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***A Decade Since UN Security Council Resolution 1373 (2001):
Ten lessons learnt on counter-terrorism and human rights***

Statement by Dr Alex Conte

International Commission of Jurists (ICJ) Representative to the United Nations
Acting Director, ICJ Global Security & Rule of Law Initiative

Working Session 5: Rule of Law

*Exchange of views on the question of abolition of capital punishment
Prevention of torture
Protection of Human Rights and Fighting Terrorism*

28 September 2011, 15h – 18h

Mr Chairperson,
Excellencies,
Ladies and Gentlemen,

It is my honour to address this audience to begin this Working Session on the rule of law. Within the range of usual topics under this Working Session, I have been asked to focus on the question of the protection of human rights while fighting terrorism. Earlier this month, the international community commemorated the ten-year anniversary of the horrific attacks of 9/11 in the United States. In December this year, OSCE participating States will observe a decade since the adoption of the *Bucharest Plan of Action for Combating Terrorism*. And today marks the tenth anniversary of the adoption by the UN Security Council of its now infamous resolution 1373 (2001) concerning measures to combat terrorism – a resolution that resulted in a proliferation of counter-terrorism legislation throughout the world.

Ten years on, then, I wish to identify what I see as ten key lessons learnt over the last decade of focussed attention on the countering of terrorism and the relationship this has had with national, regional and international human rights law. Many of these lessons are confirmed within the International Commission of Jurists' Eminent Panel report, *Assessing Damage, Urging Action*, based on 16 national and regional hearings throughout the world. For reasons of time, I will not speak to all of these lessons in my oral presentation, but I hope that each item explained in the written version of my statement might stimulate debate for this working session.

**LESSON 1:
STATES HAVE BEEN PREPARED TO COMBAT TERRORISM OUTSIDE
THE RULE OF LAW AND CONTRARY TO HUMAN RIGHTS LAW**

There is no doubt, as reflected in the Bucharest Action Plan, amongst other documents, that States have a nationally-focussed obligation to protect their citizens from acts of terrorism, and an internationally-focussed duty to contribute to the combating of international terrorism where this amounts to a threat to peace and security. However, this is not an obligation that trumps all others: the combating of terrorism must be undertaken in compliance with all

international obligations, including international human rights law, refugee law, and international humanitarian law. Not only is this an obligation under international law, it has also been asserted and reaffirmed within various instruments, including: the Bucharest Plan of Action; Security Council resolution 1624 (2005); and numerous resolutions of the UN General Assembly and Human Rights Council, including within the 2006 UN Global Counter-Terrorism Strategy.

Notwithstanding this, the years following 9/11 saw a radical shift to giving absolute priority to security considerations. Despite international and regional human rights obligations, the counter-terrorism laws, policies and practices of States from all regions of the world have very often – both consciously and unintentionally – violated human rights and fundamental freedoms. Various examples have been seen: from the unlawful rendition of terrorist suspects to secret places of detention; to the torture and ill-treatment of detainees during interrogation; just to give two examples. Even outside these more obvious and egregious violations, countermeasures adopted to combat terrorism have frequently been designed with insufficient regard to human rights.

LESSON 2:

MOST STATES HAVE RESISTED ADOPTING A WAR PARADIGM AND HAVE INSTEAD UNDERTAKEN A CAREFUL ASSESSMENT OF APPLICABLE LAW

From the early days after 9/11, the US Bush Administration asserted that its fight against Al-Qaeda was an armed conflict, a “war against terrorism”, such that the laws applicable to the combating of international terrorism were the laws of war, pushing aside the relevance and application of international human rights law. Most States, including OSCE participating States, have resisted adopting a war paradigm. Some have expressly rejected it.

Two main points have been generally accepted in this regard. First, that there can be no generic “war against terrorism”, albeit that the law of armed conflict may be relevant in certain defined periods of time, in certain geographical areas, and in respect of certain identifiable parties to an armed conflict. And secondly, that international and regional human rights law

continues to apply even in situations of armed conflict, as reaffirmed by the International Court of Justice in its Advisory Opinion on the construction of a wall in the occupied Palestinian territories.

**LESSON 3:
STATES HAVE TOO-EASILY ADOPTED COUNTER-TERRORISM
MEASURES AS EXCEPTIONAL MEASURES**

Given the severe and fear-inducing nature of the threat of terrorism, many States have designed their counter-terrorism laws and policies under a framework of exceptionalism rather than a framework of normalcy. This has been seen in three ways, each of which has either negatively impacted upon human rights, or has left the potential to do so.

The first, seen in the United Kingdom for example, has been the derogation from rights and freedoms. This has been problematic because of the often tenuous assertion that a threat of terrorism has existed, to the extent that it has posed a threat to the life of the nation (which is a legal pre-requisite for the valid derogation from human rights). It has also overlooked the fact that international and regional human rights law is capable of dealing with threats to national security under limitation provisions within human rights treaties.

The second feature of exceptionalism has been seen in the enactment of robust counter-terrorism legislation that has often been rushed through the legislative process, and allowed to do so because of the existence of clauses providing for regular renewal (often referred to as “sunset clauses”). Reality has shown, however, that once enacted, legislation subject to sunset clauses is very often renewed without a proper debate or consideration of the continued relevance of the measures concerned.

The third element of exceptionalism has been seen in the undermining of the primacy of the criminal justice system. Rather than treating terrorism as a form of serious crime that should be fought within a law enforcement framework, there has been an increasing tendency to use measures in respect of which the due process guarantees of criminal justice do not apply, and in respect of which the intelligence community has had increasing participation in, or control of.

**LESSON 4:
THE LACK OF A UNIVERSALLY AGREED-UPON DEFINITION OF
TERRORISM HAS RESULTED IN THE USE OF BROAD, OVER-REACHING
DEFINITIONS OF THE TERM**

Thirteen universal subject-specific conventions exist, each dealing with different types of terrorist conduct (concerning civil aviation or operations at sea, the protection of persons, or combating the means by which terrorists operate, such as suppressing financing of terrorism or controlling the marking of plastic explosives). Despite this, one of the problems of international law on the countering of terrorism is that there is no generally-applicable, universally-accepted and concise definition of terrorism. This has often resulted in the use of broad and over-reaching definitions of terrorism in national legislation. Because definitions of terrorism are often linked to terrorism offences; powers of arrest, questioning and investigation; rules concerning detention and trial; the listing of proscribed organisations; and administrative measures such as deportation procedures and the forfeiture of property, unnecessarily wide definitions create great potential for abuse and, fundamentally, involve the inappropriate application of such measures. One of the hurdles towards arriving at a universally-agreed upon definition has been the inappropriate use of the term to include conduct that should be dealt with under the law of armed conflict.

Notwithstanding this lack of a universal definition of terrorism, it is agreed that ideological motives do not form an element of the offence of terrorism, reinforcing that all acts, methods and practices of terrorism are unjustifiable regardless of their motivation. Furthermore, the former UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin, has proposed a concise definition that is compatible with the combating of terrorism, the rule of law and human rights. His approach is based on Security Council resolution 1566 (2004) and, as explained in his 2010 best practices report to the UN Human Rights Council, defines terrorism as requiring three cumulative elements: (1) action corresponding to an offence under the 13 universal terrorism-related conventions (or, in the alternative, action corresponding to all elements of a serious crime defined by national law); and (2) action done with the intention of provoking terror or compelling a government or international organisation to do or abstain from doing something;

and (3) action passing a certain threshold of seriousness, i.e. it either (a) amounting to the intentional taking of hostages, or (b) intended to cause death or serious bodily injury, or (c) involving lethal or serious physical violence. It is with respect to this third threshold of seriousness that a number of definitions of terrorism go beyond this model definition, where, for example, States include acts intended to cause damage to infrastructure or economic damage. Whilst such acts should certainly be criminalised, the nature and consequences of treating such conduct as terrorist call for a restrictive approach to be taken, as advocated by the UN Special Rapporteur.

**LESSON 5:
THE PROBLEM OF TERRORISM HAS NOT GONE AWAY, BUT HAS
INSTEAD ENTRENCHED ITSELF AND SPREAD**

Ten years on from the adoption of the Security Council's main resolution on the subject of countering international terrorism, the problem of terrorism persists and, many would argue, has in fact entrenched itself and spread. The reasons are numerous, and debateable in some instances, but one thing the international community has agreed on in this regard is the recognition and relevance of conditions conducive to the spread of terrorism.

The UN Global Counter-Terrorism Strategy of 2006, reaffirmed in 2008 and 2010, recognises that human rights compliance while countering terrorism is an indispensable part of a successful medium- and long-term strategy to combat terrorism. The Strategy therefore identifies respect for human rights for all, and the rule of law, as one of its four pillars and as the fundamental basis of the fight against terrorism. In Pillar I, the Strategy also recognises that compliance with human rights is necessary in order to address the long-term conditions conducive to the spread of terrorism, which include the lack of rule of law and violations of human rights, national and religious discrimination, political exclusion, socio-economic marginalisation and lack of good governance. While making it clear that none of these conditions can excuse or justify terrorism, the Strategy represents a clear affirmation by all UN Member States that effective counter-terrorism measures and the protection of human rights are not conflicting, but rather complementary and mutually reinforcing goals. The Bucharest Action Plan similarly speaks of OSCE participating states taking a

comprehensive approach to the combating of terrorism, and also recognises that certain factors may engender conditions in which terrorist organisations are able to more easily recruit and win support.

**LESSON 6:
HUMAN RIGHTS VIOLATIONS THAT HAVE OCCURRED IN THE NAME
OF FIGHTING TERRORISM HAVE OFTEN FAILED TO BE
ACCOMPANIED BY ACCOUNTABILITY MEASURES AGAINST THOSE
RESPONSIBLE**

Accountability for human rights violations is a key aspect of the rule of law, but it is a matter that has gone unaddressed, or has been actively impeded, at both national and international levels concerning the conduct and complicity of State authorities in counter-terrorism operations and activities that have involved human rights violations. For example, despite the existence of evidence warranting investigations into “enhanced interrogation techniques” – including waterboarding and other conduct recognised as amounting to torture or other forms of cruel, inhuman or degrading treatment – as authorised by the US Bush Administration and undertaken by the Central Intelligence Agency, there has been a completely inadequate approach taken by the US Attorney-General to the investigation and prosecution of suspected perpetrators and commanders. In contrast, it has to be recognised that the Council of Europe has been conducting investigations into complicity in rendition flights, which have been accompanied by a systematic practice of enforced disappearances. Lithuania and Poland are currently conducting national investigations. Italy has investigated and convicted *in absentia* 23 CIA agents, although the Italian Government has not pursued the arrest warrants with the US since that time. The UN Human Rights Council has been similarly silent in selected cases, such as a failure by it to follow up on the recommendations of the Fact Finding Mission on the Gaza flotilla, and on the Goldstone report concerning Israeli and Palestinian conduct in the Gaza conflict.

Remembering that the Global Counter-Terrorism Strategy identifies the violation of human rights as a condition conducive to the spread of terrorism, this lack of accountability cannot be allowed to persist.

**LESSON 7:
THOSE WHOSE HUMAN RIGHTS HAVE BEEN VIOLATED MUST BE
GRANTED ACCESS TO EFFECTIVE REMEDIES, INCLUDING
REPARATION**

This is not a new principle. It is a right under international and regional human rights treaties, as well as customary international law rules concerning State responsibility. It is vital in this respect that those whose rights have been violated by counter-terrorism law and practice have free access to seek effective remedies, including in respect of privatised counter-terrorism functions. The former UN Special Rapporteur on counter-terrorism has identified this as one of ten best practices in the fight against terrorism, noting that remedial provisions should be framed in sufficiently broad terms so as to enable effective remedies to be provided according to the requirements of each particular case including, for example, release from arbitrary detention, compensation and the exclusion of evidence obtained in violation of human rights. Despite this, we have seen the inappropriate use of State secrecy doctrines, or other means of preventing the disclosure of information, to frustrate access to remedies.

**LESSON 8:
THE REGULAR REVIEW OF THE CONTENT AND OPERATION OF
COUNTER-TERRORISM LAWS AND PRACTICES ENSURES
EFFECTIVENESS AND CONTINUED RELEVANCE**

The regular review of counter-terrorism legislation, and its use, has been identified by the former UN Special Rapporteur as a best practice towards helping to ensure that special powers relating to the countering of terrorism are effective and continue to be required, and also to help avoid the “normalisation” or *de facto* permanent existence of extraordinary measures. Periodic review also enables legislative and executive assessments of whether the exercise of powers under counter-terrorism laws has been proportionate and thus whether, if such powers continue, further constraints on their exercise should be introduced. According to the report on best practices in countering terrorism, regular review should include: (1) annual government review of and reporting on the exercise of powers under counter-terrorism laws; (2) annual independent review of the overall operation of counter-terrorism laws; and (3) periodic legislative review.

**LESSON 9:
PROPORTIONALITY INVOLVES A BALANCE BETWEEN
AMELIORATING EFFECTS AND NEGATIVE IMPACTS, NOT BETWEEN
SECURITY AND HUMAN RIGHTS**

Recognising that there is an obligation to comply with human rights while countering terrorism (Lesson 1), and that human rights compliance and the countering of terrorism are complementary and mutually reinforcing goals (Lesson 5), the question practitioners often struggle to adequately deal with is that of proportionality. Due to the flexibility of human rights law, a careful application of this body of law allows effective responses to the challenges involved in the countering of terrorism. Such challenges must be achieved under legal prescriptions necessary to pursue legitimate aims such as national security or the protection of public safety, and proportionate to those ends. It is in this third element, proportionality, that approaches are too often taken that are incompatible with human rights law.

When speaking of proportionality, it must be made clear that there is no trade-off to be made between security and human rights. We are not speaking here of a “zero sum game”, a situation in which one participant’s gains result only from another’s equivalent losses. As captured in his now famous statement, former UN Secretary-General Kofi Anan reflected on the three pillars of the United Nations and wrote in his report *In Larger Freedom*: “...we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights”. In the counter-terrorism and human rights context, the UN Rapporteur has succinctly stated that the balance is to be found within human rights law itself: “Law is the balance, not a weight to be measured”, he said.

**LESSON 10:
VICTIMS OF TERRORISM HAVE IN LARGE PART BEEN INADEQUATELY
CONSIDERED IN THE FIGHT AGAINST TERRORISM**

The situation of victims of terrorism is a matter that falls within the human rights paradigm, because of the duty under international human rights law for States to protect those within their territory and jurisdiction against the impairment of their rights by non-State actors, including terrorists. The situation of victims of terrorism has nevertheless been too often overlooked by States,

other than in an *ad hoc* manner and sometimes only in the immediate aftermath of a terrorist attack. Although the UN Human Rights Council recently decided to proclaim 19 August of each year as the International Day of Remembrance and Tribute to the Victims of Terrorism, there is still no international compensation fund for victims of terrorism. This is despite the issue of compensation having been on the agenda of the Security Council's resolution 1566 Working Group since 2005, and also despite the Permanent Council Decision No 618 of 2004 inviting OSCE participating States to explore the possibility of introducing or enhancing appropriate measures for support, including financial assistance, to victims of terrorism.

The Global Counter-Terrorism Strategy calls on UN Member States to protect the rights of victims of terrorism; and to consider putting into place national systems of assistance that would promote the needs of victims of terrorism and their families. Addressing the rights and situation of victims of terrorism represents a best practice not just because it assists victims to rebuild their lives, but it can also help to reduce tensions in society that might themselves result in conditions conducive to the spread of terrorism. Bringing the perpetrators of terrorist acts to justice is also vitally important in this regard.

These ten lessons are just some of the key lessons to be taken from national, regional and international experiences in combating terrorism over the past decade. They are all fundamentally linked to suppressing conditions conducive to the spread of terrorism; and to the recognition that the combating of terrorism and the protection of human rights are mutually reinforcing and vital to achieving a sustainable strategy to the countering of terrorism. To paraphrase a statement of the UN High Commissioner for Human Rights to the Human Rights Council just two weeks ago, a failure to recognise and implement this principle of mutual reinforcement "...too often [leads] to an erosion of rights and foster[s] a culture of diffidence and discrimination which, in turn, perpetuates cycles of violence and retribution".