

**REFERENCE ON THE RULE OF
LAW IN COMBATING
TERRORISM**

**INTERIM REPORT OF THE
ADVISORY COUNCIL OF
JURISTS**

**ASIA PACIFIC FORUM OF
NATIONAL HUMAN RIGHTS
INSTITUTIONS**

18 FEBRUARY 2004

TERMS OF REFERENCE

The Seventh Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, held in New Delhi in November 2002, formulated a reference to the Advisory Council of Jurists¹ on the issue of the primacy of the rule of law in countering terrorism world-wide while protecting human rights. The terms of reference adopted by Forum members were:

- (i) how international human rights instruments and standards define 'terrorism', particularly with reference to other rights including the right to freedom of association and freedom of expression;
- (ii) the reasons for which a person can be deprived of their liberty under international law;
- (iii) the length of time for which a person can be detained without being charged with an offence under international law;
- (iv) the nature of special protections that should be extended to minors when imprisoned, detained or searched in accordance with international law;
- (v) the safeguards to be followed in the event of imprisonment or detention of a person in accordance with international law (eg, access to lawyers and consular assistance);
- (vi) what safeguards are stipulated by international law relating to the right to a fair trial in the event a person is charged with an offence;
- (vii) the manner in which search and seizure powers can be exercised in accordance with international law;
- (viii) the international human rights standards relevant to determining the penalties that can be imposed for committing acts associated with 'terrorism';
- (ix) the international human rights standards that can be derogated from and in what circumstances;
- (x) the relationship between anti-terrorism measures and the rights to seek asylum and to non-refoulement; and
- (xi) the nature of the obligations on States under international human rights instruments and standards which are to be kept in view while enacting and implementing anti-terrorist legislation, at the same time maintaining the primacy of the rule of law.

¹ The Advisory Council of Jurists' President is Mr Daman Nath Dhungana (Nepal), and the members are: Professor Gillian Triggs (Australia), Justice Anthony Gates (Fiji), Mr Fali S Nariman (India), Professor Jacob Sahetapy (Indonesia), Dato' Mahadev Shankar (Malaysia), Mr Jugnee Amarsanaa (Mongolia), Hon Justice Susan Glazebrook (New Zealand), the Hon, Mr Sedfrey Ordoñez (Philippines), Professor Kyong-Whan Ahn (Republic of Korea), Mr Rajendra Goonesekere (Sri Lanka) and Professor Vitit Muntarbhorn (Thailand). The Advisory Council welcomes its new members Justice Gates (Fiji), Justice Shankar (Malaysia), Professor Ahn (Republic of Korea) and Professor Muntarbhorn (Thailand).

1. PREFACE

The Advisory Council of Jurists ('the Advisory Council') is acutely conscious of national and international security concerns about the threat of terrorism. This has led to the proliferation of many national counter-terrorism laws. A realistic approach in tackling these concerns demands that a balance be struck between security concerns and human rights.

Today's challenge is to maintain the rule of law, particularly safeguards against abuse of power, and the commitment of the international community to human rights, including the fundamental rights which preserve human dignity, while also preserving the capacity to respond to national and international security concerns.

There are many human rights instruments and standards relevant to these issues which came into being before the current global pre-occupation with terrorism. Are those standards too high and no longer relevant today? Do they expect too much, and do they impose too many burdens on those who wish to counter terrorism?

The Advisory Council considers that those human rights instruments and standards remain vitally relevant today. They were designed to be interpreted in an evolving context. They are flexible enough to respond to terrorism within the framework of international law.

The Security Council confirms that States, when enacting and implementing anti-terrorist legislation, must do so consistently with human rights instruments and standards:

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.²

² Security Council Resolution 1456, 20 January 2003.

Indeed, the UN Secretary General has observed that human rights along with democracy and social justice will, in the long-term, be one of the best prophylactics against terrorism.³

2. RECOMMENDATIONS AND OBSERVATIONS

- The Advisory Council observes that any comprehensive response to terrorism must address its root causes.
- Regional and international co-operation is essential in order to combat terrorism in all its manifestations.
- Any counter-terrorism measures must be enacted and administered within a culture of legality and must comply with international law including human rights instruments and standards.
- The rule of law can only be secured with an independent judiciary and independent legal profession.
- The Advisory Council expresses its concern that there is a widening gap between commitment to international human rights standards and their implementation in national laws and administrative practices. In particular, the Advisory Council draws attention to the following disturbing practices:
 - Administrative detention for prolonged periods without charge or opportunity for adequate judicial review;
 - Detention without notification of family of the date and place of detention;
 - The failure to ensure access to legal advice from the time of detention;

³ Statement to the Security Council, 18 January 2002.

- The failure to protect the special rights of children in the administration of anti-terrorism legislation;
 - Extrajudicial killings, such as in ‘fake encounters’;
 - The grant of impunity for gross violations of human rights;
 - Overly expansive and vague definitions of terrorism in national laws which risk restricting rights such as freedom of speech, expression and association;
 - The misuse of anti-terrorism legislation to stifle legitimate political dissent and other fundamental freedoms;
 - The failure to provide adequate safeguards in anti-terrorism legislation to prevent their misuse; and
 - Promulgation of counter-terrorism measures by executive decree without adequate parliamentary scrutiny.
- The Advisory Council recommends that immediate steps be taken by all relevant authorities to ensure that these unacceptable practices cease forthwith.
 - National Human Rights Institutions (NHRIs) should be conscious of the above matters in the performance of their functions, including complaint handling and monitoring of human rights performance within their jurisdiction.
 - NHRIs should seek to influence legislators and inform public debate about the human rights implications of counter terrorism measures and the legal obligations of States in relation to international human rights instruments and norms.
 - NHRIs should take an active role in educating all sectors of the community, for example, lawyers, journalists, doctors, police, the military, the judiciary and legislators, on the meaning and application of the international law of human rights and the general principle of the rule of law.

3. ANSWERS TO QUESTIONS POSED BY THE REFERENCE

(i) **How international human rights instruments and standards define ‘terrorism’, particularly with reference to other rights including the right to freedom of association and freedom of expression**

- There are no international human rights instruments and standards that define terrorism.
- However, there is a general working definition contained in Article 2 of the UN Draft Terrorism Convention, which provides:

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally causes:

- (a) death or serious bodily injury to any person; or
- (b) serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility, or the environment; or
- (c) damage to property, places, facilities or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

- This definition has been used in counter-terrorism laws in the region and may therefore be gaining acceptance as an appropriate definition.
- However, the Advisory Council notes that in any measures designed to counter terrorism, particular attention needs also to be given to ensuring respect for the right to freedom of expression and freedom of association.
- States must avoid including, within any definition of ‘terrorism’ or associated definitions (such as ‘terrorist’, ‘terrorist organisation’ and ‘terrorist act’), legitimate and peaceful political action and protest.

(ii) The reasons for which a person can be deprived of their liberty under international law

- Under international law, deprivation of liberty must be:
 - in accordance with law; and
 - not arbitrary.
- For detention not to be arbitrary, it must be:
 - for a legitimate purpose;
 - necessary and proportionate in pursuit of such purpose; and
 - non-discriminatory.

(iii) The length of time for which a person can be deprived of their liberty under international law without being charged

- Anyone arrested or detained for any reason has the right to be brought promptly before a judicial officer to challenge the legality of their detention.
- In addition any person arrested or detained on a criminal charge, including a terrorist offence, is entitled to be brought promptly before a judicial officer (with a delay of no more than a few days even in the context of terrorist offences) and is entitled to trial within a reasonable time.
- Even where detention is lawful and not arbitrary at inception, it can become arbitrary if the length of detention is not necessary and proportional to the circumstances. There should be an opportunity for regular judicial review of the continuing necessity for detention.
- It is recognised that terrorist offences are serious offences and may present particular security concerns. The investigation of these offences may also take longer because of their complexity and possible international component. All of these factors must be weighed by a judicial authority when making a

decision as to the necessity to detain and the appropriate limits on the length of detention.

(iv) The nature of special protections that should be extended to minors when imprisoned, detained or searched in accordance with international law

- Minors/children must be treated in accordance with the Convention on the Rights of the Child and related rules which require special protection for those under 18 years of age. The overriding principle is that the best interests of the child must be a primary consideration.
- In particular, imprisonment or detention of children must only take place as a measure of last resort and be for the shortest possible period of time.
- The Advisory Council notes the disturbing trend towards the use of children in terrorist acts. This breach of children's rights must be proscribed by law and active measures taken to prevent and eliminate such practices while providing adequately for social recovery and reintegration of the children concerned.

(v) The safeguards to be followed in the event of imprisonment or detention of a person in accordance with international law

- Every person detained is entitled to be treated with humanity and with respect for the inherent dignity of the human person.
- In particular, in addition to effective judicial review of detention and due process rights, the following safeguards apply to all detention and imprisonment:
 - The right to be free from torture;
 - Humane and appropriate conditions of incarceration;
 - Notification of and access to family;
 - Access to legal counsel;
 - Consular assistance; and

- The right to an interpreter.

(vi) What safeguards are stipulated by international law relating to the right to a fair trial in the event a person is charged with an offence

- Every person who is charged with an offence, including a terrorist offence, is entitled to a fair hearing by a competent and impartial tribunal established by law.
- Everyone charged with an offence has the right to be presumed innocent until proved guilty.
- Other key safeguards include:
 - The right to be informed of the nature and cause of the charge;
 - The right to adequate facilities for the preparation of a defence, including the right to legal counsel;
 - The right to defend themselves or through legal assistance of their own choosing;
 - The right to examine witnesses; and
 - The right not to be compelled to testify against oneself or confess guilt.
- The Advisory Council recognises that there may be particular concerns in terrorism trials with issues of witness protection and the use of classified information. In these circumstances it is important that any measures to protect witnesses and classified information be consistent to the greatest extent possible with the rights set out above and that they be authorised by the judicial authority trying the case.

(vii) The manner in which search and seizure powers can be exercised in accordance with international law

- Under international law any exercise of search and seizure powers, including interception warrants, must be lawful and not arbitrary (ie must be necessary and proportional). In particular, such measures must:
 - be non-discriminatory; and
 - take into consideration rights to privacy, family and correspondence.
- There may be justification for restricting the right to privacy in light of the threat to national security posed by terrorism. Any information gathering powers, including the power to apply for interception warrants, must, however, be clearly defined and subject to judicial oversight. They must also be necessary and proportional to the threat to national security and non-discriminatory.

(viii) The international human rights standards relevant to determining the penalties that can be imposed for committing acts associated with ‘terrorism’

- Penalties can only be imposed after a fair trial in accordance with law and by a competent, duly constituted and impartial tribunal.
- The Conventions on Terrorism require, for the crimes covered by those conventions, the imposition of appropriate penalties which take into account the grave nature of the offences.
- Penalties should be appropriate, reasonable and proportionate to the crime.
- International law prohibits cruel, inhuman and degrading punishment. International law does not specifically prohibit the death penalty. However, the death penalty may be imposed only for very serious crimes. The death penalty must not be imposed on those who were children at the time of an offence and must not be carried out on pregnant women.

- The Advisory Council notes with concern incidents of extra-judicial killings, being killings by law enforcement officers, the military or vigilante groups outside of the judicial process and without lawful excuse.
- Such killings are contrary to the fundamental human right not to be arbitrarily deprived to life. The perpetrators should not be entitled to claim immunity from prosecution in respect of such crimes.

(ix) The international human rights standards that can be derogated from and in what circumstances

- In no circumstances whatsoever can torture or cruel, inhuman and degrading treatment and punishment be justified.
- Certain human rights have become norms of customary international law, including the right to be treated humanely while in detention and certain minimum standards of due process. Such norms must always be complied with by all States.
- Departure from some other human rights standards might be permissible under the ICCPR:
 - In times of lawfully proclaimed public emergency which threaten the life of the nation; and
 - Where departure from those rights is non-discriminatory and strictly necessary and proportionate to the emergency.

(x) The relationship between anti-terrorism measures and the rights to seek asylum and to non-refoulement

- Anti-terrorism measures should not undermine access to asylum for refugees (those fleeing their country of origin by reason of well-founded fear of persecution).

- Terrorists are, however, excluded from refugee protection. Refugee status cannot be claimed by any person where there are serious reasons for considering they have committed:
 - crimes against peace, a war crime or a crime against humanity;
 - serious non-political crimes; or
 - acts contrary to the purposes and principles of the United Nations.
- Where a person has grounds for claiming refugee status, but where there are also reasons for suspecting them as a terrorist, they should have access to fair status determination procedures to assess their claim to refugee status and whether they are excluded from refugee protection.
- Non-refoulement (non-return of refugees to a country in which there is a well-founded fear of persecution) is a customary rule of international law binding on all States.
- An exception is permitted where a person has been convicted of a serious crime or where there are reasonable grounds for regarding them as a danger to the country in which they are seeking asylum. In such cases there should also be a fair procedure to determine whether a person comes within such exception.
- Even if a person is not entitled to protection as a refugee, he/she cannot be returned to a situation where they are likely to face torture.

(xi) The nature of the obligations on States under international human rights instruments and standards which are to be kept in view while enacting and implementing anti-terrorist legislation, at the same time maintaining the primacy of the rule of law

- International human rights standards impose obligations upon States when enacting and implementing anti-terrorist legislation.

- International human rights standards guarantee the primacy of the rule of law and this must be borne in mind as a priority in enacting and implementing anti-terrorist legislation.
- International human rights standards should not simply be ‘kept in view’ in enacting anti-terrorist legislation, but they must be guaranteed and incorporated into national laws and practices.

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