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Counter-terrorism and the Protection of Human Rights

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Human Rights Advocates submits this statement to address human rights issues arising out of counter-terrorist measures. This report presents commentary on Special Rapporteur on the promotion and protection of human rights while countering terrorism Martin Scheinin's recent reports on this issue for the Human Rights Council Thirteenth session. Part I presents a brief background of the issue. Part II emphasizes the continued need for a universally accepted definition of terrorism. Part III outlines a few of the human rights implicated by State counter-terrorist measures. Part IV provides recommendations to the Human Rights Council, member states, and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

Part I: Background

Terrorism was first addressed at the international level in 1937, when the League of Nations prepared the Convention for the Prevention and Punishment of Terrorism.¹ Since then, the international community has engaged in resolute and swift action in taking measures to condemn terrorism, especially after the terrorist attack on the United States on September 11, 2001. The U.N. has adopted thirteen resolutions since the 1960s relating to terrorism, eleven of which emerged prior to the September 11, 2001 attacks.² With the passage of General Assembly resolution 60/288 in 2006, member States agreed to cooperate in the global effort to eradicate terrorism, while ensuring that measures taken comply with the rule of law and human rights.³ The Security Council has also committed to this sentiment as demonstrated in resolutions 1373 (2001), 1456 (2003), 1566 (2004), and 1624 (2005). These actions acknowledge that "effective

¹ United Nations Office on Drugs and Crime. "Global Action Against Terrorism," available at: <http://www.unodc.org/unodc/en/terrorism/global-action-against-terrorism.html>

² Javier Rupérez, *The U.N.'s Fight Against Terrorism: Five Years After 9/11*, ARI 83/2006 (6 September 2006), available at <http://www.un.org/terrorism/ruperez-article.html>.

³ Office of the United Nations High Commissioner for Human Rights, "Human Rights, Terrorism and Counter-terrorism," Fact Sheet No. 32, p. 20, available at <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

counter-terrorism measures and the protection of human rights [are] not conflicting goals, but rather complementary and mutually reinforcing ones.”⁴

All States have a duty and an obligation to protect individuals within their jurisdiction from terrorists under the International Covenant of Civil and Political Rights (ICCPR), stemming from the right to life. While counter-terrorist measures are essential for States to maintain national security and ensure safety for all individuals, these measures must not circumvent international law or violate human rights. The lack of a universally accepted definition of terrorism increases the possibility of human rights violations and negatively impacts the ability of the international community to fight terrorism. Human rights are also implicated due to the lack of transparency and inadequate judicial oversight of counter-terrorism measures. Transparency in counter-terrorism policies is necessary to protect human rights while also ensuring national security.

Human rights concerns have arisen through the creation of counter-terrorism measures which States purport to be outside the realm of international law. This has occurred in the past decade in the United States, specifically in response to September 11th and the Bush Administration’s “War on Terror.” The counter-terrorist policies adopted to combat terrorism in the U.S. circumvent international conventions and treaties, including the Geneva Conventions and the Convention Against Torture. The Bush administration justified these measures, claiming the terrorist threat generated “a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians.” Former President Bush went on to

⁴ *Id.* at 21.

conclude “this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war.”⁵

The United States has claimed that the “War on Terror” is different from any previous armed conflict.⁶ One method the U.S. has used to circumvent international law was the designation of terrorists as “enemy-combatants” rather than the internationally accepted terms under the Geneva Convention: lawful and unlawful combatants. By changing the term, U.S. policy indicates that international law applicable during armed conflict does not apply to the detainees accused of terrorism. However, human rights law always applies and terrorist conduct does not remove a detainee from the protections of the Geneva Convention.⁷ Although terrorism constitutes a unique and complex threat to security, measures taken must also comply with international law and must not violate fundamental human rights.

The issues related to terrorism are not new. As mentioned above, international efforts to counter terrorism began as early as 1937. These problems have been addressed in international law for decades and there is no need for an entirely new paradigm related to terrorism. As has been noted, international human rights law applies at all times, regardless of whether an armed conflict exists.

Part II: Defining Terrorism

Although the international community has established mechanisms to address the issues related to terrorism, including the creation of the Counter-Terrorism Committee (CTC) and the Counter-Terrorism Executive Directorate (CTED), the international community has been unable

⁵ Memorandum from President Bush regarding “*Humane Treatment of Taliban and al Qaeda Detainees*” (7 February 2002), available at <http://www.fidh.org/IMG/pdf/memo11.pdf>.

⁶ Martin Scheinin. “*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Mission to the United States*,” A/HRC/6/17/Add.3, para. 6, 22 (21 November 2007).

⁷ *Id.*

to agree on a universal definition of terrorism. The lack of a universal definition of terrorism represents a serious limitation on States' ability to combat and prevent terrorism. Failing to agree on a universal definition "prevents the United Nations from exerting its moral authority and from sending an unequivocal message that terrorism is never an acceptable tactic, even for the most defensible of causes."⁸ The lack of a definition also results in the creation of State counter-terrorism measures outside the realm of international law.

Human rights are implicated in the lack of a universal definition of terrorism. Without a universal definition of terrorism, States may create broad, overreaching definitions and inadvertently criminalize activity outside the realm of terrorism. States may also intentionally create a broad definition and use this broad power to suppress oppositional movements or unpopular groups under the guise of combating terrorism. People may be prosecuted for the legitimate exercise of protected human rights due to vague and unclear domestic definitions of terrorism.⁹ Without an internationally agreed upon definition, States are free to create various and unclear definitions with no guidance from the U.N. regarding the proper scope of the definition.

Although there has been work toward an international definition of terrorism, problems remain pervasive. There are fundamental disagreements among States as to a universal definition of terrorism. Some members urge the inclusion of State use of force against civilians in the definition. Other delegations have suggested including forms of "State terrorism" in the definition.¹⁰ However, State force against civilians is already addressed in a number of

⁸ Follow-up to the outcome of the Millennium Summit, Note by the Secretary-General, A/59/565, para. 157 (2 December 2004).

⁹ Address by Ms. Navanethem Pillay to the Counter-Terrorism Committee of the Security Council, New York, p. 7 (29 Oct. 2009).

¹⁰ Informal summary prepared by the Chairman on the exchange of views in plenary meeting and on the results of the informal consultations, A/AC.252/2009/L.1/Add.1, Annex 1, Draft Report, para. 6 (30 June 2009).

international instruments, including the Geneva Convention, the U.N. Charter, and the Rome Statute for the International Criminal Court.¹¹ Inclusion of State force against civilians is not necessary in a definition of terrorism.

Other States insist that the definition avoid criminalizing self-determination. These States want to protect “the right of a people to resist foreign occupation.”¹² But this argument is irrelevant to defining terrorism since there is “*nothing* in the fact of occupation that justifies the targeting and killing of civilians.”¹³ One possible compromise to these disagreements is excluding the word “comprehensive” from the definition of terrorism.¹⁴ This compromise may be a necessary first step in creating a flexible definition and acquiring universal agreement.

The disagreement among States presents significant and unnecessary barriers creating a universal definition of terrorism.¹⁵ However, there has been movement toward a definition. The Secretary-General proposed guidelines for a possible definition in a report presented to the General Assembly in 2004. In this report, the definition includes language from Security Council resolution 1566 (2004) and includes acts committed against civilians with both 1) the intention of causing death or serious bodily injury, or the taking of hostages AND 2) for the purpose of provoking terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organization to do or abstain from doing any act.¹⁶ Through this definition, States can create more effective counter-terrorist policies within specific confines. This narrow definition will protect human rights because States will not be able to justify acts under broad or vague definitions.

¹¹ See *supra* note 8, para. 158.

¹² See *supra* note 2.

¹³ See *supra* note 8, para. 160 (*emphasis added*).

¹⁴ See *supra* note 10.

¹⁵ The U.N. Committee On Counter-Terrorism FES Briefing Paper, p. 10 (15 September 2007).

¹⁶ See *supra* note 8, para. 164.

Part III: Implicated Human Rights

Terrorism aims at the destruction of human rights through terror and violence employed against civilians, often by non-State actors. Terrorists attack democracy, the rule of law, and respect for humanity.¹⁷ Counter-terrorism measures are crucial, yet may also threaten core human rights. State counter-terrorist measures implicate numerous fundamental human rights, including the right to life through targeted killings, the prohibition against torture, liberty interests through arbitrary detention, racial and ethnic profiling, the right to due process, freedom of speech and association, the right to privacy, and many other social, economic, and cultural rights.¹⁸ This report will specifically address: (A) the prohibition against torture and cruel, inhumane and degrading treatment; (B) arbitrary detention resulting from extensive surveillance and intelligence measures; (C) the right to privacy; and finally (D) racial discrimination and ethnic profiling.

The importance of protecting human rights in creating effective counter-terrorism measures cannot be minimized. Significantly, failure to comply with international law and human rights norms may actually result in promotion of terrorism. The use of “discriminatory and stigmatizing measures affect the rights of entire communities, and may lead to further marginalization and possibly radicalization within those communities.”¹⁹ Many of the conditions conducive to the spread of terrorism result from discrimination and disenfranchisement. Counter-terrorist measure should never result in such conditions. Transparency and judicial oversight of State counter-terrorist measures must be promoted to ensure State compliance with international human rights. Monitoring of State measures is

¹⁷ See *supra* note 3, at 7.

¹⁸ See *supra* note 3, at 30-46.

¹⁹ See *supra* note 9, at 7.

already occurring under the CTC, but States should be reminded that counter-terrorist measures are not outside the realm of international law.²⁰

A. Torture and Cruel, Inhumane, and Degrading Treatment

One area of concern is the lack of transparency and judicial oversight for measures that significantly infringe on human rights, like the prohibition against cruel, inhumane, and degrading treatment. This issue is exacerbated due to the fact that many counter-terrorism measures are shrouded in secrecy, creating further difficulties for human rights protection. Torture is forbidden in all circumstances and has reached the level of a *jus cogen* norm. It is also strictly prohibited in the Convention Against Torture and in the ICCPR. Yet many States are still engaging in torture of individuals accused of terrorism.

Torture, as well as arbitrary detention and cruel, inhumane, and degrading treatment has occurred all over the world in the fight against terrorism. The United States provides an example of violating human rights in the “War on Terrorism” through arbitrary detention and torture of Guantanamo Bay detainees. The Obama Administration has taken steps toward protecting human rights and ending torture, but concerns remain. The Obama Administration has worked toward closing the Guantanamo Bay detention center, but this has not yet occurred.²¹ Continued use of torture and secrecy in the counter-terrorist procedures employed by the United States

²⁰ Martin Scheinin, *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Statement to the Counter-Terrorism Committee of the Security Council, New York, p. 2 (20 October 2008).

²¹ [Joby Warrick and Karen DeYoung](http://www.washingtonpost.com/wp-dyn/content/story/2009/01/21/ST2009012101583.html?sid=ST2009012101583&s_pos=list), “Obama Reverses Bush Policies On Detention and Interrogation,” January 23, 2009, available at: http://www.washingtonpost.com/wp-dyn/content/story/2009/01/21/ST2009012101583.html?sid=ST2009012101583&s_pos=list; *Gates: Closing Guantanamo prison 'more complicated'* September 27, 2009, available at: <http://www.cnn.com/2009/WORLD/americas/09/27/cuba.guantanamo.closure/index.html>.

raises serious concerns for human rights violations. Torture not only violates human rights norms, but also results in unreliable intelligence tainted through the use of torture.²²

A related issue is State complicity in torture and other human rights violations.²³ Many States have collaborated with the United States and facilitated detention, torture and ill treatment of terrorist detainees. States including “Bosnia and Herzegovina, Canada, Croatia, Georgia, Indonesia, Kenya, the former Yugoslav Republic of Macedonia, Pakistan and the United Kingdom of Great Britain and Northern Ireland” have acted in concert in obtaining information and seizures of individuals, who were transferred to detention facilities engaging in torture and other severe human rights violations.²⁴ States must “place serious constraints on policies of cooperation by States, including by their intelligence agencies, with States that are known to violate human rights.”²⁵ The threat of terrorism does not justify States engaging in grave violations of human rights nor cooperation with other States known to engage in such violations.

Egypt has recently been criticized for the lack of judicial oversight of counter-terrorist measures, resulting in arbitrary detention and torture of terrorist suspects. Under Egyptian law, detention centers are subject to inspections on a regular basis and arbitrary detention is a crime.²⁶ Despite such safeguards, prisoners detained by officers of the State Security Investigations (SSI) have been arbitrarily detained without due process and potentially subjected to torture.²⁷ The SSI is the established counter-terrorist agency that operates under emergency law without

²² Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/10/3, para. 51 (4 February 2009).

²³ *Id.* at para. 52.

²⁴ *Id.*

²⁵ *Id.* at para. 53.

²⁶ Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Egypt*, A/HRC/13/37/Add.2, para. 27 (14 October 2009).

²⁷ *Id.* at para. 28.

judicial oversight.²⁸ The torture allegations include “beatings, suspension in painful positions for long periods, electric shocks including on the genitals, rape and threats to kill the victim or members of the family.”²⁹ This conduct is prohibited under international law and constitutes grave human rights violations, yet continues under the justification of counter-terrorism and under emergency law.³⁰ Increased judicial oversight and transparency would help to ensure compliance with international law and remind States that counter-terrorist measures must always comply with international law.

B. Arbitrary Detention Resulting from Extensive Surveillance and Intelligence Measures

Many States employ intelligence and surveillance measures contrary to international law, justified solely on the fight against terrorism. Some have established intelligence agencies that have “legally acquired the power to arrest and detain people who are expected to have information about terrorist activities.”³¹ These agencies are not subject to judicial oversight and this may increase the risk of arbitrary detention and other human rights violations.³² In some countries, such as Morocco, Pakistan, and Jordan, there is no statutory basis for the intelligence agencies created to address terrorism. This has resulted in “arrest and detention of persons on grounds which are not clearly established in domestic law.”³³ All States must employ counter-terrorism measures within established domestic and international law.

Algeria provides another example of the need for judicial oversight in surveillance measures enacted to counter terrorism. The military intelligence agency designated to counter terrorism “specializes in detaining and interrogating people who are believed to possess

²⁸ *Id.* at para. 7.

²⁹ *Id.* at para. 30.

³⁰ *Id.* at para. 48.

³¹ See *supra* note 22, at para. 38.

³² *Id.*

³³ *Id.* at para. 40.

information about the terrorist activities of armed groups acting within Algeria or of international terrorist networks acting abroad.” This agency, however, is “operating without any civilian oversight.” Political officials are not informed of all the arrests and detentions made by this agency and are unaware of the interrogation methods used on detainees. These circumstances raise concern for the use of torture and arbitrary detention due to the lack of oversight.³⁴ If judicial oversight is meaningfully imposed, the international community would be able to monitor counter-terrorist agencies and ensure compliance with human rights. Without oversight, the risk remains for grave human rights violations to occur in secrecy.

C. The Right to Privacy

Another area requiring increased transparency and judicial oversight are procedures infringing on the right to privacy. Article 17 of the ICCPR specifically prohibits arbitrary or unlawful interference with privacy, subject to a few exceptions.³⁵ Actions taken in the United States under the Patriot Act (2001) have raised concerns due to extensive surveillance techniques employed to combat terrorism. Many of the provisions of the Patriot Act are under scrutiny for failing to provide judicial oversight for intelligence and surveillance procedures that may violate the right to privacy. Although the Patriot Act was recently due to expire, many questionable measures have been renewed despite privacy and civil rights concerns.³⁶

Recently, counter-terrorism measures infringing on the right to privacy in the United Kingdom were successfully challenged in the European Court of Human Rights. The case, titled *Case of Gillian and Quinton v. The United Kingdom*, arose out of the U.K.’s Terrorism Act, section 44, which broadly permitted public searches and seizures of persons suspected of

³⁴ *Id.* at para. 39.

³⁵ Martin Scheinin, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/13/37, para. 17 (28 December 2009).

³⁶ William Fisher, *Patriot Act- Eight Years Later*, Truthout (3 February 2010), available at <http://www.truthout.org/patriot-act-eight-years-later56600>.

terrorism. The criteria for a search were so broad that police had authority to stop and search almost anyone, including members of the press and peaceful organizers, in violation of the right to privacy.³⁷ This counter-terrorist policy did not adequately distinguish between individuals and groups engaging in the legitimate exercise of certain rights and terrorist groups. As a result, privacy was forfeited for the purpose of fighting terrorism.

Privacy must be “protected under a rigorous analytical framework that secures that any restrictions are adequately provided for in clear and precise provisions of domestic law,” while also ensuring that measures “are effective for the purpose they are intended to serve, necessary in a democratic society and proportionate to the real advantage gained.”³⁸ In order for States to address possible violations of privacy rights and other human rights, the international community must ensure that counter-terrorist measures comply with domestic and international law.

Surveillance techniques adopted to counter terrorism may have a “profound chilling effect on other fundamental rights” including the right to privacy.³⁹ Therefore, it is essential that surveillance measures be monitored to ensure compliance with human rights and protect the right to privacy. Some States have constitutional safeguards to protect individual privacy rights. Canada protects privacy and maintains a workable balance between important individual rights and law enforcement through the Charter of Rights and Freedoms.⁴⁰ More States should adopt policies similar to those in Canada and work to both protect privacy rights and ensure security.

³⁷ *Case of Gillian and Quinton v. The United Kingdom*, The European Court of Human Rights, Fourth Section (12 January 2010).

³⁸ Martin Scheinin, *Privacy and Security can be Reconciled*, The Guardian (20 January 2010), available at <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jan/20/privacy-airport-security>

³⁹ See *supra* note 35, at para. 33.

⁴⁰ *Id.* at 47.

D. Racial Profiling and Discrimination

The searches conducted under the U.K.'s Terrorism Act created problems under the right to privacy, but also implicated the risk of racial and ethnic profiling in violation of the Convention on the Elimination of Racial Discrimination (CERD). In many cases, police in the U.K. were profiling black and Asian people when conducting these arbitrary searches in the name of fighting terrorism.⁴¹ Terrorism should not be connected exclusively with a particular racial, ethnic, cultural, religious, or national group.⁴² Not only does this form of targeting violate the CERD, it may tend to promote marginalization of particular groups and increase the risk of terrorism.

Stop and search powers as well as listing procedures in the creation of terrorist suspect lists raise serious concerns for racial profiling. Due to the lack of transparency in the listing procedures, there is a risk of racial and ethnic discrimination. Transparency will ensure fairness in these procedures and protect other possible human rights violations.⁴³ The risk of racial profiling occurs in the creation of terrorist watch lists and “no-fly” lists, which is further exacerbated by lack of transparency and judicial oversight.⁴⁴ Inclusion on a terrorist watch list does not necessarily lead to inclusion on a “no-fly” list, however individuals on either list risk “immediate arrest, the collection of biometric data, information being gathered about contacts, and notification of . . . law enforcement agencies at all levels.”⁴⁵

⁴¹ Martin Scheinin, *Privacy and Security can be Reconciled*, The Guardian (20 January 2010), available at <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jan/20/privacy-airport-security>

⁴² See *supra* note 10, at para. 1.

⁴³ General Assembly Resolution 60/288, para. 15, A/RES/60/288 (20 September 2006).

⁴⁴ Randall Amster, *Homeland Insecurity: Why "No-Fly" Just Doesn't Fly*, Truthout (3 February 2010), available at <http://www.truthout.org/homeland-insecurity-why-no-fly-just-doesnt-fly56618>.

⁴⁵ *Id.*

These lists are usually not available to the public, meaning they are not subject to oversight or appeal for review.⁴⁶ Individuals on these lists “may not be able to identify why they were first placed on it, or otherwise be able to remove themselves from the multiplicity of lists that have emerged.”⁴⁷ The criteria for inclusion in a terrorist watch list are unclear, although the criteria were recently changed by the U.N. to include suspects not limited to Al-Qaida and the Taliban.⁴⁸ The lists are subject to error and false information, but since they are not available to the public, there is no independent oversight to ensure accuracy.⁴⁹ Although it may be important to maintain secrecy in the lists, this interest must be balanced with the risk of racial profiling, possible errors, and privacy infringements.⁵⁰ Increased transparency may reduce the risk of errors in the watch lists and allow for meaningful appeal of the lists, while also bringing to light prohibited ethnic or racial profiling. The first step toward addressing these concerns is unveiling the secrecy behind these procedures and forcing compliance with international law and human rights.

The risk for counter-terrorist measures to violate human rights is significant without proper oversight and transparency of the procedures. States must comply with international law and attempt to minimize the conditions conducive to terrorism. Some of these conditions, such as dehumanization of victims of terrorism, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance may result from intrusive and discriminatory anti-terrorist measures.⁵¹ Counter-terrorist measures related to arbitrary detention and torture, ethnic

⁴⁶ See *supra* note 35, at para. 39.

⁴⁷ *Id.* at para. 39.

⁴⁸ Al-Qaida and Taliban Sanctions Committee Makes Available New Standard Forms for Listing, Security Council, SC/9838 (12 January 2010), available at <http://www.un.org/News/Press/docs/2010/sc9838.doc.htm>.

⁴⁹ See *supra* note 35, at para. 26.

⁵⁰ *Id.*

⁵¹ The United Nations Global Counter-Terrorism Strategy, A/RES/60/288, Annex (20 September 2006).

and racial profiling, and privacy infringement could lead to conditions promoting terrorism. States must recognize this possibility and work toward creating fair and effective counter-terrorism policies.

Recommendations

Human Rights Advocates recommends that the Human Rights Council:

- Promote the adoption of a universal, comprehensive and precise definition of “terrorism” to ensure that all international human rights obligations are upheld. This definition should include acts committed against civilians with both 1) the intention of causing death or serious bodily injury, or the taking of hostages AND 2) for the purpose of provoking terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organization to do or abstain from doing any act, as suggested by Security Council Resolution 1566.
- Promote transparency and judicial oversight over counter-terrorism procedures to ensure the right to privacy and protect other human rights.
- Remind states that international human rights law applies at all times and terrorism does not provide an exception to core obligations. The only exceptions to international human rights obligations are provided for within individual treaties and covenants, while other norms remain non-derogable.

Human Rights Advocates urges Member States to:

- Affirm that international human rights law applies at all times and terrorism does not provide an exception to core obligations.

- Work toward acceptance of a universal definition of terrorism. Until such a definition is adopted, Human Right Advocates urges that states be aided in developing domestic legislation incorporating the double intent requirements of Security Council Resolution 1566.
- Immediately discontinue the use of torture as a means of countering terrorism.
- Recognize that diplomatic assurances are not a presumptive guarantee against torture and monitoring of the transfer of terrorist suspects is required.
- Recognize that there are only two types of combatants within the Geneva Conventions, “lawful combatants” and “unlawful combatants.”
- Recognize the possibility for human rights abuses under counter-terrorist measures and acknowledge the risk of fostering marginalization and extremism through measures meant to counter terrorism.

Human Rights advocates encourages the Special Rapporteur to:

- Urge the adoption of a universal, comprehensive and precise definition of terrorism.
Although past reports have addressed the need for a definition, the most recent report does not address issue directly. A universal definition of terrorism is the first step toward more effective counter-terrorism measures and increased human rights protection in this area.
- Continue promoting transparency and judicial oversight of State counter-terrorism measures, related specifically to the right to privacy and surveillance and intelligence issues, which were addressed in the most recent report.