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EMINENT JURISTS PANEL on Terrorism, Counter-Terrorism and Human Rights

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Eminent jurists assess counter-terrorism laws in South Asia

Members of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights concluded their visit to India today. The Panel, an independent group of eight jurists appointed by the International Commission of Jurists (ICJ), is conducting a global inquiry on the impact of terrorism and counter-terrorism measures on the rule of law, human rights and humanitarian law.

Justice Arthur Chaskalson and Professor Vitit Muntarbhorn represented the Panel at two days of public hearings on the South Asian experience of terrorism and counter-terrorism. The Panel heard testimonies from present and former state officials, leading advocates, senior retired judges, representatives of bar associations, journalists, and national and international civil society organisations. Participants came from India, Nepal, Sri Lanka, Bangladesh, and the Maldives. The Panel members wish to express their gratitude to all those who appeared before it for their cooperation. They regret that despite their efforts they were not able to hear from a representative of the government of Sri Lanka.

The public hearing was the eleventh hearing by the Panel, which will issue a global report on terrorism, counter-terrorism and human rights towards the end of 2007. The hearing was organised by the Institute of Social Sciences (ISS). The members of the Panel wish to express their sincere gratitude to the Institute for its support.

The Panel members also held private meetings with senior governmental officials of India, including the Home Minister, the National Security Advisor to the Prime Minister, the Director General of the Border Security Force, the Special Representative to the Government of India for Jammu and Kashmir Dialogue and the Acting Chairperson of the National Human Rights Commission of India. They thank the authorities of India for their support and cooperation and the frank and open discussions.

The countries of South Asia share experiences of tragic and indiscriminate terrorist acts, both past and present. Some of them have faced long-running armed conflicts in which terrorist acts have been committed. Many Counter-terrorism laws and policies in the region predate the events of September 11, 2001. Participants noted that the changing international climate after these events lent new momentum and legitimacy to counter terrorism measures, which has led to robust and overbroad laws and policies in the region.

The Panel members and all those participating at the hearing recognize the responsibility of governments to protect citizens from acts of terrorism and the difficulties of doing so. There was consensus that an effective legal framework is required to successfully address the threat of terrorism, but that such framework has to respect international human rights and humanitarian law. This is also closely related to the need for peaceful political processes to settle conflicts. While the threat of terrorism and responses by the authorities of the five countries differ in many ways and need to be understood in a country specific context, they also share certain commonalities:

The Panel members were informed that in response to the terrorist threat, South Asian countries have resorted both at present and in the past, to special and extraordinary laws to

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fight terrorism. There was vigorous debate about the need for such laws. Several witnesses took the view that there is no need to enact them as the needed solution could be found under existing laws if properly enforced and implemented. Weak law enforcement and an ineffective criminal justice system was said to contribute to a perception that the laws are insufficient, giving rise to a sense of frustration among the public in several instances and putting governments under pressure to pass new laws. Participants suggested that the need of strengthening the rule of law and in particular the professionalism of law enforcement is more effective than the introduction of draconian new laws. Others considered that certain special powers were necessary, but stressed the importance of effective and stringent safeguards against abuse.

Participants recognized that extraordinary counter-terrorism laws create an environment open to abuse. The combined effect of broad definitions and increased powers of law-enforcement agencies and the armed forces, combined with reduced accountability have a corrosive effect on human rights and weaken the rule of law. The Panel was told that the implementation of these laws led to serious and widespread human rights violations, including arbitrary detention, enforced disappearances, arbitrary killings and torture. Concern was raised that few terrorist suspects were brought to justice under these laws, evidenced by the limited number of criminal cases and low conviction rate. Rather these laws resulted in prolonged detention of suspects, often not connected to terrorist acts.

The Panel heard reports of continuing impunity for gross human rights violations committed in countering terrorism. Participants stressed that without addressing the overriding issue of impunity, no real changes in practice will occur whatever other safeguards may be provided in law. In this regard, the panel members share concerns expressed by witnesses that laws in the region making provision for limiting access to courts and granting immunity for the security services, have the effect of shielding offenders from accountability for human rights violations. There was broad consensus that there is a need for effective and competent internal oversight of police and the armed forces as well as a need for independent external controls, through courts and national human rights institutions and other independent mechanisms.

Bangladesh

Participants informed the panel members about human rights violations committed by the Rapid Action Battalion (RAB), an anti-crime and counter-terrorism force comprising military and police personnel. The Panel is concerned about the lack of clarity of the legal framework under which the Battalion operates, the apparent lack of accountability of its members and the role of the armed forces in this special force. The Panel members are also concerned about the application of far reaching provisions on administrative detention under the Special Powers Act on the basis of broadly defined acts that are 'prejudicial to national security'. The Panel members were informed about various legal provisions providing for immunity for law enforcement officials for human rights violations. They were also informed that a counter-terrorism ordinance is presently being drafted. They urge the interim government to consult with civil society and the legal profession before finalizing legislation and to ensure that counter-terrorism legislation fully complies with international human rights standards.

Maldives

Concerns were raised about the use of terrorism charges under the counter-terrorism law following public demonstrations by members of the political opposition. The Panel members were informed about the lack of an independent judicial system and the concentration of presidential powers interfering with legal processes. They welcome the statement made by the representative of the Attorney General's Office that her government is engaged in the process of legal reforms that will seek to establish an independent judiciary free from executive influence, and guarantee the right to a fair trial.

Nepal

The members of the panel heard about serious violations of human rights and humanitarian law during the conflict by the armed forces, including enforced disappearances, torture, arbitrary detention. Those appearing before the panel noted that the emergency powers and the terrorist ordinance have contributed to those abuses and created a climate of impunity. Evidence was also heard about the intimidation of the civilian population and the commission of serious human rights abuses by the insurgents. The Panel was informed that inclusive negotiations are taking place for a new constitutional order. The Panel considers it important that provision should be made through

these negotiations for a new constitutional order for the protection of human rights and that appropriate provisions should be made to address past human rights violations.

Sri Lanka

The members of the Panel learned with grave concern about the recent deterioration of the human rights situation in Sri Lanka, including large scale human rights violations, such as extra-judicial killings, torture, enforced disappearances and arbitrary detention. Serious concerns were also raised regarding the re-introduction of counter-terrorism measures contained in the Prevention of Terrorism Act and in emergency regulations, including a wide arsenal of terrorism related offences that can be used to criminalize anybody connected to any broadly defined terror suspect or to a member of a terrorist group. Other provisions of concern include the reintroduction of sweeping provisions on arrest and administrative detention, the deviation of criminal law standards, such as the admissibility of any statement obtained under any circumstances, potentially including statements under torture or cruel and inhuman treatment. Participants also raised serious concerns regarding the deterioration of important independent checks and balances, in particular the independence of the judiciary and the ineffectiveness of the national human rights commission. The Panel also heard accounts of human rights abuses by the Liberation Tigers of Tamil Eelam (LTTE) and in particular efforts to silence dissent in territories under its control. The members of the Panel are concerned that these developments mirror the framework that has led to widespread and systematic abuses in the past and ultimately aggravated the conflict.

India

The Panel recognizes that India has strong democratic institutions, an active civil society, free media and a legal community, firmly committed to the rule of law and the preservation of human rights. Despite these important safeguards, participants drew attention to the fact that counter-terrorism laws, such as the Terrorist and Disruptive Activities Act (TADA) and later the Prevention of Terrorism Act (POTA) led to serious human rights violations. The Panel members were told that these laws have been applied excessively also in states not affected by terrorism. The Panel was also told that they have been used in a discriminatory manner primarily against minority communities and members of the lower castes. Participants overwhelmingly welcomed the repeal of POTA. They underlined the need to settle pending cases in a manner that is consistent with the rule of law.

The Panel received disturbing evidence about human rights violations committed under the Armed Forces Special Powers Act. Concerns were raised in that regard about far-reaching authority to use force, including the authority to kill, wide arrest powers and impediments to holding military personnel to account for human rights violations. There was broad consensus among the participants that the recent recommendation of the Review Committee to repeal the legislation should be given effect. A number of participants raised serious concern about impunity for past misconduct of the armed forces in various states, including in Jammu and Kashmir, Gujarat and the North Eastern region. Government authorities emphasized the need to deal with threats of terrorism and the difficulty of doing so. The Panel members were told that firm directives were given to security forces to adhere to human rights standards, and that while some violations and impunity took place in the past, the government is committed to upholding human rights and to holding members of the security forces to account for such abuses. The Panel was informed by the Home Minister that, as a result of a Supreme Court decision, the events in Gujarat were investigated. These investigations had not been finalized. If they showed that human rights abuses had been committed by members of the security forces, action would be taken against such members.

Final observation

The Panel members strongly believe that responses to terrorism can be, and indeed are most effective if they comply with international human rights standards. A lesson to be learnt from South Asia is that excessive counter-terrorism laws and practices often prove counter-productive. Abuses lead to serious grievances and discontent and the alienation of communities, instead of isolating terrorist suspects, and thereby risk exacerbating rather than reducing tensions and violence.

Intelligence is crucial to prevent terrorist acts. It depends upon good coordination between security agencies and law enforcers, in addition to public support. It is the respect for human rights that creates the necessary confidence among the public to help law enforcement and to nurture the space for improved intelligence gathering. Technological and other support for intelligence work may often be more effective than the enactment of new draconian laws.

It is of fundamental importance that counter terrorism measures be subject to effective control by an independent civilian judiciary. Important safeguards are also provided by a vibrant civil society, an independent legal profession and a free and independent media. The Panel wishes to associate itself with the statement of the Indian National Human Rights Commission in its 'stand on terrorism', that "proper observance of human rights is not a hindrance to the promotion of peace and security. Rather it is an essential element in any worthwhile strategy to preserve peace and security and to defeat terrorism".

Background

The Panel is composed of eight judges, lawyers and academics from all regions of the world. It exercises its mandate independently, with the logistical support of the ICJ Secretariat and its network of partner organizations. Arthur Chaskalson, former Chief Justice and first President of the Constitutional Court of South Africa, chairs the Panel. The other members are Vitit Muntarbhorn (Thailand), Professor of Law at Chulalongkorn University in Bangkok and UN expert on human rights in North Korea; Hina Jilani (Pakistan), the UN Secretary General's Special Representative on Human Rights Defenders; Mary Robinson (Ireland), former UN High Commissioner for Human Rights and former President of Ireland; Stefan Trechsel (Switzerland), judge at the International Criminal Tribunal for the former Yugoslavia; Georges Abi-Saab (Egypt), former Judge at the International Criminal Tribunals for the former Yugoslavia and for Rwanda; Robert K. Goldman (United States), a former President of the Inter-American Commission on Human Rights and former UN expert on counter-terrorism and human rights; and Justice E. Raúl Zaffaroni (Argentina), a judge at the Supreme Court.

The Panel has held hearings in Australia, Colombia, East Africa (Kenya, Tanzania and Uganda), the United Kingdom (in London on current counter-terrorism policies and in Belfast on lessons from the past), North Africa (Algeria, Morocco and Tunisia), the United States, the Southern Cone (Argentina, Brazil, Chile, Paraguay and Uruguay), South-East Asia (Indonesia, Malaysia, the Philippines and Thailand) and the Russian Federation. Other countries or regions where the Panel will also hold hearings include Pakistan, Canada, the Middle East and Europe.

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