

**Opening Address of Bertrand Ramcharan,
Acting United Nations High Commissioner for Human Rights
At a Conference organized by the International Commission of Jurists
Geneva, 23 October, 2003**

The subject we have come here today to discuss is indeed an important and topical one: human rights, counter-terrorism, and international monitoring systems. I am pleased to be with you on this occasion and greet you warmly on behalf of all my colleagues in the Office of High Commissioner for Human Rights. Having been a Commissioner of the International Commission of Jurists (ICJ) before becoming a United Nations human rights Commissioner, you will understand my pleasure and gratitude, that this conference is being organized by the ICJ, with whom we have had a long and fruitful partnership for human rights going back for years. Some years ago, the ICJ did an important study on human rights and states of emergency and, more recently, it has done an important study on human rights and terrorism. The ICJ has thus made foundation contributions to the topics of interest to us today for which we are all grateful.

I should like, in these opening remarks, to take each of the topics of our conference in turn: human rights, counter-terrorism, and international monitoring systems. First, human rights. What are the considerations that should be in our minds today as we commence this conference? It would be important, I believe, to remind ourselves of the international code of human rights that all Governments are pledged to live by. Can one say that the basic norms of international human rights law are in fact influencing all countries and that they are seeking in good faith to implement those norms? Many countries are indeed striving, in sometimes difficult circumstances, to follow the human rights path. Many are way off course. Gross violations of human rights abound in the world. Women are the victims of pervasive injustice. Trafficking in human beings is a blot on our civilization. Poverty is the ruination of millions of lives. Indigenous peoples, minorities, refugees, internally-displaced persons, and migrants experience diverse problems when it comes to the practical enjoyment of basic human rights.

The United Nations Secretary-General, in his efforts to strengthen the human rights activities of the United Nations, has placed emphasis on the development and strengthening of national protection systems, the better implementation of human rights treaties, and the enhancement of the functioning of the special procedures system. We in the Office of the High Commissioner are placing increasing emphasis on working with Governments and with United Nations country teams on practical projects to enhance national protection systems, with particular emphasis on the role of the courts in the protection of human rights nationally. In the first instance, human rights must be protected at home. International efforts reinforce national protection.

Why is this important? It tells us, in my view, where our priorities must lie in the human rights movement: in fostering and helping strengthen national protection systems. It also invites us to ask questions such as the following: How are the acts of terrorists adversely affecting efforts to protect human rights at home? What are the dangers to human rights

in the struggle against terrorism? Is the terrorism issue being exploited as a subterfuge to suppress human rights and what is the scale and dimension of this?

Attempting to answer these questions, one needs to recognize that the acts of terrorists threaten innocent lives in all parts of the world. A government which has to act to counter terrorism is one that is being obliged to deploy resources that might otherwise have been used for nation-building and for the promotion and protection of human rights. Terrorism thus has an adverse effect on global efforts to uphold human rights.

The danger to human rights in countering terrorism -- which one has seen in many situations -- is that there might be departures from the rule of law, or from the principle of proportionality, or that one might have recourse to methods that are fraught with danger -- such as resort to military tribunals to try civilians. There are also dangers when persons suspected of terrorist acts are detained or imprisoned -- that they may be treated inhumanely or without regard to basic international standards.

International human rights treaty bodies, special rapporteurs and working groups, and reputable non-governmental organizations have been pointing up extensive evidence of abuses of human rights in different parts of the world that have taken place on the ground of countering terrorism. One of the contributions that might be made by this conference is to help assess the scale and extent of such abuses. It is important that we follow this carefully.

I turn now to the second item in the title of the conference: counter-terrorism. What are the considerations that we should have in mind when contemplating this aspect? First, as we have already said, terrorism has an adverse effect on global efforts to uphold human rights. Second, the Security Council has held, under Chapter VII of the United Nations Charter, that all Governments have a duty to act to prevent and counter terrorism. Third, there is a duty of international cooperation among Governments in acting against terrorism. Fourth, as we have already mentioned, terrorism must be fought within the framework of the law and with respect for the principle of proportionality. Fifth, there are certain norms from which there may be no derogation in any circumstances. The interdiction of torture is an example of this. Sixth, there must be access to the Courts to test particular instances of the application of counter-terrorism law and practice. Without the arbitration of the Courts there is grave danger of abuse.

A particular area of the law regulating counter-terrorism activities that requires urgent clarification relates to the role of the Courts in evaluating threat assessments by Governments. The measures a Government takes to counter terrorism will be influenced by its assessment of the degree and level of threat. This can have far-reaching consequences for law and order and for human rights. Is threat assessment to be left to the Executive alone?

Historically, the practice has varied in different jurisdictions. In Common Law countries the Courts have been reluctant to question the judgment of the Executive, leaving it to the electorate to make the ultimate judgment. The European Court of Human Rights has

accorded a margin of appreciation to Governments, distinguishing between a democratic and a non-democratic government. In Civil Law systems it does not seem that the Courts have been ready to challenge the judgment of the Executive when it comes to threat assessment. At the international level, the issue has been moot so far. The Security Council is a political rather than a judicial body and the issue of threat assessment has hardly exercised bodies such as the International Court of Justice.

I believe, however, that at a conference organized by the International Commission of Jurists, it is of the utmost importance to reflect on this issue. Unless there can be some possibility of judicial monitoring of threat assessment one would be condemned to dealing with situations after the fact. From a human rights standpoint this would be ominous.

I turn now to the third component of the conference: international monitoring systems. The first thing to note about this component is that monitoring is of two kinds: monitoring of compliance with the duty to act against terrorism; and monitoring of compliance with international human rights norms. Monitoring of compliance with the duty to act against terrorism is a leading task of the Counter-Terrorism Committee (CTC) of the Security Council. It has had a good beginning with Governments submitting their initial reports but, more recently, reports have been lagging. The quality and depth of monitoring is open to study. While the CTC has been willing to receive information and presentations on human rights issues, there is no evidence that it has so far developed an approach to monitoring of compliance with international human rights norms.

Monitoring of compliance with international human rights norms has been carried out largely by the international human rights treaty bodies, the special procedures of the United Nations, NGOs, and the media. The idea has been discussed around the Commission on Human Rights of designating a Special Rapporteur to monitor compliance with international human rights norms in counter-terrorism activities, but it has so far not come to decision because views have differed. There has been some monitoring of compliance with human rights norms in regional and similar bodies such as the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE).

One could also mention, in this context, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, who has been engaged in a study of the topic of terrorism and human rights.

Having now touched upon the three components of our conference's topic, human rights, counter-terrorism, and international monitoring systems, what insights should we seek to derive as we set about our deliberations? I would suggest the following: it would be important to identify best practices when it comes to safeguard measures against abuses. Prevention of abuses is crucial. Preventive measures need to be examined at the national, regional and international levels. It would be important to place before Governments examples of successful safeguard measures. This is what moved us to prepare a digest of human rights jurisprudence of United Nations and regional courts and commissions so as to sound a note of caution to Governments and to provide a source of guidance to them.

Out of this conference could come a compendium of safeguard measures to protect against abuses in the struggle against terrorism. Thank you.

***Human Rights and Counter-Terrorism:
International Monitoring Systems***

**Welcome remarks by Mr. Sergei Ordzhonikidze
United Nations Under-Secretary-General
Director-General of the United Nations Office at Geneva
At the conference of experts on human rights and counter-terrorism
organized by the International Commission of Jurists**

**Palais des Nations, Room XVI
Thursday, 23 October 2003, at 09:30 a.m.**

Ladies and Gentlemen:

It is a great pleasure to welcome you to the Palais des Nations today.

This Seminar is indeed very timely. The beginning of the 21st century is characterized by two significant developments: on the one hand, growing recognition of the universality of human rights, *and* on the other hand, an increase in the *frequency* and *force* of international terrorist attacks. Our common challenge is to ensure an *effective* fight against terrorism without *undermining* – or indeed *sacrificing* – human rights and civil liberties.

Let us be clear: terrorism affects the full enjoyment of human rights. States have a *duty* to protect their citizens against this threat. But we must work to

make sure that ***upholding*** human rights standards and ***uprooting*** terrorist networks do not become contradictory efforts. Rather, the two should be mutually reinforcing and proceed in parallel. ***Strengthening*** human rights standards – not ***weakening*** them – is in fact an integral part of the fight against terrorism.

International and regional conventions can work towards cutting the lifelines that sustain terrorism – in particular ***funding***, ***shelter*** and ***supply of arms*** and other ***equipment***. Law enforcement agencies can work towards restricting cross-border movement of terrorists to ***curb communication*** and ***formation*** of solid network, and to ***prevent*** them from perpetrating their heinous crimes.

But wherever human rights are ***compromised***, wherever freedoms are ***denied***, wherever political voices are ***silenced*** – that is where terrorist networks can be nurtured and where they may gain strength. Regardless of where they take place, human rights abuses contribute to creating conditions of insecurity and instability with potential worldwide implications.

As the pre-eminent international organization with universal membership and a global mandate, the United Nations has a key role to play in the fight against terrorism. It provides a legal and an organizational framework for the common fight. Resolution 1373, passed unanimously by the United Nations Security Council, remains a principal instrument for the international community's counter-terrorism efforts. The United Nations is committed to strengthening the international legal base to enable effective counter-terrorism efforts.

International obligations have to be *implemented* by States through *national measures*. Here, partners in other international and regional organizations as well as civil society must be closely involved for effective implementation. We must also include the business sector when taking measures to secure trade and cross-border investment in order to limit the economic impact of counter-terrorism efforts. The economic consequences of terrorism are often overlooked. Yet, it is estimated that the terrorist attacks on 11 September 2001 alone account for a one percent reduction of the world GNP. This could have long-term repercussions for development.

It is imperative that international counter-terrorism *responsibilities* do not lead to *regression* in the protection of individual rights and liberties or to *derogation* from principles of international law. Appropriate monitoring – and mechanisms for addressing transgressions – must be in place. This Seminar is part of that effort.

Ladies and Gentlemen:

The expertise and experience of the International Commission of Jurists is widely recognized and respected. This Seminar – together with the Commission’s publications and other projects – are examples of how non-governmental organizations can make very practical contributions to current debates, and in this way strengthen our common efforts.

As the United Nations Secretary-General stresses: ‘*there is no trade-off between effective action against terrorism and the protection of human rights*’. Your debates here over the coming two days will contribute to our joint endeavour to ensure that the *promotion* of human rights and the *fight* against terrorism do not *clash* but *complement* each other.

I wish you much success in your discussions.

Thank you very much.

«Counter-terrorism» measures and their human rights impact: an overview

*Presentation by Claudio Cordone of Amnesty International at the conference on
“Human Rights and Counter-Terrorism: International Monitoring Systems”*

Geneva, Palais des Nations, 23 October 2003

In this presentation, I wish to highlight some of the ways in which practices by governments justified in terms of “counter-terrorism” result in serious human rights violations. I realize that we address this issue in a context where governments do not agree on a general definition of “terrorism” and that we can even question whether pursuing such a definition is a useful exercise. For the purposes of this discussion I will note that the term “terrorism” usually refers to two broad types of conduct.

First, “terrorism” is used to refer to conduct prohibited under international law. Looking specifically at the conduct of armed political groups, the killings of civilians by members of *al-Qa’ida*, the Communist Party of Nepal (Maoist) or ETA in Spain; the hostage-taking by members of the FARC in Colombia or the Abu Sayyaf group in the Philippines; and the suicide bombings by members of Palestinian groups, are all well-recognized crimes affecting the enjoyment of human rights. They are crimes under domestic law. When committed in the context of an armed conflict they are war crimes. Some amount to crimes against humanity.

Second, “terrorism” is used to refer to conduct which is not unlawful under international law. The peaceful exercise of one’s freedom of association remains an internationally-recognized right, even when governments criminalize it as a “terrorist” activity. Attacks on a governmental military target in an armed conflict are not in themselves unlawful, even if certain states would not hesitate to always call them “terrorism”.

Looking at the broad picture with some historical perspective, we know that the use of the term “terrorism” as just illustrated, and the violations of human rights in the name of “counter-terrorism”, are not new phenomena. However, since the attacks on the United States of America (USA) of 11 September 2001, governments have been upfront in pursuing repressive agendas that previously they would have been defensive about. Many play on peoples’ fears and sometimes prejudices. Some governments have introduced measures that break with their best judicial traditions. Others have repackaged existing repressive practices using the language of “counter-terrorism”. And governments once willing to intercede with other governments on human rights issues have been more reluctant to do so.

Looking now at specific pattern of human rights violations, I will highlight some trends that relate mainly to the use of force as well as to new legislation; arbitrary detention; the death penalty; and public attitudes towards human rights violations. I am

conscious that this is only a very partial picture of the various ways in which “counter-terrorism” measures affect human rights, and of the countries where it is happening.

Let me begin by addressing what can be called the *militarization of law enforcement*. By that I mean the doctrine according to which states are engaged in a global “war” against “terrorist” groups, where military means are resorted to irrespective of whether the situation in the territories where this “war” plays itself out is one of armed conflict or one where law enforcement measures would be available.

In this perspective, the frameworks of international human rights and humanitarian law are seen as cumbersome or obsolete. The mindset is one of firing guided missiles on suspects, sometimes across borders, without necessarily trying to seek their arrest. It happens almost every week in the Palestinian territories occupied by Israel, where Israeli forces carry out such attacks even in areas where they exercise effective control and routinely arrest people. Last November a United States (US) missile killed six men in Yemen said to be members of *al-Qa'ida* in circumstances suggesting it may have been an extrajudicial execution.

Unlawful killings are perpetrated in the name of “counter-terrorism” also in Algeria, where the government feels vindicated by the attacks of 11 September 2001 in its ruthless approach towards a ruthless opposition, and up to 100 people continue to be killed every month. The conflict in Colombia has deteriorated, with government forces, paramilitary and opposition groups engaging in the killing of civilians, among other abuses. Unlawful killings with “counter-terrorism” connotations continue to be carried out also in Chechnya, Indonesia and the Philippines.

Governments officially concerned about the threat of weapons of mass destruction are fuelling existing conflicts with large transfers of conventional weapons, including small arms. In general, the world’s richest states have relaxed restrictions and increased military aid in the name of the “war on terror”, even when knowing that the recipients were engaging in grave human rights abuses.

With regard to *new legislation*, a very large number of countries have toughened up their laws after 11 September 2001, some rushing legal amendments in a matter of weeks. Others are still debating “anti-terrorism” laws. Common to most such laws are vaguely worded definitions of new offences; sweeping powers to hold people without charge or trial, often on the basis of secret evidence; provisions to allow for prolonged incommunicado detention, which we know facilitates torture; and measures which effectively deny or restrict access to asylum as well as speed up deportations.

Laws raising human rights concerns have been introduced from Germany to Mauritius, and from Cuba to Morocco. The Prevention of Terrorism Ordinance in India even provides for immunity from prosecution for officials acting in “good faith” against “terrorists”. Similar provisions exist in the Russian Federation. Currently, South Korea is preparing a Terrorism Prevention Bill which could further empower the National

Intelligence Service, already responsible for serious human rights violations. Tunisia is also in the process of drafting new legislation which, if adopted, will further undermine the right to freedom of expression, among other rights.

Regarding *arbitrary detention*, very much under the spotlight has been the United States (US) naval base in Guantanamo Bay, where over 600 detainees are held in indefinite detention. They are held outside the protection of US courts, effectively in a legal vacuum without precedents. The US authorities have made clear that these detainees are held primarily to be interrogated or simply to be “kept off the streets”. A handful of them now face the prospect of trial before deeply flawed “military commissions”.

Other similar detainees are held by, or apparently on behalf of, the USA in secret locations around the world. US courts have allowed the executive to remove even US citizens from the ordinary criminal justice system and place them in indefinite and incommunicado military custody as “enemy combatants”.

Security forces in Yemen embarked on mass arbitrary arrests and detentions in the immediate aftermath of 11 September 2001. Last year, the Yemeni authorities acknowledged to Amnesty International that they were violating both Yemeni law and international human rights standards, but said that they had no other option because they had to fight “terrorism” and avert the risk of US military action against Yemen. Domestic law as well as international standards have also been violated in Pakistan, where nationals and non-nationals have been arbitrarily detained and handed over to other countries.

Thousands of Uighurs in the Xinjiang Uighur Autonomous Region of China have been arbitrarily detained and accused of “separatism” or “terrorism”, as part of a general crackdown affecting also their religious rights. Some are believed to have been tried unfairly and executed. Members of Islamist organizations have been arbitrarily arrested in Uzbekistan, where torture is systematic.

In the United Kingdom (UK), hundreds were arrested and 16 individuals remain interned under the Anti-terrorism, Crime and Security Act. This law was passed after 11 September 2001 and allows for the indefinite detention without charge or trial of non-deportable foreign nationals on the basis of secret evidence. Among other reasons, the UK has justified these measures on the grounds that its rules of evidence are too stringent to allow successful prosecutions.

I should also mention that human rights activists across the world, from Colombia to Zimbabwe, are more exposed to arbitrary detention and other forms of intimidation and outright violence. They include journalists and lawyers defending unpopular suspects.

As for the *death penalty*, although the trend towards the abolition continues, a number of retentionist countries have introduced new capital offences relating to “terrorism”. They include China, Guyana, Jordan, India, Morocco, the USA and Zimbabwe. Executions apparently related to “terrorism” offences have been reported in China. Three men recently convicted of the Bali bombing in Indonesia are under sentence of death.

Outside the realm of governmental action, I am afraid that we should worry at what seems to be an increased level of public opinion support or at least indifference for measures that normally would have been loudly condemned. For example, we have witnessed an ongoing debate where even liberal jurists have advocated forms of legitimization of torture for “terrorist” suspects. Xenophobia and other forms of discrimination are ever present in most societies.

Most obvious in this context is the attitude towards asylum seekers and other non-nationals, easy scapegoats and possibly those most vulnerable to “counter-terrorism” measures. We have seen ironies such as Australia’s efforts to block the entry of Afghans seeking protection from persecution weeks before the attacks of 11 September 2001. Afterwards, the harsh treatment meted out on them, including detention, was justified as necessary to prevent “terrorist” activities. It is undeniable that such measures enjoy popularity. Yet they not only result in the violation of rights such as the right to protection against *refoulement*, but also ignore the evidence that foreign nationals intending to enter a country to commit “terrorist” or other crimes very seldom rely on the asylum channels.

Since 11 September 2001, public attitudes as well as government policies have had a detrimental impact also on the rights of women. In her last report, the Special Rapporteur on Violence against Women has pointed out that the fight to eradicate certain violent cultural practices is often made difficult by what can be termed as “the arrogant gaze” of the outsider. Many feel that this “gaze” has increased since 11 September 2001.

Given these factors, any attempt at monitoring and challenging abusive measures in the context of the “war on terror” is a daunting challenge. Yet there is a need for global, sustained, dispassionate and coordinated monitoring of the multiple impacts of “counter-terrorism” measures on human rights, as well as for authoritative analysis, legal precision, and forward looking recommendations. This approach will unmask practices where “counter-terrorism” is just a cover for old-fashioned repression. In those cases where the threat to security is real, monitoring and advocacy should recognize such threat but reassert the fundamental human rights values which must be respected under all circumstances if responding to the threat is not to undermine the very foundations of the rule of law. States must be held accountable for all their actions, including extra-territorial ones, while the abuses of armed groups must be systematically acknowledged, as a minimum.

The picture is not altogether bleak. The ruling by a US court in the case against Zacarias Moussaoui, ordering that some of the charges against him be dropped since the government was not prepared to produce witnesses in his defence, is a courageous stand within a judiciary which has otherwise virtually abdicated its role in “terrorism” cases. Also, governments have generally reacted to public debates on legalizing torture by restating their commitment to the absolute prohibition of torture. Of course this does not mean that they necessarily intend to respect such a prohibition, but at least they have not crossed the red line of turning practice into theory. And despite the risks, activists around the world continue to stand up for human rights with courage and determination.

In conclusion, the unlawful practices labelled “terrorism” remain a real threat to human rights. They must certainly be addressed by proper domestic law enforcement measures, improved legal cooperation among states and support for the International Criminal Court. However, in responding to threats governments must respect international human rights standards and, where military force is used, the rules of international humanitarian law. In addition, broad and long-term strategies aimed at fulfilling all human rights, and promoting justice in a wider sense, should be pursued nationally and through international cooperation. These strategies are of value in themselves, but would also help countering widespread sympathy for acts of “terrorism”.

The work done by the United Nations (UN) special procedures and treaty bodies, and that of the regional mechanisms, has been commendable. Despite its chronic resource constraints, the Office of the High Commissioner for Human Rights has also contributed to the effort of monitoring and advising countries and the rest of the UN system. However, we know that all this is insufficient.

Together with others, Amnesty International has been actively seeking to reinforce the global system of human rights monitoring. With regard to the UN, we have sought to ensure that the Security Council’s Counter-Terrorism Committee receives proper human rights guidance, and that the overall UN human rights system is able to exercise its functions effectively. In this context we believe that a new special mechanism of the Commission on Human Rights should be established, to look at the human rights impact of “terrorism” and “counter-terrorism” in a coherent and comprehensive way, and actively develop policy and recommendations. Such a mechanism is overdue. We are keen to discuss what form it should take, for example whether it should be a Special Rapporteur or a Working Group, and what we can do together to achieve it.

I very much welcome this discussion, and look forward to exploring ways to strengthen existing monitoring mechanisms and exploring the need for new ones.

Antoine BERNARD

Remarques préliminaires

Bertrand Ramcharan nous invitait à juste titre tout à l'heure à ne pas minimiser les risques du terrorisme pesant sur les populations civiles. Je voudrais comme point de départ me fonder sur la déclaration de Kofi Annan en mars dernier au Comité contre le terrorisme (CTC). La vision du Secrétaire Général des Nations Unies peut être considérée comme une base fondamentale à l'ensemble de notre journée: "Les actes terroristes, en particulier ceux qui causent la perte de vies humaines constituent de graves violations des droits de l'homme. Notre riposte face au terrorisme et l'action que nous menons pour déjouer et prévenir cette menace doivent être fondées sur les droits fondamentaux que les terroristes voudraient réduire à néant. (...) Le respect des droits de l'homme et la primauté du droit sont des outils indispensables à la lutte contre le terrorisme et non des privilèges que l'on peut sacrifier en période de tension. ☐ En effet, c'est cette vision qui nous inspire au quotidien. Ceci m'amène à faire une clarification sur la question des responsabilités. On nous oppose souvent, sinon tous les jours, le fait que les terroristes portent la responsabilité des situations et qu'il faut bien y faire face. D'autre part, on nous dit que ce sont les Etats qui portent la responsabilité. Notre point de vue plaide pour la concomitance des responsabilités. On ne peut pas confondre, d'une part, la responsabilité pénale des individus qui engage l'auteur d'un acte criminel et les membres de son groupe le cas échéant, et d'autre part, la responsabilité internationale de l'Etat qui reste le premier, au regard du droit international, à devoir garantir le respect des droits de l'homme et des libertés fondamentales. C'est cette concomitance de responsabilités qui doit fonder notre réflexion et, à cet égard, le système universel et les mécanismes nous paraissent gravement ébranlés depuis deux ans au nom de la lutte contre le terrorisme. Les maîtres mots de cette évolution sont ☐ l'arbitraire, la disproportionnalité, la restriction illégale des libertés.

Ne peut-on pas considérer aujourd'hui que le constat sur les dérives graves de la lutte antiterroriste en matière de droits de l'homme est très largement connu, identifié et partagé ☐ S'il faut le résumer en quelques mots, je me livrerai à cet exercice car c'est ma tâche aujourd'hui, mais sachez qu'aucune information vraiment nouvelle ne sera portée à la connaissance de cette salle.

Les exemples qui nous viennent à l'esprit sont tout d'abord ceux concernant les Etats-Unis, l'une des plus vieilles démocraties du monde, l'un des états de droit les plus exemplaires. L'un de ces exemples s'appelle Guantanamo. Plus de 2000 personnes y sont détenues dans une situation équivalente à une garde à vue depuis plus de deux ans, entre les mains de services de renseignements, en situation de non droit absolue et de violation flagrante, quotidienne et systématique de leurs libertés fondamentales. Lorsqu'aucune des préconisations faites au gouvernement américain par les organes de protection, qu'il s'agisse de la Commission interaméricaine des droits de l'homme ou du Groupe de travail des Nations Unies sur la détention arbitraire n'a le moindre effet, lorsque le CICR sort de sa réserve habituelle pour tirer la sonnette d'alarme sans le moindre effet, lorsque les voies de recours internes ne traitent pas la question, on en vient à être réduit à un seul espoir tellement ténu : celui de voir la Cour Suprême américaine enfin saisie de six cas, trancher sur le principe dans les prochains mois. Cette situation n'est pas seulement extrêmement grave au regard des libertés constitutionnelles aux Etats-Unis mais au regard du message qu'elle porte aux Etats. Le droit tel que nous le soutenons connaît aujourd'hui l'épreuve de la puissance et elle l'a très gravement malmené.

Afin de terminer sur le mauvais exemple des Etats-Unis, je ne peux pas ne pas mettre en parallèle Guantanamo et la politique américaine à l'égard du système de justice international en cours d'édification. L'offensive de l'administration américaine à l'égard de la CPI n'est pas seulement une offensive visant l'autoprotection des agents ou des services américains, c'est aussi une offensive de destruction d'une institution que vous êtes plus de 130 Etats à avoir soutenue, et plus de 90 à avoir ratifiée. C'est une démarche très forte et symbolique que cette atteinte portée au système international des droits de l'homme et de lutte contre l'impunité tels que nous voudrions le voir se développer.

Bien sûr, la lutte contre le terrorisme et le terrorisme s'inscrivent dans des sociétés particulières et lutter contre l'antiterrorisme suppose une prise en compte particulière des singularités nationales et régionales. Avant-hier, le PNUD a sorti un rapport extrêmement intéressant sur la situation des libertés dans les pays arabes. Je voudrais en résumer les grandes lignes :

- 1) la singularisation par des budgets militaires qui, depuis 1967, grèvent les budgets de l'Etat
- 2) le déficit démocratique, notamment les atteintes à la liberté d'expression
- 3) la faillite des systèmes d'éducation

4) le sous- statut des femmes

Lutter contre le terrorisme, c'est prendre en compte ces contextes-là. Agir dans le respect des droits de l'homme contre le terrorisme, c'est aussi lutter pour tous les droits pour tous. La seule approche sécuritaire a démontré depuis deux ans qu'elle donnait lieu à l'arbitraire, à la disproportionnalité et à l'illégalité. Elle a aussi renforcé une alliance objective des radicalismes. D'une certaine façon, et ce n'est pas le monopole de la région dont je parlais à l'instant, extrémisme militaire d'une part et fondamentalisme religieux d'autre part, se nourrissent, s'alimentent, voire se justifient réciproquement.

Sociétés civiles

Les sociétés nationales et les contextes locaux, c'est aussi le mouvement des droits de l'homme et les sociétés civiles engagées dans la défense des droits de l'homme. Ces sociétés civiles sont en première ligne de la répression en raison de leur seul engagement. Je voudrais vous donner une illustration de propos tenus le 8 septembre dernier par un chef d'Etat lors de la prise de fonction du chef de l'Etat major : «Général Lesmez, vous assumez le commandement des forcées aériennes pour vaincre le terrorisme. Que les trafiquants des droits de l'homme ne vous arrêtent pas, ne vous trompent pas. Que toutes les forces aériennes prêtent à cette grande nation le service de nous aider à nous libérer de ce cauchemar.▣ Il s'agit du Président Uribe qui a tenu ce discours devant tout l'Etat major colombien à l'occasion de la prise de fonction du chef de l'Etat major. Il a réitéré ces propos le 11 septembre. Vous le savez, en Colombie, le nombre de défenseurs des droits de l'homme indépendants assassinés se chiffre à plusieurs dizaines par an. Il y a trois jours, une militante des droits de l'homme de 40 ans a été assassinée à Barrancabermeja selon toute vraisemblance par un groupe de paramilitaires.

Lutter contre le terrorisme, ce n'est pas désigner à la vindicte de l'arbitraire les militants des droits de l'homme, c'est les soutenir et garantir leur liberté d'action.

Un problème important est, comme Claudio l'a rappelé, le fait que vous ne parvenez pas à vous mettre d'accord sur la définition du terrorisme tout en tentant de définir les actes qui en découlent. Je pense ici à l'évolution des Conventions régionales s'agissant de la répression du terrorisme. Je voudrais prendre pour exemple la Convention arabe contre le terrorisme adoptée en 1999 et entrée en vigueur en 2002. Ceci représente un record de vitesse puisqu'il aura fallu uniquement trois ans pour qu'elle entre en vigueur. Cette

Convention définit le terrorisme de façon tellement large que le simple fait pour des salariés de faire grève dans une entreprise publique pourrait être interprété comme relevant de l'association de malfaiteurs en vue d'une entreprise terroriste. Les caractères de ce droit positif sont l'incrimination large, la limitation ou la restriction arbitraire des libertés, l'augmentation du rôle des pouvoirs de police par rapport au pouvoir judiciaire et une coopération policière et judiciaire -en particulier en matière d'extradition- qui fait fi des garanties traditionnelles énoncées en droit international des droits de l'homme avec tous les risques de dérive que cela comporte.

De l'usage opportuniste de la lutte antiterroriste

On pourrait ensuite entrer dans une nouvelle énumération des pratiques nationales des Etats, qu'ils aient ou non adopté une nouvelle législation depuis le 11 septembre 2001 pour développer des pratiques qui violent les droits de l'homme au nom de la lutte antiterroriste. On peut ainsi identifier plusieurs dizaines d'Etats «opportunistes» et, de ce point de vue-là, la politique américaine notamment équivaut à une bénédiction du mal.

En Israël, n'importe qui peut être qualifié de terroriste. C'est le cercle infernal de crimes de guerre que constituent les attentats palestiniens contre des civils, lesquels (et réciproquement) pour le gouvernement israélien la perpétration quotidienne et systématique de crimes de guerre à l'égard de la population civile palestinienne. Ce cercle de l'enfer est aux antipodes des principes de responsabilité internationale de l'Etat d'Israël, seul principe qui conformément aux droits de l'homme et au droit humanitaire doit fonder la lutte contre le terrorisme.

Or, Israël n'est pas le seul cas. En Mauritanie, en mai dernier, il y eut une vague d'arrestations de plusieurs dizaines de personnalités, notamment des magistrats. Pour le Premier ministre, les personnes arrêtées sont des terroristes islamistes à la solde de pays étrangers qui constituent une menace réelle sur le pays. En août, ces personnes sont libérées sans plus d'explication ; entre temps, pas de procès, pas de présentation à un juge, pas de procès équitable.

Au Maroc, une loi antiterroriste était en discussion au Parlement, un vrai débat public s'était instauré dans la société. Puis, interviennent les attentats de Casablanca le 16 mai et la loi est adoptée à l'unanimité, loi qui viole sérieusement les engagements internationaux du Maroc.

Pratiques clandestines

Un autre aspect essentiel de notre réflexion est celui des pratiques clandestines. Claudio a donné tout à l'heure des exemples de détention au secret, de transferts illégaux, d'exécutions sommaires menées au nom et dans le cadre de la lutte antiterroriste. Un des principaux problèmes est que précisément ces pratiques sont secrètes et donc très difficiles à superviser. On évoque le chiffre de plusieurs milliers de personnes détenues arbitrairement ici et là, transférées de tel pays vers un autre confidentiellement. Cette dimension est l'une des dimensions les plus inquiétantes pour l'avenir. Lorsque nous nous mobilisons tous à propos d'une situation d'arbitraire et de confidentialité dans un Etat qui développe des pratiques de violations de droits de l'homme par la clandestinité, comme par exemple les disparitions forcées, nous pouvons imaginer ce qu'il en est lorsque, au nom de la lutte contre le terrorisme, ces pratiques sont développées, sinon systématisées, dans le cadre de coopérations policières interétatiques affranchies de tout contrôle du juge et de tout contrôle international.

Conclusion

En octobre 2002, le Haut-Commissaire aux droits de l'homme s'adresse au CTC et l'alerte. En mars 2003, Kofi Annan s'adresse au CTC et lui délivre le même message. En juin 2003, les procédures spéciales de la Commission des droits de l'homme font une déclaration commune pour dire leur extrême préoccupation. Fin 2002, vous adoptez la résolution de l'Assemblée générale et en mars 2003, celle de la Commission des droits de l'homme.

Le 16 octobre 2003, le CTC fait son rapport d'activités au Conseil de sécurité. Sur 60 Etats qui sont intervenus, seuls cinq ont évoqué les droits de l'homme et les risques que la lutte antiterroriste faisait peser sur les droits de l'homme: le Mexique, la Bulgarie, le Liechtenstein, l'Afrique du Sud et l'Equateur. Enfin, lorsqu'on sait que le CTC a reçu plus de 350 rapports dont plus de 200 étatiques et que par ailleurs, les six Comités de droits de l'homme accumulent un retard de plus de 1500 de vos rapports, on mesure à quel point le système vacille.

Pistes de réflexion

1) Agissons sur Guantanamo pour la survie de notre système de valeurs universelles et de notre système de protection. Faisons état de l'article 1 des Conventions de Genève de 1949 qui fonde le devoir de respecter et faire

respecter le droit international humanitaire pour intervenir auprès de l'administration Bush.

2) Renforçons nos agendas locaux. Nous devons démasquer la clandestinité des pratiques mises en oeuvre. Nous devons nous adapter pour faire le monitoring de la pratique de l'arbitraire clandestin. Nous devons soutenir les défenseurs des droits de l'homme et les sociétés civiles indépendantes qui constituent des remparts d'autant plus importants que les garanties institutionnelles s'effritent.

3) Développons notre agenda régional et international, d'une part en complétant le dispositif procédural des Nations Unies actuel par un mécanisme spécifique qui permette le traitement systématique des dérives de l'antiterrorisme au regard des droits de l'homme, d'autre part, par une action résolue de soutien au système de la CPI car c'est aujourd'hui le seul espoir que nous avons de voir la force du droit l'emporter sur le droit de la force.

ICJ CONFERENCE, GENEVA, 23 OCTOBER 2003

RORY MUNGOVEN

**THE GLOBALISATION OF HUMAN RIGHTS VIOLATIONS IN
THE CAMPAIGN AGAINST TERRORISM**

Thank you to my distinguished colleagues for presenting such a comprehensive survey of the impact of the campaign against terrorism on human rights worldwide. I will be able to keep my remarks fairly short therefore and just pick up a few points derived from the analysis presented by Claudio [Cordone] and Antoine [Bernard].

As we have heard, over the past two years, we have seen Governments such as India, Indonesia and others enact new security laws or resurrect old laws that violate basic human rights. We have seen Governments like the US and others arbitrarily detain terrorist suspects, deny them due process and the protection of law. We have seen governments elsewhere -- Russia, Colombia and China -- use the language of counter-terrorism opportunistically to justify military abuses or repression of their domestic opponents. And we have seen States like Australia and many Western European countries apply arbitrary and punitive measures against asylum seekers and other non-nationals as part of their response to perceived terrorist threats.

Now, it could be argued that this is business as usual, that there may be a question of degree or the proliferation of these measures, but that in essence these are patterns that have gone before and therefore can be dealt adequately by the UN human rights system as currently configured. But I would argue that what we have seen since September 11 does represent a qualitative change. I think it can be distilled in essence to the "globalization" of this problem because, just as September 11 stands as a symbol of a new globalized form of terrorism, what we have seen in response to September 11 is a new *globalized* pattern of human rights violations in response to terrorism. I think that poses a very new and unique challenge for human rights monitoring system that remains in essence State-focused rather than globally focused.

I would like to highlight two areas where I think this is true.

- 1) Firstly, the range of abuses that we have seen that have an extraterritorial dimension: The classic case has been Guantanamo Bay, chosen as a detention facility to warehouse security detainees by the US beyond the reach of the US courts and their jurisdiction. But similar problems are posed by the detention of terrorist suspects in other locations in second countries. For instance, the US military airbase at Bagram in Afghanistan or the several hundred terrorism-related detentions we now know have taken place under US military occupation in Iraq. These are situations in which terrorist suspects are detained in second countries without the participation of the government concerned, where one Member State is holding prisoners in the territory of another. We have also seen, as Claudio highlighted, the extra-territorialization of some aspects of the counter-terrorist effort in ways that willfully confuse armed conflict and law enforcement, that blur the boundaries between international human rights standards and international humanitarian law. The difficult questions that Claudio posed about the US attack on Al-Qaida suspects in Yemen last year are one such example.
- 2) The second area where I think we have seen a new globalized challenge for the UN human rights system is in the bilateral or transnational dimension of the problem. One of the issues Human Rights Watch has been following with concern has been the transfer and rendition of terrorist suspects between countries. Nationals of second or even third countries are being handed over and transferred from one country to another without due process, without resort to regular extradition proceedings and often in situations where they may face torture, cruel, inhuman and degrading treatment, unfair trials or even the death penalty. For instance, we have seen detainees handed over to US custody from countries such as Georgia, Bosnia, Malawi, Indonesia, the Gambia, outside of regular legal process. And equally we have seen security detainees returned to their home countries or to second countries, from the US and elsewhere, where they may be at risk of torture or unfair trial.

Human Rights Watch has followed two cases in Sweden of Egyptians whose asylum claims were rejected on the basis of their links with Islamist groups and cases against them by the Egyptian authorities. They were returned to Egypt in December 2001 after a summary proceeding on the basis of secret evidence that was never revealed to

them or to their lawyers, and without the right of appeal. The Swedish Government received only the flimsiest of “diplomatic assurances” as to their treatment and failed to follow through with systematic monitoring of these cases. Even then, Swedish officials were given no independent access to these detainees in prison. So I think there is a very important dimension of bilateral cooperation – the transfer of detainees between countries- that requires monitoring and attention.

- 3) The third bilateral dimension of the campaign against terrorism is the way in which governments have been encouraged, sometimes pressured to enact new laws and security measures that violate human rights. In Kenya, the Government reportedly came under US pressure to implement a version of the US Patriot Act. In Indonesia, following the Bali bombings, the Government was under pressure to enact new measures, to resurrect some old Suharto era provisions, and to replicate aspects of the repressive Internal Security Acts used in neighbouring Malaysia and Singapore. Much of this pressure has come from the US and its allies in the campaign against terrorism, but some of this pressure has come from the United Nations itself: Security Council Resolution 1373 and the follow-up work by its Counter Terrorism Committee (CTC).

The UN human rights system has partly risen to this challenge. It has been encouraging the degree to which the treaty bodies have taken these issues up in their examination of State reports and have elaborated general comments on certain issues within their mandate. It has been encouraging that the Special Rapporteurs have pursued these issues with vigour and have also taken collective positions on the impact of counter-terrorist measures on human rights. As we heard from the Acting High Commissioner this morning, OHCHR has produced guidelines and digests of law and jurisprudence, has engaged the CTC and other bodies, but has not yet gone so far in terms of its advice and recommendations to governments.

This attention is very welcome, but it remains very limited in scope and fails to provide the comprehensive and global scrutiny and analysis that is needed. The treaty bodies, as we know, can only review the performance of States in the context of their periodic reports and therefore can only raise concern, sometimes years after the event, or in the context of individual communications that are limited to specific cases. They face terrible problems of backlog in dealing with the reporting States. And the Special

Procedures, for their part, only focus on those issues within their mandate and so are unable to give a complete holistic picture of the problem.

For that reason, we have joined with ICJ and others to advocate for a special mechanism dedicated to this purpose. Various models have been proposed: whether it should be a Special Procedure of the Commission on Human Rights or, given the political dimension of this problem and the role of other bodies such as the UN Security Council and regional organizations, whether this would better performed by a Special Representative of the Secretary General who could ensure this issue was monitored, addressed and mainstreamed across all parts of the UN and regional systems.

So we welcome this discussion, particularly the participation of governments, and hope that as we hear some of the challenges, the limitations and the gaps in these different levels of monitoring, that we can really lay the basis of a consensus on this very important additional element for the UN human rights monitoring system in the face of the enormous challenges presented by the campaign against terrorism.

Thank you.

Security Council Counter-Terrorism Committee
UN Headquarters, 19 June 2003

Briefing by
Sir Nigel Rodley, Vice-Chairperson
Human Rights Committee

Human Rights and Counter-Terrorism Measures

Mr Chairman, Distinguished Committee Members.

1. I appear before you as the representative of the Human Rights Committee, the body established under the International Covenant on Civil and Political Rights to monitor compliance with the provisions of the Covenant by the States parties to it. I should first of all like to express our appreciation for the continued willingness of the Counter-Terrorism Committee to engage in exchanges with voices from the United Nations' human rights community. As far as the Human Rights Committee is concerned, this involved the very useful briefing that Ambassador Ward gave us at our 77th session in March of this year. We are also aware of the briefings your Committee has received from the former and present High Commissioners for Human Rights, as well as from the head of their office here in New York.

2. I should like to preface my remarks by being very clear about one thing. It is evident that the Security Council, in adopting resolution 1373 (2001) so soon after the atrocity of 11 September 2001, was acting true to its solemn responsibilities under the Charter for the maintenance of international peace and security. The programme contained in the resolution, and the setting up of your Committee to pursue its implementation, represented a serious response to the need to protect the whole international community from the sort of horror of which the 9/11 attack was the culmination. Numerous subsequent murderous terrorist attacks, spread around the globe, have only served to underscore the importance of preventing and repressing such crimes against humanity.

3. For some time after the adoption of resolution 1373, there were fears that the resolution might become an instrument for circumventing States' human rights obligations. Despite the fact that preambular paragraph 5 of the resolution spoke of employing means 'in accordance with the Charter of the United Nations' to combat threats to international peace and security caused by terrorist acts, the Human Rights Committee has heard Charter article 103 being invoked to justify departures from obligations under international human rights law, including the International Covenant on Civil and Political Rights. Fortunately, the Council itself acted to foreclose that approach in its ministerial declaration annexed to resolution 1456 (2003), operative paragraph 6 of which removed any ambiguity by demanding:

'states must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in

accordance with international law, in particular international human rights, refugee, and humanitarian law.’

4. I do not propose to belabour the importance of addressing human rights matters in this context. As the Secretary-General said to the Council on the day resolution 1456 was adopted, ‘we must never lose sight of the fact that any sacrifice of freedom or the rule of law within States ... is to hand the terrorists a victory that no act of theirs alone could possibly bring.’ Far from being an unwelcome fetter on the combat against terrorism, respect for human rights is an integral component of an effective universal counter-terrorist strategy.

5. It follows inexorably from this that the Council has a direct interest in ensuring that the human rights component is not lost sight of. And, however inconvenient it may appear, the Council should not leave it wholly to those parts of the United Nations system that have a specific human rights mandate. Political and legal reasons support this contention. What resolutions 1373 and 1456 represent is a paradigm shift towards depoliticization and a professionalization of what had been a supremely political discourse in our organization, that is, the discourse on terrorism. Like the earlier discourse on terrorism, human rights discourse in the inter-governmental organs of the United Nations dealing with human rights, notably, the Commission on Human Rights, has suffered from the same political manipulation and has not yet begun to transcend it. Accordingly, the Council cannot rely on those bodies to monitor the human rights dimension with the methodology necessary to make their monitoring reliable. Moreover, from the legal perspective, their findings would not, of themselves, have the same binding force that decisions of the Security Council adopted under chapter VII of the Charter evidently have. It is true that the thematic special procedures of the Commission on Human Rights do not suffer from the problem of politicization, but the legal limitation remains.

6. Nor, as things stand, can the task be left to human rights treaty bodies, such as the Human Rights Committee which is responsible for monitoring compliance with the International Covenant on Civil and Political Rights, that is, the treaty whose provisions articulate the human rights most at stake in the context of counter-terrorism activities. Certainly, the Human Rights Committee does take cognisance *ex officio* of Member State reports to the Counter-Terrorism Committee in reviewing reports periodically submitted to us by States parties to the Covenant (our main function under the Covenant and the only one to which all 149 States parties are subject). However, our mandate excludes the almost one quarter of United Nations Member States that are not party to the Covenant. In addition, the reports of many States parties are seriously overdue. And, since in practice we can only consider some 15 reports per year (five per session), even in a period of, say, three years from the adoption of resolution 1373, we shall only have considered some 45 State reports.

7. Even with these limitations, we have been moved to express concerns to a number of States parties to the Covenant in respect of counter-terrorism measures adopted pursuant to resolution 1373, namely, Egypt (CCPR/CO/76/EGY, para. 16), Estonia

(CCPR/CO/77/EST, para. 8), Moldova (CCPR/CO/75/MDA, para. 8), New Zealand (CCPR/CO/75/NZL, para. 11), Sweden (CCPR/CO/74/SWE, para. 12; see also State party response in CCPR/CO/74/SWE/Add.1, paras. 9-17) and the United Kingdom of Great Britain and Northern Ireland (CCPR/CO/73/UK; CCPR/CO/73/UKOT, para. 6; see also State party response in Add.2, paras. 2-25).

8. The kinds of issues generating our expressions of concern stem from measures contemplated or adopted (sometimes before 9/11) in respect of:

- administrative detention without effective judicial review (ICCPR, art. 9(4) [right to challenge before a court the lawfulness of detention]);
- denial of entry, or expulsion of, persons at risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7 [prohibition of torture and cruel, inhuman or degrading treatment]);
- loose definitions of ‘terrorism’ or ‘terrorist organization’, capable of resulting in breaches of the principle of legality (art. 15 [non-retroactivity of crime and penalty]) and in the removal of safeguards, such as those against prolonged incommunicado detention, that would prevent torture or cruel, inhuman or degrading treatment or punishment or even violations of the right to life (various combinations of violations of articles 6 [right to life], 7, 10(1) [right to be treated with humanity and respect for human dignity] and 14 [right to fair trial]).

9. In this connection, I should note that articles 6, 7 and 15 are all non-derogable, which means that under article 4 they cannot be suspended even in time of a public emergency threatening the life of the nation. Moreover, in its General Comment 29 on article 4 [annexed to this statement], adopted only seven weeks before 9/11, the Human Rights Committee expressed its understanding that the principle of proportionality ensures that ‘no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a State party’ (General Comment 29, para. 4). In particular, this principle together with ‘the principle of legality and the rule of law inherent in the Covenant as a whole’ have the effect of preserving the essence of articles 9(4), 10(1) and 14 (General Comment 29, para. 16).

10. In the light of these considerations, it will presumably come as no surprise that I find myself urging the Counter-Terrorism Committee to give serious consideration to proposals of the Office of the High Commissioner of Human Rights. It would, I believe, be desirable for the Counter-Terrorism Committee to pose questions to Member States on the human rights dimensions of their reports to the Counter-Terrorism Committee. Apart from the questions suggested in the Office’s “Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures” and the “Further Guidance Note on Compliance with International Human Rights Standards”, those listed on page 4 of Mary Robinson’s 19 February 2002 address to the Counter-Terrorism Committee are of interest and summarize the general concerns. I would add that the Counter-Terrorism Committee might pose the question as to the effect on, or relevance of, any human rights treaties the State in question has ratified to the counter-terrorism measures it has adopted, including whether or not it is up-to-date in its reporting under the treaties, especially the International Covenant on Civil and Political

Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. If, as would be eminently desirable, the Counter-Terrorism Committee were to include human rights expertise among the complement of expertise it has at its disposal, the Committee could then frame questions more specifically focussed on the details of the State's report. One important benefit of that would be the avoidance of seeming to suggest that the Counter-Terrorism Committee was expecting measures to be taken that could be at odds with a State's human rights obligations. For example, it seems from Slovakia's reply to Counter-Terrorism Committee questions on that State's report to the CTC (S/2002/730, Annex) that the Counter-Terrorism Committee's questions could be understood to be urging that State to overlook the principle that in no case should a person be sent to a territory where he or she faces torture or cruel, inhuman or degrading treatment or punishment, or a violation of the right to life.

12. Let me at once point out that this does not imply the granting of safe havens. Measures may be taken to ensure that, if returned, the person will not in fact be subjected to the feared violation. But those measures would need to be serious and effective. Alternatively, the State in whose territory the person is found should have in place the power to bring the suspect before its own system of justice.

13. Mr. Chairman, let me conclude by reiterating the Human Rights Committee's appreciation of the continuation of our dialogue through this meeting, its concern that terrorism be effectively combatted and its belief that respect for human rights will assist, not hamper that combat. We look forward to considering suggestions as to how *we* might more effectively monitor the human rights dimensions of counter-terrorism, notably in a manner that might be complementary to the work of the CTC.

Thank you, Mr Chairman.

ICJ Seminar on Human Rights and Counter-Terrorism: International Monitoring Systems, Geneva 23-24 October 2003

Martin Scheinin:

Counter-Terrorism Measures and the Human Rights Committee

Introduction

At the outset it must be made clear that human rights treaties do not provide answers to all legal questions triggered off by terrorism or by State responses to terrorism. Human rights treaties address State obligations in respect of individuals, which makes it quite natural that they have more to say about counter-terrorism measures of States than about terrorism itself. However, this does not mean that acts of terrorism could not be categorized as human rights violations. In the context of this paper the observation just made is of methodological nature and it only relates to the fact that the existing monitoring mechanisms under, for instance, the International Covenant on Civil and Political Rights all focus on compliance or non-compliance by States.

On the Relevance of General Comment No. 29

Although the Human Rights Committee's General Comment No. 29 on ICCPR article 4 (states of emergency) was not written for the purpose of addressing counter-terrorism measures and was also adopted *prior to 9/11* it has become a reference document in building up a human rights response to post-9/11 counter-terrorism measures. There are two reasons for this:

Firstly, in some extreme situations terrorism *may* constitute a threat to the life of the nation, justifying derogation from a State's full human rights obligations. Here, the General Comment speaks for a restrictive interpretation as to the duration and geographical scope of such an emergency, as well as in relation to any derogations that are made on the basis of a state of emergency.¹

Secondly, the General Comment is useful in the current discussion on counter-terrorism measures because it confirms in explicit terms that at least certain human rights *are* absolute in the sense of not being subject to derogation even during a state of emergency threatening the life of the nation. In the counter-terrorism context perhaps the most important point made in the General Comment is the Committee's emphasis that article 15 is non-derogable in its entirety and not only as a prohibition against retroactive criminal law. The provision is paraphrased as follows: "the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty".² This interpretation *does* flow from article 15 but when contrasted with the vague and ambiguous definitions often found in national criminal law on the crime of terrorism it establishes farreaching requirements.

Equally important is the holistic reading given to the Covenant in the General Comment, on the basis of which the Committee asserts that certain elements in provisions that as such are derogable cannot be derogated from, due to their importance for the Covenant as a whole, including its nonderogable provisions. For instance: "The Committee is of the opinion that the principles of legality and the rule of law require that *fundamental requirements of fair trial* must be respected during a state of emergency. Only a *court of law* may try and convict a person for a criminal offence. The *presumption of innocence*

¹ CCPR/C/21/Rev.1/Add.11, see, paras. 3-5. One may note that after 9/11 the United States has *not* resorted to ICCPR article 4 in order to derogate from any of its obligations under the Covenant. In contrast, the United Kingdom has notified the Secretary-General of a state of emergency, in order to justify the long-term detention of certain non-citizens who pose a risk to society but cannot be deported because of the rule of *non-refoulement*

² Paragraph 7.

must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the *court to decide without delay on the lawfulness of detention*, must not be diminished by a State party's decision to derogate from the Covenant."³ This interpretation means, of course, that certain elements of articles 9 and 14, two provisions not mentioned as nonderogable ones in article 4, paragraph 2, are not subject to derogation during a state of emergency.

Post-9/11 Experiences of the Reporting Procedure under Article 40 of the ICCPR

After September 2001, the Human Rights Committee has regularly addressed questions about counter-terrorism measures, to States appearing before it in the reporting procedure. This practice was started already in October 2001 with the consideration of a report by the United Kingdom. Several members raised pertinent questions and the Concluding observations addressed the implementation of Security Council resolution 1373 (2001) by expressing concern over its potentially far-reaching effects on rights guaranteed in the Covenant.⁴

From March 2002 onwards the Committee has been systematic in its questioning on post-9/11 measures, and from July 2002 the Committee has *ex officio* reviewed the reports submitted by the same State under resolution 1373 to the Counter-Terrorism Committee of the Security Council by posing Covenant-related questions arising on the basis of those reports. In this respect New Zealand was a pilot case and also exemplary in its willingness to provide full answers to the questions.⁵ Typically, the questioning in this respect is opened with an item in the Committee's list of issues, such as we had earlier this week when dealing with the report by the Philippines: "How is compliance with the

³ Paragraph 16 (emphasis added).

⁴ See Concluding observations on the United Kingdom, CCPR/CO/73/UK, para. 6 and, also, CCPR/C/SR.1963, para. 25 where the UK delegation is recorded as responding as follows: "With regard to the relationship between Security Council resolution 1373 (2001) and the Covenant, he was unable to say whether the action against terrorism called for in the resolution would involve a derogation from Covenant rights, but if it did the provision of Article 103 of the Charter of the United Nations to the effect that obligations under the Charter prevailed over those under any other international agreement would apply."

⁵ See, CCPR/C/SR.2016.

Covenant secured when introducing counter-terrorism measures pursuant to Security Council resolution 1373 (2001)?”⁶

Some of the relevant substantive issues regularly addressed by the Committee in the consideration of State reports can be listed as follows:

- The notion of terrorism. Is terrorism a crime as such, or a qualifying factor in respect of existing crimes?⁷
- The notion of a terrorist organisation and its consequences.⁸
- Respect for the nonderogable provision of article 15 on the principle of legality in criminal law, including the requirement of all elements of crime being defined by law.⁹
- Non-refoulement, monitoring after extradition¹⁰ and humane treatment after receiving a national suspected of terrorism.¹¹
- Preventive, administrative and other forms of detention in terrorism-related circumstances. Its grounds, duration, conditions, and the availability of judicial review.¹²

Individual Complaints

Under the Optional Protocol to the ICCPR there is so far case law pertaining to four important dimensions of counter-terrorism measures.

⁶ CCPR/C/79/L/PHL, item 6.

⁷ Concluding observations on Egypt, CCPR/CO/76/EGY, para. 16.

⁸ Concluding observations on Estonia, CCPR/CO/77/EST, para. 8.

⁹ Concluding observations on Estonia, CCPR/CO/77/EST, para. 8; Concluding observations on Israel, CCPR/CO/78/ISR para. 14; Concluding observations on Portugal, CCPR/CO/78/PRT, para. 15.

¹⁰ “...the State party should maintain its practice and tradition of observance of the principle of non-refoulement. When a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance of the receiving State with these assurances from the moment of expulsion.” Concluding observations on Sweden, CCPR/CO/74/SWE, para. 12. See, also, Concluding observations on New Zealand, CCPR/CO/75/NZL, para. 11.

¹¹ Concluding observations on Egypt, CCPR/CO/76/EGY, para. 16.

¹² Concluding observations on Israel, CCPR/CO/78/ISR para. 12; Concluding observations on Peru, CCPR/CO/70/PER, para. 13; Concluding observations on Yemen, CCPR/CO/75/YEM, para. 18.

Firstly, the cases *Maroufidou v. Sweden* (58/1979), *Celepli v. Sweden* (456/1991) and *Karker v. France* (833/1998) relate to expulsion or restriction of movement of foreigners having links with international terrorism. While the Committee has accepted restrictions on freedom of movement and even some adjustment of expulsion procedures in cases involving national security, it has not allowed compromises to the absolute norm of *non-refoulement* whenever there is a real risk of torture or other treatment contrary to article 7 of the Covenant. In the current session the Committee will probably conclude a *refoulement* case which will give further light to this issue.

Secondly, it is above all in the Peruvian cases of *Polay Campos* (577/1994), *Sybila Arredondo* (688/1996) and *Gutierrez Vivanco* (678/1996) that the Committee has made it clear that whatever adjustments are made in court procedures to protect the judiciary against terrorism, the basic requirements of fair trial must be respected. Hence, the “faceless courts” of Peru did not comply with article 14 of the Covenant.¹³ The case of *Kavanagh v. Ireland* (819/1998), although not as such related to terrorism, belongs to the same category due to the emphasis that the subjection of an accused to an extraordinary criminal procedure, even when it as such is compatible with article 14, violates article 26 if a trial before an ordinary court is denied through a discretionary decision by the executive.

A third category of cases is related to violations of human rights through disappearances or arbitrary executions in the course of a government’s measures against terrorism. Violations of articles 6 or 7 have been established for instance in the cases of *Celis Laureano v. Peru* (540/1993), *Coronel Navarro et al. v. Colombia* (778/1997) and *Sarma v. Sri Lanka* (950/2000).

Finally, the case of *Yong-Joo Kang v. Republic of Korea* (878/1999) serves as a reminder that States may not use terrorism as a pretext for curtailing freedom of expression.

¹³ In the last-mentioned (and latest) one of these cases, Committee member Ivan Shearer appended a concurring individual opinion where he takes the view that an otherwise fair procedure before anonymous judges could be accepted by way of derogation from article 14 during a state of emergency.

To date, there are no decided Optional Protocol cases that would directly relate to post-9/11 counter-terrorism measures. However, at least two alarming issues have arisen in cases that at the moment are pending before the Committee. Firstly, certain Central Asian countries have in several of our pending cases executed a complainant, irrespective of the Committee's duly communicated request for interim measures of protection. At least in some of these cases "terrorism" has been among the crimes leading to capital punishment. Secondly, in one pending case a North African state is contesting the admissibility of an individual communication submitted to the Committee on the grounds that counsel was placed on a list of terrorists and subsequently expelled from the Bar. Hence, he should, according to the State party, not be allowed to represent an alleged victim before the Committee

Inter-State Complaints

It is worth mentioning that individual complaint mechanisms under human rights treaties are perhaps not at their best in relation to emergency powers or other systemic problems and that under the European Convention system States have occasionally resorted to the procedure for inter-State complaints in such situations. Although 47 States have made the declaration under article 41 of the Covenant allowing other States with a similar declaration to submit inter-State complaints, the procedure has never been resorted to. One could imagine that this possibility would be considered either in respect of systemic issues such as a state of emergency, or in a more concrete way by States whose nationals are detained without trial as terrorism suspects by a country that has not allowed for individual complaints and that is several years delayed in submitting its periodic report to the Human Rights Committee.

Assessment and the Way Forward

Knowing that this seminar will end with a panel discussion under the heading “Towards an Effective United Nations Mechanism or Procedure of Human Rights Monitoring of Anti-terrorist Measures”, let me conclude by way of presenting some reflections on that topic.

Although the Human Rights Committee has been, in its consideration of State reports since 9/11, fairly systematic and focused in conducting a human rights review of counter-terrorism measures, there are important factors that point to the insufficiency of this procedure: Since September 2001 the Committee has reviewed only 25 States, including the Russian Federation which will appear before us today. This means only 1/6 of all States parties within a period of two years. This is not because a huge backlog of reports awaiting consideration. The Committee *is* able to deal with all incoming reports relatively expeditiously but emphasis is on the word “incoming”. A big part of the 151 States parties to the Covenant are seriously overdue in submitting their reports. And even if all reported, there would remain more than 40 other States that are not parties to the ICCPR, many of them giving rise to serious concern over the human rights compatibility of their counter-terrorism measures. Particularly in Asia the ratification of the ICCPR is far from universal.

As to States parties to the ICCPR, the Committee could improve its monitoring through one of the following two options: Either: the Committee could use its power to call for *special reports* by some selected States, especially those that are seriously late in the submission of a regular report *and* are known to have resorted to problematic counter-terrorism measures such as long-term detention without access to court. Or: the Committee could call for a special report on counter-terrorism measures from *all* States parties, on the basis of a questionnaire that would draw upon the Committee’s two years of experience since 9/11. While the first option would lead to an oral consideration of a small number of special reports during the Committee’s regular sessions, the latter option would require the creation of a written procedure and the appointment of one member of the Committee as Special Rapporteur, to be assisted by a team within the OHCHR. The

Special Rapporteur would then report on his or her findings to every session of the Committee with recommendations as to what action should be taken.

If the latter methodology were to be chosen, it could be *mutatis mutandis* extended by the Commission on Human Rights to cover States that are not parties to the ICCPR, relying on the Universal Declaration for the substantive standards but also on the experience of the HRC in order to focus on certain issues arising under those standards. As a result of the combined effect of the two parallel procedures, all States would be subject to one of the two procedures for the assessment of the human rights compatibility of their counter-terrorism measures.

1. Podemos partir de la afirmación de que la prohibición de la tortura y otros tratos o penas crueles, inhumanos o degradantes, se impone a todos los Estados, y a todos los demás sujetos del Derecho internacional, por una norma imperativa de Derecho internacional general (*ius cogens*). La obligación de impedir la tortura y otros tratos o penas crueles, inhumanos o degradantes, es universalmente exigible (*erga omnes*) y nunca puede ser suspendida.

La Convención contra la tortura de 1984 formula esa norma, particularmente por medio de los artículos 1, 2 y 16 de modo tal que dicha formulación se considera generalmente como equivalente a la de la misma norma de Derecho internacional general. Por otro lado, toda una serie de instrumentos jurídicos internacionales, universales y regionales, reiteran la indicada prohibición. Quizá convenga destacar entre ellos a los cuatro Convenios de Ginebra de 1949 sobre Derecho internacional humanitario, cuyo común artículo 3º introduce la prohibición de la tortura en el estándar mínimo universal de derechos humanos, aplicable en particular en los conflictos armados.

2. El crimen internacional de terrorismo constituye una grave violación de los derechos humanos fundamentales. Es cierto que a pesar de la adopción de una serie de instrumentos convencionales universales destinados a su represión, no existe todavía una definición jurídica universalmente aceptada de que sea terrorismo en el sentido del Derecho internacional. Ahora bien, la Resolución 1373 (de 28-9-2001) del Consejo de Seguridad de Naciones Unidas, adoptada sobre la base del Capítulo VII de la Carta, suple por el momento (aunque sea precariamente) la ausencia de esa definición y obliga a todos los Estados a cooperar internacionalmente para prevenir y reprimir dicho crimen en todas sus formas, en especial cumpliendo las Convenciones internacionales más relevantes en materia de lucha contra el terrorismo.

En cualquier caso la obligatoria adopción por los Estados de medidas contra el terrorismo debe ser realizada dentro del respeto a los derechos humanos fundamentales y, particularmente, del derecho de toda persona a no ser sometida a torturas ni a otros tratos o penas crueles, inhumanos ó degradantes.

3. El Comité contra la Tortura, órgano basado en la Convención de 1984, ha tenido ocasión de adoptar Resoluciones relacionadas con actividades terroristas y con medidas tomadas por los Estados partes para luchar contra el terrorismo.

Es destacable ante todo la adopción, el 22 de noviembre de 2001, de una Declaración (CAT/C/XXVII/Misc. 7.) en la cual, condenando de manera absoluta los ataques terroristas del 11 de septiembre de 2001, recordaba a los Estados parte “el carácter irrenunciable de la mayoría de las obligaciones” contraídas por ellos al ratificar la Convención. El Comité se refirió en particular a que tres Disposiciones de la Convención deberían observarse en toda circunstancia, la del art. 2 (“en ningún caso podrán invocarse circunstancias excepcionales como justificación de la tortura”), la del art. 15 (prohibición de que las confesiones extraídas como resultado de la tortura puedan ser invocadas como prueba, salvo en contra del torturador), y la del art. 16 (prohibición de los tratos o penas crueles, inhumanos o degradantes). En esa importante Declaración se echa de menos una referencia expresa al carácter irrenunciable de la obligación establecida por el art. 3 de no devolver a un extranjero a un país donde corra serio peligro personal de ser sometido a tortura (*non refoulement*).

4. De otra parte si bien no ha habido lugar por el momento a referirse a la vigencia absoluta de la prohibición de la tortura y de los tratos inhumanos en el contexto del procedimiento del art. 20 de la Convención (investigación confidencial) ni en el del art. 21 (quejas interestatales –nunca aplicado–), sí encontramos referencias aunque sea indirectas en el desarrollo de los otros dos procedimientos ante el Comité.

Así, dentro del marco del procedimiento de examen de informes estatales regulado por el art. 19, el Comité ha tenido ocasión de adoptar Conclusiones y

Recomendaciones dirigidas a los Estados parte en las cuales se encuentran algunas afirmaciones destacables en el contexto ahora examinado.

En ese sentido el Comité ha reiterado en diferentes ocasiones que las dificultades que un Estado parte cualquiera pueda experimentar para dar pleno respeto a sus obligaciones según la Convención, por causa de tener que soportar acciones terroristas, no puede justificar en modo alguno ningún acto de tortura.

5. Así, en lo que se refiere a las Conclusiones y Recomendaciones para España (CAT/C/CR/29/3, de 23-12-2002) el Comité (par. 7) se declaró consciente de la difícil situación que afrontaba el Estado parte como resultado de los frecuentes y graves actos de violencia y terrorismo y reconoció el derecho y el deber del Estado de proteger a sus ciudadanos de tales actos y de terminar con la violencia; al mismo tiempo observó que su reacción conforme a la ley debe ser compatible con el art. 2,2 de la Convención, según el cual ninguna circunstancia excepcional puede invocarse como justificación de la tortura.

Semejantes razonamientos se encuentran en las Conclusiones y Recomendaciones para Egipto (CAT/C/CR/29/4, de 23-12-2002, par. 4) y para la Federación Rusa (CAT/C/CR/28/4, de 6-6-2002, par. 4).

De modo más indirecto, sin referirse a grupos terroristas, al adoptar sus Conclusiones y Recomendaciones sobre el tercer informe de Colombia (CAT/C/DR/31/1, de 18 de noviembre de 2003) el Comité señaló que “es consciente de las dificultades que la actual y compleja situación interna plantea al respeto de los derechos humanos y del Derecho internacional humanitario, particularmente en un contexto caracterizado por la acción de grupos armados ilegales, los cuales incurren regularmente en graves violaciones de este último. El Comité reitera, sin embargo, que, de conformidad con el art. 2 de la Convención, en ningún caso podrán invocarse circunstancias excepcionales como justificación de la tortura”.

Por otra parte, al examinar el último informe presentado por Suecia (CAT/C/CR/28/6, de 6-6-2002, par. 6,b) el Comité mostró su preocupación porque la ley especial sobre el control de los extranjeros, llamada Ley

Antiterrorista, permite la expulsión de extranjeros sospechosos de terrorismo según un procedimiento que no se ajusta al parecer a lo dispuesto en la convención, puesto que no se prevee ningún procedimiento de operación.

6. También es destacable el énfasis que el Comité ha puesto en que ciertas prácticas utilizadas por los Estados son rechazables en todo caso, incluso en el marco de acciones contra grupos cuyas actividades pudieran ser calificadas de terroristas. En el caso de las Conclusiones y Recomendaciones adoptadas por el Comité tras su examen del tercer informe de Israel (CAT/C/XXVII/Concl. 5, de 23-11-2001) el Comité destacó (par. 5) que era plenamente consciente de la difícil situación de inquietud (*unrest*) afrontada por Israel, particularmente en los Territorios Ocupados, y que entendía sus preocupaciones relativas a la seguridad. Afirmó asimismo que al tiempo que reconocía el derecho de Israel a proteger a sus ciudadanos frente a la violencia, reiteraba que ninguna circunstancia excepcional puede invocarse como justificación de la tortura. Pues bien, entre los motivos de preocupación destacados por el Comité se encuentran: “j) las políticas israelitas de demolición de viviendas que, en ciertos casos, pueden constituir un trato o pena cruel, inhumano o degradante”. Y entre las Recomendaciones dirigidas a Israel se encuentra (par. 7, g) la de que “el Estado parte debería desistir de las políticas de desalojo y de demolición de viviendas, cuando son contrarias al art. 16 de la Convención.
7. En el marco del procedimiento del art. 22 el Comité ha dejado claro que cualquier reclamante, incluso uno que sea sospechoso de haber cometido actos de terrorismo o de pertenecer a un grupo terrorista, es un individuo protegido por la Convención en toda su amplitud. Sin necesidad de extenderse aquí a decisiones relativas a reclamaciones determinadas, el Comité ha dejado claro que son rechazables con carácter general la detención incomunicada, la detención durante periodos prolongados de modo desproporcionado, sin sometimiento a juez de los detenidos, particularmente los detenidos en locales administrativos; y el enjuiciamiento de los presuntos responsables de tortura, incluso personas civiles,

por tribunales militares o tribunales de excepción, se trate o no de actos cometidos en el desarrollo de actividades contra el terrorismo.

Por otra parte en el trato que se le aplique deberán ser respetados los estándares universalmente aceptados aplicables a personas detenidas o en prisión, particularmente los relativos a acceso libre a un abogado y a un médico y el derecho a contactar con personas de su familia o de su confianza.

En este contexto toda persona goza en especial, como ya se ha indicado, del derecho a no ser devuelto a un país donde corra un serio peligro personal de ser sometido a tortura. Véanse, por ejemplo, sobre esta cuestión las Decisiones relativas a las quejas n° 193/2001 (CAT/C/29/D/193/2001) de 19-12-2002; la n° 219/2002 (CAT/C/30/D/219/2002), de 12-5-2003; y la n° 191/2001 (CAT/C/30/D/191/2001), de 19-5-2003. En los dos primeros casos el Comité afrontó la posible violación del art. 3 de la Convención en la persona de presuntos terroristas y llegó a la conclusión de que los procedimientos internos desarrollados en Francia y en Suiza, respectivamente, constituían suficiente garantía de cumplimiento del principio de no devolución. En el tercer caso (párrafo 6.4) el Comité afrontó la cuestión de la devolución de una persona a un país en el cual pudiera correr serio riesgo de tortura o malos tratos infringidos por una “entidad no gubernamental” y afirmó, siguiendo su jurisprudencia anterior, que si estos actos se cometían sin el consentimiento del gobierno, quedaban fuera del ámbito del art. 3 de la Convención a menos que la entidad en cuestión ejerciera una autoridad cuasi gubernamental sobre el territorio al cual el reclamante fuera a ser devuelto.

Es también interesante recordar que en su Decisión en la queja n° 63/1997 (CAT/C/23/D/63/1997), de 5-6-2000, el Comité apreció violación del art. 3 en cuanto que la deportación del reclamante se había efectuado por un procedimiento administrativo sin control judicial y sin posibilidad de que el interesado contactara con su familia o su abogado, además de que un Tribunal administrativo del Estado deportador del reclamante había decidido posteriormente que la entrega había sido ilegal (párrafo 11.5).

8. Finalmente cabe decir que el Comité contra la Tortura, de acuerdo con las normas de su propio Reglamento (CAT/C/3/Rev. 4, de 9 de agosto de 2002), puede ejercer poderes específicos de control para vigilar, llegado el caso, de qué manera los Estados partes cumplen sus obligaciones según la Convención al adoptar medidas para luchar contra el terrorismo.

El Comité podría así, llegado el caso, solicitar respuestas especiales sobre el cumplimiento de la antes citada Resolución 1373 (art. 64,3). Puede ciertamente examinar en toda su extensión la situación en Estados parte retrasados en la presentación de sus informes (art. 65) y puede solicitar informes adicionales sobre los aspectos que estime pertinentes (art. 67). Además puede realizar un seguimiento específico, dentro de plazos perentorios, del cumplimiento por un Estado parte de sus Recomendaciones (art. 68.1).

No está de más recordar que las medidas provisionales que el Comité puede adoptar para proteger a los reclamantes frente a daños irreparables de sus derechos pueden servir también para reducir efectos desproporcionados de normativas antiterroristas, particularmente en supuestos de expulsión, extradición o devolución de extranjeros a terceros países (art. 108).

9. El Comité contra la Tortura no ha utilizado hasta ahora información proveniente del Comité contra el Terrorismo establecido por el Consejo de Seguridad de Naciones Unidas pero, cada vez más, a medida que van llegando informes de Estados partes, a la luz de toda la información disponible para su examen, el Comité contra la Tortura reafirma vigorosamente el carácter absoluto inderogable de la prohibición de la tortura y, en su caso, de los tratos inhumanos.

El Comité afronta en su práctica todas las dificultades propias de los mecanismos convencionales del sistema de Naciones Unidas protector de los derechos humanos: retraso de informes, reservas al Tratado, falta de ratificaciones significativas, falta de medios materiales, etc. Se impone así una estrecha colaboración entre el Comité contra la Tortura y el Comité contra el Terrorismo, tanto más cuanto que el propio Consejo de Seguridad de Naciones Unidas ha mostrado su preocupación (Res. 1456/2003) por el respeto de las normas

protectoras de derechos humanos en el contexto de la lucha contra el terrorismo. Un nuevo mecanismo, grupo de trabajo, relatoría u otro, podría ser un elemento clave en la protección de los derechos humanos fundamentales que pudieran resultar seriamente afectados en el contexto de la legítima acción internacional contra el crimen de terrorismo.

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Counter-Terrorism Measures and Human Rights: Reaction of CERD

By now it is almost a truism to state that the events of 11 September 2001 have changed the world. It is still too early to come to any final conclusion as regards the impact of those events and their repercussion on the international legal order, on the complex system of norms regulating the behaviour of States, and in particular the relations between them, including international human rights norms.

In my view the following are the basic elements which ought to determine the attitude of States towards the phenomenon of terrorism and the consequential measures taken (and authorized under international law) by Governments with a view to combating terrorism and reduce its evil results to the minimum possible, considering that those who are in fact most heavily victimized by terrorist acts are innocent human beings.

1. The element that all acts of terrorism have been declared (and are indeed!) contrary to the UN Charter and international human rights norms (see Security Council resolution 1373 (2001)).
2. The element that acts of international terrorism constitute threats to international peace and security (see SC. res. 1373 (2001)).
3. The element that terrorist acts, i.e. acts defined as criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes, are in any circumstance unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature may be invoked to justify them (see GA res. 55/158, December 2000).
4. The element that States are in duty bound to adopt appropriate measures in accordance with the UN Charter and the relevant provisions of international law, including international standards of human rights, to prevent terrorism and strengthen international cooperation in combating it (GA res 55/158).

It is, therefore, obvious that in combating international terrorism States have an obligation to respect, and to act within the scope of, international human rights law. A good part of international human rights law is to be considered as *ius cogens*. For that reason alone it is not legally possible for States - in their fight against terrorism - to dissociate themselves from those norms, to disregard them or to abandon them even if States might wish to do so.

When the issue of terrorism was first formally brought to the attention of the Committee on the Elimination of Racial Discrimination (CERD) by means of a message from the High Commissioner for Human Rights, the Committee reacted

immediately and adopted at the beginning of its spring session in 2002 a statement “on racial discrimination and measures to combat terrorism”. That statement, limited as it is to the area of responsibility of CERD under the Convention of 1963, reflects precisely the views of the Committee and its individual members on the overriding importance of continued respect of the inalienable rights of the individual even in times of severe crisis, such as the crisis provoked by the events of 11 September and their aftermath. That statement reads as follows:

The Committee:

1. Condemns unequivocally the terrorist attacks on the United States of America of 11 September 2001,
2. Affirms that all acts of terrorism are contrary to the Charter of the UN, the Universal Declaration of Human Rights and other human rights instruments referred to in the Preamble to the International Convention on the Elimination of all Forms of Racial Discrimination,
3. Emphasizes that measures to combat terrorism must be in accordance with the Charter of the UN and that they are only legitimate if they respect the fundamental principles and the universally recognized standards of international law, in particular international human rights law and international humanitarian law,
4. Recalls that the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted,
5. Demands that States and international organizations ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin,
6. Insists that the principle of non-discrimination must be observed in all matters, in particular in those concerning liberty, security and dignity of person, equality before the courts and due process of law, as well as international cooperation in judicial and police matters in these fields,
7. Intends, in this context, to monitor, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination, the potentially discriminatory effects of legislation and practices in the framework of the fight against terrorism. (Report 2002, p. 106-107.)

Apart from the general confirmation that measures to combat terrorism can only be considered legitimate if they respect the fundamental principles and the universally recognized standards of international human rights law and international humanitarian law, and apart from the reminder that the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted, what is really remarkable in the statement is the quasi-assurance given that the Committee would monitor, within its sphere of competence under the 1963 Convention, the potentially discriminatory effects of legislation and practices adopted and applied by States in the framework of their fights against terrorism. And indeed, that is what the Committee is attempting to do.

In the same context I ought to mention as a side issue another pertinent statement of the Committee entitled “Declaration”. In that Declaration, adopted on 10 March 2003, the Committee, referring to the worsening situation in the world, recalled its condemnation of terrorism in all its forms and its destructive effect on human rights, drew the attention of the international community to the “devastating effects of any resort to wars not only at the military, economic, political and social level, and in relation to the fate of civilian populations, but also because of the resurgence of phenomena of racial and ethnic discrimination, xenophobia, intolerance, and even terrorism, that could result from it”.

Terrorism breeds the destruction of human rights, and the destruction of human rights breeds terrorism. In fact, terrorism is itself the result of a xenophobic and intolerant attitude, but it may in turn lead to xenophobia and intolerance in populations which are victims of terrorist acts, and those measures which are taken against terrorism, to combat or – better – prevent it, may again lead to outbursts of xenophobia and intolerance. We are here confronted with a dilemma to solve.

Let us, however, at this stage return to the action taken by CERD. The Committee examining and discussing the reports which States are submitting in accordance with the Convention’s procedures, i.e. in the course of its monitoring activities, potentially discriminatory measures adopted by States in their fight against terrorism, or adopted in the course of international governmental activities to coordinate the measures taken by single States.

Some concrete examples:

Moldova: When the first series of reports submitted by Moldova were considered in March 2002, the Committee noted reports according to which, after the tragic events of 11 September 2001, a parliamentary inquiry was conducted into the alleged existence of terrorists among students of Arab origin at the International Independent University of Moldova. The Committee reminded the Government that it should ensure that actions taken should follow due process of law and that they avoid any suspicion of racial profiling (Concluding observations, para.15, see Report 2002, p. 43).

Canada: During the consideration of the 13th and 14th report of Canada, in August 2002, the Committee noted with concern that, in the aftermath of the events of 11 September, Muslims and Arabs have suffered from increased racial hatred, violence and

discrimination. While welcoming a statement of the Prime Minister in a Mosque condemning all acts of intolerance and hatred against Muslims, as well as the reinforcement of Canadian legislation to address hate speech and violence, the Committee expressly requested the Government “to ensure that the application of the Anti-terrorism Act does not lead to negative consequences for ethnic and religious groups, migrants, asylum seekers and refugees, in particular as a result of racial profiling”. (Concluding observations, para. 23, Report 2002, p. 59).

Morocco: In the framework of its consideration of the 14th, 15th and 16th report of Morocco which took place in March 2003, the Committee noted the submission in November 2002 to the Moroccan Parliament of two bills: one relating to foreigners’ entry and residence in Morocco, illegal immigration and emigration, and the other to terrorism. The Committee explicitly drew the Government’s attention to its statement of 8 March 2002 (see above). (Concluding observations, para. 19, see Report 2003).

Russian Federation: When the 15th, 16th and 17th report of the Russian Federation came up for consideration, the Committee, while acknowledging Russia’s efforts to confront the scourge of terrorism, expressed concern about reports that members of particular groups, notably Chechens, were singled out by law enforcement officers, and the Committee again referred to its statement of 8 March 2002 (see above) underlining the obligation of States to “ensure that measures taken in the struggle against terrorism do not discriminate on grounds of race,…” (Concluding observations, para. 24, see Report 2003).

United Kingdom: On the basis of the United Kingdom’s 16th and 17th report of a thorough discussion of certain aspects of the British Anti-Terrorism Crime and Security Act took place. The Committee expressed deep concern about provisions of that Act which provide for the indefinite detention without charge or trial, pending deportation, of non-UK nationals who are suspected of terrorism-related activities. While acknowledging the Government’s national security concerns, the Committee recommended to the Government that it seek to balance those concerns with the protection of human rights and its international obligations, drawing attention to the Committee’s statement of 8 March 2002 (see above). (Concluding observations, para. 17).

Israel: Another case in point concerned Israel where the Committee had resort to its “urgent action/procedure”. Having received information to the effect that Israel – for security reasons, and in order to prevent terrorist acts – had enacted the Nationality and Entry into Israel Law (Temporary Order) on 31 July 2003, which suspended for a renewable one-year period the possibility of family reunification (subject to limited and discretionary exceptions) in the cases of marriage between an Israeli citizen and a person residing in the West Bank or Gaza, the Committee indicated that the Law raised serious issues under the Convention of 1963, and invited Israel to revoke the law and

reconsider its policy with a view to facilitating family reunification on a non-discriminatory basis.

There is no doubt that the Committee on the Elimination of Racial Discrimination is engaged in a continuous *bona-fide* attempt to ascertain, within the scope of its competences, that is, limited to the issue of discriminatory treatment in violation of the 1963 Convention, whether the legislation and practices introduced by States Parties in the aftermath of the events of 11 September 2001, with a view to combating terrorists and terrorist activities, are in line with the Convention, which is still the binding international norm in this area. Much will depend on the information provided to the Committee and on the willingness of States to explain in detail their new approaches to the phenomenon of terrorism, under the scourge of which they may now be living. An open-minded and frank dialogue between CERD as a monitoring body, and the Government concerned, on the reasons and the implications of any new measures in this field is surely the first step towards alleviating – or remedying – situations which otherwise might grow worse and lead to uncontrollable violations of essential human rights.