



# INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

*" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "*

**Speech by Nicholas Howen, Secretary-General**  
**International Commission of Jurists**  
**ICJ Biennial Conference 2004**  
*Counter-terrorism and Human rights: Challenges and Responses*

Federal Foreign Office, Berlin, Germany, 27 August 2004

Your Excellency Minister of State, Kerstin Müller,  
Your Excellency, the United Nations High Commissioner for Human Rights, Louise Arbour,  
ICJ Commissioners, Sections and Affiliates, invited guests and colleagues,

To be truthful, I stand here with mixed emotions.

I am proud to follow in the footsteps of those who founded the International Commission of Jurists with passion and commitment in this city of Berlin 52 years ago. Ours is a unique global network of judges, lawyers, prosecutors and human rights defenders.

But this is not the celebration I would have wanted.

A few years ago I did not think we would be meeting today to discuss one of the most critical global threats to the rule of law that we have seen for many years.

Counter-terrorism measures worldwide are challenging our most basic assumptions about the rule of law and human rights.

We thought that no government would again brazenly argue it can justifiably torture detainees to extract information.

We thought we would not have to answer again whether someone who is suspected of committing horrific criminal acts can be treated inhumanly. Can they be denied the rights of other human beings?

We are forced again to defend fundamental rules of state behaviour that have been negotiated and agreed by governments themselves.

## **Victims of counter-terrorism measures**

Early last year I was in Peshawar in northern Pakistan, near the Afghanistan border. I met with two families who were refugees from Algeria. Women with babies and young children. The women were in tears. More than one year before, their husbands had been arrested by Pakistani police and taken away, with the assistance of US officials. Apparently without any of the usual extradition procedures. They knew that one husband was in Bagram airbase, the other in Guantanamo Bay. But that is all they knew. They did not know why their husbands had been arrested; whether they would

be charged or tried; whether they would be released; how they were being treated. Their husbands had fallen into the legal black hole of US off-shore anti-terror detention. The lives of these women and their children were on hold, indefinitely; in a foreign country; with no future and no prospects.

[I can only hope that if still detained, at least the Guantanamo Bay detainee will now be able to test the legality of his detention in a court following the US Supreme Court decision in the *Rasul* case that Guantanamo Bay detainees cannot be denied access to US courts.]

We speak about laws and policies. But we should never forget that this is about people, about families. Terrorism creates victims. Counter-terrorism is creating new victims.

The ICJ was born on the ideological frontline of a divided post-war Berlin in memory of another victim – Dr. Walter Linse. He denounced arbitrary arrests, secret trials and detentions in labour camps in the Soviet zone. He was abducted by East German intelligence agents and later executed in Moscow for “espionage”. This led to a group of lawyers founding the ICJ at the inaugural congress in Berlin in 1952.

We are now back in Berlin as the guests of our generous hosts the Federal Foreign Office of the Government of Germany and with the essential support of the Friedrich Ebert Stiftung and NOVIB.

### **Patterns of violations in counter-terrorism**

Today the ICJ’s role as an advocate for the rule of law is as critical as it ever was.

We have seen governments again trying to justify the use of torture against terror suspects, in the name of national security.

They have tried to redefine torture to exclude psychological pain and avoid their responsibility. [A UK court two weeks ago agreed with the UK Government that evidence obtained by torture in another country could be used as evidence in a British court against a person suspected of terrorist offences.]

Prominent lawyers have even proposed that torture could be somehow regularised through a form of judicial torture warrant.

[It is not by chance that the international community has said that torture is a peremptory norm of international law that it can never be justified – and never means never.]

We have seen people suspected of terrorist offences removed beyond the protective reach of the courts, held without judicial review, without *habeas corpus*.

Incommunicado detention is now more widespread and in more countries can government ministers put terror suspects in administrative detention for long periods without charge or trial.

Many detainees have been summarily taken or expelled, without due process, in violation of usual extradition procedures, to a country where they can be tortured with impunity.

We have seen basic fair trial guarantees ignored, rights of defence cut down and rights of appeal removed.

Indeed, in the name of defending democracy, the separation of powers, a fundamental foundation of a democracy, is being undermined. Civilian justice is being militarised: civilians are tried by military tribunals, special courts or *ad hoc* or military commissions. Speaking about the detainees in Guantanamo Bay, Lord Steyn, a British Lord of Appeal said, “The military will act as interrogators, prosecutors, defence counsel, judges and, when death sentences are imposed, as executioners”<sup>1</sup>. What has happened to the right to be tried by an independent and impartial tribunal established by law? Can we accept there is a territory in this world where no law applies to protect people?

Some countries face a real threat of terrorism. But others face no significant threat and use counter-terrorism laws as a pretext to crackdown on legitimate political and social opposition or to outlaw acts that should be considered ordinary criminal offences. Indeed, without any agreed definition of terrorism we fall back on the proliferation of often vague or loose definitions of terrorism in national laws – and open the door to such abuses.

[This definitional void will become worse as long as Security Council Resolution 1373 imposes heavy legal obligations on states to combat terrorism without saying what terrorism is and what it is not. In the words of a French judge and the Chief Commissioner of the French National Police, “La résolution 1373 ... décrète la chasse universelle au terrorisme sans le définir”.<sup>2</sup>.]

### **Global threat to rule of law**

Many countries have adopted new counter-terrorism laws and policies in the last three years. But the post September 11 environment has also given new life to old laws that have violated human rights in the name of national security for decades. Yesterday’s separatists, rebels, subversives and extremists become today’s terrorists, whether they are or not. And in today’s climate any crackdown on terrorists has instant legitimacy.

With both old and new ill-conceived counter-terrorism measures, the threat to the rule of law has spread and become a major problem that touches all regions.

It sometimes seems that governments have collectively declared a global state of emergency. If so, let us remember that any state of emergency must be an extension of the rule of law, not an abrogation of it. States of emergency are bound by strict rules to prevent violations of rights. [An emergency cannot be endless. There is a heavy burden on states to justify every action taken. Any suspension of rights must be necessary, proportionate, cannot discriminate against people because of their race or similar grounds and respect the principle of legality. And of course some rights can never be suspended.]

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<sup>1</sup> Johan Steyn, “Guantanamo Bay: The Legal Black Hole”, *ICLQ*, Vol.53, January 2004, pp. 1-15, at p.9.

<sup>2</sup> Jean-François Gayraud; David Sénat, “Le terrorisme”, *Collection "Que sais-je?"*, N° 1768, Presses universitaires de France, 3<sup>ème</sup> édition, Paris, 2002, page 29.

## **Rhetoric, rule of law & legitimacy**

The “war against terrorism” is more than a set of specific laws. It is a way of thinking. We have seen the return of a disturbing rhetoric. It is a security-dominated discourse. It says that rights and freedoms interfere with security of state. It pushes aside the usual laws and norms because they seem to constrain the unfettered discretion of the executive to take any action it thinks necessary. In this rhetoric there are only patriots and terrorists; good and evil.

But the rule of law must be the first defence against arbitrary power.

The strength of our rule of law and human rights norms will be judged by whether they hold up in times of crisis, when governments are most tempted to ignore them, yet when they are most needed.

[It cannot be commonplace to say that all human beings have dignity. We debase our societies and ourselves if we imply that those suspected of committing barbarous acts can be abused.]

The political legitimacy of counter-terrorism measures should therefore flow from their respect for rule of law.

Let us be very clear. Al-Qaeda and similar groups indiscriminately kill and maim. Governments have a duty to protect people from terrorism. But they must protect people from terrorist acts and abusive acts by the state. Both duties form part of a seamless web of protection that states must fulfil.

As human rights lawyers we hold all states, whether with new or old counter-terrorism measures, to the same standards. States themselves drafted these standards, with a keen sense of their national security needs. These norms, and the detailed jurisprudence from thousands of cases, already address national security and human rights in a balanced way. They already give states a wide margin of flexibility but set limits that must be respected.

There are many reasons why people carry out terrorist acts – ideology, territory and power, human rights grievances, social injustices and exclusion, failure of the political system to resolve conflicts peacefully. While terrorist acts are never acceptable, the complexity of the causes should be mirrored by complex and suitable responses that do not just tackle the symptoms.

## **Learning the lessons of history**

As I have said, terrorism is not new, even if it has emerged on a deadly and perhaps global scale. We must learn from history. As human rights lawyers many of you have already lived through cycles of terrorism. You have witnessed groups indiscriminately killing civilians to further their cause. You have seen governments respond with anti-terrorism laws; laws that have resulted in enforced disappearance, torture, extrajudicial executions and secret detentions; laws that excluded the jurisdiction of the courts.

The voices of human rights defenders and victims from the past must be heard to guide us today.

Almost from its very beginnings, the ICJ has been active on terrorism, counter-terrorism, states of emergency and internal security acts. Looking into the annals of ICJ reports and action, the sad roll call from history is long: Peru, Sri Lanka, Spain, Turkey, Israel, Colombia, Northern Ireland, India, Algeria and many others. No continent has been immune from cycles of terrorism and excessive counter-terrorism.

Across the world we also saw in the past governments use anti-terror and internal security legislation to suppress peaceful political opposition, demonstrations and writings in the name of internal subversion. From Chile and Argentina to Singapore, South Africa, the Philippines and South Korea, we saw political opponents branded as terrorists and a threat to national security.

### **Leadership role of the ICJ and legal community**

Global insecurity and terrorist attacks will continue for the foreseeable future. Several governments are setting a breath-taking pace for new counter-terrorism measures to be adopted around the world. But the “war against terrorism” has taken on a dynamic of its own in several regions of the world. The erosion of international law risks becoming entrenched and worldwide – unless we act.

The legal and human rights communities must now globally take a leadership role in showing how the rule of law can and must be respected in addressing terrorism. Now is the time to take principled, strong and clear positions. We must defend basic principles of criminal law, international human rights law, international humanitarian law and refugee law.

This conference signals the commitment of the ICJ to act.

Your role during this conference is to chart a path through the legal and political obfuscation. Today you will explore and explain the legal principles and norms that should guide counter-terrorism laws and policies. Tomorrow you will examine the political and legal obstacles to achieving our vision. You will ask what strategies the ICJ should adopt. What you conclude at this conference will shape the ICJ’s future actions.

The problem is that the legal and human rights community is struggling. We face a public that is frightened; that in many countries seem ready to allow governments to suppress rights – principally the rights of others. Policy-makers dismiss general statements of human rights principle as unrealistic. The ideology of the “war against terrorism” has created a wall, so far too sheer to scale.

You will need to consider over the next two days how to break through and reach the decision-makers. How will we mobilize the entire ICJ network in 70 countries to become an effective, worldwide legal campaigning force?

Certainly, we must amplify our voice by forging alliances with other global, regional and national human rights and legal organisations. We must draw on our legal expertise and our ability to command attention at the highest levels of the judiciary, legislature and executive.

I am announcing today that the ICJ will convene a panel of eminent jurists on counter-terrorism and human rights. It will investigate to what extent counter-terrorism measures and acceptable in the

face of today's terrorist threats. These jurists will spend at least one year listening to lawyers, human rights defenders and victims in a series of national and regional hearings in countries around the world. They will bring together the lessons of history and of many different peoples and nations. I ask you to consider how the ICJ network can give this initiative resonance around the world.

Today we need to find ways to reach out to and embolden a judiciary that is often under intense pressure to be more executive than the executive. They are the guardians of human rights in the fight against terrorism, when laws are reviewed, when terror suspects are tried.

Members of the legal profession and bar associations must add their voice publicly and use their legal skills vigorously to challenge counter-terrorism measures that violate human rights. But we need to persuade many lawyers with no involvement that these issues are of vital importance

We must also move away from general principle to a detailed exploration, with governments, of the nature of today's security threats and the acceptable limits of counter-terrorism measures. Lawyers should play a key role in creating a dialogue that is based on reason. The ICJ will need to engage in quiet but intensive discussions with civilian and military authorities responsible for counter-terrorism measures. The ICJ will launch a series of Roundtable Policy Dialogues to begin to change attitudes and policies.

The United Nations and regional organizations must accept their clear responsibilities as guardians of international law and human rights. We will never relent in expecting them to monitor and hold member states accountable. We will persuade the Security Council's Counter Terrorism Committee to bring its dictates into line with international human rights obligations.

The ICJ will step up its monitoring of trends in counter-terrorism worldwide and intervene, in partnership with other organizations, to help prevent, minimize or reverse the negative impact of significant measures.

Tomorrow evening, after further discussions, this conference will adopt a public Declaration. It will set out the legal principles that states should respect in their counter-terrorism measures and bear witness to ICJ's commitment to act collectively.

We will be proud to invoke the Berlin Declaration; to be adopted in a city that gave birth to the ICJ. Let me recall the words of Dr. V. Kielinger, Senator of Justice in Berlin, who said in his welcoming remarks to the International Congress of Jurists in Berlin 52 years ago:

*“Nobody can be more desirous of the recognition and realisation of human rights the world over than the people of Berlin. This city is and will remain linked with the struggle for justice inextricably coupled with freedom, because in the past it was this city in which the miscomprehension and the disregard of human rights resulted in action which deeply hurt the conscience of mankind.”*

Thank you.