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Chair for Inaugural session: Justice K.G. Balakrishnan, Chief Justice of India

Dr. Manmohan Singh / Sh. H.R. Bhardawaj / Esteemed colleagues / members of
the bar / Ladies and Gentleman,

From our recent experience, we have learnt that terrorist attacks against innocent and unsuspecting civilians threaten the preservation of rule of law as well as human rights and terrorism can broadly be identified with the use of violent methods in place of the ordinary tools of civic engagement and political participation. It has become an increasingly recurrent strategy for insurgent movements as well as identity-based groups to make their voice heard through armed attacks and bomb blasts in place of public dialogue. Independent India is no stranger to the problem of tackling armed terrorists and has faced long-running insurgencies as well as sporadic attacks in many parts of the country.

However, in the age of easy international travel and advanced communications, terrorist networks have also assumed cross-border dimensions. In many instances attacks are planned by individuals located in different countries who use modern technology to collaborate for the transfer of funds and procurement of advanced weapons. This clearly means that terrorism is an international problem and requires effective multilateral engagement between

various nations. For the international legal community, this poses a doctrinal as well as practical challenge. I say this because from the prism of international legal norms, prescriptions against violent attacks have traditionally evolved under two categories – firstly, those related to armed conflict between nations and secondly those pertaining to internal disturbances within a nation. While the conduct and consequences of armed conflicts between nations – such as wars and border-skirmishes – are regulated by international criminal law and humanitarian law, the occurrence of internal disturbances within a nation are largely considered to be the subject-matter of that particular nation’s domestic criminal justice system and constitutional principles.

It is often perceived that these doctrinal demarcations actually inhibit international cooperation for cracking down on terrorist cells with cross-border networks. In the absence of bilateral treaties for extradition or assistance in investigation, there is no clear legal basis for international cooperation in investigating terrorist attacks – which are usually classified as internal disturbances in the nation where they took place. Since there are no clear and consistent norms to guide collaboration between nations in acting against terrorists, countries like the United States have invented their own doctrines such as ‘pre-emptive action’ to justify counter-terrorism operations in foreign nations. However, the pursuit of terrorists alone cannot be a justification for arbitrarily breaching another nation’s sovereignty. In this scenario, one strategy that has been suggested is that of recognising terrorist attacks as coming within a new ‘hybrid’ category

of armed conflict, wherein obligations can be placed on different countries to collaborate in the investigation and prosecution of terrorist attacks that have taken place in a particular country. This calls for a blurring of the distinction between the international and domestic nature of armed conflict when it comes to terrorist strikes.

Another suggestion that has been made in this regard is that of treating terrorist attacks as offences recognised under International Criminal Law, such as ‘crimes against humanity’ which can then be tried before a supranational tribunal such as the *International Criminal Court (ICC)*. However, the obvious practical problem with this suggestion is that prosecutions before this Court need to be initiated by the *United Nations Security Council (UN SC)* and the latter body may be reluctant to do so in instances of one-off terrorist attacks as opposed to continuing conflicts. Yet another practical constraint that has been brought to the fore with the Mumbai attacks has been the question of holding governments responsible for the actions of non-state actors. While one can say that there is a moral duty on all governments to prevent and restrain the activities of militant groups on their soil, the same is easier said than done. For example, several terrorist groups are able to organise financial support and procure weapons even in Western nations where it is perceived that policing and criminal justice systems are relatively stronger than the subcontinent.

Coming to the domestic setting, I must state that the symbolic impact of terrorist attacks on the minds of ordinary citizens has also

been considerably amplified by the role of pervasive media coverage. In India, the proliferation of 24-hour T.V. news channels and the digital medium has ensured that quite often some disturbing images and statements reach a very wide audience. One of the ill-effects of unrestrained coverage is that of provoking anger amongst the masses. While it is fair for the media to prompt public criticism of inadequacies in the security and law-enforcement apparatus, there is also a possibility of such resentment turning into an irrational desire for retribution. Furthermore, the trauma resulting from the terrorist attacks may be used as a justification for undue curtailment of individual rights and liberties. Instead of offering a considered response to the growth of terrorism, a country may resort to questionable methods such as permitting indefinite detention of terror suspects, the use of coercive interrogation techniques and the denial of the right to fair trial. Outside the criminal justice system, the fear generated by terrorist attacks may also be linked to increasing governmental surveillance over citizens and unfair restrictions on immigration.

In recent years, the most prominent example of this 'slippery-slope' for the curtailment of individual rights is the treatment of the detainees in Guantanamo Bay who were arrested by U.S. authorities in the wake of the 9/11 attacks. It is alleged that they have detained hundreds of suspects for long periods, often without the filing of charges or access to independent judicial remedies.

For its part the US Administration has defended these practices by asserting that the detainees at Guantanamo Bay have safeguards such as appeals before Military Commissions, Administrative Review Boards and Combatant Status Review Tribunals. A follow up to the same in *Hamdan v. Rumsfeld*,¹ led to the ruling that the terror suspects could not be denied the right of *habeas corpus* and should be granted access to civilian courts. The rationale for this was that the various military tribunals did not possess the requisite degree of independence to try suspects who had been apprehended and detained by the military authorities themselves.

Even in the United Kingdom, the House of Lords in the *Belmarsh decision*² ruled against a provision in the Anti-Terrorism, Crime and Security Act, 2001 which allowed the indefinite detention of foreign terror suspects. This ruling prompted the enactment of the Prevention of Terrorism Act, 2005 which was fiercely debated and the British Parliament accepted a 42-day period as the maximum permissible for detention without charges, subject to judicial checks. Evidently, the judiciary in these two countries has played a moderating role in checking the excesses that have crept into the response against terrorism.

In some circles, it is argued that the judiciary places unnecessary curbs on the power of the investigating agencies to tackle terrorism. In India, those who subscribe to this view also

¹ 126 S. Ct. 2749 (2006)

² *A v. Secretary of State for the Home Department*, [2004] UKHL 56

demand changes in our criminal and evidence law - such as provisions for longer periods of preventive detention and confessions made before police officials to be made admissible in court. While the ultimate choice in this regard lies with the legislature, we must be careful not to trample upon constitutional principles such as '*substantive due process*'. This guarantee was read into the conception of 'personal liberty' under Article 21 of the Constitution of India by our Supreme Court.³ The necessary implication of the same is that all governmental action, even in exceptional times must meet the standards of reasonableness, non-arbitrariness and non-discrimination. This implies that we must be wary of the use of torture and other forms of coercive interrogation techniques by law enforcement agencies. Coercive interrogation techniques mostly induce false confessions and do not help in preventing terrorist attacks. Furthermore, the tolerance of the same can breed a sense of complacency if they are viewed as an easy way out by investigative agencies.

The apprehension and interrogation of terror suspects must also be done in a thoroughly professional manner, with the provision of adequate judicial scrutiny as mandated in the Code of Criminal Procedure. This is required because in recent counter-terrorist operations, there have been several reports of arbitrary arrests of individuals belonging to certain communities and the concoction of evidence – such as the production of similarly worded confession

³ This idea of '*substantive due process*' was incorporated through the decision in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

statements by detained suspects in different places. The proposal for the admissibility of confessional statements made before the police is also problematic since there are fears that such a change will incentivise torture and coercive interrogation by investigative agencies in order to seek convictions rather than engaging in thorough investigation.

In this regard, the role of the judiciary should not be misunderstood. Adherence to the constitutional principle of 'substantive due process' is an essential part of our collective response to terrorism. As part of the legal community, we must uphold the right to fair trial for all individuals, irrespective of how heinous their crimes may be. If we accept a dilution of this right, it will count as a moral loss against those who preach hatred and violence. We must not confuse between what distinguishes the deliberations of a mature democratic society from the misguided actions of a few.

Thank You!