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**Statement by Ben Emmerson**

**SPECIAL RAPPORTEUR ON THE PROMOTION AND  
PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL  
FREEDOMS WHILE COUNTERING TERRORISM**

International Seminar

Terrorism and human rights standards

15 November 2011

Santiago de Chile



Dear Mr. Incalcaterra, ladies and gentlemen,

I would like to warmly thank Mr. Incalcaterra and his team from the Regional Office for South America of the Office of the High Commissioner for Human Rights for the invitation to participate in this seminar on terrorism and international human rights standards. I very much regret that I am not able to be here with you in person for reasons beyond my control.

I have taken up my duties as the new Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on 1 August 2011, succeeding Mr. Martin Scheinin in his rapporteurship of six years.

On 21 October, I presented my first thematic report (A/66/310) to the Third Committee of the General Assembly in which I outline some initial thoughts on two areas I would like to pay proportionate attention to in the early days in the discharge of my mandate, namely the issue of the rights of victims of terrorism and prevention of terrorism.

In my intervention to the Third Committee I began with paying tribute to my predecessor and thanked him for his invaluable contribution to the promotion of human rights standards in the fight against terrorism, culminating in his 2011 annual report to the Human Rights Council (A/HRC/16/51) in which he identified ten areas of best practice in countering terrorism while respecting human rights. I would like to do the same here today as I intend to adopt and build upon those areas of best practice identified by Mr. Scheinin.

Ladies and gentlemen,

These ten areas of best practice fall squarely within the scope of our seminar today as they do not only relate to “good laws” in countering terrorism, i.e. laws that are human rights compliant. They also go beyond addressing the legal – and institutional – frameworks in the fight against terrorism towards a comprehensive approach that also tackle the conditions conducive to the spread of terrorism as identified in Pillar I of the Global Counter-terrorism Strategy of the General Assembly (A/RES/60/288). According to the Strategy, conditions conducive to the spread of terrorism, “[i]nclud[e], but [are] not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism.”

The ten areas of best practice identified in my predecessor’s report relate to the following:

1. Consistency of counter-terrorism law with human rights, refugee law and humanitarian law.
2. Consistency of counter-terrorism practice with human rights, refugee law and humanitarian law.
3. The principles of normalcy and specificity.
4. Regular review of counter-terrorism law and practice.
5. The requirement of effective remedies for human rights violations.
6. Reparations and assistance to victims of terrorism and victims of counter-terrorism measures.

7. Model definition of terrorism.
8. Model definition of the offence of incitement to terrorism.
9. Minimum safeguards in the listing of terrorists.
10. Core rules concerning the arrest and interrogation of terrorist suspects.

I will not be able to dwell upon all of them – for those interested I highly recommend reading the report, which also contains a user-friendly Annex listing all ten areas of best practice. However, allow me to elaborate on some of the best practices in further detail now and begin with the model definition of terrorism that Martin Scheinin proposed and that I endorse. The model definition reads in full:

“Terrorism means an action or attempted action where:

1. The action:

(a) Constituted the intentional taking of hostages; or

(b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or

(c) Involved lethal or serious physical violence against one or more members of the general population or segments of it;

and

2. The action is done or attempted with the intention of:

(a) Provoking a state of terror in the general public or a segment of it; or

(b) Compelling a Government or international organization to do or abstain from doing something;

and

(3) The action corresponds to:

(a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or

(b) All elements of a serious crime defined by national law. “

It is no secret that I favour an approach to the notion of terrorism as being a political rather than a legal concept. However, I have to accept that Security Council resolution 1566 (2004) – adopted under Chapter VII of the United Nations Charter and thus imposing direct obligations binding upon all Member States – requires States to prevent acts of terrorism and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

Consequently, if there has to be a specific criminal offence of terrorism at the national level, rather than a combined application of criminal provisions defining serious crimes – which is what terrorism is: a serious and unjustifiable crime – such a crime of terrorism has to be narrowly defined.

The first rationale for promoting a narrow definition of terrorism is that the adoption of an overly broad definition carries the potential for abuse against political or social movements opposed to the policies of the Government of the day and thus can give rise to a number of potential human rights violations, for example of the right to freedom of opinion and expression, the right to freedom of peaceful assembly, the right to freedom of association, or the right to take part in the conduct of public affairs under articles 19, 21, 22, and 25 of the International Covenant on Civil and Political Rights.

Crushing dissent by applying overly broad counter-terrorism laws or abusing such laws can also be counter-productive and render measures taken by States in the fight against terrorism ineffective by overstating the problem. Such actions ultimately have the potential of adding to the root causes, or the conditions conducive to the spread, of terrorism as they are called at the United Nations level, as they contribute to – actual or perceived – grievances in certain parts of the population which may cause individuals to make the wrong choices and resort to terrorism. But let me be very clear, even if that is the case, acts of terrorism remain unjustifiable and inexcusable under any circumstances.

The second rationale for a proper definition of the crime of terrorism at the national level is also rooted in human rights law, namely in article 15 of the International Covenant on Civil and Political Rights, which is made non-derogable even in times of public emergency. It implies that the requirement of criminal liability is limited to clear and precise provisions in the law, so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation which would broaden the scope of the proscribed conduct.

The model definition of terrorism has been drafted against this background in the absence of a universally agreed upon and internationally recognized comprehensive and concise definition of terrorism, taking into account the elements contained in op 3 of Security Council resolution 1566 (2004).

Since we are in Chile and the programme of the seminar makes reference to it, allow me to highlight that my predecessor, through joint communications sent with the Special Rapporteur on the rights of indigenous peoples, James Anaya, has expressed concern at Law No.

18.314 and other special laws both with respect to an overly broad definition of terrorism and the effect the application of the laws have had in practice. I would welcome if the momentum of this seminar could trigger a reform of these laws, in particular of the definition of the crime of terrorism contained in Law No. 18.314, in accordance with recommendations by other human rights mechanisms such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination.

The mandate bestowed upon me by the Human Rights Council and the General Assembly requests me to make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism, including, at the request of States, for the provision of advisory services or technical assistance on such matters.

I stand ready to provide such services if the Government of Chile so wishes. Such an undertaking could form part of a visit to the country on official mission. I therefore thank the Government of Chile, represented here today, for having indicated before I took up my duties as Special Rapporteur that such a mission could take place in 2012.

Ladies and gentlemen,

allow me to turn now to a second area of best practice that in my opinion warrants further refining and elaboration. Practice 6 proposes a model provision on reparations and assistance to victims of terrorism and essentially calls upon States to compensate victims of both counter-terrorism measures and of terrorist acts through funds from the State budget.

I am conscious of the fact that some States reject the notion that there is an international human rights obligation to indemnify victims of terrorist acts from the State budget even if the act of terrorism, which is carried out by non-State actors, can in no way be legally attributed to the State. For example, this could be for failing to fulfill its obligation to protect the right to life of all persons under its jurisdiction and/or for failing to bring perpetrators of terrorist acts to justice in a human rights compliant manner, or to conduct investigations into plausible allegations of having failed to prevent such acts from occurring.

This is but one of the reasons why I intend to devote part of my upcoming report to the Human Rights Council to further explain what I mean in respect of the rights of victims of terrorism as identified in my General Assembly report. I consider that the incorporation of State obligations towards the victims of terrorism reflects the acceptance by the international community of the fact that any sound, sustainable, and comprehensive strategy to combat terrorism requires recognition of the suffering of victims of terrorist acts.

I intend to approach the topic by reference to the following four pillars:

1. States' negative and positive operational duties to protect and promote the right to life;
2. States' adjectival obligations to investigate perpetrators of terrorist crimes, and to conduct prompt, thorough, independent and impartial investigations into any plausible allegation of intelligence or other operational failures in the prevention of a terrorist act;
3. States' responsibilities to provide compensation and rehabilitation to victims of terrorism (whether or not that responsibility amounts to an international legal obligation); and



4. States' duties to prevent terrorism by seriously addressing the conditions conducive to the spread of terrorism according to a human rights based approach (including by ensuring accountability for, and eradication of, the commission of human rights violations in the fight against terrorism, one of the important factors contributing to the spread of terrorism).

It is essential that the protection of the human rights of the victims of terrorism is seen as a genuine legal duty resting primarily on States, and that it is not misused as a pretext for violating the human rights of those suspected of terrorism, for taking emergency measures which provide for excessive and disproportionate executive powers, or for other essentially political objectives.

Ladies and gentlemen,

These observations lead me to my final remarks which I would like to make in relation to the common misapprehension that the protection of human rights is incompatible with effective counter-terrorism strategies. Over the last decade the international community has come to accept, at least formally, that the reverse is true, and that it is only by strict adherence to international human rights standards that counter-terrorism strategies can ultimately succeed, and that by actively promoting and protecting human rights Member States at the same time contribute to preventing terrorism.

The Global Counter-Terrorism Strategy places the promotion of human rights at the centre of the fight against terrorism. Member States reaffirmed that they must ensure that any measures taken to combat terrorism comply with their obligations under international law, and in

particular human rights law, refugee law and international humanitarian law.

This is not solely a question of legitimacy. It is also a question of effective prevention. Security Council resolution 1963 (2010) reiterates that violations of human rights are one of the conditions conducive to the spread of terrorism, and recognizes for the first time that terrorism will not be defeated by military force, law enforcement measures and intelligence operations alone. In the discharge of my mandate I intend to focus and build upon this important principle – now internationally recognised – as we are all too aware that the practices of States have not always followed their commitments.

What makes this area so complex, and so difficult, is the ever-present danger that some States, including States with a proud record of respect for the rule of law, have been willing at times to abandon those core values on the pretext of defending them.

The central priority of the mandate will therefore continue to be maintaining a close watch on practices that undermine international standards in the investigation, prosecution and punishment of those accused of acts of terrorism, as well the range of executive measures taken at a national and international level to suppress terrorism. These issues will remain at the very heart of the mandate.

I hope that these remarks will be helpful for the discussion.

Thank you.