reason in principle that intelligence agencies should not be made answerable for their actions. States are responsible for the actions of their agents and this responsibility extends beyond the requirement not to directly engage in human rights abuses, but also requires that they not cooperate in, or seek to benefit from, such violations carried out by others. In particular, the prohibition of torture is non-derogable, and States are obliged under international law to take all appropriate measures to prevent it and to thoroughly investigate any allegation of ill-treatment. The failure of the international community to speak out sufficiently forcefully on this matter in recent years is a matter of grave concern.

The Panel recommends that agencies involved in intelligence gathering, including military intelligence, must be subject to effective mechanisms of control and that their operations (domestic and transnational) must be governed by law and regulations in full compliance with all human rights standards.

Preventive counter-terrorism measures

The priority for governments in recent years has been for early interventions that will prevent terrorist acts from taking place, rather than merely responding after the event. Given the legal duty on States to protect all those within its jurisdiction,

preventing such attacks is a proper objective, and one to be encouraged, if regulated carefully. The Panel heard evidence about successful and unsuccessful attempts by States to comply with this duty.

The practice of administrative detention is increasingly relied upon to deal with individuals suspected of posing a threat. The Panel heard evidence about this in Australia, East Africa, Israel and the Occupied Palestinian Territory, the Middle East, North Africa, South Asia (Bangladesh, Nepal and Sri Lanka), and South East Asia (Malaysia, Thailand). The Panel received extensive testimony about the abuse of this practice in some of these countries, and concerns were raised regarding the numbers of administrative detainees; the length of detention; and a lack of judicial oversight. Whilst it is clear that preventive measures, with appropriate safeguards, can comply with international human rights law, there is at least one non-negotiable safeguard, and that is the principle that no one must be subject to torture and other cruel, inhuman or degrading treatment.

Torture violates the principle of human dignity that lies at the heart of the broader international human rights framework, and as such is never acceptable. The absolute prohibition on torture, whilst not always respected in practice, has been part of the global consensus for decades. Despite this, the Panel received extensive testimony that detainees are being tortured, and is aware of attempts by some senior government officials to justify such practices in the prevention of terrorism. Even when the absolute prohibition on torture and other cruel, inhuman or degrading treatment was accepted in principle, sufficient precautions to prevent torture were often not taken in practice. The Panel heard from witnesses that many newly introduced preventive measures involving detention facilitate torture and ill-treatment; certainly, any diminution of the right to due process, access to legal advice, or judicial oversight, is likely to create the conditions in which torture or ill-treatment can occur. An inescapable duty lies with States to publicly promulgate their commitment to the proper treatment of detainees, and to ensure that, whatever measures are introduced, the right to be free from torture is guaranteed.

The report records that a number of countries have placed immigration law at the centre of their preventive counter-terrorism strategies: using deportation and detention (sometimes prolonged) pending deportation. Immigration law offers less legal protection than criminal law, and it was troubling for the Panel to hear evidence of immigration measures that lower the standard of proof, limit access to independent legal counsel, and reduce judicial oversight. Of concern to the Panel was evidence that many States are departing from the principle of *non-refoulement*, a long established principle of international law, which prohibits transferring a person to country where that person might face a real risk of torture or other serious human rights violations.

The Panel heard evidence from witnesses who spoke of the imposition of control orders in the United Kingdom and elsewhere, to inhibit the freedom of movement, association and expression of suspected terrorists. Breaches of control orders

are crimes. According to the evidence the combined effect of various restrictions imposed by some of these orders can make it difficult for the controlled persons to live a normal life, yet these measures require a relatively low threshold of suspicion, and offer only limited opportunities for legal challenge.

A common feature of all these measures is the use of secret intelligence to justify the action taken. The intelligence is not disclosed to the people against whom action is taken and they have no effective opportunity to rebut it. Concerns about real and perceived discrimination in the application of such measures were also raised.

A counter-terrorism preventive measure that has become increasingly important since 2001 has been the process of creating lists of individuals or organisations suspected of involvement in terrorism. Listed organisations are generally banned, while listed individuals typically face restrictions on their freedom of movement, or in their financial transactions.

The UN Security Council introduced a listing system before 9/11 but it has taken on greater significance in recent years. The European Union (EU) maintains a list that implements the Security Council lists, and also an independent European Union list. There are also national lists. There is, inevitably, a considerable amount of overlap between listing at the national, regional and international levels. With such overlapping, comes both the potential for increased error, and the difficulty of legal challenge, or correction; yet, affected persons or entities are rarely given an effective opportunity to challenge their designation – before or after being designated. An aggravating factor as far as the UN listing procedure is concerned, is that once a name has been put on the list, it cannot be removed without the consent of all the members of the listing committee – in effect, each member has a veto. The Panel concurs with the view of the Parliamentary Assembly of the Council of Europe that the current procedures of listing undermine the credibility of the international fight against terrorism, and are “unworthy” of international institutions like the UN and the EU.

Identifying and freezing the assets of persons, groups, and organisations involved in terrorism are clearly acceptable, and possibly even necessary, tactics in effectively combating terrorism. However, the Panel received virtually uniform criticism of the listing system as it presently operates. The UN sanctioning of lists is seen as arbitrary and inconsistent with the obligations of States under international human rights law. This can cause difficulties for Member States if they try to abide by UN procedures. On the one hand they have human rights obligations by which they are bound, and on the other hand they have obligations to implement decisions under Chapter VII of the *UN Charter*. This may give rise to legal challenges in domestic and international tribunals. In this regard, the report welcomes a recent landmark decision of the European Court of Justice, which ruled that the implementation within the EU of listings by the Security Council have to be measured for their full compliance with human rights law.

The Panel make a number of recommendations relevant to preventive efforts, but they can be summed up by the recommendation that a major stock-taking exercise is needed at the international, regional and national levels to measure all counter-terrorism measures against international human rights law.

Criminal Justice

In several of the countries visited, government officials argued to the Panel that the criminal justice system as it stood was ill-equipped to deal with the modern threat from terrorism: criminal investigations are allegedly slow, cumbersome, mainly reactive, and therefore inappropriate. The Panel was told that the State must emphasise preventive action (see above) and that where the criminal justice system is used, it may require special procedures or even, in some countries, special courts to deal with the cases brought to trial.

The report discusses a range of special measures introduced in the name of counter-terrorism. These measures include, but are not restricted to, the creation of new offences (often defined in an over-broad and vague way); extended periods of pre-charge or pre-trial detention; limited access to legal counsel; suspension or limitation on *habeas corpus* or its equivalent; the use of special or military courts; restrictions on the suspect's access to evidence; increased reliance on confessions; lowering of evidentiary standards; the use of anonymous witnesses; and limitations on the right of appeal.

The failure of the international community to agree on a common definition of terrorism, or even on the need for such a definition, has facilitated the development of an *ad hoc* approach. Nevertheless, the Panel started from the premise that acts of terrorism, whether committed during armed combat or outside of armed conflict, are crimes – sometimes, heinous crimes. The crimes involved include murder, hostage-taking, and violence against civilians, and are some of the most serious offences under any legal system. The purpose for which terrorist acts are committed may distinguish them from common crimes, but very grave crimes they remain. Like other criminality, terrorism will not end solely by way of law enforcement. The causes and the consequences of crime, and of terrorism, need also to be addressed creatively. However, the criminal justice system is the proper place to prosecute those suspected of having committed crimes, including terrorist acts committed outside of armed conflict, and even in the face of new challenges the Panel concluded that the system – properly applied – is sufficiently robust and adaptable to overcome any alleged weaknesses.

At several Hearings, the panellists learnt of new laws being introduced with broad definitions of terrorism, and a wide range of new often inchoate terrorist offences. This vagueness, which itself violates the basic principle of legal certainty can be exploited to target political or other opposition. Examples of this misuse of legislation, supposedly introduced to deal with terrorism, but actually being used to stifle dissent, were provided to the Panel. Witnesses in several Hearings gave examples of

governments taking advantage of the perceived terrorist threat to limit, and indeed criminalise, normal political debate or mere expressions of controversial ideas, and to circumscribe freedom of association and expression. Some new offences aimed at activities in support of terrorism, or offences which result in the imposition of financial and other controls (see above), may have a detrimental impact way beyond the original intended target, with often incalculable effects on family members, especially children.

In some countries, special courts – often military – are given jurisdiction over terrorist offences. The report explores the practices of these courts and the problems they create for due process rights. The independence and impartiality of tribunals are the cornerstone of any judicial system. The use of military or special courts is not automatically in conflict with fundamental rights but the practice in the past has often led to abuses. There must, therefore, be a convincing justification for moving from a “normal” court system and independence and impartiality must be fully ensured: there are no half-way solutions. The Hearings of the Panel showed that when military or special courts are used to try terrorist offences, these conditions are typically not met. In none of the Hearings were the Panel given any convincing reason why military or special courts are better equipped than civilian courts to deal with terrorism.

Similarly, special rules of procedure such as restrictions on access to courts or counsel, reversal of the burden of proof, lowering of the standard of proof, the anonymity of witnesses, or limitations on the right to disclosure of evidence, are explored. The Panel was particularly concerned that suspects are often detained for a prolonged period without prompt and effective access to courts or legal counsel, exposing them to a heightened risk of torture and ill-treatment. The Panel concluded that, whilst there may be, in some instances, a need to adjust ordinary rules of criminal procedure and evidence to the new complexities of terrorism cases, some of the modifications – whether in law or in practice – raise concerns regarding the crucial concepts of necessity, proportionality and non-discrimination. The cumulative effect of special rules, combined with longer pre-charge or pre-trial detention periods, as well as slower and constrained access to legal counsel, is particularly worrisome. The Panel came to the conclusion that the criminal justice system does not so much need changing, as it needs strengthening. It may be understandable for counter-terrorism specialists, supported by governments, to want to by-pass an under-resourced and inefficient judicial system, but this is short-sighted, and will only succeed in further weakening respect for the law. Where necessary, the judicial system must be made more independent, professional, and efficient, which would in turn allow justice to be dispensed more promptly.

The ordinary court system, with its built-in safeguards to avoid error and abuse, afford the suspected terrorist the same guarantees of fairness and justice that are extended to any other suspect. Fair trial procedures exist not only to protect the individual suspect, but also reflect society’s commitment to justice and fairness

for all. The Panel finds it necessary to recall that justice must not only be done, but also be seen to be done: this objective is particularly important in the context of the fight against terrorism.

The Panel makes a number of detailed recommendations in the report but, in short, the Panel calls on all States to strengthen their criminal justice systems. If properly resourced and strengthened, it is the criminal justice system that is best placed to address terrorism.

Conclusions

The Panel concludes that terrorism sows terror, and many States have fallen into a trap set by the terrorists. Ignoring lessons from the past, some States have allowed themselves to be rushed into hasty responses, introducing an array of measures which are undermining cherished values as well as the international legal framework carefully developed since the World War II. Seven years after 9/11, and sixty years after the adoption of the *Universal Declaration of Human Rights*, it is time for the international community to re-group, take remedial action, and reassert core values and principles of international law. Those values and principles were intended to withstand crises, and they provide a robust and effective framework from within which to tackle terrorism. It is clear that the threat from terrorism is likely to be a long-term one, and solid long-term responses are needed.

Moreover, the Panel concludes that counter-terrorist policies can only be successful over the longer term with the active support of an informed public. Yet, many of the measures we observed tend instead to encourage an “us and them” approach, often alienating communities whose support is essential for successful counter-terrorism action. We need to strengthen, not weaken, civil society if terrorism is to be effectively countered.

Last but not least, political leadership is needed urgently at a national and international level to develop a comprehensive strategy committed to combating terrorism, that will *inter alia* – repudiate torture and all other serious human rights violations, restore respect for well-established principles of international human rights and international humanitarian law, and insist on the effective integration of human rights law into counter-terrorist initiatives.

Key recommendations

Each chapter of this report sets out the Panel's detailed recommendations and provides a fuller argumentation for each proposal. The following is a summary of the key recommendations:

1. Stocktaking and repairing the damage

There is a need to take stock, take remedial action, and make a fresh start. Measures need to be taken at the international, regional and national levels:

- a. **Internationally:** All UN bodies, including the Security Council, should take a leadership role in restoring respect for human rights in the counter-terrorism efforts of its agencies and Member States. In particular, the Human Rights Council should develop a detailed plan of action and ensure a systematic follow-up to the recommendations of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.
- b. **Regionally:** Relevant organisations should conduct a comprehensive review of regional agreements and measures on counter-terrorism, and review, where necessary, the mechanisms to ensure compliance with human rights standards, including mechanisms for monitoring implementation by Member States.
- c. **Nationally:** States should undertake comprehensive reviews of their counter-terrorism laws, policies and practices, including in particular the extent to which they ensure effective accountability, and their impact on civil society and minority communities. States should adopt such changes as are necessary to ensure that they are fully consistent with the rule of law and the respect for human rights, and to avoid all over-broad definitions which might facilitate misuse.

2. Preventing the normalisation of the exceptional

States should take explicit precautions to ensure that any measures, intended to be exceptional, do not become a normal part of the legislative framework. Precautions could include ensuring that any new counter-terrorist laws or measures:

- fill a demonstrable gap in existing laws;
- comply with all the requirements of international human rights law, and where relevant, international humanitarian law;
- are subject to clear time-limits;

- are subject to periodic independent review, not solely as to implementation, but also as to the continuing necessity and proportionality of the measure;
- and that the review process monitor that any formal derogations entered by the State are only in place for as long as terrorism poses a genuine threat to the life of the nation, and are in compliance with all substantive and procedural requirements of relevant instruments.

3. Equality and non-discrimination

States must ensure that counter-terrorist measures are non-discriminatory, and that due respect be paid to the rights of those, such as juveniles, women and minority communities, who may experience terrorism and counter-terrorist measures differentially. A particular effort must be made to ensure that people are not treated as terrorist suspects on the sole basis of their ethnicity, religion, or similar identity.

4. Accountability in counter-terrorism measures

States should ensure that where human rights violations have been alleged, effective inquiries, with proper disclosure, should be established. Accountability should be strengthened on all levels and, in particular, provisions for immunity, indemnity clauses, and limitations on access to courts should be removed. Effective remedies and accountability depend to a large extent on a strong, independent and knowledgeable judiciary and legal profession: efforts should be made to strengthen the criminal justice system, including the provision of technical assistance where needed.

5. Repudiating the war paradigm

The incoming US administration should reaffirm the US's historic commitment to fully uphold and faithfully apply the laws of war during situations of armed conflict and recognise that human rights law does not cease to apply in such situations. Accordingly, it should seek the repeal of any law and repudiate any policies or practices associated with the "war on terror" paradigm which are inconsistent with international humanitarian and human rights law. In particular, it should renounce the use of torture and other proscribed interrogation techniques, extraordinary renditions, and secret and prolonged detention without charge or trial.

It should also conduct a transparent and comprehensive investigation into serious human rights and/or humanitarian law violations committed in the course of the "war on terror" and should take active steps to provide effective remedies to the victims of such abuses. The military detention centre at Guantánamo Bay should be closed in a human rights compliant manner and

persons held there should be released or charged and tried in accordance with applicable international law standards.

Other countries that have been complicit in human rights violations arising from the war paradigm should similarly repudiate that behaviour and review legislation, policies and practices to prevent any such repetition in future.

6. Human rights compliant intelligence efforts

States should take steps to ensure that the work of intelligence agencies is fully compliant with human rights law. The powers of intelligence and law enforcement should be separated and intelligence agencies should not in principle have the power to arrest, detain and interrogate; if intelligence agencies are assigned such powers, the powers should be exercised in conformity with human rights standards.

Care should be taken to regulate by law the powers of intelligence agencies, the gathering of intelligence and the sharing of intelligence with other agencies. It is also imperative to establish independent oversight mechanisms. There should be precise rules on the protection of privacy and measures such as surveillance and interception of communications should require judicial authorisation.

States should provide effective remedies and reparation for human rights violations (including those carried out by their intelligence services) and conduct thorough and independent investigations into allegations of human rights violations, such as renditions and secret detentions or ill-treatment. The need to maintain secrecy of intelligence services' activities must not deprive victims access to an effective remedy and reparation.

7. The prevention of terrorism

Measures to prevent terrorism, especially when based on secret intelligence, must be mindful of the fundamental rights of the individuals concerned. Administrative detention, control orders, the freezing of assets and other actions on the basis of terrorist lists, must in the first place be necessary and proportionate, limited in time, non-discriminatory and subject to independent periodic review. Furthermore, those affected must have an effective and speedy opportunity to challenge the allegation before a judicial body.

States should repeal laws authorising administrative detention without charge or trial outside a genuine state of emergency; even in the latter case, States are reminded that the right to *habeas corpus* must be granted to all detainees and in all circumstances.

States should ensure that immigration law does not serve as a substitute for criminal law in its counter-terrorism efforts and should, in particular, reaffirm

their commitment to the principle of *non-refoulement*. They should not rely on diplomatic assurances or other forms of non-binding agreements to transfer individuals when there is a real risk of serious human rights violations.

The UN Security Council, the Council of the European Union and other organisations using a listing system should urgently comply with basic standards of fairness and due process, including, as a minimum, allowing affected persons and organisations the right to know the grounds of listing and the right to challenge such listing in an adversarial hearing before a competent, independent and impartial body.

8. Reasserting the value of the criminal justice system

States should ensure that their criminal justice law, and the various agencies of the criminal justice system, are ‘fit for purpose’ so that they can meet the long-term challenges posed by terrorism. Priority should be given to efforts to strengthen the capacity of ordinary law enforcement and judicial systems to enforce their existing criminal law and to improve international judicial cooperation. The international community should support such efforts, including by providing technical assistance where needed to strengthen States’ ability to investigate complex crimes within a framework of the rule of law.

9. Repudiation of serious human rights violations

The international community should repudiate the serious human rights and humanitarian law violations that have been committed worldwide by many States in the name of countering terrorism. Given the ambiguity that has arisen around previously uncontested truths, it is vital to reiterate that all forms of torture, cruel, inhuman or degrading treatment, extra-ordinary renditions, and secret detention are illegal and unacceptable.