



**United Nations Counter-Terrorism Implementation Task Force**  
CTITF Working Group on Protecting Human Rights while Countering Terrorism

# **Basic Human Rights Reference Guide: Security Infrastructure**

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**United Nations Office of the High Commissioner on Human Rights**

*With the support of*

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

**United Nations Office on Drugs and Crime**

**Counter-Terrorism Committee Executive Directorate**

**Office of Legal Affairs United Nations Interregional Crime and Justice Research Institute**

**International Maritime Organization**

**International Criminal Police Organization**

**1267 /1988 Monitoring Team**

**And the participation of the International Committee of the Red Cross, the  
Office for the Coordination of Humanitarian Affairs  
and the United Nations High Commissioner for Refugees as observers**



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## About the United Nations Counter-Terrorism Implementation Task Force

The United Nations Counter-Terrorism Implementation Task Force (CTITF), established by the Secretary-General in 2005, aims to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system and to support implementation of the UN Global Counter-Terrorism Strategy (General Assembly resolution 60/288). CTITF is comprised of 31 UN and international entities and is chaired by a senior UN official, Under-Secretary-General Mr. J. Feltman. CTITF provides for the delivery of focused and coherent assistance to Member States in implementing the UN Global Strategy, mainly by working together through the Working Groups and other initiatives to coordinate activities and build synergies in UN counter-terrorism efforts.

The United Nations Global Counter-Terrorism Strategy, which brings together into one coherent framework decades of United Nations counter-terrorism policy and legal responses emanating from the General Assembly, the Security Council and relevant United Nations specialized agencies, has been the focus of the work of CTITF since its adoption by the General Assembly in September 2006

The Strategy sets out a plan of action for the international community based on four pillars:

- Measures to address the conditions conducive to the spread of terrorism;
- Measures to prevent and combat terrorism;
- Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard;
- Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

In accordance with the Strategy, which welcomes the institutionalization of CTITF within the United Nations Secretariat, the Secretary-General in 2009 established a CTITF Office within the Department of Political Affairs to provide support for the work of CTITF. Via the CTITF Office, with the help of a number of thematic initiatives and working groups, and under the policy guidance of Member States through the General Assembly, CTITF aims to coordinate United Nations system-wide support for the implementation of the Strategy and catalyse system-wide, value-added initiatives to support Member State efforts to implement the Strategy in all its aspects. CTITF seeks to foster constructive engagement between the United Nations system and international and regional organizations and civil society on the implementation of the Strategy.

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## About the Basic Human Rights Reference Guide Series

The Basic Human Rights Reference Guide series is an initiative of the Counter-Terrorism Implementation Task Force (CTITF) Working Group on Protecting Human Rights while Countering Terrorism.

The United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288) was adopted by consensus by all Member States on 8 September 2006 and has since then been reaffirmed on a biannual basis, lastly by General Assembly resolution 66/282 of 12 July 2012. The Strategy reaffirms respect for human rights and the rule of law as the fundamental basis for the fight against terrorism. In particular, Member States reaffirmed that the promotion and protection of human rights for all and respect for the rule of law are essential to all components of the Strategy, and recognized that effective counter- terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.

In order to assist States in this regard, the Task Force formed the Working Group on Protecting Human Rights while Countering Terrorism, which is led by the Office of the United Nations High Commissioner for Human Rights (OHCHR). Members include the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the United Nations Office on Drugs and Crime (UNODC), the Counter-Terrorism Committee Executive Directorate (CTED), the Office of Legal Affairs (OLA), the United Nations Interregional Crime and Justice Research Institute (UNICRI), the International Maritime Organization (IMO), the International Criminal Police Organization (INTERPOL), and the 1267/1988 Monitoring Team. The International Committee of the Red Cross (ICRC), the Office for the Coordination of Humanitarian Affairs (OCHA), and the United Nations High Commissioner for Refugees (UNHCR) participate as observers.

The Guides have been prepared to assist Member States in strengthening the protection of human rights in the context of countering terrorism. They aim to provide guidance on how Member States can adopt human rights-compliant measures in a number of counter-terrorism areas. The Guides also identify the critical human

rights issues raised in these areas and highlight the relevant human rights principles and standards that must be respected.

Each Guide comprises an introduction and a set of guiding principles and guidelines, which provide specific guidance to Member States based on universal principles and standards, followed by an explanatory text containing theoretical examples and descriptions of good practices. Each Guide is supported by reference materials, which include relevant international human rights treaties and conventions, United Nations standards and norms, as well as general comments, jurisprudence and conclusions of human rights mechanisms and reports of United Nations independent experts, best practice examples and relevant documents prepared by United Nations entities and organizations.\*

The Guides are intended for State authorities, including legislators; law enforcement and border officials; national and international non-governmental organizations; legal practitioners; United Nations agencies; and individuals involved in efforts to ensure the protection and promotion of human rights in the context of counter-terrorism.

The Counter-Terrorism Implementation Task Force is grateful to the Governments of the Netherlands, Spain and Sweden, and the United Nations Counter-Terrorism Centre (UNCCT) for their generous support of this project

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\* For a brief overview of the broader international law framework, including an introduction which aims to give a quick insight into the general principles of international law as well as the basic elements of international criminal law, humanitarian law, refugee law and human rights law which may be relevant in a counter-terrorism context, see United Nations Office on Drugs and Crime, *Frequently Asked Questions on International Law Aspects of Countering Terrorism*, United Nations, Vienna, 2009.

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## I. Introduction

1. As part of an effective counter-terrorism strategy, States are placing increased emphasis on the prevention of terrorist acts. The obligation to prevent acts of terrorism is a result of the development, since 1963, of a set of universal instruments by the international community, which now consist of more than a dozen conventions and protocols,<sup>1</sup> as well as of United Nations Security Council resolutions,<sup>2</sup> which require States to prevent the commission of terrorist acts through the adoption of a number of measures. In addition, the United Nations Global Counter-Terrorism Strategy has devoted an entire pillar to specific measures to prevent and combat terrorism.<sup>3</sup> This focus on prevention has led to the adoption of enhanced security measures, which include the development of a security infrastructure.

### A. Definitions

2. In the present document, security infrastructure is defined as the facilities, technologies, networks and processes aimed at preventing terrorist attacks, limiting the damage caused by such attacks or addressing the consequences of such attacks, including measures to investigate and apprehend those responsible through law enforcement action. Security infrastructure involves the combination of physical and network security, as well as its use and implementation by intelligence agencies, law enforcement officials and contracted civilians to provide a security framework. Security measures may be limited to physical structures, such as checkpoints, checkposts and separation barriers, including those now often surrounding international airports, or screening and other surveillance devices to detect weapons, plastic explosives and other materials or facilities linked to or capable of being used to facilitate terrorist acts. Many other features of security infrastructure involve a combination of physical, technological and human instruments. Active analytical aspects may be involved, through intelligence analyses and threat assessments, such as profiling and the use of advance passenger screening programmes. More passive means of data collection, such as surveillance cameras, are also utilized for potential analysis or law enforcement action.

### B. Key issues

3. All measures, including those related to the design and implementation of security infrastructure, to prevent and deter terrorist acts in the national territories of States must comply fully with States' international human rights obligations. The



protection and promotion of human rights while countering terrorism is both an obligation of States and a condition for an effective counter-terrorism strategy.

4. Counter-terrorism measures adopted by States related to the design and implementation of security infrastructure can have negative impacts on the enjoyment of a range of human rights, including the principles of equality and non-discrimination, the right to freedom of movement, the right to seek and enjoy asylum and the right to privacy. The international human rights framework is flexible enough to allow States to deal with a number of exceptional circumstances in which they may need to restrict the enjoyment of some human rights, while at the same time remaining within the boundaries of what is permissible under international human rights law. Whenever counter-terrorism measures, including those linked to security infrastructure, limit the full enjoyment of a human right, States must show that the measure was provided by law, and is both necessary and proportional.
5. The principles of equality and non-discrimination are both integral to international human rights law and crucial for effectively countering terrorism.<sup>4</sup> International human rights law also provides that any derogating measure must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.<sup>5</sup> In addition, compliance with the principle of non-discrimination has been identified in the United Nations Global Counter-Terrorism Strategy as an essential measure when addressing conditions conducive to the spread of terrorism.<sup>6</sup> Therefore, counter-terrorism measures related to the design and use of security infrastructure must always fully respect the principles of equality and non-discrimination.<sup>7</sup>
6. By making travelling difficult or impossible, or by deterring individuals from travelling, security infrastructure often has a serious impact on the right to freedom of movement.<sup>8</sup> Freedom of movement involves the right of persons within the territory of a State to move within that territory. It includes the right of persons to establish themselves in a place of their choice, as well as the right of every person to travel abroad, including departure for emigration, and the right to enter one's own country. Freedom of movement is also a key platform for the exercise of other human rights, including, for example, the right of everyone to attend school and work; to gain access to land, water and other natural resources, and to social services and medical treatment; and to take part in cultural life and associate with their family.<sup>9</sup>
7. As part of an effective counter-terrorism strategy, States have a legitimate interest in border security as part of efforts to identify security threats at the point of entry. Measures taken by States to secure their airports, sea and land borders,

which often involve the design and implementation of security infrastructure, may have an impact on a range of international human rights and may violate international refugee law, by resulting in the inability of asylum-seekers and refugees to benefit from international protection. International human rights law, which provides human rights protection to all persons within a State's jurisdiction or territory, is also an important component of the framework for the protection of asylum-seekers and refugees – alongside international refugee law, which addresses the specific concerns, needs and situation of asylum-seekers and refugees.<sup>10</sup> These complementary bodies of law are built upon the foundation established in the Universal Declaration of Human Rights.<sup>11</sup>

8. A number of counter-terrorism measures related to security infrastructure involve the use of technologies, which in turn involve the recording, collection, storing and sharing of information. Such measures as the circulation of secret watch lists, data sharing agreements and the creation of profiles on travellers may have a serious impact on the right to privacy.<sup>12</sup> It is therefore important to understand the extent to which a State may lawfully limit this right, recognizing that the State must also continue to take active steps to protect individual privacy.
9. States must be held accountable for the design and implementation of security infrastructure.<sup>13</sup> When a violation of human rights is alleged as a result of the implementation of counter-terrorism measures linked to the use of security infrastructure, effective remedies before the competent authorities must exist. In addition, States should set up oversight mechanisms to review mechanisms and policies linked to the use of security infrastructure
10. Two aspects related to the use of security infrastructure are not dealt with in depth in this Guide, although they constitute key aspects of an effective counter-terrorism strategy. The first aspect is the impact that the measures adopted by States to combat terrorism related to security infrastructure may have on the enjoyment of economic, social and cultural rights. While these are not examined specifically in this Guide, they are referred to where necessary throughout. This aspect must be taken into consideration, as the promotion and protection of economic, social and cultural rights can be an important means of addressing conditions conducive to the spread of terrorism and hence of preventing acts of terrorism.<sup>14</sup> The second aspect relates to the more indirect, perverse effect that may be a result of the design and use of security infrastructure, in that measures may have a disproportionate impact, in particular on the rights of certain categories of individuals and communities. This may lead to further marginalization, discrimination and, in extreme cases, radicalization within affected communities. It is therefore especially important that States pay particular attention to the design

and implementation of security infrastructure. This Guide also does not address the issue of international humanitarian law, but where counter-terrorism occurs within the context of an armed conflict, international humanitarian law applies, in addition to international human rights law. International humanitarian law does not allow for derogation as it was specifically conceived for the emergency situations that armed conflicts constitute.

## C. Purpose of the Guide

11. This Guide is not intended to cover all forms of security infrastructure, which may vary from one country to another. Its main purpose is to assess the impact of security infrastructure on the enjoyment of human rights and to provide Member States with legal and practical guidance to assist them in ensuring that such measures comply with international human rights and refugee law. The following guidelines aim to provide practical guidance concerning the design and implementation of security infrastructure in a manner which respects human rights and fundamental freedoms. All those involved in determining the policies and practices to be used in achieving security, designing and implementing security infrastructure and in reviewing the challenges to their implementation should be made aware of the obligation to respect human rights and refugee law. This includes legislators, decision makers in the areas of policy and practice, law enforcement officials and persons responsible for the management of discrete units or geographical areas, border police and the judiciary. This Guide should be read in conjunction with the Guide *“Stopping and Searching of Persons in the Context of Countering Terrorism”*, the forthcoming Guides *“Conformity of National Counter-Terrorism Legislation with International Human Rights Law”*, *“Detention in the Context of Countering Terrorism”*, *“Proscription of Organizations in the Context of Countering Terrorism”*, and *“Right to a Fair Trial and Due Process in the Context of Countering Terrorism”*, and Fact Sheet No. 32 (*Human Rights, Terrorism and Counter-Terrorism*) of the Office of the United Nations High Commissioner for Human Rights.

## II. Guiding principles and guidelines

12. *All counter-terrorism measures, including those related to the design and implementation of security infrastructure, must comply with international human rights law. Any measure adopted regarding the design and implementation of security infrastructure which limits the full enjoyment of human rights must be prescribed by law, and be in the pursuance of a legitimate purpose, necessary and proportionate.*
13. The obligation to respect, protect and promote human rights while countering terrorism is both an obligation of Member States and a condition for an effective counter-terrorism strategy. Therefore, all security measures regarding the use of security infrastructure designed and implemented in the context of countering terrorism must be prescribed by law and regulated by precise and strict guidelines, necessary for the protection of public order or safety, or of national security, and implemented by proportional means.<sup>15</sup>
14. The international human rights framework is conceived to be flexible enough to allow States to deal with a number of exceptional national circumstances in which they need to restrict the enjoyment of some human rights, while at the same time remaining within the boundaries of what is permissible under international human rights law. In order to do so, two means may be used: limitations and derogations.
15. States may legitimately limit the exercise of certain rights, including the right to freedom of movement and the right to privacy. Limitations must be prescribed by law and in pursuance of one or more specific legitimate purposes. The protection of public order and safety, and of national security are legitimate objectives for the restriction of human rights under the International Covenant on Civil and Political Rights.<sup>16</sup> Public order has been defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*). In turn, public safety has been defined as protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.<sup>17</sup>
16. Limitations must also be both necessary and proportionate. These requirements mandate that States shall use the least restrictive means for the achievement of the objective sought.<sup>18</sup> Therefore, it must be analysed and assessed in each case

whether the measure, including the duration, location and scope of its implementation, is proportional in light of the objective of the measure. In addition, limitations imposed for the protection of national security must be necessary to avert a real and imminent — not just hypothetical — danger to the existence of the nation, its territorial integrity or political independence.<sup>19</sup> Finally, the measures and their implementation must be in strict compliance with the principles of equality and non-discrimination.

17. In a very limited set of circumstances, such as a public emergency which threatens the life of the nation, States also may take measures to derogate from certain human rights provisions under international human rights law. However, as with limitations, any derogation must comply strictly with a number of conditions, including the principles of necessity and proportionality, and must not involve discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>20</sup>
18. Consequently, if the design or use of security infrastructure would limit the enjoyment of certain human rights, States must show that the limiting measure has a legitimate aim and objective, is adequate and is permitted by the international human rights framework applicable to the affected right or rights.<sup>21</sup> For example:
  - (a) Where an initial body scan at an airport leads the authorities to have reasonable cause to believe that the individual is carrying dangerous substances, asking the individual to undress in public would not comply with the principles of necessity or proportionality, and may also violate a number of human rights, such as the right to privacy, and amount to ill-treatment. To ensure that their response complies with international human rights law, the authorities should take incremental steps, first asking the individual to remove clothes that could hold dangerous materials, for example a jacket, a bulky sweater, shoes and belt; then, if necessary, performing a frisk over the outer layer of clothing; and finally, if suspicion based on specific facts remains, undertaking a partial body search in a private area and in the sole presence of security personnel of the same sex. Invasive searches must be carried out only when absolutely necessary and as a means of last resort.<sup>22</sup>
  - (b) The adoption of increased security measures to counter terrorism, such as the setting up of invasive checkpoints or increasing the number of individuals undergoing personal searches at airports, may violate international human rights law in the absence of any direct or specific terrorist threat against a State or a part thereof. The adoption of such measures may comply with international human rights law where a State is able to show that: direct and clear terrorist threats have been made or attacks have been carried out or attempted; the measures are to be adopted in specific areas, for a limited time, under strict legislative and judicial scrutiny; existing law or measures would be inadequate

to address the situation; and the measures adopted are the least restrictive and most effective measures possible to protect individuals from terrorist acts.

- (c) Security infrastructure may appear to be unwarranted as a counter-terrorism measure, designed mainly to humiliate people and viewed as a form of harassment by the authorities. This will likely be the case where the measures are implemented in a manner which disproportionately affects certain individuals or communities. This may be the case where a checkpoint is set up on a road leading to areas populated mainly with indigenous peoples who have voiced claims regarding respect for their indigenous status, including land claims, but who have not carried out any terrorist acts or made any terrorist threats, or where there is excessive police presence in minority areas. In turn, such measures may lead to increased marginalization and stigmatization and thereby be counterproductive. Where security infrastructure is developed in a manner consistent with international human rights law, the State must guarantee its non-discriminatory application and take all necessary steps to ensure that it does not contribute to conditions conducive to the spread of terrorism, as defined in the United Nations Global Counter-Terrorism Strategy.<sup>23</sup>

Where a State designs and implements security infrastructure to counter terrorism which limits the full enjoyment of human rights, it must show that the following principles are respected in order to comply with the international human rights framework:

- The principle of legality: the restrictive measures must be set out within, or authorized by, a prescription of law, which is both accessible and precise.
- The principle of legitimate purpose: restrictions on the exercise of human rights cannot be lawfully justified under the International Covenant on Civil and Political Rights or other applicable international human rights instruments for reasons not expressly contained therein or for purposes alien to the effective protection of human rights. Counter-terrorism legislation which would limit the exercise of human rights should not be applied to conduct that does not amount to terrorism,<sup>24</sup> nor should it be used to broaden State powers in other areas.
- The principles of necessity and proportionality: interference with the exercise of an individual's rights must be necessary for a legitimate purpose or purposes, and proportionate when applied to a specific individual. It is not sufficient that the measure be simply reasonable or possibly advisable: it must be necessary. It will be instructive to determine how the measure is linked to the countering of an actual or potential threat of terrorism against the State and the measure's contribution to international and regional frameworks for countering terrorism. The imposition of a limitation on rights and freedoms for the purpose of countering terrorism, but by ineffective means, is unlikely to be justifiable.
- The principles of equality and non-discrimination: both are central tenets of human rights law.

In his 2010 report to the Human Rights Council, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism identified ten areas of best practices in countering terrorism. He proposed the following "model provisions on consistency of counter-terrorism practices with human rights and refugee law, and [international] humanitarian law:

In the application and exercise of all functions under the law relating to terrorism, it is unlawful for any person to act in any way that is incompatible with the purposes and provisions of international human rights and refugee law that are binding upon the State. In this regard:

1. The exercise of functions and powers shall be based on clear provisions of law that exhaustively enumerate the powers in question.
2. The exercise of such functions and powers may never violate peremptory or non-derogable norms of international law, nor impair the essence of any human right.
3. Where the exercise of functions and powers involves a restriction upon a human right that is capable of limitation, any such restriction should be to the least intrusive means possible and shall: (a) Be necessary in a democratic society to pursue a defined legitimate aim, as permitted by international law; and (b) Be proportionate to the benefit obtained in achieving the legitimate aim in question.
4. If the State is involved, as a party, in an ongoing armed conflict, the above provisions shall apply also to securing compliance with principles and provisions of international humanitarian law, without prejudice to the obligation to comply with international human rights and refugee law.<sup>25</sup>

19. *All counter-terrorism measures, including those related to the design and implementation of security infrastructure, must respect the principles of equality and non-discrimination. Any difference in treatment, including through profiling practices, must be supported by objective and reasonable grounds, in compliance with international human rights law.*<sup>26</sup>

The Committee on the Elimination of Racial Discrimination, in its statement on racial discrimination and measures to combat terrorism, recalled that

*“... the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted”; demanded that “... States and international organizations ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin”; and insisted that “... the principle of non-discrimination must be observed in all matters, in particular in those concerning liberty, security and dignity of the person, equality before the courts and due process of law, as well as international cooperation in judicial and police matters in these fields.”<sup>27</sup>*

20. If based on “profiling”, the screening of individuals at security checkpoints (land and maritime borders, airports and roadblocks) or by intelligence and law enforcement authorities through the use of data mining and automated data analysis programmes, may violate the right to equality and non-discrimination, the right to the presumption of innocence,<sup>28</sup> the right to honour and reputation<sup>29</sup> and the prohibition of incitement to discrimination, hostility or violence.<sup>30</sup>
21. Profiling is generally defined as the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use

as a basis for making law enforcement decisions.<sup>31</sup> As such, profiling is, in principle, a permissible means of law enforcement.<sup>32</sup> The use of profiles that reflect unexamined generalizations may, however, constitute disproportionate interferences with human rights and violate the principle of non-discrimination. This is likely to be the case if profiling is based on ethnic or national origin or religion, or if profiling solely or disproportionately affects a specific part of the population.<sup>33</sup> Profiling may also be problematic where it is based on a person's country of origin if this is used as a proxy for racial or religious profiling,<sup>34</sup> if the police were to rely on a person's ethnic and/or religious appearance when conducting routine stops, document checks or searches,<sup>35</sup> or where checks apply to male immigrants, not suspected of any criminal activity, solely because they are of a certain age and originate from certain countries.<sup>36</sup>

22. A difference in treatment based on criteria such as race, ethnicity, national origin or religion would only be compatible with the principle of non-discrimination if it was supported by objective and reasonable grounds.<sup>37</sup> However, it should be noted that the general position is that racial and religious profiling can generally not be justified on objective and reasonable grounds, as profiling practices based on ethnicity, national origin and religion have proved to be both inaccurate and largely unsuccessful in preventing terrorist activity or in identifying potential terrorists.<sup>38</sup> Such practices may affect thousands of innocent people, without producing concrete results, and may thus have considerable negative effects, rendering these counter-terrorism measures disproportionate. Such negative effects are not limited solely to the particular cases in which such measures are implemented, but extend to the broader population, as illustrated below.

*“Profiling practices based on ethnicity, national origin or religion can take a profound emotional toll on those subjected to them. The Special Rapporteur believes that profiling practices have a more serious impact than ‘neutral’ law-enforcement methods. While anyone stopped, searched or questioned by the police may feel intimidated or degraded to a certain extent, the encounter has a particularly humiliating effect when characteristics such as ethnicity or religion play a role in the law-enforcement officer’s decision. The Special Rapporteur is concerned that these individual experiences may translate into negative group effects. Terrorist-profiling practices single out persons for enhanced law-enforcement attention simply because they match a set of group characteristics, thus contributing to the social construction of all those who share these characteristics as inherently suspect. This stigmatization may, in turn, result in a feeling of alienation among the targeted groups. The Special Rapporteur takes the view that the victimization and alienation of certain ethnic and religious groups may have significant negative implications for law-enforcement efforts, as it involves a deep mistrust of the police .... The lack of trust between the police and communities may be especially disastrous in the counter-terrorism context. The gathering of intelligence is the key to success*



*in largely preventive law-enforcement operations.... To be successful, counter-terrorism law-enforcement policies would have to strengthen the trust between the police and communities.*

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism<sup>39</sup>

In the context of racial profiling, when making an assessment of proportionality, the European Commission against Racism and Tolerance has noted that consideration must be given to the “harm criterion”, defined as the extent to which a concrete measure affects the rights of the individual (the right to respect for private and family life, the right to liberty and security and the right to be free from discrimination):

*“Beyond considerations relating to the individual rights affected, the harm criterion should be understood in more general terms, as including considerations on the extent to which the measure in question institutionalizes prejudice and legitimizes discriminatory behaviour among the general public towards members of certain groups. Research has shown that racial profiling has considerably negative effects. Racial profiling generates a feeling of humiliation and injustice among certain groups of persons and results in their stigmatization and alienation as well as in the deterioration of relations between these groups and the police, due to loss of trust in the latter. In this context, it is important to examine, as part of the assessment of the harm criterion, the behaviour of the police when conducting the relevant control, surveillance or investigation activity. For instance, in the case of stops, courtesy and explanations provided on the grounds for the stop have a central role in the individual’s experience of the stop. It is also important to assess the extent to which certain groups are stigmatized as a result of decisions to concentrate police efforts on specific crimes or in certain geographical areas.”*

European Commission against Racism and Tolerance, General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, adopted 29 June 2007<sup>40</sup>

23. However, when a terrorist crime has been committed or is in preparation, and there is evidence or information which raises reasonable grounds to assume that the suspect fits a certain descriptive profile, then reliance on such characteristics as ethnic appearance, national origin or religion may be justified.<sup>41</sup> In the case of preventive counter-terrorism efforts that are not based on evidence or specific information, the situation is different, however. In those cases, a profile may not be based on stereotypical generalizations that certain ethnic or religious groups pose a greater terrorist risk than others.<sup>42</sup>
24. Profiling based on behavioural indicators appears to be significantly more efficient, although reliance on such indicators must be neutral and the indicators not just be used as mere proxies for ethnicity, national origin or religion.<sup>43</sup> When law enforcement officials are unable to rely on evidence, specific information or useful behavioural indicators, the stopping and searching of persons should be

carried out on a genuinely random basis and affect everyone equally. Indeed, as opposed to profiling, these techniques are impossible for terrorists to evade and may thus also be more effective.<sup>44</sup>

25. A good practice at airports is to submit individuals to additional checks on a random basis, such as one in every five or 10 passengers. Additional checks based on profiling should be used only where there is specific intelligence on a threat or a clear descriptive profile, such as height, weight, colour of hair or clothing, or specific behavioural indicators. In all cases, checks based solely on the fact that a person holds a specific passport or has a name or a dress which may reflect a specific religion or ethnicity, would be contrary to the principle of non-discrimination.

In the context of preventive counter-terrorism efforts, where law enforcement officials do not have specific intelligence to rely on:

- Profiling should never be based solely on a person's racial or religious belonging. Profiling based on national identity or other criteria shall never be used as a proxy for racial or religious profiling.
- Profiling based on behavioural indicators should be used instead, as it yields more effective results. Care should be taken in relying on certain indicators in isolation, such as the display of signs of nervousness or the wearing of large or bulky clothes in warm weather, as they could be over-inclusive. The use of such indicators as mumbling or recitation may be mere proxies for religion.
- Ideally, controls should be universal and affect everyone equally. Where the costs for blanket searches are deemed to be too high, the targets for heightened scrutiny should, as a general rule, be selected on a random rather than on an ethnic or religious basis. As opposed to profiling, random searches are impossible for terrorists to evade and may thus be more effective than profiling.

In cases where either a terrorist crime has been committed or information exists regarding its preparation, and there is specific evidence or information raising reasonable grounds to assume that the suspect fits a certain descriptive profile, law enforcement officials may rely on such characteristics as ethnic appearance, national origin or religion as an element of the descriptive profile.<sup>45</sup>

26. *All counter-terrorism measures, including those related to the design and implementation of security infrastructure, which may limit the full enjoyment of the right to freedom of movement, must comply with the international human rights framework. The right to freedom of movement may only be restricted to the extent it is necessary and consistent with other rights and freedoms.*

*“... repressive security measures (such as control orders and the construction of physical barriers to limit the movement of certain individuals and groups), adopted with a view to countering terrorism, have severely restricted the ability of certain individuals and populations to work, and their rights to education, health services and a family life. A human rights analysis of the impact of these counter-terrorism measures merits particular consideration in*

*the light of the serious consequences they may have for the individual, as well as for his or her family and community.”*

Office of the United Nations High Commissioner for Human Rights, Human Rights  
Fact Sheet No. 32, p. 47

27. In recent years, States have adopted a number of counter-terrorism measures, through the use of security infrastructure, that have a serious impact on the right to freedom of movement. These include such measures as control orders, checkpoints and permit regimes, which render travelling within and between borders more cumbersome, or may even prevent travelling altogether. This, in turn, may have a serious impact on other human rights, the exercise of which can be contingent on the right to freedom of movement. Restrictions on the right to freedom of movement may prevent individuals from attending school or work, from accessing land, water and other natural resources, as well as limit access to social services or medical treatment or prevent individuals from taking part in cultural life or associating with their family
28. There may be situations in which States must adopt measures that restrict individuals’ right to freedom of movement, while at the same time complying with their obligations under international law. As already noted, a number of conditions must nonetheless be fulfilled by States adopting such measures, including that they be provided by law,<sup>46</sup> fully respect other aspects of the principle of legality,<sup>47</sup> pursue a legitimate aim<sup>48</sup> and respect the principles of necessity and proportionality. Furthermore, they must not have an overly negative — or disproportionate — impact on other human rights. Where such measures affect asylum seekers or refugees, they must comply with relevant provisions of international refugee law.<sup>49</sup>
29. In addition, in order to respect the right to freedom of movement, other conditions under international human rights and refugee law must be respected. For example, liberty of movement and freedom to choose residence must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place.<sup>50</sup> The enjoyment of these rights cannot be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country.<sup>51</sup> Once a person is lawfully within a State, any restrictions on the right to liberty of movement, freedom to choose residence and freedom to leave any country, including one’s own, as well as any treatment different from that accorded to nationals, have to be justified.<sup>52</sup> In situations of humanitarian crises, security measures must not impede either the effective delivery of humanitarian assistance or the safe and regular passage and movement of humanitarian

staff. In all cases, collective punishments are prohibited.<sup>53</sup> All individuals, be they military or civilian, involved in the decision-making process, must be made aware of international human rights and refugee law and, where applicable, of obligations under international humanitarian law and ensure that these are fulfilled.

Good practices to ensure that security infrastructure with the potential to limit the right to freedom of movement of persons is in compliance with international law include:

- Permit regimes, checkpoints and other such measures must not have a disproportionate impact on human rights.<sup>54</sup> They should be established only when strictly necessary. Unnecessary delays at checkpoints or in the issuance or processing of permits should be avoided.
- Checkpoints and other such measures should not prevent persons from travelling to and from their homes. They should not be used to unduly interfere with the ability of persons to take part in cultural life or associate with their families, including those visiting individuals in detention.<sup>55</sup> Measures should be taken to ensure that persons are able to attend full school and working days.
- Measures should be adopted to ensure access to social services and medical treatment, particularly in emergencies and in the case of pregnant women.<sup>56</sup> Immediate, safe and unimpeded access to humanitarian assistance for those in need must be guaranteed.
- Access to land, water and other natural resources should not be impeded, since this may have significant effects on the lives of individuals and family units and may, in some cases, violate the enjoyment of economic, social and cultural rights by affected individuals and have a devastating socio-economic impact on communities.<sup>57</sup>
- The screening of persons at checkpoints must be conducted in compliance with international human rights law. Personnel involved in screening activities should treat all individuals with equal respect, professionalism and take into account sensitivities linked to the gender, religion, age and any other special need of the person being screened.<sup>58</sup> The screening of persons should be undertaken by personnel of the same gender as the person being screened and, if requested, should occur in a partitioned area out of view of the general public. All personnel who have direct contact with persons should be well trained in international human rights law.
- The establishment of separation barriers should not involve the destruction or confiscation of property or land belonging to individuals without prompt and adequate compensation being given to such individuals.<sup>59</sup>
- The imposition of control orders should never be a substitute for criminal proceedings. Where criminal proceedings cannot be brought, or a conviction maintained, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stated that a control order may (depending on the facts and conditions of that order) be justifiable where new information or the urgency of a situation call for action to prevent the commission of a terrorist act. In such cases:
  - Transparency and due process must be maintained.<sup>60</sup>
  - Control orders must be proportionate and regularly reviewed to ensure that they are imposed for only as long as strictly necessary.<sup>61</sup>
  - Control orders must not be tantamount to detention, in particular where the proceedings fall short of criminal prosecutions. House arrest is a form of detention, and therefore is permissible only during the course of a criminal investigation, while awaiting trial or during a trial, or as an alternative to a custodial sentence.<sup>62</sup>
  - The direct and indirect impact of control orders on the economic, social and cultural rights of the person on whom it is imposed as well as on third parties, in particular

family members, should be taken into consideration. The rights that can be affected include: protection and assistance accorded to the family, children and young persons; the right to an adequate standard of living, including adequate food and housing; the right to health; the right to education; and civil and political rights, such as protection against arbitrary and unlawful interference with the family and privacy and protection of the family.<sup>63</sup>

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also urged States to carefully consider the applicable standards of proof and to examine whether a hybrid of proof beyond reasonable doubt and balance of probabilities should be applicable.<sup>64</sup>

30. *All aspects of security infrastructure aimed at preventing the movement of suspected terrorists and ensuring effective border security as part of an effective counter-terrorism strategy must comply with international law, including international refugee law and international human rights law.*
31. A number of measures adopted by States to prevent and counter terrorism in the post-2001 context are aimed at preventing the movement of suspected terrorists through increased controls at international borders, including airports and maritime and land borders. This ensues from a number of international obligations, including United Nations Security Council and General Assembly resolutions.

Under Security Council resolution 1373 (2001), States are:

- Required to prevent the movement of terrorists or terrorist groups through effective border controls, controls on issuance of identity papers and travel documents, and measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents (para. 2 (g));
- Called upon to find ways of intensifying and accelerating the change of operational information, especially regarding actions or movements of terrorist persons or networks and forged or falsified travel documents (para. 3 (a));
- Called upon to take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts (para. 3 (f));
- Called upon to ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists (para. 3 (g));

Under Security Council resolution 1624 (2005), States are called upon to “cooperate, inter alia, to strengthen the security of their international borders, including by combating fraudulent travel documents and, to the extent attainable, by enhancing terrorist screening and passenger security procedures with a view to preventing those guilty of the conduct in paragraph 1 (a) [incitement to terrorism] from entering their territory” (para. 2).

Through the United Nations Global Counter-Terrorism Strategy (2006), Member States resolve to:

- Deny safe haven to any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens (Pillar II, para. 2).
- Take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum-seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in section II, paragraph 1 [through which States resolve to refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens.] (Pillar II, para. 7).

32. States have a legitimate interest in border security as an important aspect of an effective counter-terrorism strategy, which allows for the identification of security threats at the point of entry. However, measures undertaken by States to secure their airports, maritime and land borders, which often involve the design and implementation of security infrastructure may affect a range of international human rights and may violate international refugee law, including by resulting in the inability of asylum-seekers and refugees to benefit from international protection.
33. Concerns arise in particular regarding the treatment and screening of individuals who cross an internationally recognized State border,<sup>65</sup> for example in the context of measures involving body scanning technology, profiling techniques, the stopping and searching of persons,<sup>66</sup> the arrest or detention of persons or the non-uniformity in the use of machine-readable travel documents and their non-recognition. Another concern is that national measures aimed at controlling irregular migration are often part of States' border management tools to prevent terrorist movement and these objectives are not always compatible. In this respect, the United Nations High Commissioner for Human Rights has noted that:

*“There is a need to make a clear distinction between immigration and migration laws and regulations, and security and counter-terrorism measures. It is neither correct nor desirable to consider all migration laws and policies as counter-terrorism legislation. However, it is clear that terrorism and security may be used as a trigger for States to take measures aimed at targeting ethnic minorities and migrants. Measures that targeted particular minorities, for example, took the form of invasive surveillance of a group, fingerprinting campaigns targeting a specific ethnic group, the adoption of decrees stating that a particular minority was a security threat, or the adoption of measures to facilitate their eviction. All of these measures have a serious impact on economic, social and cultural rights.”<sup>67</sup>*

34. The merging by States of their immigration laws and policies and their counter-terrorism legislation must not have a disproportionate or discriminatory impact on asylum-seekers, refugees, immigrants or, more generally, non-citizens.
35. International refugee law provides important parameters for States undertaking measures to prevent terrorist mobility and ensure effective border security without undermining their international protection obligations.<sup>64a</sup> As noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism:

*“While the Special Rapporteur recognizes the need for increased border security as part of an effective counter-terrorism strategy, he is concerned that few concrete measures are taken to compensate for the increasing difficulties that persons encounter and must overcome to access protection. For persons seeking international protection, their only means of leaving their home country and accessing another State to seek protection is often the use of fraudulent travel documents and resorting to the assistance of smugglers ... Increasing border control and pre-screening measures without adequately addressing the difficulties encountered by persons seeking protection will undermine the global regime of refugee protection and human rights, inter alia the protection against refoulement.”<sup>69</sup>*

International refugee law contains a number of provisions enabling States to comply with their obligations not to provide a “safe haven” to persons involved in terrorism. In this context, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism noted that:

*“In dismissing unwarranted linkages between refugee protection and terrorism the Special Rapporteur emphasizes the humanitarian, civilian and non-political character of asylum and the many safeguards of the institution of asylum, such as the identification and exclusion of persons in respect of whom there are serious reasons for considering that they have committed heinous acts or serious crimes which render them undeserving of international protection. In the same vein, it should be recalled that refugee status does not shield a person against criminal prosecution, extradition or expulsion in accordance with due process and pursuant to articles 32 and 33 (2) of the 1951 Refugee Convention.”<sup>70</sup>*

In all cases, States must ensure that international cooperation and any measures taken to prevent and combat terrorism comply with States’ obligations under international refugee, human rights and humanitarian law, as underscored in the pertinent United Nations resolutions.<sup>71</sup>

36. It should be recalled that international human rights law, which applies to all persons within a State’s jurisdiction or territory, is an important component of the

framework for the protection of asylum-seekers and refugees – alongside international refugee law.<sup>72</sup> The 1951 Convention relating to the Status of Refugees reaffirms, in its preamble, “the principle that human beings shall enjoy fundamental rights and freedoms without discrimination”, and recalls that the United Nations endeavours “to assure refugees the widest possible exercise of these fundamental rights and freedoms”.

37. Key human rights, standards and principles that need to be observed in the design and implementation of security infrastructure aimed at preventing terrorist mobility and ensuring effective border security include respect for the principle of non-refoulement.<sup>73</sup> This principle is the cornerstone of international refugee protection, from which no derogation by States is permitted. It is set out in article 33(1) of the Refugee Convention and precludes the extradition, expulsion, deportation or other forms of transfer of refugees and asylum-seekers to any country where they would be at risk of persecution.<sup>74</sup> Non-refoulement obligations under international human rights law — as recognized, inter alia, in article 3 of the Convention against Torture and article 7 of the International Covenant on Civil and Political Rights — are also fully applicable to asylum-seekers, refugees and all individuals seeking to enter a country.
38. The right to seek asylum, as enshrined in article 14 of the Universal Declaration of Human Rights, must be safeguarded, as must the right of access to fair and efficient asylum procedures. When a person arrives at a border seeking asylum, that person must not be refused entry at the border without having undergone a fair and efficient refugee status determination procedure, which is instrumental in identifying those who need international protection and those who do not.<sup>75</sup> As asylum-seekers may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status. Moreover, as a general rule, no information regarding an asylum application, or an individual’s refugee status, should be shared with the country of nationality or, in the case of stateless persons, the country of former habitual residence.<sup>76</sup>
39. The right to liberty and security of persons must be respected. As noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,

*“Apart from special provisions related to detention of terrorism suspects, most States’ immigration legislation contains provisions for the detention of foreigners, including asylum-seekers. In many countries ... it appears that as one measure to counter terrorism, such detentions are increasing or taking new forms that may lack the safeguards required by international human rights standards. The administrative detention of foreigners, including asylum-seekers, raises issues*



*related to the necessity and proportionality of such measures, the right to speedy and effective court review of any form of detention, the rights of detained persons including their right to the best attainable health, and possible violations of the prohibition against discrimination. Detention, particularly over protracted or even indefinite periods, has in numerous studies been found to affect adversely the mental health and well-being of detainees. Conditions of isolation, often in remote locations, in detention centres or prisons may also heighten the risk of detainees being subject to abuse or violence, in contravention of articles 7 and 10 of the International Covenant on Civil and Political Rights.”<sup>77</sup>*

40. 40. The prolonged detention of a non-citizen who enters a country without an entry permit is likely to violate the right to liberty and security of that person, in particular if it cannot be demonstrated that alternative and less intrusive measures are available and is thus not necessary in all circumstances of the case.<sup>78</sup> This is particularly relevant in the case of asylum-seekers and refugees, as seeking asylum is not an unlawful act.<sup>79</sup> Mandatory and indefinite detention of asylum-seekers is arbitrary and in violation of international law.<sup>80</sup> Although article 9 of the International Covenant on Civil and Political Rights and other instruments of human rights and refugee law allow for the administrative detention of immigrants under certain circumstances, the Human Rights Committee has noted that that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.<sup>81</sup>
41. More specifically, the Human Rights Committee has noted that the fact of illegal entry may indicate a need for investigation and that there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors, however, detention may be considered arbitrary, even if entry was illegal.<sup>82</sup> The Committee has also requested that States demonstrate that there were no less invasive means of achieving compliance with immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of individuals’ deteriorating conditions.<sup>83</sup> The Committee has also shown concern regarding the mandatory use of immigration detention centres in all cases of illegal entry, the retention of an excise zone and the non-statutory decision-making process for people who arrive by boat to the State party’s territory and are taken to an island.<sup>84</sup>
42. The right to freedom of movement, which includes the right of every person to leave any country including one’s own, which comprises departure for permanent emigration, and the right to enter one’s own country, must be respected.<sup>85</sup> While States have a legitimate interest in controlling irregular migration and

- strengthening border controls as one way of identifying security threats at points of entry, measures undertaken by States to secure their airports, maritime and land borders must not result in the inability of asylum-seekers and refugees to benefit from international protection.<sup>86</sup>
43. 43. More specifically, the Human Rights Committee has shown concern for the number of legal and bureaucratic barriers which unnecessarily affect the full enjoyment of the rights of individuals to move freely, to leave a country, including their own, and to take up residence. These include: lack of access to the competent authorities for applicants willing to leave the country and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; and refusal to issue a passport because the applicant is said to harm the good name of the country.<sup>87</sup>
44. The design and implementation of security infrastructure aimed at preventing terrorist mobility and ensuring effective border security may also have an impact on transnational trade and the operation of passenger carriers. Access to freight at ports and airports should be restricted to persons with a legitimate reason to be in areas where freight is being handled or stored, in order to prevent such activities as the introduction of unauthorized weapons or dangerous substances.<sup>88</sup> Security measures imposed on passenger carriers should seek to minimize their impact on the operation of carriers.<sup>89</sup> As is the case with the application of all security infrastructure, such controls must be applied in a non-discriminatory manner, remembering also that those involved in exporting or in other forms of transnational commercial operations have the right to earn their living by performing freely chosen work, and that individuals in exporting countries have the right to development and to an adequate standard of living.<sup>90</sup>
45. All of these considerations should inform States' practices when designing and implementing security infrastructure aimed at preventing terrorist mobility and establishing effective border control mechanisms, to ensure that the rights of refugees and asylum-seekers are fully observed, in line with States' obligations

to preserve the institution of asylum. In this regard, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has identified a need for closer cooperation between States and the Office of the United Nations High Commissioner for Refugees (UNHCR) to counteract the negative effects of pre-entry immigration control measures and interception operations while at the same time remaining vigilant in respect of the threat of terrorism.<sup>91</sup>

46. *Security infrastructure involving the use of technologies which in turn involve the recording, collection, storing and sharing of information must be consistent with international human rights law, including the right to privacy.*

*“The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person’s private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the International Covenant on Civil and Political Rights. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.”*

Human Rights Committee, General comment No. 16, para. 10

*“Concerns have been expressed that the sharing of data between States will introduce the risk of data being collected for one purpose while being used for another and also provide highly sensitive data to Governments that cannot be expected to protect the data adequately. In addition, some critics charge that such anti-terrorism measures may be abused in an effort to improperly influence and shape political agendas, compromise the ability of courts to ensure that powers are not abused and weaken governmental accountability by allowing for greater secrecy. Some of these measures may also result in unnecessary access to the financial, travel and medical records of individuals and an increased possibility that some individuals will be wrongly singled out for unnecessary scrutiny.”*

United Nations independent expert on the protection of human rights and fundamental freedoms while countering terrorism<sup>92</sup>

Various types of security infrastructure technologies involving the recording, collection or storing of information are now being used in security strategies. They can be placed into several categories, including technologies of direct surveillance and so-called “dataveillance”, the monitoring of data trails left by individuals in numerous transactions, through access to public and private sector databases.<sup>93</sup> These include:

- Technology to record information through satellite, aerial or video surveillance, including by high-definition, wi-fi broadband-enabled closed-circuit television;
- Technology to intercept and record communications, by telephone or other means;
- Technology to track the movement of persons or goods, as well as other monitoring tools, such as electro-optical and radar sensors and facial recognition software;
- Technology used at security checkpoints or border controls for fingerprinting, taking photographs or performing retinal scans;
- Machine readable travel documents (MRTDs), such as biometric passports and some forms of national identity cards, which have embedded integrated circuits that can process and store data, and which may include radio-frequency identification chips for the contactless (or remote) reading of biometric and biographical data stored on MRTDs;<sup>94</sup>
- Widely used commercial technology, such as “cookies”, “web bugs” and other advertising-supported software that monitors computer and online activities, which is now also being used in security strategies;
- Powerful central databases created by States, which may include biometrics, such as computer-readable facial photographs, fingerprints, DNA, as well as information on social security, pension, benefits, medical records, contacts with the police, etc. Data on airline travellers may also be compulsorily obtained, analysed and used for anti-terrorist purposes.

47. The human right to privacy is protected at the universal level by article 17 of the International Covenant on Civil and Political Rights. As already noted, it is not an absolute right. Once an individual is being formally investigated or screened by a security agency, personal information — including information collected through the use of security infrastructure technologies involving the recording, collection or storing of data — is shared among security agencies for counter-terrorism purposes. As a consequence, the right to privacy is almost automatically affected. Every instance of interference must be subject to critical assessment,<sup>95</sup> in accordance with the human rights framework for limitations and derogations set forth in the first principle in this Guide.
48. Examples of counter-terrorism measures involving security infrastructure that may have an impact on the right to privacy include:
- The circulation of secret watch lists, such as those communicated to airlines and security officials, with instructions to detain and question any passenger with a certain name. In addition to the possibilities for error and issues regarding data integrity, these lists are often kept secret. Individuals may therefore be continually subject to scrutiny without knowing that they have been placed on a list and without effective independent oversight. Such secret surveillance could therefore constitute a violation of the right to privacy.<sup>96</sup>
  - Other examples are the result of monitoring, regulation, interference and control of the movement of people at borders. Through advanced technologies and data-sharing agreements, States are creating comprehensive profiles on foreign travellers to identify individuals whose profiles correspond to

those of terrorists. At the border, individuals are subjected to further — and potentially invasive — information collection practices.<sup>97</sup>

- Many States require carriers to submit passenger manifests prior to departure, and seek to access passenger name records, which include identification information, transactional information and financial data, choice of meals, medical data, place of residence and prior travel information. This information is used to profile and assess the risk level of passengers, usually by submitting queries to various multiagency law-enforcement, terrorist database and watch lists. As a result, foreign carriers may be restricted from issuing an individual a boarding pass, solely on the basis of the result of the database query in the destination country, without due process.<sup>98</sup>
  - States increasingly monitor travellers by gaining information from third parties, who are compelled to comply lest they be refused landing rights or given punitive fines, even though privacy guarantees may not meet the requirements of domestic privacy laws. Moreover, foreigners may not be granted equal access to judicial remedies in these countries and rights at borders are significantly restricted.<sup>99</sup>
  - Individuals can be prevented from entering States for refusing to disclose information, and States may insist upon disclosure without ensuring that there is a lawful authority to require this information.<sup>100</sup>
49. Any interference with the right to privacy, including through the use of security infrastructure technologies involving the recording, collection or storing of information, should be authorized by laws that conform to the principle of legality.<sup>101</sup> Any interference must be proportionate to the security threat,<sup>102</sup> and offer effective guarantees against abuse.<sup>103</sup> The law must designate an authority to determine, on a case-by-case basis, such authorizations to interfere with the right to privacy,<sup>104</sup> and the decision-making authority should be structured so that the greater the invasion of privacy, the higher the level of authorization needed.<sup>105</sup>
50. Surveillance, interception of communications, wiretapping and recording of conversations are exceptional measures.<sup>106</sup> Where such measures are taken, they must be authorized by an independent, preferably judicial, authority for specific and lawful purposes.<sup>107</sup> This should be limited to circumstances where there are reasonable grounds to believe that a serious crime has been committed or prepared, or is being prepared, and where other less intrusive means of investigation are inadequate.<sup>108</sup> Where surveillance activities solely or disproportionately affect a specific segment of the population, the measures may be both discriminatory and may have an adverse impact on the freedoms of association, expression and movement.<sup>109</sup>
51. The use of body scanning technology at passenger terminals, which is said to increase the efficiency and speed of passenger screening, and limit more obtrusive

physical searches of passengers, has an impact on the right to privacy. Good practices with regard to the use of this technology include making body scans optional for passengers,<sup>110</sup> establishing rules concerning their use and making these rules readily accessible to the public, together with clear privacy safeguards.<sup>111</sup>

52. Any personal data collected must be protected against unlawful or arbitrary access, disclosure or use. Effective protection includes measures to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process or use it (for example, through the unauthorized interception of data on MRTD radio-frequency identification chips<sup>112</sup>), including for purposes incompatible with human rights;<sup>113</sup> and to limit the storage of personal data only for as long as is necessary.<sup>114</sup>
53. It is recommended that States adopt comprehensive data protection and privacy laws to ensure that there are clear legal protections for individuals to prevent the excessive collection of personal information. Such laws shall ensure that measures are in place to guarantee the accuracy of information, create limits on the use, storage and sharing of the information and mandate that individuals are to be notified of how their information is used and that they have a right of access and redress, regardless of nationality or jurisdiction.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has identified several legal safeguards for measuring the necessity, proportionality or reasonableness of new counter-terrorism laws and policies and of measures on the right to privacy. These safeguards, which have emerged through policymaking, jurisprudence, policy reviews and good practices from around the world, are:

- The principle of minimal intrusiveness: States must have exhausted less-intrusive techniques before resorting to others.<sup>115</sup>
- The principle of purpose specification restricting secondary use: authorities should only use information collected for the purpose for which it was obtained; States must be obliged to provide a legal basis for the reuse of information, in accordance with constitutional and human rights principles.<sup>116</sup>
- The principle of oversight and regulated authorization of lawful access: surveillance systems require effective oversight to ensure that interferences are lawful (and thus accountable) and necessary (and thus applied proportionately).<sup>117</sup>
- The principle of transparency and integrity: States must show openness and communicate about surveillance practices, because the application of secrecy privileges for surveillance systems inhibits the ability of legislatures, judicial bodies and the public to scrutinize State powers.<sup>118</sup>
- The principle of effective modernization: States should be conscious of how technology and policy change may have a negative impact on individuals. They should consider the adoption of such tools as privacy impact assessments, which articulate privacy considerations in the design of new surveillance techniques, including how policymakers considered the principles listed above.

54. *All individuals whose rights have been violated through the design and implementation of security infrastructure should have access to an effective remedy before competent, preferably judicial, authorities. All allegations of human rights violations should be investigated and remedies made available when violations have occurred. Oversight mechanisms must be established to review policies and mandates.*

Any measure which limits the full enjoyment of human rights, including through the operation and implementation of security infrastructure, must be accompanied by adequate safeguards, through independent institutions — administrative, legislative and judicial — by means of which individuals who allege a violation of their human rights can seek redress and obtain reparation.<sup>119</sup> Recommendations in this regard include:

- Any individual who believes that his/her human rights have been infringed as a result of the design or implementation of security infrastructure should be able to file complaints under effective mechanisms. Remedies should be established, including, for example, reimbursement for loss or damage caused to property. Any individual who believes that his/her rights have been infringed by an intelligence service should be able to bring a complaint to a court or oversight institution, such as an ombudsman, human rights commissioner or national human rights institution. Individuals affected by illegal actions of an intelligence service have recourse to an institution that can provide an effective remedy, including full reparation for the harm suffered.<sup>120</sup>
- The institutions responsible for addressing complaints and claims for effective remedy arising from the activities of intelligence services should be independent of the intelligence services and the political executive. Such institutions have full and unhindered access to all relevant information, the necessary resources and expertise to conduct investigations and the capacity to issue binding orders.<sup>121</sup>
- Strong independent oversight mandates should be established to review policies and practices, in order to ensure that there is strong oversight of the use of intrusive surveillance techniques and the processing of personal information. Therefore, there should be no secret surveillance system that is not under the review of an effective oversight body and all interferences should be authorized through an independent body.<sup>122</sup>
- Any watch list- or profile-based surveillance programme should include due process standards for all individuals, including rights to redress. The principle of transparency should be upheld so that individuals can be informed as to why and how they were added to watch lists or how their profile was developed, and of the mechanisms of appeal without undue burden.<sup>123</sup> Given the inherent dangers of data mining, it is recommended that any information-based counter-terrorism programme should be subject to robust and independent oversight.<sup>124</sup>
- There should be a high level of professional training of personnel involved in the implementation and management of security infrastructure, including training on human rights law. The practical implementation of all security measures, including at checkpoints and terminals and through the use of data mining, should be professional, transparent and accountable.
- Law enforcement officials should at all times respect and protect the human rights of all persons. They should at all times remain courteous and not unnecessarily provoke or threaten individuals who are being stopped for security checks. Weapons should not be displayed with the objective of instilling fear.
- Clear and visible notices setting out how and to whom complaints can be made should exist. Transportation security authorities could include such information online. A good

practice is to provide a single point of contact for individuals who wish to address difficulties experienced during their screening when travelling, at airports and train stations or when crossing international borders, and to seek redress. This could include cases in which individuals believe that they have been wrongly placed on national lists that qualify them for repeated additional screenings, or in which they believe they have been unfairly or incorrectly delayed, denied boarding or identified for additional screening, based on discrimination or other grounds, at points of entry to or departure from a given country.





### III. Reference materials

- 1 See United Nations Office on Drugs and Crime, *Handbook on Criminal Justice Responses to Terrorism*, Criminal Justice Handbook Series, p. 10 (United Nations publication, Sales No. 09.IV.2). See also United Nations Office on Drugs and Crime, Terrorism Prevention Branch, “Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments”, Technical Assistance Working Paper, United Nations, New York, 2006.
- 2 See, in particular, Security Council resolution 1373 (2001), which sets out a range of mandatory obligations (paras. 1 and 2) and recommendations (para. 3). See also Security Council resolution 1624 (2005).
- 3 See “The United Nations Global Counter-Terrorism Strategy and Plan of Action”, annex, part II, “Measures to prevent and combat terrorism” (A/RES/60/288).
- 4 See:
  - International Covenant on Civil and Political Rights, art. 2(1): (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); and art. 4(1) (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”).
  - Universal Declaration of Human Rights, arts. 2(1) and 7; European Convention on Human Rights, art. 14 and Protocol 12, art. 1; American Convention on Human Rights, arts. 1(1) and 24; African Charter on Human and Peoples’ Rights, arts. 2 and 3(1). See also International Convention on the Elimination of All Forms of Racial Discrimination; Committee on the Elimination of Racial Discrimination General recommendation No. 14: Definition of discrimination (art. 1, para. 1 of the Convention), in A/48/18; Human Rights Committee, General comment No. 18: Non-discrimination (10/11/89). See also Report of the Committee on the Elimination of Racial Discrimination, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 18 (A/57/18)*, chap. XI, sect. C, Statement on racial discrimination and measures to combat terrorism, paras. 4-6.

- International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, 2001 (United Nations, 2008), commentary to art. 26, para. 5.
  - Report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 41 (“The guarantees of non-discrimination of articles 2 and 26 of ICCPR prohibit discrimination on grounds such as race, national origin and religion. Discrimination on the basis of race and national or ethnic origin is also prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 5 of ICERD explicitly prohibits racial discrimination with respect to the ‘right to equal treatment before [...] all [...] organs administering justice’ and to ‘freedom of movement’. Furthermore, the prohibition against discrimination on the grounds of race and religion is generally accepted as a peremptory norm of international law, which cannot be set aside by treaty or acquiescence”). See also report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/10/3/Add.2), para. 28 (“Compliance with the principle of non-discrimination, as established in a number of international human rights instruments, is crucial for effectively countering terrorism ...”).
- 5 See International Covenant on Civil and Political Rights, art. 4(1). See also Human Rights Committee, General comment No. 29: States of emergency (art. 4) (CCPR/C/21/Rev.1/Add.11), para. 8 (“According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant”).
  - 6 See General Assembly resolution 60/288, United Nations Global Counter-Terrorism Strategy, annex, part I, preambular paragraph (“We resolve to undertake the following measures aimed at addressing the conditions conducive to the spread of terrorism, including but not limited to ... ethnic, national and religious discrimination ... while recognizing that none of these conditions can excuse or justify acts of terrorism”).
  - 7 See General Assembly resolution 34/169, Code of Conduct for Law Enforcement Officials, annex, art. 2 (which provides that such officials must “maintain and uphold the human rights of all persons”, including the right to non-discrimination) and its commentary (a). See also General Assembly resolution 68/178, sixth preambular paragraph (“Reaffirming further that terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group”); Security Council resolution 1963 (2010), second preambular paragraph (“Reaffirming also that terrorism cannot and should not be associated with any religion, nationality, civilization or group”); Security Council resolution 2083 (2012), third preambular paragraph (“Reaffirming that terrorism cannot and should not be associated with any religion, nationality or civilization”); Outcome Document of the Durban Review Conference, Geneva 2009, para. 67, which “[c]alls upon States to ensure that any measures

- taken in the fight against terrorism are implemented in full respect of all human rights, in particular the principle of non-discrimination ...”).
- 8 Art. 12 of the International Covenant on Civil and Political Rights (“(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (2) Everyone shall be free to leave any country, including his own. (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant; and (4) No one shall be arbitrarily deprived of the right to enter his own country”). Universal Declaration of Human Rights, arts. 9 and 13; European Convention on Human Rights Protocol 4, arts. 2-4; European Convention on Human Rights Protocol 7, art. 1; American Convention on Human Rights, art. 22; African Charter on Human and Peoples’ Rights, art. 12. See also Human Rights Committee, General comment No. 27: art. 12 (Freedom of movement).
- 9 The rights mentioned are reflected in the following provisions of the International Covenant on Civil and Political Rights:
- Art. 17 (1) (“No one shall be subjected to arbitrary or unlawful interference with his ... family ...”)
  - Art. 23(1) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”).

These rights are also provided for in the following provisions of the International Covenant on Economic, Social and Cultural Rights:

- Art. 6 (“The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”).
- Art. 10(1) (“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children”).
- Art. 11(1) (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent”).
- Art. 12(1) recognizes “... the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, and its subparagraph (2)(d) provides that the steps to be taken to fully realize this right shall include those necessary for “the creation of conditions which would assure to all medical service and medical attention in the event of sickness”.
- Art. 13 recognizes “... the right of everyone to education.”
- Art. 15(1)(a) recognizes the right of everyone “... to take part in cultural life”.

10 See Universal Declaration of Human Rights, art. 14(1) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”). See also the Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 and its Protocol, 1967 (General Assembly resolution 2198 (xxi)).

11 The Universal Declaration of Human Rights was adopted by the General Assembly in its resolution 217A (III). See the preamble to the Convention relating to the Status of Refugees (General Assembly resolution 429 (V)), which reaffirms “the principle that human beings shall enjoy fundamental rights and freedoms without discrimination”, and recalls United Nations endeavours “to assure refugees the widest possible exercise of these fundamental rights and freedoms” (first and second preambular paras.). See also para. 36 below.

For a comprehensive compilation of international legal instruments, including international human rights law and refugee law, standards, recommended practices and other guidance material relating to counter-terrorism aspects of border management, see the Compendium of Border Control Instruments, Standards and Recommended Practices Related to Counter-Terrorism of the CTITF Working Group on Border Management relating to Counter-Terrorism: <https://creator.zoho.com/uncted/bordercontrol#>.

12 Art. 17 of the International Covenant on Civil and Political Rights states that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation” and that “Everyone has the right to the protection of the law against such interference or attacks”.

13 See Art. 2(3) of the International Covenant on Civil and Political Rights (“Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and (c) To ensure that the competent authorities shall enforce such remedies when granted”).

14 See Report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/6/17):

“69. The Special Rapporteur concludes that counter-terrorism measures have both a direct and an indirect impact on the enjoyment of economic, social and cultural rights. The measures adopted by States to combat terrorism often pose serious challenges to economic, social and cultural rights. States therefore need to be mindful of their duty to ensure the conditions allowing all people living within their jurisdiction to enjoy all human rights, including economic, social and cultural rights. This is particularly important as the promotion of those rights should be seen as a means of addressing conditions conducive to the spread of terrorism and hence of preventing acts of terrorism.

“70. The social and economic marginalization of and discrimination against vulnerable groups, such as minorities, indigenous peoples or underprivileged households of women and children often amount to violations of their human rights, in particular of their economic,

social and cultural rights. These circumstances may also provide fertile soil for recruitment to movements that promise a prospect for change but resort to the unacceptable means of acts of terrorism.

“71. Through their negative impact on the effective enjoyment of economic, social and cultural rights, insensitive counter-terrorism measures, even when they may have a justification as permissible limitations to human rights, often result in counterproductive effects that undermine the long-term beneficial role of the promotion of economic, social and cultural rights in sustainable strategies to prevent terrorism.”

15 See, for example:

- The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, hereinafter “The Siracusa Principles” (E/CN.4/1985/4), annex, paras. 10 and 16 (“10. Whenever a limitation is required in the terms of the Covenant to be ‘necessary,’ this term implies that the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant; (b) responds to a pressing public or social need; (c) pursues a legitimate aim; and (d) is proportionate to that aim”; and

“16. Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.”).

- Human Rights Committee, *Robert Faurisson v. France*, Communication 550/1993 (CCPR/C/58/D/550/1993) (1996), Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), para. 8 (“The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in article 19, paragraph 3 (a) or (b) (the rights or reputations of others, national security, ordre public, public health or morals). The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be **necessary** to protect the given value. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value”) (original emphasis).
- Human Rights Committee, *Marqués de Morais v. Angola*, Communication 1128/2002 (CCPR/C/83/D/1128/2002) (2005), para. 6.8, which states in part: “The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.”

16 International Covenant on Civil and Political Rights, art. 12(3). See also art. 13 concerning the expulsion of aliens on national security grounds; art. 14(1) concerning exclusion of the press from a trial; art. 19(3)(b) concerning limitations on the freedom of expression; art. 21 concerning freedom of assembly; and art. 22(2) concerning freedom of association. As this applies to the International Covenant on Economic, Social and Cultural Rights, see also art. 8 (1) concerning trade unions.

- 17 “The Siracusa Principles” (E/CN.4/1985/4), annex, paras. 22, 23 and 33.
- 18 “The Siracusa Principles” (E/CN.4/1985/4), annex, para. 11.
- 19 See, “The Siracusa Principles” (E/CN.4/1985/4), annex, para. 29 (“National security is capable of being invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation, its territorial integrity or political independence against force or threat of force”) and para. 30 (“National security cannot be invoked ... to prevent merely local or relatively isolated threats to law and order”). See Human Rights Committee, Aleksander Belyatsky et al. v. Belarus, Communication No. 1296/2004 (CCPR/C/90/D/1296/2004) (2007), para. 7.3 (“The mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose”); Human Rights Committee, Jeong-Eun Lee v. Republic of Korea, Communication No. 1119/2002 (CCPR/C/84/D/1119/2002) (2005), para. 7.2.
- 20 See Universal Declaration of Human Rights, art. 2(1); International Covenant on Civil and Political Rights, art.26 and also art.4(1); see also Committee on Economic, Social and Cultural Rights, General Comment No. 20 (Non-discrimination in economic, social and cultural rights), para. 32; Report of the Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert Goldman (E/ CN.4/2005/103), para .9, where the Independent Expert refers to the potential to derogate from certain rights, emphasizing that “The ability of States to derogate from rights under these instruments is governed by several conditions which are in turn regulated by the generally recognized principles of proportionality, necessity and non-discrimination”.
- 21 See “The Siracusa Principles” (E/CN.4/1985/4), paras. 10(a) op. cit. and 6 (“No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed”).
- 22 Committee against Torture, Concluding Observations, Hong Kong Special Administrative Region (CAT/C/HKG/CO/4) (2009), para. 10, recommendation (c) (“seek alternate methods to body cavity search for routine screening of prisoners; if such search has to be conducted, it must be only as a last resort and should be performed by trained health personnel and with due regard for the individual’s privacy and dignity.”). See also Inter-American Commission on Human Rights report 38/96, X and Y v. Argentina, Case No. 10.506 (October 15, 1996), paras. 73-80.
- 23 The first pillar of the Plan of Action of the United Nations Global Counter-Terrorism Strategy (see General Assembly resolution 60/288, annex, part I) states that the conditions conducive to the spread of terrorism include but are not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, 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.
- 24 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten areas of

- best practices in countering terrorism (A/HRC/16/51), paras. 28 and 32, which proposes a model definition of the offense of terrorism and incitement to terrorism.
- 25 Report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten areas of best practices in countering terrorism (A/HRC/16/51), para. 16.
  - 26 See also the Basic Human Rights Reference Guide “*Stopping and Searching of Persons in the Context of Countering Terrorism*”, paras. 34 *et seq.*
  - 27 Report of the Committee on the Elimination of Racial Discrimination, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 18* (A/57/18 (2002)), chap. XI, sect. C, Statement on racial discrimination and measures to combat terrorism, paras. 4-6.
  - 28 The presumption of innocence, a non-derogable right, requires that “no guilt can be presumed until the charge has been proved beyond reasonable doubt”. See International Covenant on Civil and Political Rights, art. 14(2); American Convention on Human Rights, art. 7 (1)(b); European Convention on Human Rights, art. 8(2); African Commission on Human and Peoples’ Rights, art. 14(2). See also Human Rights Committee, General comment No. 13: art. 14 (Equality before the courts and the right to a fair and public hearing by an independent court established by law), para. 7; International Covenant on Civil and Political Rights, art. 4; Human Rights Committee, General comment No. 29: art. 4 (States of emergency), paras. 11 and 16. See also Committee on the Elimination of Racial Discrimination, General recommendation 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 29; Universal Declaration of Human Rights, art. 8; art. 11; and art. 12. See also, Human Rights Committee, General comment No. 16: art. 17 (Right to privacy).
  - 29 See International Covenant on Civil and Political Rights, art. 17; American Convention on Human Rights, art. 11; and European Convention on Human Rights, art. 8. See also Human Rights Committee, General comment No. 16: art. 17 (Right to privacy), para. 11 (“Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible”). See also Committee on the Elimination of Racial Discrimination, General recommendation 26 (The right to seek just and adequate reparation or satisfaction), para. 1 (“The Committee on the Elimination of Racial Discrimination believes that the degree to which acts of racial discrimination and racial insults damage the injured party’s perception of his/her own worth and reputation is often underestimated”).
  - 30 See International Covenant on Civil and Political Rights, art. 20(2); *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (Durban Declaration and Programme of Action) (A/CONF.189/12), Declaration, para. 94; Report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 40. See also Committee on the Elimination of Racial Discrimination, General recommendation 30: Discrimination against Non Citizens, para. 12; its General recommendation 29: art. 1, para. 1 of the Convention (Descent), para. 18; and its General recommendation 15: Organized violence based on ethnic origin (art. 4), para. 3.



- 31 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 33, which provides examples of definitions of profiling and of various types of profiling (“Profiles can be either descriptive, i.e. designed to identify those likely to have committed a particular criminal act and thus reflecting the evidence the investigators have gathered concerning this act; or they may be predictive, i.e. designed to identify those who may be involved in some future, or as-yet-undiscovered, crime ...”); Report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Australia: Study on human rights compliance while countering terrorism (A/HRC/4/26/Add.3), para. 52 (taking note of a definition used by a Member State’s Customs Service, i.e. “a filtering process involving a single or cluster of indicators that, when grouped together, present the characteristics of a high-risk passenger or consignment”).
- 32 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 33 (“... In the view of the Special Rapporteur, profiling is, in principle, a permissible means of law-enforcement activity. Detailed profiles based on factors that are statistically proven to correlate with certain criminal conduct may be effective tools better to target limited law-enforcement resources”). See also report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Australia: Study on human rights compliance while countering terrorism (A/HRC/4/26/Add.3), para. 52 (“The use of indicator clusters to profile potential suspects is, in principle, a permissible means of investigation and law enforcement activity.”).
- 33 See
- Human Rights Committee, General comment No. 27: art. 12 (Freedom of Movement) (CCPR/C/21/Rev.1/Add.9), para. 18, on permissible restrictions to the freedom of movement under art. 12 of the International Covenant on Civil and Political Rights (“... it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).
  - See *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (Durban Declaration and Programme of Action) (A/CONF.189/12), Programme of Action, para. 72, which urges States “to design, implement and enforce effective measures to eliminate the phenomenon popularly known as ‘racial profiling’ ...”.
  - See Committee on the Elimination of Racial Discrimination, General recommendation 30: Discrimination against non-citizens, para. 10, according to which States must “ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping” (see HRI/GEN/1/Rev.8, sect. III).
  - See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 36, which highlights the use of terrorist profiling based on national or

ethnic origin and religion in the context of immigration controls; para. 40, in which the former Special Rapporteur highlights the relevance of the principle of non-discrimination to different forms of terrorist profiling, and notes his concern that “profiling based on stereotypical assumptions may bolster sentiments of hostility and xenophobia in the general public towards persons of certain ethnic or religious background”; and para. 42, in which the former Special Rapporteur refers to the various international and regional human rights bodies which have highlighted the risk of discrimination presented by law-enforcement efforts to counter terrorism. See also paras. 53-55.

- See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/6/17/Add.3), para. 45, in which the former Special Rapporteur has also noted that it is a significant problem in certain regions of the world that the religious affiliation of persons is wrongly confused with the identification of such persons as potential terrorists.
- 34 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 36.
  - 35 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 37, which provides examples of cases where police forces have relied on profiles based on a person’s ethnic and/or religious appearance when conducting stops, document checks or searches for counter-terrorism purposes.
  - 36 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 36.
  - 37 See Human Rights Committee, General comment No. 18: non-discrimination, para. 13 (“... not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”). Human Rights Committee, *S. W. M. Brooks v. The Netherlands*, Communication 172/1984 (CCPR/C/OP/2) (1990), para. 13 (“The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26”).
  - 38 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), paras. 45-54, and in particular paras. 53 and 54, in which the former Special Rapporteur highlights that profiling practices based on ethnicity, national origin and religion have proved to be largely unsuccessful, and notes that they are unsuitable and ineffective, and therefore a disproportionate, means of countering terrorism, to the extent that they affect thousands of innocent people without producing concrete results.
  - 39 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), paras. 55-58.

- 40 See European Commission against Racism and Intolerance General Policy Recommendation No. 11 on combating racism and racial discrimination in policing (CRI(2007)39).
- 41 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 59 (“If, in the context of an investigation into a terrorist crime already committed, there are reasonable grounds to assume that the suspect fits a certain descriptive profile, then the reliance on characteristics such as ethnic appearance, national origin or religion is justified. Similarly, these factors can be employed to target search efforts where there is specific intelligence suggesting that someone fulfilling these characteristics is preparing a terrorist act. The situation is different, however, in the case of preventive counter-terrorism efforts that are not intelligence-led. While profiles used for such efforts may include behavioural or psychological characteristics, the Special Rapporteur is of the view that they may not be based on stereotypical generalizations that certain ethnic or religious groups pose a greater terrorist risk than others”).
- 42 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 59.
- 43 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 36 and para. 60 (“The Special Rapporteur takes the view that, in any event, profiling based on behavioural patterns is significantly more efficient than reliance on ethnicity, national origin or religion. The importance of focusing on behaviour is highlighted, for example, by the experiences of the [Member State’s] Customs Service. In the late 1990s, the Customs Service stopped using a profile that was based, among other factors, on ethnicity and gender in deciding whom to search for drugs. Instead, the customs agents were instructed to rely on observational techniques, behavioural analysis and intelligence. This policy change resulted in a rise in the proportion of searches leading to the discovery of drugs of more than 300 per cent. The Special Rapporteur believes that behaviour is an equally significant indicator in the terrorism context. He therefore urges States to ensure that law-enforcement authorities, when engaging in preventive counter-terrorism efforts, use profiles that are based on behavioural, rather than ethnic or religious, characteristics. At the same time, the Special Rapporteur reminds States that behavioural indicators must be implemented in a neutral manner and must not be used as mere proxies for ethnicity, national origin or religion”).
- 44 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), para. 61 (“However, it may not always be possible for law-enforcement agencies to rely on specific intelligence or useful behavioural indicators in the context of preventive counter-terrorism efforts. The Special Rapporteur is of the view that in such situations controls should be universal, affecting everyone equally. Where the costs for blanket searches are deemed to be too high, the targets for heightened scrutiny must be selected on a random rather than on an ethnic or religious basis. In fact, this is what airlines are already routinely doing. As opposed to profiling, random searches are impossible for terrorists to evade and may thus be more effective than profiling.”).

- 45 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26), paras. 55-61.
- 46 Art. 12(3) of the International Covenant on Civil and Political Rights requires that any restriction on the freedom of movement must be “provided by law”. See General comment No. 27: art. 12 (Freedom of movement), para. 13, where the Human Rights Committee stated that: “The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution” (CCPR/C/21/Rev.1/Add.9).
- 47 See International Covenant on Civil and Political Rights, art. 15. See also Fact Sheet No. 32 (*Human Rights, Terrorism and Counter-Terrorism*) of the Office of the United Nations High Commissioner for Human Rights, pp. 39 *et seq.*
- 48 See International Covenant on Civil and Political Rights, art. 12(3). In para. 14 of its General comment No. 27, on art. 12 of the Covenant, the Human Rights Committee stated “Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”
- 49 See Universal Declaration of Human Rights, art. 14(1), which provides that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” Seeking asylum is thus not an unlawful act. Moreover, the 1951 Convention relating to the Status of Refugees provides, in art. 31(1), that States “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” See also United Nations High Commissioner for Refugees, “Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention”, (“UNHCR Detention Guidelines”), 2012, in particular Guidelines 1 and 2.
- 50 See Human Rights Committee, General comment No. 27: art. 12 (Freedom of movement), para. 5 (“The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3”).
- 51 See Human Rights Committee, General comment No. 27: art. 12 (Freedom of movement), para. 17 (“A major source of concern is the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence. Regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications. States’

practice presents an even richer array of obstacles making it more difficult to leave the country, in particular for their own nationals. These rules and practices include, inter alia, lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue a passport because the applicant is said to harm the good name of the country. In the light of these practices, States parties should make sure that all restrictions imposed by them are in full compliance with article 12, paragraph 3”).

- 52 See Human Rights Committee, General comment No. 27: art. 12 (Freedom of movement), para. 4 (“Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3).
  
- 53 See 1949 Third Geneva Convention, art. 87(3); 1949 Fourth Geneva Convention, art. 33(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 1977, art. 75(2)(d); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, art. 4(2)(b). See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law, Volume I; Rules*, ICRC, Cambridge, Rule 103. See also Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights)
  
- 54 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Israel, including visit to the Occupied Palestinian Territories (A/HRC/6/17/Add.4), paras. 30-43, in particular para. 31 (“Notwithstanding the correlation between the construction of the barrier and the reduction in the number of successful terrorist attacks against [the State’s] civilians, the barrier is having an enormously negative impact on the enjoyment of human rights by the [group of people concerned]. A considerable part of the [territory], including towns and villages, is being separated from the rest of the Territory by the barrier. The winding route of the barrier is creating multiple obstacles for movement between even close-by communities within the [territory] and establishing a ‘seam zone’ of land between the Green Line and the route of the barrier, representing approximately 10 per cent of the [territory]. The Office for the Coordination of Humanitarian Affairs in the [territory] reports a dramatic and continuing deterioration in the socio-economic conditions of many parts of the [territory] since the construction of the barrier”). See also A/HRC/6/17/Add.4, para. 59 (“... the Special Rapporteur recommends urgent action to ensure that the permits regime, the administration of checkpoints, and all other associated measures in the [territory] do not

- have a disproportionate impact on the enjoyment of civil, cultural, economic, political and social rights in the territory”).
- 55 See arts. 10 (1) and 15 (1) (a) of the International Covenant on Economic, Social and Cultural Rights, and arts. 17 (1) and 24 (1) of the International Covenant on Civil and Political Rights. See also report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Israel, including visit to the Occupied Palestinian Territories (A/HRC/6/17/Add.4), para. 42, where the former Special Rapporteur stated: “[t]he permits regime also has an impact on the integrity of family units and the ability of men and women to marry with people outside their own permit zones. The permits regime, and checkpoint closures and procedures, have also had a negative impact on the ability of families to visit those in detention, whether sentenced prisoners or those held in administrative detention.”
- 56 See International Covenant on Economic, Social and Cultural Rights, arts. 6, 11 (1), 12 (1) and 13; see also art. 10 (2) (“Special protection should be accorded to mothers during a reasonable period before and after childbirth”). See also report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Israel, including visit to the Occupied Palestinian Territories (A/HRC/6/17/Add.4), para. 39, and paras. 40-41: “40. Delays at checkpoints have complicated childbirth for (...) women. This has resulted in the delivery of children at checkpoints and unattended roadside births, putting at risk the health of both child and mother, and leading to numerous miscarriages and the death of at least five mothers. These hardships are reported to have contributed to an 8.2 per cent increase in home deliveries ...
- “41. As a result of the barrier, Palestinian children encounter significant obstacles in attending or remaining at educational institutions. It also affects the movement of teaching staff, whether this be as a result of the barrier having been erected between ‘closed’ communities and educational facilities, or the difficulties in obtaining special permits from the [Member State’s] Defense Forces to enter areas in which educational facilities are present ...”.
- 57 See art. 11(1) of the International Covenant on Economic, Social and Cultural Rights, and art. 6 of the International Covenant on Civil and Political Rights (“Every human being has the inherent right to life”). See also report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Israel, including visit to the Occupied Palestinian Territories (A/HRC/6/17/Add.4), para. 39 (“As a result of closures and the system of permits regulating the movement of people from one area to another, the [people] are adversely affected in their ability to gain access to education; health services, including emergency medical treatment; other social services; and places of employment. Access by ordinary [people] to their land and water resources, including through the devastation or separation from villages of agricultural land in the course of erecting the barrier, is also being impeded, in some cases to the point of having a devastating socio-economic impact on communities”)
- 58 See further the Basic Human Rights Reference Guide “*Stopping and Searching of Persons in the Context of Countering Terrorism*”, paras. 27 *et seq.*
- 59 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, ICJ Reports 2004*, para. 163 (3), in which the International Court of Justice (by fourteen votes to one) held that: construction of the separation barrier was contrary

to international law; that work on its construction had to cease forthwith and structures already assembled had to be dismantled forthwith; and that the Member State was “under an obligation to make reparation for all damage caused by the construction of” the separation barrier. See also report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Israel, including visit to the Occupied Palestinian Territories (A/HRC/6/17/Add.4), para. 61 (“The Special Rapporteur urges [the State] to ensure that any demolition of housing or other destruction of private property conducted as a measure aimed at combating or preventing terrorism is resorted to in strict compliance with international law and is accompanied by adequate reparation”).

- 60 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Australia: Study on human rights compliance while countering terrorism (A/HRC/4/26/Add.3), para. 38.
- 61 See A/HRC/4/26/Add.3, paras. 37 and 38.
- 62 See A/HRC/4/26/Add.3, para. 37.
- 63 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/64/211), para. 41.
- 64 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/63/223), para. 42.
- 65 See report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/12/22), paras. 29 and 30.
- 66 See Basic Human Rights Reference Guide “*Stopping and Searching of Persons in the Context of Countering Terrorism*”.
- 67 See report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/12/22), para. 29. See also, generally, Committee on Economic, Social and Cultural Rights, General comment No. 20: art. 2 (2): non-discrimination in economic, social and cultural rights.
- 68 See generally, United Nations High Commissioner for Refugees, “Addressing Security Concerns without Undermining International Refugee Protection”, November 2001. See also United Nations High Commissioner for Refugees, “Refugee Protection and Mixed Migration: A Ten-Point Plan of Action”, January 2007, which provides practical suggestions for management strategies and entry systems which enable States to respond to new arrivals and make the necessary distinctions.
- 69 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/62/263), para. 38.
- 70 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/62/263), para. 35. See also United Nations High Commissioner for Refugees, “Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”, September 2003, HCR/GIP/03/05, and the accompanying “Background Note; United Nations High Commissioner for Refugees, Note on the Impact

of Security Council Resolution 1624 (2005) on the Application of Exclusion Under Article 1F of the 1951 Convention Relating to the Status of Refugees”, December 2005.

71 See, for example, Security Council resolution 1963 (2010), which reaffirms “that Member States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee, and humanitarian law,…” (thirteenth preambular para.). See also General Assembly resolution 68/178, which urges States, while countering terrorism “[t]o ensure that any measures taken or means employed to counter terrorism, …, comply with their obligations under international law, including the Charter of the United Nations, human rights law and international humanitarian law” (operative paragraph 6 (s)), and Human Rights Council resolution 19/19, operative paragraph 1.

72 See para. 7 above.

73 In this respect, see:

- Art. 33 (1) of the Convention relating to the Status of Refugees (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”).
- Art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that: (1) “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”; and (2) “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.
- Art. 7 of the International Covenant on Civil and Political Rights guarantees that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. The Human Rights Committee has interpreted art. 7 to include an obligation on States not to expose individuals to “the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”: see Human Rights Committee, General comment No. 20: art. 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment), para. 9.

See also the resolutions of the Security Council and the General Assembly concerning the need for counter-terrorism measures to comply with international law, including human rights and refugee law, and international humanitarian law. On the specific question of compliance with the non-derogable principle of *non-refoulement*, see, as recent example, General Assembly resolutions 68/178, para. 6, which urges States, while countering terrorism:

“(j) To fully respect non-refoulement obligations under international refugee and human rights law and, at the same time, to review, with full respect for these obligations and other legal safeguards, the validity of a refugee status decision in an individual case if credible and relevant evidence comes to light that indicates that the person in question has



committed any criminal acts, including terrorist acts, falling under the exclusion clauses under international refugee law;

(k) To refrain from returning persons, including in cases related to terrorism, to their countries of origin or to a third State whenever such transfer would be contrary to their obligations under international law, in particular international human rights, humanitarian and refugee law, including in cases where there are substantial grounds for believing that they would be in danger of subjection to torture, or where their life or freedom would be threatened, in violation of international refugee law, on account of their race, religion, nationality, membership of a particular social group or political opinion, bearing in mind obligations that States may have to prosecute individuals not returned, and in that case to adhere to the principle of extradite or prosecute;”

- 74 The principle of non-refoulement also applies in the context of emerging practices of removing “immigration risks” offshore. See, for example, Human Rights Committee, Concluding Observations, New Zealand (CCPR/CO/75/NZL), para. 11 (“The Committee recognizes that the security requirements relating to the events of 11 September 2001 have given rise to efforts by [the State party] to take legislative and other measures to implement Security Council resolution 1373 (2001). The Committee, however, expresses its concern that the impact of such measures or changes in policy on [the State party’s] obligations under the Covenant may not have been fully considered. The Committee is concerned about possible negative effects of the new legislation and practices on asylum-seekers, including by “removing the immigration risk offshore” and in the absence of monitoring mechanisms with regard to the expulsion of those suspected of terrorism to their countries of origin which, despite assurances that their human rights would be respected, could pose risks to the personal safety and lives of the persons expelled (articles 6 and 7 of the Covenant). The State party is under an obligation to ensure that measures taken to implement Security Council resolution 1373 (2001) are in full conformity with the Covenant ... In addition, the State party should maintain its practice of strictly observing the principle of non-refoulement.”). See also United Nations High Commissioner for Refugees, “Advisory Opinion on the Extraterritorial Application of *Non-refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol”, 26 January 2007.
- 75 Admission into asylum procedures may be denied only if: (a) the individual concerned has already found protection in another country, and such protection is both available and effective; or (b) the applicant can be returned to a country through which he or she has passed en route to the country where asylum is requested, provided he or she will be re-admitted, will be able to access fair asylum procedures and, if recognized, will be able to enjoy effective protection there. See, for example, United Nations High Commissioner for Refugees Global Consultations on International Protection, 2nd meeting, “Asylum Processes (Fair and Efficient Asylum Procedures)”, (EC/GC/01/12 (2001)), para. 8 (“An asylum-seeker may be refused access to the substantive asylum procedure in the country where the application has been made: if the applicant has already found effective protection in another country (a first country of asylum); or if responsibility for assessing the particular asylum application in substance is assumed by a third country, where the asylum-seeker will be protected from refoulement and will be able to seek and enjoy asylum in accordance with accepted international standards (a ‘safe third country’)”).

- 76 See United Nations High Commissioner for Refugees, “Preserving the institution of asylum and refugee protection in the context of counter-terrorism: the problem of terrorist mobility”, para. 20 (iv), where a key aspect of refugee protection is identified as follows: “Adequate data and information sharing mechanisms between States are essential in the fight against terrorism. However, States are bound by the principle of confidentiality as regards asylum-seekers and refugees. As a general rule, no information regarding an asylum application, or an individual’s refugee status, should be shared with the country of nationality or, in the case of stateless persons, the country of former habitual residence, as this may breach the individual’s right to privacy and protection against arbitrary or unlawful interference, as guaranteed under international human rights law.”
- 77 See the report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/62/263, para. 41). On the question of non-discrimination, see arts. 2 and 26 of the International Covenant on Civil and Political Rights and art. 3 of the Convention relating to the Status of Refugees, the latter of which provides that: “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”.
- 78 See Human Rights Committee, *A. v. Australia*, Communication 560/1993 (CCPR/C/59/D/560/1993) (1997), para. 9.4. See also:
- Convention relating to the Status of Refugees, art. 26 (“Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances”).
  - Convention relating to the Status of Refugees, art. 31 (“The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country”).
  - Report of the Working Group on Arbitrary Detention (A/HRC/7/4), paras. 41-54.
- 79 See United Nations High Commissioner for Refugees, “Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention” (“UNHCR Detention Guidelines”), 2012, in particular Guideline 1.
- 80 See United Nations High Commissioner for Refugees, “Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention” (“UNHCR Detention Guidelines”), 2012, in particular Guideline 6.
- 81 Human Rights Committee, *A. v. Australia*, Communication 560/1993 (CCPR/C/59/D/560/1993) (1997).
- 82 See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/62/263), para. 42, and Human Rights Committee, *A. v. Australia*, Communication 560/1993 (CCPR/C/59/D/560/1993) (1997). See also United Nations High Commissioner for Refugees, “Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention” (“UNHCR Detention

Guidelines”), 2012, <http://www.refworld.org/docid/503489533b8.html>“, in particular Guideline 4.

- 83 Human Rights Committee, *Mr. C v. Australia*, Communication 900/1999 (CCPR/C/76/D/900/1999) (2002), para. 8.2.
- 84 Concluding observations of the Human Rights Committee, *Australia* (CCPR/C/AUS/CO/5) (2009), para. 23.
- 85 See International Covenant on Civil and Political Rights, art. 12 (2).
- 86 See UNHCR Executive Committee Conclusion on International Protection Nos. 6 (XXVIII), 85 (XLIX) and 99 (LV) which reaffirm the fundamental importance of the observance of the principle of non-refoulement, both at the border and within the territory of a State, of persons who may be subjected to persecution if returned to their country of origin, irrespective of whether or not they have been formally recognized as refugees; and stress that the principle of non-refoulement and non-rejection at borders requires access to fair and efficient procedures for determining status and protection needs.

See also report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: *Australia: Study on human rights compliance while countering terrorism* (A/HRC/4/26/Add.3), para. 51 (“As part of a layered approach intended to prevent the transboundary movement of terrorists, and of others involved in criminal activity, the latter measures [a database used to store details about people and travel documents of immigration concern to the State] seem rational and, according to authorities, are very effective. Notwithstanding this, the Special Rapporteur has two concerns about the latter measures. The first is that the Convention relating to the Status of Refugees, as well as article 12, paragraph 2, of the International Covenant on Civil and Political Rights, guarantees to every person the right to leave any country, including one’s own country. States should be cautious of implementing measures that may effectively prevent persons from exercising this right, particularly in the context of those fleeing persecution in their own country with an intention to seek refugee status elsewhere. The ability to leave is essential to the operation of the framework safeguarding the rights of refugees.”)

See also report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/13/37), para. 30.

- 87 See also Human Rights Committee, General comment No. 27: art. 12 (Freedom of movement), para 17.
- 88 See, for example, the International Maritime Organization and International Labour Organization Code of Practice on Security in Ports (MESSHP/2003/14) para. 3 (3), which states:

“Some examples of the aim of security measures that may be considered are to:

“3.3.1. Prevent access to the port by persons without a legitimate reason to be there and prevent those persons with legitimate reasons to be in the port from gaining illegal access to ships or other restricted port areas for the purpose of committing unlawful acts.

- “3.3.2. Prevent introduction of unauthorized weapons, dangerous or hazardous substances and devices, into the port or vessels using the port.
- “3.3.3. Prevent personal injury or death, or damage to the port, port facility, ship or port infrastructure by explosive or other devices.
- “3.3.4. Prevent tampering with cargo, essential equipment, containers, utilities, protection systems, procedures and communications systems affecting the port.
- “3.3.5. Prevent smuggling of contraband, drugs, narcotics, other illegal substances and prohibited material.
- “3.3.6. Prevent other criminal activities, such as theft.
- “3.3.7. Protect against the unauthorized disclosure of classified material, commercially proprietary information or security sensitive information.”
- 89** See, for example, the International Air Transport Association/Control Authorities Working Group Statement of Principles for Advance Passenger Information Systems (FAL/12-WP/60), annex (“API systems should seek to minimise the impact on existing carrier system and technical infrastructure”).
- 90** International Covenant on Economic, Social and Cultural Rights, arts. 6 and 11 (1).
- 91** See report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/62/263), para. 39.
- 92** See E/CN.4/2005/103, para. 68
- 93** For more on these issues, see “Protecting the right to privacy in the fight against terrorism”, Council of Europe, Commissioner for Human Rights, 17 November 2008, (CommDH/IssuePaper(2008)3), the UN Guidelines concerning Computerized Personal Data Files, E/CN.4/1990/72, and General Assembly resolution 45/95 (Guidelines for the Regulation of Computerized Data Files), which set out principles of data protection.
- 94** Although the use of machine readable travel documents can “minimize handling time during check-in” and achieve more secure forms of travel documentation (see International Civil Aviation Organization (ICAO) document 9303, “Machine Readable Travel Documents”, annex 9, Chap. 3, para. 3.47), the ICAO Guidelines on Electronic Machine Readable Travel Documents and Passenger Facilitation (TAG-MRTD/18-WP/3, chap. 3.4.1) state:
- “Firstly, with regard to the e-MRTD and how it is read by suitable equipment, it must be possible to demonstrate a resilience to ‘skimming’ or ‘eavesdropping’ whereby data might be read from the chip by non-authorized equipment within the vicinity. Technology supplier’s claims alone are not sufficient to provide confidence in this respect, and trials should be undertaken in order to ascertain such susceptibility under field conditions.
- “Secondly, there is the much broader issue of what happens to the data after it has been read, who might have access to it and for what purpose. There has been an increasing trend to blur immigration control with law enforcement in many countries. This is a potentially serious issue as, on the one hand we are dealing with the legitimate person seeking rights to cross a border, while on the other we are dealing with criminal activity. If this distinction is

not properly understood and catered for, there is a risk of citizens becoming disenchanted with the process and losing confidence in the government agencies and control authorities involved. There are perhaps two areas where reassurances might usefully be created. Firstly, by making it easy for document holders to see exactly what is encoded within the chip of their e-MRTD (as recommended by ICAO) and, secondly, the provision of clear statements as to exactly how that data is used, with whom it is shared and for what purpose. Furthermore, such a statement should cover factors such as data retention, access control and associated factors.”

Concerning the use of biometric data, see also report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/13/37), which states:

“24. A key component to new identity policies is the use of biometric techniques such as facial recognition, fingerprinting and iris-scanning. While these techniques can, in some circumstances, be a legitimate tool for the identification of terrorist suspects, the Special Rapporteur is particularly concerned about cases where biometrics are not stored in an identity document itself, but in a central database, thereby increasing the information security risks and leaving individuals vulnerable. As the collection of biometric information increases, error rates may rise significantly. This may result in the wrongful criminalization

of individuals or social exclusion. Meanwhile, unlike other identifiers, biometrics cannot be revoked: once copied and/or fraudulently used by a malicious party it is not possible to issue an individual with a new biometric signature. In this context it has to be noted that, contrary to its scientific objectivity, DNA evidence can also be falsified.

“25. Centralized collection of biometrics creates a risk of causing miscarriages of justice, which is illustrated by the following example. Following the [bombings] of 11 March 2004, [a Member State’s] police managed to lift a fingerprint from an unexploded bomb. [Another Member State’s investigation bureau] fingerprint experts declared that a lawyer’s fingerprint was a match to the crime-scene sample. The person’s fingerprint was on the national fingerprint system because he was a former [soldier of the latter Member State]. The individual was detained for two weeks in solitary confinement, even though the fingerprint was not his. Examiners failed to sufficiently reconsider the match, a situation that was made worse for him when it was discovered that he, as a lawyer, defended a convicted terrorist, was married to [an immigrant from another Member State], and had himself converted to Islam.

95 ”See A/HRC/13/37, para. 13.

96 See A/HRC/13/37, para. 26.

97 See A/HRC/13/37, para. 29. Concerning the collection and storage of information by customs authorities, see the World Customs Organization SAFE Framework of Standards, page 26 (“... National legislation must contain provisions that specify that any data collected and or transmitted by Customs must be treated confidentially and securely and be sufficiently protected, and it must grant certain rights to natural or legal persons to whom the information pertains”).

98 See A/HRC/13/37, para. 30.

99 See A/HRC/13/37, para. 31.

100 See A/HRC/13/37, para. 32.

101 The principle of legality is enshrined in art. 15 of the International Covenant on Civil and Political Rights. See also Fact Sheet No. 32 (*Human Rights, Terrorism and Counter-Terrorism*) of the Office of the United Nations High Commissioner for Human Rights, pp. 39 *et seq.* Specific to art. 17 of the International Covenant on Civil and Political Rights, see also:

- Human Rights Committee, General comment No. 16: art. 17 (Right to privacy), para. 3.
- Human Rights Committee, *Antonius Cornelis Van Hulst v. The Netherlands*, Communication 903/1999 (CCPR/C/82/D/903/1999) (2004), para. 7.3 (“... in order to be permissible under article 17, any interference with the right to privacy must cumulatively meet several conditions set out in paragraph 1, i.e. it must be provided for by law, be in accordance with the provisions, aims and objectives of the Covenant and be reasonable in the particular circumstances of the case”).
- A/HRC/13/37, para. 17, which provides that:

“[...] Restrictions that are not prescribed by law are ‘unlawful’ in the meaning of article 17, and restrictions that fall short of being necessary or do not serve a legitimate aim constitute ‘arbitrary’ interference with the rights provided under article 17. Consequently, limitations to the right to privacy or other dimensions of article 17 are subject to a permissible limitations test, as set forth by the Human Rights Committee in its general comment No. 27 (1999). That general comment addresses freedom of movement (art. 12), one of the provisions that contains a limitations clause. At the same time, it codifies the position of the Human Rights Committee in the matter of permissible limitations to the rights provided under the [International Covenant on Civil and Political Rights]. The permissible limitations test, as expressed in the general comment, includes, inter alia, the following elements:

“(a) Any restrictions must be provided by the law (paras. 11-12);

“(b) The essence of a human right is not subject to restrictions (para. 13); “(c) Restrictions must be necessary in a democratic society (para. 11);

“(d) Any discretion exercised when implementing the restrictions must not be unfettered (para. 13);

“(e) For a restriction to be permissible, it is not enough that it serves one of the enumerated legitimate aims; it must be necessary for reaching the legitimate aim (para. 14);

“(f) Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected (paras. 14-15);

“(g) Any restrictions must be consistent with the other rights guaranteed in the

102 Human Rights Committee, General comment No. 16: art. 17 (Right to privacy), para. 7 (“As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual’s private life the knowledge of which is essential in the interests of society as

understood under the Covenant ...” See also A/HRC/13/37, para. 49 (“Some interference with the private lives of individuals is more intrusive than others. Constitutional protection of property and people has been extended over the past 50 years to include communications, information that is related to a biographical core and a right to the confidentiality and integrity of information-technological systems. These protections require States to have exhausted less-intrusive techniques before resorting to others. [A Member State’s] Parliament’s Home Affairs Committee reviewed and adapted these ideas for modern data-centred surveillance systems into the principle of data-minimization, which is closely linked to purpose-specification. In its review, the [Member State’s] Parliamentary committee recommended that Governments ‘resist a tendency to collect more personal information and establish larger databases. Any decision to create a major new database, to share information on databases, or to implement proposals for increased surveillance, should be based on a proven need.’ The Special Rapporteur contends that States must incorporate this principle into existing and future policies as they present how their policies are necessary, and in turn proportionate.”

103 International Covenant on Civil and Political Rights, art. 17 (1). See also:

- Human Rights Committee, General comment No. 16: art. 17 (Right to privacy), para. 4 (“The expression ‘arbitrary interference’ is also relevant to the protection of the right provided for in article 17. In the Committee’s view the expression ‘arbitrary interference’ can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”). This was reiterated by the Committee in *Nicholas Toonen v. Australia*, Communication 488/1992 (CCPR/C/50/D/488/1992) (1994), para. 8.3,
- See A/HRC/13/37, para. 16 (“The wording of article 17 of the Covenant prohibits ‘arbitrary or unlawful’ interference with privacy, family or correspondence, as well as ‘unlawful attacks’ on a person’s honour and reputation. This can be contrasted with the formulation of such provisions as article 12, paragraph 3; article 18, paragraph 3; article 19, paragraph 3; article 21 and article 22, paragraph 2, which all spell out the elements of a test for permissible limitations. In its most elaborate form this test is expressed in article 21 and article 22, paragraph 3 as consisting of the following three elements: (a) restrictions must be prescribed by national law; (b) they must be necessary in a democratic society; and (c) they must serve one of the legitimate aims enumerated in each of the provisions that contain a limitations clause”).

104 See, for example:

- Human Rights Committee, General comment No. 16: art. 17 (Right to privacy), para. 3 (“The term ‘unlawful’ means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant) and para. 8 (“Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis”).

- Human Rights Committee, *Antonius Cornelis Van Hulst v. The Netherlands*, Communication 903/1999 (CCPR/C/82/D/903/1999) (2004), para. 7.7, in which the latter comment was confirmed.

See A/HRC/13/37, para. 51 (“Surveillance systems require effective oversight to minimize harms and abuses. Where safeguards exist, this has traditionally taken the form of an independent authorization through a judicial warrant and/or a subpoena process with the opportunity of independent review. Many policies have attempted to restrict oversight and lower authorization levels, however: communications interception laws have minimized authorization requirements for some communications; secret subpoenas are issued to gain access to information held by third parties and have restricted the ability to seek judicial protections; and States are increasingly allowing intelligence and law enforcement agencies to self-authorize access to personal information where previously some form of independent authorization and effective reporting was necessary”) and para. 53 (The Special Rapporteur is concerned that the lack of effective and independent scrutiny of surveillance practices and techniques calls into question whether interferences are lawful (and thus accountable), and necessary (and thus applied proportionately). He commends the hard work of oversight bodies within government agencies, including internal privacy offices, audit departments, and inspectorate-generals, as they too play a key role in identifying abuses. The Special Rapporteur therefore calls for increased internal oversight to complement the processes for independent authorization and external oversight. This internal and external accountability system will ensure that there are effective remedies for individuals, with meaningful access to redress mechanisms”).

**105** See A/HRC/13/37, para. 60.

**106** Human Rights Committee, General comment No. 16: art. 17 (Right to privacy), para. 8 (“Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited”).

**107** See, for example:

- E/CN.4/2005/103, para. 69: (“Recognizing that such measures might unreasonably interfere with privacy, the Council of Europe in its Guidelines on human rights and the fight against terrorism indicated that such measures, in particular, body searches, house searches, bugging, telephone tapping, surveillance of correspondence, and use of undercover agents, must be provided for by law and subject to court challenge (guideline VI). More particularly, guideline V states that the collection and processing of personal data by any competent authority in the field of State security may interfere with respect for private life only if such collection and processing, in particular: ‘(i) are governed by appropriate provisions of domestic law; (ii) are proportionate to the aim for which the collection and the processing were foreseen; and (iii) may be subject to supervision by an external independent authority”).
- European Court of Human Rights, *Klass and Others v. Germany*, Application No. 5029/71, 6 September 1978, Court (Plenary) ECHR 4, para. 48 (“As the Delegates observed, the Court, in its appreciation of the scope of the protection offered by Article 8 (art. 8), cannot but take judicial notice of two important facts. The first consists of the technical advances made in the means of espionage and, correspondingly, of surveillance; the second is the development of terrorism in Europe in recent years. Democratic societies



nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime”) and 49 (“As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (cf., *mutatis mutandis*, the *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the *Golder* judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45; cf., for Article 10, para. 2, the *Engel and others* judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100, and the *Handyside* judgment of 7 December 1976, Series A no. 24, p. 22, para. 48).

“Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate”).

108 See, for example:

- A/HRC/13/37, para. 21 (“The range of surveillance operations runs from the specific to the general. At the specific level, legal systems are capable of authorizing and overseeing: undercover operations and covert surveillance to identify illegal conduct; the accumulation of intelligence on specific individuals to identify breaches of law, and targeted surveillance of individuals to build a legal case. The Special Rapporteur had earlier specified that States may make use of targeted surveillance measures, provided that it is case-specific interference, on the basis of a warrant issued by a judge on showing of probable cause or reasonable grounds. There must be some factual basis, related to the behaviour of an individual, which justifies the suspicion that he or she may be engaged in preparing a terrorist attack”).
- Council of Europe, Recommendation (2005)10 of the Committee of Ministers to member States on “special investigation techniques” in relation to serious crimes including acts of terrorism (20 April 2005), para. 4 (“Special investigation techniques should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more particular persons or an as-yet-unidentified individual or group of individuals”) and para. 6 “Member states should ensure that competent authorities apply less intrusive investigation methods than special investigation techniques if such methods enable the offence to be detected, prevented or prosecuted with adequate effectiveness”).

109 International Covenant on Civil and Political Rights, arts. 19 (2) and (3) of which state that the freedom of expression includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art,

or through any other media of his choice” and may only be subject to restrictions provided by law and necessary either “(a) For respect of the rights or reputations of others” or “(b) For the protection of national security or of public order (ordre public), or of public health or morals”. Art. 22 (1) of the Covenant guarantees that “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests” and article 22 (2) stipulates that no restrictions may be placed on the exercise of this right “other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”. Concerning the potential impact of surveillance on the freedoms of association, expression and movement, see A/HRC/13/37, para. 33 (“Surveillance regimes adopted as anti-terrorism measures have had a profound, chilling effect on other fundamental human rights. In addition to constituting a right in itself, privacy serves as a basis for other rights and without which the other rights would not be effectively enjoyed. Privacy is necessary to create zones to allow individuals and groups to be able to think and develop ideas and relationships. Other rights, such as freedom of expression, association and movement all require privacy to be able to develop effectively. Surveillance has also resulted in miscarriages of justice, leading to failures of due process and wrongful arrest”); para. 34 (“In many nations around the world, users are being monitored to review what sites they are visiting and with whom they are communicating. In [a Member State] the Federal Intelligence Service was found in 2006 to have been illegally spying on journalists using communications surveillance and placing spies in newsrooms. In [another Member State], the Administrative Department of Security was found, in 2009, to have been conducting illegal surveillance of members of the media, human rights workers, Government officials and judges, and their families for seven years. In numerous countries across the world, internet users must show identification and their sessions are recorded for future use by authorities. For instance, in Internet service providers in [a further Member State] were required in 2007 to turn over records of their users’ identities, passwords and usage to authorities. Some users were then visited by authorities, who searched through their computers and contact lists. In [a further Member State], the [bureau of investigation] counter-terrorism unit monitored the activities of peace activists at the time of the 2004 political conventions. These surveillance measures have a chilling effect on users, who are afraid to visit websites, express their opinions or communicate with other persons for fear that they will face sanctions. This is especially relevant for individuals wishing to dissent and might deter some of these persons from exercising their democratic right to protest against Government policy”); para. 35 (“In addition to surveillance powers, many anti-terrorism laws require individuals to pro-actively disclose information and provide broad powers for officials to demand information for investigations. In this context, the Special Rapporteur has earlier expressed his concerns about the use of national security letters in [a Member State]. Some countries have expanded this power to require the disclosure of information originally collected for journalistic purposes. In [another Member State], the 2002 Anti-Terrorism Act allows for wiretapping and searches of the media if there are “special reasonable grounds” that the information has “substantial value” in an anti-terrorism investigation. The Special Rapporteur stresses that the legitimate interest in the disclosure of confidential materials of journalists outweighs the public interest in the non-disclosure only where an overriding requirement of the need for disclosure is proved, the circumstances are of a sufficiently vital and serious nature and the necessity of the disclosure is identified as

responding to a pressing social need”); para. 36 (“The rights to freedom of association and assembly are also threatened by the use of surveillance. These freedoms often require private meetings and communications to allow people to organize in the face of Governments or other powerful actors. Expanded surveillance powers have sometimes led to a ‘function creep’, when police or intelligence agencies have labelled other groups as terrorists in order to allow the use of surveillance powers which were given only for the fight against terrorism. In [a Member State], environmental and other peaceful protestors were placed on terrorist watch lists by the [State] Police before political conventions in [other cities]. In [another Member State], surveillance cameras are commonly used for political protests and images kept in a database. A recent poll in the [latter Member State] found that one third of individuals were disinclined to participate in protests because of concern about their privacy”); and para. 37 (“Freedom of movement can also be substantially affected by surveillance. The creation of secret watch lists, excessive data collection and sharing and imposition of intrusive scanning devices or biometrics, all create extra barriers to mobility. As described in previous sections, there has been a substantial increase in the collection of information about people travelling both nationally and internationally. Information is routinely shared and used to develop watch lists that have led to new barriers to travel. When profiles and watch lists are developed using information from a variety of sources with varying reliability, individuals may have no knowledge of the source of the information, may not question the veracity of this information, and have no right to contest any conclusions drawn by foreign authorities. A mosaic of data assembled from multiple databases may cause data-mining algorithms to identify innocent people as threats. If persons are prohibited from leaving a country, the State must provide information on the reasons requiring the restriction on freedom of movement. Otherwise, the State is likely to violate article 12 of the International Covenant on Civil and Political Rights”).

- 110 Whole-body imaging technologies can see through clothing to reveal metallic and non-metallic objects, including weapons or plastic explosives. They also reveal a person’s silhouette and the outlines of underwear. For a video demonstration of the operation and use of body scanning technology, see: <http://edition.cnn.com/2009/TRAVEL/05/18/airport.security.body.scans/index.html#cnnSTCVideo>. The full implications of body imaging, in terms of both privacy and other matters, including the medical and health implications of repeated exposure to whole body imaging technology, is not yet fully known. This has stirred much debate on whether and when such technology can and should be used (see generally, for example, <http://epic.org/privacy/airtravel/backscatter/>).
- 111 See, for example, the Aircraft Passenger Whole-Body Imaging Limitations Act of 2009 ([http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2027ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2027ih.txt.pdf)).
- 112 Despite early claims by developers of radio-frequency identification (RFID) chips that such chips allow the contact-less reading of the biometric and biographical data of individuals stored on machine readable travel documents, research has shown that RFID chips can be read at a distance of 69 feet and, with specialized eavesdropping equipment, at significantly longer ranges: see Bruce Schneier, “Fatal Flaw Weakens RFID Passports” (3 November 2005), available from <http://www.schneier.com/essay-093.html>.
- 113 Human Rights Committee, General comment No. 16: art. 17 (Right to privacy), para. 10 (“The gathering and holding of personal information on computers, databanks and other

devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public [authorities] or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination”).

114 See, for example:

- A/HRC/13/37, para. 12 (“The State’s ability to develop record-keeping facilities was enhanced with the development of information technology. Enhanced computing power enabled previously unimaginable forms of collecting, storing and sharing of personal data. International core data protection principles were developed, including the obligation to: obtain personal information fairly and lawfully; limit the scope of its use to the originally specified purpose; ensure that the processing is adequate, relevant and not excessive; ensure its accuracy; keep it secure; delete it when it is no longer required; and grant individuals the right to access their information and request corrections. The Human Rights Committee provided clear indications in its general comment No. 16 that these principles were encapsulated by the right to privacy, but data protection is also emerging as a distinct human or fundamental right.”)
- Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS 108) and its Additional Protocol regarding supervisory authorities and transborder data flows (CETS 181).
- The 2003 Guidelines on Advance Passenger Information, produced by the World Customs Organization, the International Air Transport Association (IATA) and ICAO, concerning data privacy and data protection legislation, which state:
 

“9.3. This legislation can vary from country to country. However, there is a large degree of commonality of provisions of such legislation. Data privacy and data protection legislation typically requires that personal data undergoing automated (computer) processing :

  - “– Should be obtained and processed fairly and lawfully;
  - “– should be stored for legitimate purposes and not used in any way incompatible with those purposes;
  - “– should be adequate, relevant and not excessive in relation to the purposes for which they are stored;
  - “– should be accurate and, where necessary, kept up to date;
  - “– should be preserved in a form which permits identification of the data subjects for no longer than is required for the purposes for which that data is stored.”

“9.4. Such legislation also usually incorporates provisions concerning the right of access by data subjects to their own personal data. There may also be provisions regarding

disclosure of personal data to other parties, and about transmission of such data across national borders and beyond the jurisdiction of the country in which it was collected.”

- 115 See A/HRC/13/37, para. 49.
- 116 See former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/62/263), para. 41. See also A/HRC/13/37, para. 50.
- 117 See A/HRC/13/37, para. 51-53.
- 118 See A/HRC/13/37, para. 54-56.
- 119 See International Covenant on Civil and Political Rights, art. 2 (3). See also the Siracusa Principles, para. 24 (“State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts or other competent independent bodies”) and para. 34 (“The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse”).
- 120 See the report of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight (A/HRC/14/46), sect. II (C), Practice 9.
- 121 See former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/14/46), Practice 10.
- 122 See A/HRC/13/37, para. 62.
- 123 See A/HRC/13/37, para. 69.
- 124 See A/HRC/13/37, para. 70.

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