

Office of the High Commissioner for Human Rights

Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures

This note considers human rights aspects of counter-terrorism measures taken by States. It begins by offering some general considerations and elucidating key principles which can guide an analysis of counter-terrorism measures from a human rights perspective. The note then proposes some questions applicable to all States which can assist the Counter-Terrorism Committee in exploring these issues further.

A. General Considerations

The Office of the High Commissioner for Human Rights (OHCHR) welcomes the opportunity to contribute to the Counter-Terrorism Committee's consideration of reports submitted pursuant to Security Council resolution 1373. From the outset, OHCHR has considered it important that the CTC include a human rights perspective in its analysis of measures taken by States to eliminate the threat of terrorism. In this regard, reference is made to the Proposals for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001), regarding Compliance with international human rights standards, which were intended to supplement the Chairman's note on "Guidance" of 26 October 2001. The Further Guidance note was included in E/CN.4/2002/18.

The CTC will be aware that it is the intention of the Secretary-General to publish the report of a policy working group he has established on terrorism. The report contains a number of recommendations, including that the UN should publish a pamphlet on the main points of human rights jurisprudence in this area, incorporating for example the findings of the UN, the Council of Europe, the OAS, and the OSCE. The report of the sub-group, which contains a concise analysis of the jurisprudence, is being submitted concurrently with the present note.

There are two central concerns that undoubtedly guide the CTC and the international community in its work on this issue: first, that pursuit of the struggle against terrorism must take place within the framework of the rule of law, both nationally and internationally; and second, that human rights must be safeguarded in the struggle against terrorism. The purpose of security measures is, fundamentally, to protect freedom and human rights.

Principles: Against this background, it would be important for the CTC to have in view continually certain fundamental principles which are essential to keeping the struggle against terrorism consistent with respect for human rights. These include the following:

a) Legality

All measures taken by States against terrorism must be prescribed by law and set out with sufficient precision so as to preclude arbitrary or discriminatory enforcement. Measures against terrorism outside any legal framework should be proscribed.

b) Non-derogability

Certain rights are absolute and not subject to derogation or curtailment under any circumstances. These include:

- the right to life
- the prohibition against torture and cruel, inhuman or degrading treatment or punishment
- the principles of precision and of non-retroactivity of criminal law (except where a later law imposes lighter penalty)
- the right to recognition everywhere as a person before the law, and
- the right to freedom of thought, conscience and religion.

According to the UN Human Rights Committee's General Comment No. 29 on "States of Emergency",^[1] the are other elements of rights contained in the International Covenant on Civil and Political Rights (ICCPR) who are non-derogable. These include:

- the right of all persons deprived of liberty to be treated with humanity and respect for their human dignity
- elements of the rights of persons belonging to minorities
- the prohibition against propaganda for war or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence
- elements of the right to due process, including the right to be tried by a court of law, the presumption of innocence, and the right to judicial review of the lawfulness of detention (*habeas corpus*)
- in any trial which could lead to the imposition of the death penalty, strict respect for due-process rights including the right to be informed of the nature of the charge(s), the right to counsel, and the right to examine witnesses and evidence.

c) *Necessity and Proportionality*

Whether in an officially-proclaimed time of emergency or at any other time, any restrictions placed on rights which are subject to derogation must be limited to the extent strictly required by the exigencies of the situation. According to the Human Rights Committee, this principle relates, *inter alia*, to the duration, geographical coverage and material scope of any special measures taken.

d) *Non-Discrimination*

Counter-terrorism measures may never involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

e) *Due Process and Rule of Law*

As noted above, certain elements of the right to due process are not subject to derogation under any circumstances, including the right to be tried by a court of law, the presumption of innocence, and the right to *habeas corpus*. Any restrictions placed on other due-process rights, such as the right to counsel, are strictly limited by the principles of necessity and proportionality.

f) *Right to seek asylum/Non-refoulement*

Everyone has the right to seek and enjoy in other countries asylum from persecution. Moreover, States shall not expel or return a person to another State where there are substantial grounds for believing that person's life, physical integrity or freedom may be threatened on account of his or her race, religion, nationality, membership in a particular social group or political opinion. States shall also not expel or return a person to another State where there is a substantial risk generally of torture or cruel, inhuman or degrading treatment or punishment.

5. OHCHR believes that the CTC's study of State reports under SC resolution 1373 could benefit from the objective and reliable assessment of counter-terrorism measures, much of it in the light of the foregoing principles, made by the following sources in the field of human rights:

- The six United Nations human rights treaty bodies
- The reports and communications of special rapporteurs, representatives and working groups of the Commission on Human Rights
- Human rights reports and other material from regional organizations recognized by the UN: the Council of Europe, OAS, OSCE, AU, *et al*^[2]
- Analysis by OHCHR based on the above-stated principles.

The lines of inquiry suggested below are based on the above-mentioned principles and the jurisprudence of the above

mentioned sources.

B. Suggested Lines of Inquiry

The following illustrative and non-exhaustive list of questions may assist the CTC in questioning States and assessing the human rights implications of counter-terrorism measures.

General

1. **What legislation exists in your country for the declaration of a state of emergency or similar state of exception? Has your Government made such a declaration? If so, when did it become effective, and under what circumstances will it end? Has a notification of the declaration been submitted to the Secretary-General?**
2. **If a state of emergency has been declared, what measures exist to ensure respect for the non-derogability of certain rights?**

Legality

3. **Does your legislation include (as an autonomous basis for criminal conviction, deprivation of liberty, denial of immigration benefits or similar measures) references to “terrorism”, “terrorist acts”, “support to terrorist groups” and similar notions? If so, how precisely does your legislation define such notions?**
4. **Can the legislation referred to be used to criminalize peaceful activity protected by human rights law, such as the holding of beliefs or the peaceful, private discussion of ideas?**
5. **When did the legislation referred to come into effect? How does the legislation ensure that any penalties incurred by a person accused and convicted of terrorist activities were provided for by law at the time the acts were committed, and that no heavier penalty is imposed than the one applicable at the time the acts were committed?**

Non-Derogability/Torture

6. **Do your counter-terrorist measures provide for exceptional treatment of persons detained under terrorism-related charges, such as prolonged detention without charges, incommunicado detention or restrictions on access to counsel? If so, what are the provisions? How are these measures justified, and what limits are placed on their applicability?**
7. **What protective measures (e.g., judicial supervision, access to medical assistance) exist to prevent torture and similar rights violations from occurring under these exceptional procedures?**
8. **Does your Government maintain independent complaints mechanisms, outside prosecutorial mechanisms, which are accessible to persons held in custody? What provisions exist to ensure impartial and full investigations into allegations of torture reported to the authorities, and the prosecution and punishment, as appropriate, of perpetrators?**
9. **What safeguards exist to ensure that confessions or other evidence obtained under torture or duress are not admitted as evidence?**

Necessity and Proportionality

10. **With respect to your counter-terrorism legislation, what specific steps has your Government taken to ensure that its provisions are applied only to the extent strictly required by the exigencies of the situation? For example, are there limits on the duration, geographical coverage and material scope of such measures?**

11. Are counter-terrorism measures in your country subject to judicial review or any other form of review? Is the applicability of these measures re-assessed on a regular basis?

Non-Discrimination

12. Could your counter-terrorism legislation have any discriminatory effect on certain sectors of society based on race, colour, sex, language, religion, social origin, migration status or similar distinctions? What measures are in place or are envisaged to prevent any discriminatory effect?

Due Process/Rule of Law

13. Do all persons detained under counter-terrorism measures enjoy the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention (habeas corpus)?
14. For all persons detained on account of suspected terrorist activities and held pending trial, what provisions exist for regular judicial supervision of the lawfulness of the detention?
15. Do persons in proceedings related to alleged terrorist activities enjoy the right to presumption of innocence? How does your Government ensure that this presumption is safeguarded?
16. In what ways do counter-terrorism measures in your country impact on fundamental aspects of due process, including the rights in article 14 of the International Covenant on Civil and Political Rights? If enjoyment of any of the listed rights is restricted as a consequence of a state of emergency or similar state of exception, what steps have been taken to limit such restrictions to the extent strictly required by the exigencies of the situation?
17. What are the legal provisions for persons arrested or detained for terrorist activities to be brought promptly before a judge? How long is the permissible period of police custody? Is this subject to judicial review? What steps have been taken to limit the impact of any exceptional measures in this regard to the extent strictly required by the exigencies of the situation?
18. *[If the State retains capital punishment]* In capital cases, what steps does the Government take to ensure the protection of due process rights, including the right to be informed of the nature and cause of the underlying charge, the right to counsel, and the right to examine witnesses and evidence?

Special courts/Military tribunals

19. Do your counter-terrorism measures allow for the trial of civilians on terrorism-related charges by special or military courts? If so, how is this considered compatible with the provisions of article 14 of the International Covenant on Civil and Political Rights?

Right to seek asylum/Non-refoulement

20. With respect to claims to asylum made either at a border or following entry into your country, what procedures are in place to deal with asylum seekers where there are reasons to believe that they may be responsible for terrorist act? Do these procedures ensure that such individuals are guaranteed access to asylum procedures where their possible exclusion from refugee protection can be determined by qualified personnel familiar with refugee law and the complicated issues associated with exclusion from refugee status?
21. In the case of extradition requests for asylum seekers suspected of responsibility for terrorist acts, are procedures in place to ensure that the extradition is not being requested solely or principally as a means to return a person to a country for purposes which in fact amount to persecution?
22. In the cases of individuals deemed to be excluded from refugee protection as a result of their responsibility

for terrorist acts, what procedures are in place to ensure that such individuals are brought to justice, as asserted in Security Council Resolution 1373 of 28 September 2001? Do these procedures take into account the need to ensure that such persons are not returned to countries where they may be subject to torture, or other cruel, inhuman and degrading treatment? If there is a possibility of torture in the receiving state, do these procedures envisage the possibility of prosecution in the state where the asylum claim was made?

Annex
Article 14 of the International Covenant on Civil and Political Rights

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[1] CCPR/C/21/Rev.1/Add.11 (31 August 2001)

[2] In particular, the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism are useful in this regard.