Terrorism, counter-terrorism and human rights

Excerpt compiled by Susannah Cowen, Cape Bar, from the executive summary of a report entitled 'Assessing Damage, Urging Action', *which was released in February 2009 by the* Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights *established under the auspices of the International Commission of Jurists. The chair of the Panel, which was composed of eight judges, lawyers and academics from all regions of the world, was former Chief Justice and first President of South Africa's Constitutional Court, Justice Arthur Chaskalson.The executive summary of the report dealing with its recommendations is itself a summary of the Panel's detailed recommendations and argument in respect of each proposal.*

'[T]he responses to the events of 11 September 2001 have changed the legal landscape in countries around the world. ... [A]s a result of the cumulative impact of counter-terrorism policies that are being pursued, the international legal order based on respect for human rights, built up painstakingly during the second half of the last century, is in jeopardy.' From the introduction to the report.

The full report and executive summary can be accessed online at www.icj.org and is an important read for anyone concerned about the impact of that fateful day on the global order and the challenges that we now face. We should perhaps also take note of another example of how South Africa's judicial leadership has contributed to shaping global dialogue.

The mandate of the Panel was 'to examine the compatibility of laws, policies and practices adopted to counter terrorism with the rule of law, international human rights law and, where applicable, international humanitarian law (the laws of war).' Notwithstanding international law obligations to respond to terrorism in accordance with human rights law, refugee law and international humanitarian law, the Panel concluded that 'what had happened, … is that in the formulation and implementation of counter-terrorist policies, established principles of international human rights and humanitarian law are being questioned and at times ignored, not only by regimes whose record for doing so is well known, but also by liberal democracies that used to be in the forefront of promoting and protecting human rights.'

Stocktaking and repairing the damage

There is a need to take stock, take remedial action, and make a fresh start. Measures need to be taken at the international, regional and national levels:

Internationally: All UN bodies, including the Security Council, should take a leadership role in restoring respect for human rights in the counter-terrorism efforts of its agencies and Member States. In particular, the Human Rights Council should develop a detailed plan of action and ensure a systematic follow-up to the recommendations of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

Regionally: Relevant organisations should conduct a comprehensive review of regional agreements and measures on counter-terrorism, and review, where necessary, the mechanisms to ensure compliance with human rights standards, including mechanisms for monitoring implementation by Member States.

Nationally: States should undertake comprehensive reviews of their counter-terrorism laws, policies and practices, including in particular the extent to which they ensure effective accountability, and their impact on civil society and minority communities. States should adopt such changes as are necessary to ensure that they are fully consistent with the rule of law and the respect for human rights, and to avoid all over-broad definitions which might facilitate misuse.

Preventing the normalisation of the exceptional

States should take explicit precautions to ensure that any measures, intended to be exceptional, do not become a normal part of the legislative framework. Precautions could include ensuring that any new counter-terrorist laws or measures:

- fill a demonstrable gap in existing laws;
- comply with all the requirements of international human rights law, and where relevant, international humanitarian law;
- are subject to clear time-limits;
- are subject to periodic independent review, not solely as to implementation, but also as to the continuing necessity and proportionality of the measure;
- and that the review process monitor that any formal derogations entered by the State are only in place for as long as terrorism poses a genuine threat to the life of the nation, and are in compliance with all substantive and procedural requirements of relevant instruments.

Equality and non-description

States must ensure that counter-terrorist measures are non-discriminatory, and that due respect be paid to the rights of those, such as juveniles, women and minority communities, who may experience terrorism and counterterrorism measures differentially. A particular effort must be made to ensure that people are not treated as terrorist suspects on the sole basis of their ethnicity, religion, or similar identity.

Accountability in counter-terrorism measures

States should ensure alleged, effective inquiries, with proper disclosure, should be established. Accountability should be strengthened on all levels and, in particular, provisions for immunity, indemnity clauses, and limitations on access to courts should be removed. Effective remedies and accountability depend to a large extent on a strong, independent and knowledgeable judiciary and legal profession: efforts should be made to strengthen the criminal justice system, that where human rights violations have been including the provision of technical assistance where needed.

Repudiating the war paradigm

The incoming US administration should reaffirm the US's historic commitment to fully uphold and faithfully apply the laws of war during situations of armed conflict and recognise that human rights law does not cease to apply in such situations. Accordingly, it should seek the repeal of any law and repudiate any policies or practices associated with the' war on terror" paradigm which are inconsistent with international humanitarian and human rights law. In particular, it should renounce the use of torture and other proscribed interrogation techniques, extraordinary renditions, and secret and prolonged detention without charge or trial.

It should also conduct a transparent and comprehensive investigation serious human rights and/or humanitarian law violations committed in the course of the' war on terror" and should take active steps to provide effective remedies to the victims of such abuses. The military detention centre at Guantánamo Bay should be closed in a human rights compliant manner and persons held there should be released or charged and tried in accordance with applicable international law standards.

Other countries that have been complicit in human rights violations arising from the war paradigm should similarly repudiate that behaviour and review legislation, policies and practices to prevent any such repetition in future.

Human rights compliant intelligence efforts

States should take steps to ensure that the work of intelligence agencies is fully compliant with human rights law. The powers of intelligence and law enforcement should be separated and intelligence agencies should not in principle have the power to arrest, detain and interrogate; if intelligence agencies are assigned such powers, the powers should be exercised in conformity with human rights standards.

Care should be taken to regulate by law the powers of intelligence agencies, the gathering of intelligence and the sharing of intelligence with other agencies. It is also imperative to establish independent oversight mechanisms. There should be precise rules on the protection of privacy and measures such as surveillance and interception of communications should require judicial authorisation.

States should provide effective remedies and reparation for human rights violations (including those carried out by their intelligence services) and conduct thorough and independent investigations into allegations of human rights violations, such as renditions and secret detentions or ill-treatment. The need to maintain secrecy of intelligence services' activities must not deprive victims access to an effective remedy and reparation.

The prevention of terrorism

Measures to prevent terrorism, especially when based on secret intelligence, must be mindful of the fundamental rights of the individuals concerned. Administrative detention, control orders, the freezing of assets and other actions on the basis of terrorist lists, must in the first place be necessary and proportionate, limited in time, non-discriminatory and subject to independent periodic review. Furthermore, those affected must have an effective and speedy opportunity to challenge the allegation before a judicial body.

States should repeal laws authorising administrative detention without charge or trial outside a genuine state of emergency; even in the latter case, States are reminded that the right to habeas corpus must be granted to all detainees and in all circumstances.

States should ensure that immigration law does not serve as a substitute for criminal law in its counter-terrorism efforts and should, in particular, reaffirm their commitment to the principle of non-refoulement. They should not rely on diplomatic assurances or other forms of non-binding agreements to transfer individuals when there is a real risk of serious human rights violations.

The UN Security Council, the Council of the European Union and other organisations using a listing system should urgently comply with basic standards of fairness and due process, including, as a minimum, allowing affected persons and organisations the right to know the grounds of listing and the right to challenge such listing in an adversarial hearing before a competent, independent and impartial body.

Reasserting the value of the criminal justice system

States should ensure that their criminal justice law, and the various agencies of the criminal justice system, are 'fit for purpose' so that they can meet the long-term challenges posed by terrorism. Priority should be given to efforts to strengthen the capacity of ordinary law enforcement and judicial systems to enforce their existing criminal law and to improve international judicial cooperation. The international community should support such efforts, including by providing technical assistance where needed to strengthen States' ability to investigate complex crimes within a framework of the rule of law.

Repudiation of serious human rights violations

The international community should repudiate the serious human rights and humanitarian law violations that have been committed worldwide by many States in the name of countering terrorism. Given the ambiguity that has arisen around previously uncontested truths, it is vital to reiterate that all forms of torture, cruel, inhuman or degrading treatment, extra-ordinary renditions, and secret detention are illegal and unacceptable.

In support of Justice Goldstone

By Arthur Chaskalson, former Chief Justice of South Africa, and George Bizos SC, senior counsel at the Constitutional Litigation Unit of the Legal Resources Centre.

Following the publication of the Report of the United Nations Fact Finding Commission on Gaza, which he chaired, Justice Richard Goldstone has been subjected to a vicious attack on his character, clearly organised in an attempt to discredit the report by discrediting him. This seemed to us at the time to be reprehensible and to call for a response. We were not concerned with criticism of the report but with the scurrilous attacks on Justice Goldstone, who we hold in high regard, making clear that this was our concern. Those who disagree with the report are free to criticise its provisions; they should however do that, and not seek to discredit the report by attacking Richard Goldstone's character. Our response was published in the media. We do not intend to repeat all that we said then. But more recently there has been a scurrilous attack on Justice Goldstone's record as a judge in South Africa, published in Yediot Ahronot, an Israeli newspaper with a mass circulation in Israel, which leads us to repeat the following from our previous statement:

'Not every judge appointed during the apartheid era was a supporter of apartheid. There were a number among, them including Richard Goldstone, who accepted appointment to the Bench in the 70s and 80s in the belief that they could keep principles of the law alive. They included Michael Corbett, Simon Kuper, Gerald Friedman,