

*Launching Event: Joint ODIHR and OSCE Transnational Threats
Department / Strategic Police Matters Unit
Manual on Human Rights in Counter-Terrorism Investigations
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KEYNOTE ADDRESS

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Madam Chair,
Excellencies,
Ladies and Gentlemen and Distinguished Experts,

It is a great pleasure and honour to address this audience during this launch of the manual on *Human Rights in Counter-Terrorism Investigations*. This is an important tool in the identification and implementation of human rights-compliant measures to prevent and counter terrorism. The aim of the manual – to provide law enforcement officers in the OSCE region with concrete guidance – is key. It serves as a practical tool; it demonstrates how human rights and counter-terrorism are complementary and reinforcing; and it speaks to the commitment of OSCE participating States to make human rights compliance in the fight against terrorism a reality.

I have been asked, in this address, to explain the link between human rights protection and effective counter-terrorism practices; and to highlight how human rights are themselves useful tools to successfully preventing and countering terrorism. In doing so, I will focus on the subject matter of the manual by pointing to five law, policy and practical reasons that human rights compliance is required and/or contributes to the prevention and countering of terrorism.

First

As mentioned in the welcoming remarks, human rights compliance is an obligation of States under international law. I do not propose to labour this point. We know it. And at the very least we speak it.

We know that human rights compliance while countering terrorism is an international obligation. It stems from customary international law,

applicable to all States, and international treaties, applicable to States parties. The *UN Global Counter-Terrorism Strategy* resolves that States will take urgent action to implement all resolutions on measures to eliminate international terrorism, including those concerning the protection of human rights and fundamental freedoms while countering terrorism. In that regard, both the General Assembly and the Security Council have emphasized that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular international human rights, refugee and humanitarian law.

It is also worth recalling that human rights law is itself one of the bases of the responsibility for countering terrorism. States have both a right and duty to protect individuals under their jurisdiction from acts of terrorism and to bring terrorists to justice. This is part of international and regional human rights law; it stems from the general duty of States to protect individuals under their jurisdiction from interference with their enjoyment of human rights. This includes States' obligations to ensure respect for the right to life and the right to security. As stated in the International Commission of Jurists' *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*: "...safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the State".

Second

Looking at the investigative stage of counter-terrorism cases, we need to consider the gathering of evidence. How does human rights compliance assist the investigator? What are the consequences of non-compliance with human rights in the gathering of evidence? Whether or not they think of this as part of human rights, all police know the answer: the advantages of compliance are enormous. Human rights compliance means that there will be an exponentially greater chance that the precious resources dedicated to terrorist investigations will result in the admissibility of evidence. And the contrary is clear: non-compliance with human rights means that there will be an exponentially greater chance that investigative efforts will be for nothing.

This position can be illustrated in several contexts. I will refer to two such situations.

The first of these concerns the questioning of suspects and witnesses. Several human rights norms apply to the treatment of detained persons and the measures used in the eliciting of statements from persons under the control of investigating authorities. This is a matter addressed in Session 3 of this meeting, but let me reiterate some key points in that regard.

The International Covenant on Civil and Political Rights (the ICCPR) is one the core international human rights instruments, to which 161 States are parties, and also represents in many respects a codification of applicable customary international law and of relevant aspects of the Universal Declaration of Human Rights. The ICCPR requires that all persons deprived of their liberty “shall be treated with humanity and with respect for the inherent dignity of the human person”. This right to humane treatment is supplemented by other provisions of the ICCPR, as well as other international instruments. Of particular relevance, the guarantee of humane treatment supplements the absolute prohibition against torture or cruel, inhuman or degrading treatment. The ICCPR also requires, as a minimum guarantee in any criminal trial, that every person is entitled “not to be compelled to... confess guilt”.

These obligations and guarantees require domestic law to ensure that statements obtained by torture or ill-treatment are excluded from evidence, including during a state of emergency. While the Convention against Torture expressly applies this rule only to statements obtained by torture, the Committee against Torture has interpreted this prohibition to apply also to ill-treatment, and the ICCPR does not make this distinction. Nor does customary international law. Where it is alleged that a statement was obtained by torture or ill-treatment, the burden is on the State to prove that the statement was made of the person’s own free will.

This is addressed in the manual on *Human Rights in Counter-Terrorism Investigations*. Chapter 3 addresses the questioning of terrorist suspects. The title to section 3.5.1 highlights that torture and ill-treatment “should be outlawed in domestic law”. The chapter reflects that OSCE participating States have committed themselves to criminalise all acts of torture and ill-treatment. The point I would make here is that this is not just an OSCE commitment but also an obligation under international law: under the ICCPR,

under the Convention against Torture, under the European Convention on Human Rights and under customary international law. So, as a matter of law, I would go further than this title of the manual: it is not that States “should” outlaw torture and ill-treatment in domestic law; States are legally obliged to do so.

The manual reiterates that any statements made as a result of torture or ill-treatment must not be used as evidence in court, except in proceedings against the perpetrator of torture or ill-treatment. It goes on to identify various compelling reasons why the use of torture and ill-treatment is an ineffective tool in obtaining information, ranging from: its detrimental effect on (1) current and future investigations, (2) police-community relations, and (3) the victims of such treatment; as well as the inherent unreliability of information obtained by such means.

In short, if a statement is obtained through compulsion, including through torture or ill-treatment, that statement must be excluded from evidence. Whether coming from a suspect or a witness, that information will therefore be useless in any prosecution case.

The second situation comes about where States adopt procedures to legally require a person to answer questions by intelligence services. This is a tool used by some countries for the gathering of intelligence concerning terrorist threats. Where such measures exist, it is essential that information obtained under this process does not violate the privilege against self-incrimination (the right not to be compelled to confess guilt). This means that information provided must be restricted to the gathering of intelligence; it cannot be used as evidence in criminal proceedings against the person who is compelled to answer questions. This principle is referred to in some countries as the application of ‘use immunity’ to information obtained by compulsion.

It is equally important that there is no ‘derivative use’ of the information. The UN Special Rapporteur on human rights while countering terrorism has taken the view, for example, that law enforcement officers should not be present during intelligence-gathering hearings. This is important to ensure that information provided during the hearing does not steer police officers who are present towards a particular line of inquiry; one that would not otherwise have been pursued. If police officers are present

during intelligence-gathering hearings, any evidence obtained through a line of inquiry that is pursued as a result of information at the hearing should not be used in criminal proceedings against the person giving the information. This does not prevent all potential use of the information, and does not affect its role in the intelligence setting, but it respects the privilege against self-incrimination. And, as expressed by the Special Rapporteur: “A clear demarcation should exist and be maintained between intelligence gathering and criminal investigations”.

Also considering the investigative stage, the manual on *Human Rights in Counter-Terrorism Investigations* addresses, amongst other things: surveillance and the interception of communications; the seizure and retention of evidence; and the stopping and searching of suspects.

Third

Looking at the trial stage of counter-terrorism prosecutions, we should consider the impact of the investigative and pre-trial phases on the ability to obtain terrorism convictions. In other words, how does human rights compliance during the investigative and pre-trial phases contribute to the likelihood of a sound conviction at trial?

From the second topic just addressed, one point should be obvious: human rights compliance means that there will be an exponentially greater chance that evidence gathered during the investigation will result in its admissibility at trial. Statements obtained without recourse to torture or ill-treatment will not be barred from admissibility, unless they fail to meet normal admissibility criteria such as rules against hearsay evidence. Material obtained through the exercise of lawful and reasonable search and seizure should similarly be admissible. These features apply to the purely investigative aspects of the pre-trial phase.

Added to this, there is the important question of the detention of persons prior to trial. There are numerous applicable guarantees, many of which are addressed in the manual launched today. Bearing in mind certain practices, especially those over the past 12 years, a matter of particular concern in the counter-terrorism context is prolonged detention. I am speaking here about the prolonged detention without charge or without trial of persons who have allegedly committed or otherwise supported terrorist

acts. This may occur, for example, in the context of what is sometimes referred to as ‘preventive’ detention, meaning the detention of persons for the purpose of preventing their engagement in certain activities, including interference with witnesses or destruction of evidence; or ‘investigative’ detention, referring to the detention of a person to allow police to gather further evidence to allow charges to be brought against the person.

What are the risks of such forms of detention? And how might these risks impact on the aim of bringing terrorists to justice?

Prolonged detention without trial gives rise to the risk of multiple violations of human rights; each have consequences that run counter to the prevention and combating of terrorism. Experience has shown that prolonged detention increases the likelihood that individuals will be subjected to solitary confinement and/or situations of detention that are contrary to the prohibition of torture and ill-treatment. Furthermore, although detention without charge may in certain circumstances be allowed for security reasons, such detention must always be accompanied by regular and effective review of the continued need for detention. The burden for establishing this is on the State. The ICCPR reaffirms this principle, under the procedure known in many countries as *habeas corpus*, which must be available at all times and under all circumstances, including during states of emergency. The UN Working Group on Arbitrary Detention has made it clear that violation of these norms will almost inevitably render the detention of a person arbitrary. In that case, release of the person would be required; as well as compensation for the arbitrary deprivation of the person’s liberty.

In the current context, we must also recall that the ultimate aim of convicting perpetrators of terrorism will be severely undermined by prolonged pre-trial detention. As a minimum guarantee in criminal trials, the ICCPR requires that an accused person be tried without undue delay. Furthermore, as reaffirmed by the Special Rapporteur on counter-terrorism when he considered the situation of detainees at Guantanamo Bay in 2007, “the detention of persons for a period of several years without charge fundamentally undermines the right of fair trial”. In such cases, where the right to a fair trial is violated, the State will have thereby put itself in the invidious position of establishing grounds to challenge the validity of any conviction, or of the possibility of a trial altogether.

Fourth

To this stage, then, we can say that human rights compliance contributes to: (1) the potential to use at trial of evidence gathered during the investigation of a terrorist act; and (2) the successful prosecution of a terrorist that will result in a sound conviction. In other words, it means that perpetrators of terrorist acts are effectively and promptly brought to justice.

This is important not only for its own sake, but also when viewed from the perspective of the victims of terrorism. There is an increased recognition by States of the need for victims of terrorism to be provided with legal status and with protection of their human rights, including their rights to justice, truth and reparation. Victims of terrorism not only have a personal interest in seeing that terrorists are brought to justice; the very act of bringing perpetrators to justice contributes to the right of victims to know the truth. This constitutes a measure of satisfaction, which is an element of reparation. Since those affected by serious crimes must be able to seek and obtain effective remedies and reparation – as required by the ICCPR and reflected in the *Impunity Principles* – bringing terrorists to justice constitutes an important aspect of States' ability to satisfy the right of victims of terrorism to remedies and reparation.

We should also recall that the dehumanisation of victims of terrorism is recognised as a condition conducive to the spread of terrorism. The effective (meaning the human rights-compliant) investigation and prosecution of terrorists therefore runs full circle: from victim, to convicted perpetrator, to partly repaired victim, and thereby to avoiding further conditions conducive to the spread of terrorism.

Mention of conditions conducive to the spread of terrorism brings me to my last point.

Finally

Added to the legal and practical benefits listed, we must recall the underlying policy basis for human rights compliance while countering terrorism. This should not only be done because it is legally required, or because it has practical benefits, or because it is the right thing to do – all of which are valid reasons by themselves. In adopting and reaffirming the *UN Counter-Terrorism*

Strategy, the international community has recognised that compliance with human rights and the rule of law on the one hand, and the prevention and combating of terrorism on the other, are not conflicting goals but, rather, are complementary and mutually reinforcing goals.

We are not speaking here of a trade-off to be made between achieving security and protecting human rights; we are not speaking of a “zero sum game” (a situation in which one participant’s gains result only from another participant’s equivalent losses); we are not speaking of two coins (one for human rights, one for counter-terrorism) that must, according to their value, be placed on a scale and balanced against each other. Because human rights and counter-terrorism are in fact part of the same coin; the head of the coin cannot exist without the tail, and vice versa.

In his now famous statement, Kofi Anan wrote “...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”. This is closely linked to what was said by the *High-level Panel on Threats, Challenges and Change*. The Panel concluded that recruitment by international terrorist groups was aided by grievances that are nurtured by factors including poverty and the absence of human rights and democracy. The *Counter-Terrorism Strategy* therefore resolves to undertake measures aimed at addressing the conditions conducive to the spread of terrorism. The *Strategy* describes these conditions to include “lack of the rule and violations of human rights”.

So, while making it clear that none of these conditions can excuse or justify terrorism, the *Strategy* represents a clear affirmation that an effective counter-terrorism strategy involves compliance with human rights and the rule of law. Not only is human rights compliance when countering terrorism a legal obligation; not only does it contribute to the ability to rely at trial on evidence obtained during investigations; not only does it contribute to ensuring that pre-trial detention does not undermine the trial of terrorist suspects; not only does it thereby contribute to the realisation for victims of terrorism of their rights to truth and reparation; but it is also the essential basis for a sustainable, long-term approach to the countering of terrorism.