

Comprehensive Review on the Status of Implementation of Resolution 1540 (2004)

**Background papers prepared by 1540 Committee experts according to the document on
modalities for the consideration of a comprehensive review (S/2009/170)**

Specific Element (e)

**“Evaluate, as appropriate, the impact of national implementation measures on
individuals and due process standards.”***

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This paper explores a new area for consideration in the implementation of resolution 1540 (2004). After the adoption of the resolution, the efforts of the 1540 Committee established pursuant to paragraph 4 of the resolution aimed to raise awareness among member States about the nature and the requirements of the resolution.

By 2008, the Committee focused no longer only on awareness raising, but also on enhancing States' implementation of the resolution. The resolution, *inter alia*, requires that all States shall adopt and enforce appropriate laws and measures to prevent non-State actors having access to nuclear, chemical and biological weapons, their means of delivery and related materials, the proliferation of which constitutes a threat to international peace and security.

The subject of this background paper arises from the use of the word "effective" to describe these laws and measures to be adopted and enforced. Being "effective" includes also respecting individual freedoms and due process standards.

Notwithstanding the urgency and importance of global efforts against WMD related terrorism, such efforts should continue to be based on the principles of international law and respect for fundamental freedoms and rights of an individual. States, through resolution 1540, thus have to address seriously national and international security concerns by taking also into account the protection of fundamental freedoms and the rule of law.

A. The rule of law

"No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law".

This statutory rendition of Magna Carta in A.D. 1354 introduces a written statement of due process of law.

The most important application of "due process" is the principle of *nullum crimen nulla poena sine lege* that postulates "legality" as the opposite of the rule of "discretion". Laws must be formulated with sufficient explicitness and detailed precision of the criminalized conduct in order to ensure that persons plan their actions and deliberately set their values and behavior. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to prove the criminal liability of individuals and to punish their behavior with penalties that affect the supreme values of life and liberty. The principle of generality and equality requires that the law should apply to all citizens without distinctions based on race, religion, wealth, political status.

Rule of law postulates also that *post facto* laws should not be applied retrospectively to the disadvantage of individuals without any fair chance of knowing and predicting their rights,

how to regulate their conduct and the reaction of the State to the violation of the law. The provision concerning a crime could affect an act committed before only if the social impact (*periculo sociali*) and the consideration by the State of the gravity of the crime have changed *in meius*¹. A defendant can take advantage of a light punishment because this responds to a different perception of behavior by the society.

Many of the principles coming from the rule of law have been incorporated into the Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948.²

B. Due process guarantees

- *Independence and impartiality of the Judiciary in order to ensure the rule of law and effective protection of the fundamental rights and freedoms of the human person*

Independence of judiciary from the legislative and executive powers is indispensable for the maintenance of the rule of law, including respect for human rights standards; and all branches of government and all State institutions have a duty to prevent any erosion of this independent decision-making authority of the judiciary.

Impartiality of the judiciary is an essential aspect of the right to a fair trial. It means that all the judges involved must act objectively and base their decisions on the relevant facts and applicable law, without personal bias or preconceived ideas on the matter and persons involved and without promoting the interests of any one of the parties.

The creation of military courts or other courts of special jurisdiction often gives rise to some concerns of violations of the right to due process of law. While the international treaties do not draw any express distinction between ordinary and special (including military) tribunals, the Human Rights Committee made it clear that these principles apply “to all courts and tribunals...whether ordinary or specialized”. This means, for instance, that likewise, military or other special tribunals which try civilians must comply with the condition of independence and impartiality.

All general universal and regional human rights instruments guarantee the right to a fair hearing in civil and criminal proceedings before a competent, independent and impartial court or tribunal, established by law. Although some countries may not yet have ratified or acceded to these human rights treaties, they are still bound by customary rules of

¹ In Latin this is known as the “principle of *favor rei*” that allows the applicability of the law to acts conducted before its adoption when the treatment of the defendant is more favorable.

² Other relevant international instruments include: International Covenant on Civil and Political Rights (ICCPR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, American Convention on Human Rights, African Charter on Human and People’s Rights.

international law, as well as by general principles of law, of which the principle of an independent and impartial judiciary is generally considered to form part. They are thus also bound by the fundamental principles laid down in the Universal Declaration of Human Rights, which provides in its article 10 that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

- *Presumption of innocence*

An essential aspect of the right to fair trial when respecting human rights during efforts to counter terrorism is the presumption of innocence. In this regard, the Universal Declaration of Human Rights, article 11, states: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defence”, and this principle has been stressed by all systems, ranging from the European Court of Human Rights, the Inter-American System to that of the United Nations. Although article 14 of the UN Covenant on Civil and Political Rights is not listed as non-derogable under article 4, the Human Rights Committee has concluded that peremptory norms go beyond the provision of article 4 and, consequently, States cannot invoke article 4 as a justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by deviating from fundamental principles of fair trial, including the presumption of innocence.

As an evidentiary rule of proceedings this implies that the defendant has the right to silence and not to incriminate himself and that his behavior cannot be interpreted as an expression of guilt. This means, however, that the prosecution office has the burden to prove the defendant “guilty” beyond a reasonable doubt, and – in the event that the prosecution fails to do this – the accused shall be considered innocent (*in dubio pro reo*). It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defense accordingly.

- *The right to a defense*

The right to a defense guarantees the person accused having committed a crime to prepare his defense on equal terms with the prosecution. The right of defense includes different topics; the most significant ones are described below.

Firstly, pre-trial and trial detention represents a legitimate response to the national security concerns and an adequate tool to ensure criminals to justice and to safeguard evidence. But, in order to protect the rule of law, the right of freedom and the presumption of innocence, a judicial body must decide, without delay, on the lawfulness of detention. Moreover, the right of individuals to be informed of the reasons of arrest constitutes a guarantee against prolonged pre-trial detention without charge as well as a guarantee against the possibility to be arrested on suspicion.

The conditions of detention have been a matter of concern for both the United Nations and regional systems with respect to the right of freedom from torture and other cruel, inhuman or degrading treatment and the right to respect for the dignity of the human person, especially in a state of emergency or terrorism. In that regard, article 7 of the International Covenant on Civil and Political Rights states that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The Human Rights Committee, in its General Comment 20, underlined the non-derogable nature of this provision, and, even if aware of the difficulties that States face in the fight against terrorism, recalled that no exceptional circumstance can be invoked as a justification for torture. The Human Rights Committee also expressed concerns for some guidelines for the conduct of interrogation of suspected terrorists considering “moderate physical pressure” as a tool to obtain information considered crucial for the protection of life and international security.

Moreover, the European Court of Human Rights has reiterated that under article 3 of the Convention, the State must ensure that a person is detained in conditions that are compatible with the respect for human dignity.

The right of defense implies also that a person charged should be informed promptly, in a language which the person understands and in detail, of the nature and cause of the accusation, ensuring that persons who are not capable of understanding or following the proceedings receive access to free interpretation and translation.

The accused must also be given adequate time and facilities to prepare the defense, the right to have legal advice and to be heard, both before the trial and at the trial and to communicate, *inter alia*, with consular authorities in case of foreign suspects.

Finally, the right to appeal, as an expression of fair trial, responds to the necessity to limit judicial mistaken evaluation of the circumstances of the crime, to the possibility to reopen the case if other relevant facts occur, and to the aim to reach substantial justice. The Inter-American Convention contains an interesting analysis of the right to appeal: for a true review of the judgment, it requires that the higher court has the jurisdictional authority, established by law, to take up the case in question. If the Court of second instance fails to satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law, then this phase cannot be deemed to be either lawful or valid.

In addition, the UN Committee against Torture has recommended that States shall ensure that the person convicted by decisions of military courts in terrorism cases have the right to their conviction and sentence being reviewed by a higher tribunal according to law.

C. Considerations

A preliminary review of the reports and additional information that States have submitted to the 1540 Committee since the adoption of the resolution shows that a large number of

States has reported mainly on their legal framework and not addressed how these measures operate in practice. So far, no State has reported having granted law enforcement agents with special or extraordinary search, arrest and detention powers or added limitations on legal representation or on the right to appeal when violation of legal provisions relevant to 1540 requirements have been ascertained.

Issues arise when the activities listed in operative paragraph 2 of resolution 1540 are characterized by the specific intent of “terrorism”. Precisely, the resolution refers in its Preamble to the threat of terrorism and the risk that non-State actors may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery, and more importantly in OP2, asks States to prohibit such activities, in particular “for terrorist purposes” as well as any participation in them. The goal of resolution 1540 is to prevent the proliferation of nuclear, chemical, biological weapons and their means of delivery and setting controls over related materials regardless of intent: the reference “in particular for terrorist purposes” might suggest a terrorist intent but that is an aggravated cause or intent that is secondary to the “basic” intent to conduct an activity of manufacture, develop, etc, in OP2 for which the prohibitions are required.

States nevertheless do have legitimate and urgent reasons to take all the due measures to prevent terrorism. According to *The Digest*, prepared by the United Nations Office of the High Commissioner for Human Rights (OHCHR): “Acts and strategies of terrorism aim at the destruction of human rights, democracy and the rule of law. They destabilise governments and undermine civil society.” The manner in which counter-terrorism efforts are conducted, however, can have an impact on individuals and due process standards. This explains why in September 2002, almost one year after the adoption of the resolution 1373 (2001) by the Security Council and the establishment of the Counter-Terrorism Committee (CTC), the High Commissioner for Human Rights submitted a “Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-terrorism Measures”, that sets general principles of law to guide States in protecting human rights in the context of their efforts to eradicate terrorism. In May 2006, following its comprehensive review report of December 2005, the CTC provided to its Executive Directorate policy guidance on human rights in connection with identification and implementation of effective measures to implement resolution 1373 (www.un.org/sc/ctc/rights.html).

From the broader perspective of the General Assembly, a Policy Working Group on the United Nations and Terrorism was established in October 2001 to identify the implications and policy dimensions of terrorism for the United Nations and to formulate recommendations on steps that the United Nations might take to address the issue.

The report, submitted by the Secretary-General to the General Assembly and to the Security Council in August 2002 (document A/57/273 – S/2002/875), observed that in all cases the fight against terrorism must be respectful of international human rights obligations and contained recommendations, including:

- All the relevant parts of the United Nations should emphasize that human rights must always be protected. The independence of the Judiciary and the existence of legal remedies are essential for the protection of fundamental human rights in all situations involving counter-terrorism measures.
- The Department of Public Information should be requested, in cooperation with the UN High Commissioner for Human Rights, to publish a digest of the core jurisprudence of international and regional human rights bodies on the protection of human rights in the fight against terrorism. The Digest can be used by Governments and human rights organizations in the development of counter-terrorism policies.

While the current mandate is not about focusing on compliance related to human rights and the rule of law in general, the 1540 Committee could consider inviting States to provide information, as appropriate, on how they handle due process issues relevant to measures for the implementation of resolution 1540 (2004).