### ***Check against delivery***



***Statement by Ms. Fionnuala Ní Aoláin***

***Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism***

***Virtual open briefing of the Counter-Terrorism Committee on “The role of judges, prosecutors and defence counsel in bringing terrorists to justice, including the effective use of battlefield or military-collected evidence”***

***12 November 2020***

* The Special Rapporteur acknowledges the importance of this debate, and the significance of fair and human rights compliant trial and the professionalism and protection of key actors engaged in the prosecution of acts of terrorism as well as the necessary prosecution of acts that constitute serious violations of international law, including international humanitarian law and human rights law.
* The mandate would stress the importance of protecting and ensuring the independence and impartiality of judges, particularly those involved in trials of terrorism, given the unique challenges and pressures they may face.
* The mandate stresses the centrality of fair trial as protected by international law including for those charged with acts of terrorism, notably Universal Declaration of Human Rights (Article 10) the International Covenant on Civil and Political Rights (Article 14). Fair trial is not only a legal obligation but in the mandate’s view the abrogation of fair trial, or short-cuts around it prompted by counter-terrorism regulation, have long-term and serious consequences for the rule of law, and are often hardwired into the negative cycle of grievance and alienation from fairness and the rule of law that perpetuates violence in many societies.
* She underscores the particular challenges being faced by defence lawyers in the discharge of their professional and ethical obligations to persons charged with terrorism across the globe, including the challenges of access to persons detained and charged with terrorism offences, the conflation of lawyers defending persons charged with terrorism with their clients, the challenges of equality of arms including access to evidence, and the exclusions of independent lawyers from many terrorism courts on the grounds of national security.
* The Special Rapporteur voices her particular concern about the resort to ‘battlefield evidence’. A significant part of today’s discussions were CTED Guidelines labelled as **guidance for member states**. However, it is important for States to be aware that there is a disclaimer within the document that would appear to suggest they are simply (pg 1,3) “**intended to serve as a basis for discussion and to illustrate the issues** that will need to be comprehensively addressed at the national level…”
* **Implication:** When the United Nations produces such guidelines, they are understood to be as such. Member States will use and reference these guidelines for their practice. If the document was not so intended, it should be transparently recorded and categorized as such and titled as a Discussion Paper. Production of “guidelines” with such a caveat raise questions of due diligence in the UN’s production of guidance, standards and norms.
* Further, she notes that standards under discussion, while a worthy endeavor were not endorsed by her mandate because they did not fully take on board and address the treaty and customary law obligations of States in respect of fair trial and legal process. Moreover, she is also worried by the lack of relation to prior investigation and prosecution of evidential practice involving crimes of universal jurisdiction; war crimes, crimes against humanity and genocide. She notes her particular concerns about the use of military obtained evidence in civilian judicial mechanism; the encouragement of legal exceptionalism; the lowering of standards in the investigation of offences committed by Foreign (Terrorist) Fighters including in the context of “sexual violence crimes committed with a terrorist intent”, categories which have distinct challenges of legal certainty under international law; the need to address data collection with a holistic regard to appropriate human rights and legal safeguards at all stages (collection, storage, use and transfer); and an abiding concern of the infringement of battlefield evidence on the operation of existing bodies of international and national law. Here she also takes seriously the sovereign concerns engaged, including the consent concerns of territorial states about the collection of such evidence.
* The Special Rapporteur affirms the necessity for accountability for serious violations of international law and underscore that such accountability will only be meaningful if delivered in compliance with international law. Bad cases make bad law, and the necessity to ensure human rights compliant prosecution, rehabilitation and reintegration has never been greater.

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