

## **Presentation on comprehensive assessment of EU security policy**

### **LIBE Committee, 11 May 2017**

On behalf of the International Commission of Jurists (ICJ), I am grateful for this opportunity to contribute to such a timely and important discussion. We welcome the remarks of Commissioner King, and in particular his emphasis on the importance of human rights principles in countering terrorism.

The ICJ is an organisation of lawyers and judges from all regions of the world that works to uphold the rule of law and human rights. For more than six decades, since the ICJ's foundation in 1952, our aim has been to ensure that legal systems are effective in protecting human rights. We have seen again and again that it is in situations where the system is under pressure or threat, such as following terrorist attacks or in states of emergency, that the strength of the rule of law, and the legal system's capacity to protect human rights is most tested.

Globally, the experience of the ICJ has been that, too often, security and counter-terrorism measures have disregarded human rights obligations and rule of law principles, leading to violations of human rights, and to undermining, not strengthening, security.

Notably, an ICJ expert panel report of 2009 which analysed the impact of counter-terrorism measures taken around the world following the September 2001 attacks, found that many states, failing to learn the lessons of history, had "allowed themselves to be rushed into hasty responses, introducing an array of measures which are undermining cherished values as well as the international legal framework carefully evolved over at least the last half-century."

Today, as the EU and its Member States strive to address developing threats of terrorist attacks while upholding the rule of law and human rights, these mistakes can and must be avoided. An EU security strategy which is informed by past experiences, and by wide consultation, debate, and scrutiny of proposals, is the most likely to be effective.

Above all, to be credible, and to ensure long term security, EU security and counter-terrorism strategies must be rooted in the rule of law and in the protection of human rights.

Crucially, it should be made clear in any security strategy that protecting human rights and ensuring security are not opposing aims – rather they are complementary and mutually re-enforcing objectives. Indeed, under international human rights law, states have positive obligations to protect

the lives and safety of people under their jurisdiction, including from terrorist threats. They have duties to criminalise, investigate and bring to justice the perpetrators of terrorist acts.

Equally, states have obligations to protect the rights to freedom of expression, association, freedom of movement, the right to liberty and to fair trial, of those who are suspected of terrorist acts, and to protect against discriminatory application of these measures.

On a practical level, counter-terrorism measures that are compliant with human rights and the rule of law reinforce the credibility and legitimacy of the response to terrorism. Conversely, as we have seen before, violations of human rights in countering terrorism may actively threaten security, creating disaffection and encouraging resort to terrorist or other criminal acts.

At the heart of a human rights response to terrorism, must be principles of legal certainty, necessity and proportionality of the response, and non-discrimination. The principle of proportionality implies that counter-terrorism measures must intrude on human rights to the least extent necessary to ensure security, and that the need for and impact of such measures must be continually reassessed and evaluated in light of the circumstances in which they are applied.

In this regard we have concerns about the recent Directive on Combatting Terrorism, which builds on the previous Framework Decision, and extends its scope to address issues related to so-called "foreign terrorist fighters". The measures in the Directive draw heavily on Security Council Resolution 2178 and on the Council of Europe Protocol to the Convention on Terrorism. Following these international instruments, the Directive was agreed through an expedited procedure with, in the view of the ICJ, insufficient scrutiny or consultation.

The offences introduced by the Directive criminalise a wide range of conduct ancillary or preparatory to or associated with terrorism, some of which is very far removed from the principal, violent terrorist act. The way in which they are defined therefore calls for particular vigilance and precision.

The Directive includes offences of travel for purposes of terrorism or for the purposes of participation in a terrorist group, with "participation" subject to broad definition that appears to include relatively minor contributions or conduct that may have no little or no proximate link to terrorist acts. It includes offences of providing and of receiving training for terrorism, and financing, assistance, and participation in a terrorist group. The Directive also provides for an offence of direct and indirect incitement, including glorification, of terrorism. All of these offences are based on a broad definition of terrorist offence in Article 3 of the Directive.

Without careful definition, in particular as regards the intent of the perpetrator, offences with such a low degree of proximity to a violent

terrorist act are difficult to justify as necessary and proportionate to combat terrorism.

We are concerned that without sufficient safeguards, they may lead to national criminal laws that can be applied arbitrarily or disproportionately in violation of human rights – of freedom of expression, association, freedom of movement, privacy rights, the right to liberty - or in a way that discriminates against minority communities.

Although the Directive contains human rights safeguard clauses in Article 23, this, without more, will not protect against the arbitrary or excessive application of the measures.

To ensure that the Directive fulfils its stated aim of upholding the fundamental values of the EU, careful national implementation measures, that define criminal offences with sufficient precision in national law and apply procedural safeguards, will be crucial. Human rights principles will have to be taken into account by national authorities in developing implementing legislation and guidance, but also by national prosecutors, judges, lawyers and law enforcement officials in implementation of the legislation in practice.

The EU institutions must do all in their power to support, encourage and review such implementation to ensure that it is in accordance with human rights standards and fundamental values of the EU. In particular, it is important that an EU security strategy should involve systems for evaluation of national counter-terrorism measures that integrates assessment, and regular re-assessment of their impact on human rights.