



GUIDANCE TO STATES

ON HUMAN RIGHTS-COMPLIANT RESPONSES
TO THE THREAT POSED BY FOREIGN FIGHTERS



United Nations Counter-Terrorism Implementation Task Force

Working Group on Promoting and Protecting Human Rights
and the Rule of Law while Countering Terrorism

Guidance to States on human rights-compliant responses to the threat posed by foreign fighters

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I. Introduction

1. In September 2014, the Security Council unanimously adopted resolution 2178 to counter the threat posed by foreign terrorist fighters. Paragraph 6 of resolution 2178 (2014) defines foreign terrorist fighters as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training”. In June 2014, it was estimated that up to 12,000 people from more than 80 countries had travelled to Iraq and the Syrian Arab Republic to join groups such as the Al-Nusrah Front and the Islamic State in Iraq and the Levant (ISIL).¹ In September 2015, that number was thought to have grown to almost 30,000 from more than 100 countries.² By August 2017, the flow of people to Iraq and the Syrian Arab Republic had diminished dramatically in light of the military efforts against ISIL. In October 2017 it was estimated that over 40,000 people from more than 110 countries had joined ISIL, and that at least 5,600 of them had returned home.³ The Analytical Support and Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015) concerning ISIL (Da’esh), Al-Qaida and associated individuals, groups, undertakings and entities has noted that the threat posed is in the return of these individuals to their countries of origin or in their relocation to third countries to join cells or groups affiliated with ISIL or Al-Qaida.⁴

Terminology: “foreign terrorist fighters”

Concerns have been raised over the labelling of individuals as well as their families, by association, as foreign terrorist fighters (as defined in resolution 2178 (2014)); difficulties related to the criminal regulation of individuals’ intentions; as well as the blurring of lines between terrorism and armed conflict, with consequences for human rights protection and the protection regime under international humanitarian law. This document uses the term “foreign terrorist fighters” when referring to the use of this term as reflected in the relevant Security Council resolutions.

- ¹ Richard Barrett, “Foreign fighters in Syria” (Soufan Group, June 2014), p. 9; Security Council 7272nd meeting, 24 September 2014 (S/PV.7272).
- ² Soufan Group, “Foreign fighters: an updated assessment of the flow of foreign fighters into Syria and Iraq” (December 2015), p. 5.
- ³ Richard Barrett, “Beyond the caliphate: foreign fighters and the threat of returnees” (Soufan Center, October 2017).
- ⁴ S/2017/573.

2. There is no clear profile for foreign terrorist fighters. Some are motivated by extremist ideology, while others appear more driven by alienation and boredom.⁵ Motivation may also change over time. Motivational factors may also include the desire to belong to a group or to gain peer acceptance; kinship, nationalism or patriotism; and humanitarian reasons, namely to protect the local population. Financial or material gain may also be a factor.⁶ The Global Counter-Terrorism Strategy points to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance conditions among the conditions conducive to the spread of terrorism.⁷
3. The movement of people for the purposes of joining and supporting terrorist groups as well as their return to their countries of origin poses serious challenges to States in their efforts to prevent acts of terrorism. It is crucial that States adopt comprehensive long-term responses that deal with this threat and manage the return of fighters, and that in doing so they comply with their obligations under international human rights law. States have an obligation to protect the lives of individuals subject to their jurisdiction, and this includes the adoption of effective measures to counter the threat posed by foreign fighters. However, in its 2016 review of the Global Counter-Terrorism Strategy, the General Assembly expressed serious concern at the occurrence of violations of human rights and fundamental freedoms committed in the context of countering terrorism and stressed that, when counter-terrorism efforts neglected the rule of law and violated international law, they not only betrayed the values they sought to uphold, but they might also further fuel violent extremism that could be conducive to terrorism.⁸
4. Resolution 2178 (2014) specifically requires that its operative paragraphs be implemented in accordance with international human rights law, humanitarian law and refugee law. Acting under Chapter VII of the Charter of the United Nations, the Security Council, in paragraph 5 of resolution 2178 (2014) decided that:

“States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities.”

⁵ S/2015/358.

⁶ A/70/330.

⁷ General Assembly resolution 60/288, annex.

⁸ General Assembly resolution 70/291, para. 16. See also A/72/316.

5. In resolution 2178 (2014), the Security Council underscored that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort. It noted the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity.⁹ The Counter-Terrorism Committee has noted the importance, as States revise legislation and policy to stem the flow of foreign terrorist fighters, to recognize that the protection of human rights and the rule of law contribute to the countering of terrorism. Arbitrary arrests, incommunicado detentions, torture and unfair trials fuel a sense of injustice and may in turn encourage terrorist recruitment, including of foreign terrorist fighters.¹⁰
6. However, certain measures adopted by States in the implementation of resolution 2178 (2014) have resulted in profound human rights challenges. As noted by the United Nations High Commissioner for Human Rights:

“Some of the measures taken under the scope of Security Council resolution 2178 (2014) may have a negative impact, for example, on the right to due process for affected individuals, including the right to presumption of innocence; to enjoyment of the right to freedom of movement, and be protected against arbitrary deprivation of nationality; to the rights to freedom of religion, belief, opinion, expression or association; and to protection against arbitrary or unlawful interference in privacy. It should not be presumed, for example, that every individual travelling to an area of conflict has criminal intent or is supporting or engaging in criminal terrorist activity. This consideration is fundamental to ensuring respect for due process and the presumption of innocence.”¹¹
7. In December 2017, the Security Council adopted resolution 2396 (2017), building on resolution 2178 (2014) and providing greater focus on measures to address returning and relocating foreign terrorist fighters and their families, and requiring States to strengthen their efforts in border security, information-sharing, and criminal justice. In order to protect public order and safety in the countries to which foreign terrorist fighters return or relocate, resolution 2396 (2017) sets out additional measures

⁹ Security Council resolution 2178 (2014), seventh preambular paragraph.

¹⁰ S/2015/338.

¹¹ A/HRC/28/28, para. 49.

beyond those in resolution 2178 (2014), which may raise concerns from a human rights perspective.¹²

8. The present document aims to provide concrete guidance to States in their efforts to implement resolutions 2178 (2014), 2396 (2017) and other relevant resolutions in compliance with international human rights law, international humanitarian law and international refugee law, as intended by the Security Council, and in a manner consistent with the comprehensive approach agreed by the General Assembly in its 2016 review of the Global Counter Terrorism Strategy. It provides a short overview of the applicable laws, before turning to some of the possible human rights implications related to the implementation of resolution 2178 (2014) as well as resolution 2396 (2017). It first looks at the impact on the right to liberty and freedom of movement for people within the territory of States, those seeking to leave States and those seeking entry or transit through States, and the related issue of arbitrary deprivation of nationality. The document then analyses the gender aspects and the situation of children affected by or involved in foreign fighter activities and provides guidance on how to ensure information exchange, data collection and analysis in conformity with human rights. The document then addresses criminal justice measures, including the definition of terrorism; prosecution, fair trial and due process rights; rehabilitation and reintegration of returnees; and special laws, sunset clauses and review mechanisms. Finally, the document provides guidance on the right to an effective remedy for those whose rights have been violated and on preventing and countering violent extremism and incitement.
9. The document should be read in conjunction with the Basic Human Rights Reference Guides of the CTITF Working Group on Promoting and Protecting Human Rights and the Rule of Law While Countering Terrorism. Those guides provide more detailed guidance on some of the issues dealt with in this document, including detention and the right to a fair trial and due process.¹³

¹² Concerns include the obligation on States to develop watch lists and databases of “known and suspected terrorists”, a requirement which could have serious implication of the protection of civil society, minority groups, political dissidents and human rights defenders. Increased border controls and data (including biometric data) collection and sharing could have far-reaching privacy implications, as well as discriminatory impacts on specific groups. See Fionnuala Ni Aoláin, “The UN Security Council, global watch lists, biometrics, and the threat to the rule of law” (17 January 2018), available from www.justsecurity.org/51075/security-council-global-watch-lists-biometrics.

¹³ See www.un.org/counterterrorism/ctitf/en/uncct/basic-human-rights-reference-guides.

II. Applicable laws

A. International human rights law

10. International human rights law is established through treaties and customary international law. States can become parties to international human rights treaties, the consequence of which is that they are obliged to act in accordance with and uphold all of the requirements, both negative and positive, imposed by the treaty. International human rights law is also found in customary international law, which is established through State practice (which is uniform and consistent, generally applied and established over time) that is carried out by States in the belief that such practice is required by law (*opinio juris*). Customary international law is applicable to all States, regardless of individual treaty ratifications. Norms of jus cogens, or peremptory norms of customary international law, are those that are accepted by the international community as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of customary international law having the same character. It is universally accepted that the prohibitions of torture, slavery, genocide, racial discrimination and crimes against humanity, as well as the right to self-determination, are norms of jus cogens.
11. Any measures undertaken to implement resolutions 2178 (2014), 2396 (2017) or other Security Council resolutions must comply with general human rights principles grounded in treaty law and customary law. This means that any measures which may limit or restrict human rights must be prescribed by law, be necessary, proportionate to the pursuance of legitimate aims and non-discriminatory.¹⁴ They should also be procedurally fair and offer the opportunity of legal review.
12. Measures are “provided by law” or “prescribed by law” where they have some basis in national law.¹⁵ That is not, however, enough. There is an additional requirement that the “quality of the law” must be “compatible with the rule of law”.¹⁶ This means that “laws imposing limitations on the exercise of human rights [must] not be arbitrary or unreasonable”, and “adequate safeguards and effective remedies [must] be provided by law against illegal or abusive imposition or application of limitations on

¹⁴ Human Rights Committee general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

¹⁵ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex), para. 15.

¹⁶ European Court of Human Rights, *Malone v. United Kingdom*, application No. 8691/79, judgment, 2 August 1984, para. 67 and *Gillan and Quinton v. United Kingdom*, application No. 4158/05, judgment, 12 January 2010, para. 76, on the “prescribed by law” requirement of the European Court of Human Rights.

human rights”.¹⁷ In addition, a norm, to be characterized as a law, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and it must be made accessible to the public.¹⁸ The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.¹⁹

13. In a limited set of circumstances, States may also take measures to temporarily derogate from certain international human rights law provisions.²⁰ As noted by the Human Rights Committee, measures derogating from the provisions of the International Covenant on Civil and Political Rights must be of an exceptional and temporary nature. Two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation; and the State party must have officially proclaimed a state of emergency. The obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers.²¹

B. International refugee law

14. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, along with regional refugee instruments,²² are the core legal instruments of the international refugee regime, complemented by customary international law and international human rights law. These instruments define the term “refugee”²³ and establish an international framework for the protection of refugees, setting out the obligations of States towards refugees on their territory or otherwise under their jurisdiction, and the basic minimum standards of treatment for individuals defined as refugees. The principle of non-refoulement is the cornerstone of international refugee protection. Enshrined in article 33 (1) of the 1951 Convention, which provides that a refugee may not be expelled or otherwise forcibly returned to a country where his or her life

¹⁷ E/CN.4/1985/4, annex, paras. 16 and 18.

¹⁸ Human Rights Committee general comment No. 34 (2011) on the freedoms of opinion and expression, para. 25.

¹⁹ Human Rights Committee general comment No. 27 (1999) on freedom of movement, para. 13.

²⁰ International Covenant on Civil and Political Rights, art. 4; European Convention on Human Rights, art. 15; and American Convention on Human Rights, art. 27.

²¹ Human Rights Committee general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency; also A/HRC/37/52.

²² African Union Convention Governing the Specific Aspects of Refugee Problems in Africa (1969); and Cartagena Declaration on Refugees (1984).

²³ Article 1A of the 1951 Convention defines the term “refugee”, in part, as one who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”. The 1969 African Union Convention and the 1984 Cartagena Declaration expand this definition to include, in part, those fleeing external aggression, events seriously disturbing public order, generalized violence, internal conflicts and massive violations of human rights.

or freedom would be threatened based on race, religion, nationality, membership of a particular social group or political opinion.

15. The 1951 Convention provides for the exclusion from refugee status, persons with regard to whom there are serious reasons for considering that they have committed certain serious crimes or heinous acts.²⁴ International refugee law also permits exceptions to the principle of non-refoulement where an individual has been determined to pose a danger to the security of the country or to its community in certain specific circumstances.²⁵ Given the potentially serious consequences, however, of denying refugee status or protection from refoulement to a person who otherwise may face harm upon return to his or her country of origin, these provisions are to be interpreted in a restrictive manner.²⁶

C. International humanitarian law

16. International humanitarian law is also known as the law of war or the law of armed conflict and is applicable to both situations of international or non-international armed conflicts. These rules are enshrined in the four Geneva Conventions and their Additional Protocols, as well as in customary rules of international humanitarian law. International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons, civilians, who are not or are no longer participating in the hostilities as well as fighters hors de combat and restricts the means and methods of warfare.
17. While international humanitarian law pertains to situations of armed conflict, international human rights law, including the core civil and political rights enshrined in the International Covenant on Civil and Political Rights, is applicable at all times

²⁴ Article 1F of the 1951 Convention states that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that: “(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations”.

²⁵ Article 33(2) of the 1951 Convention provides that protection from refoulement may not be claimed by “a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.

²⁶ See UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses – Article 1F of the 1951 Convention relating to the Status of Refugees* (September 2003) (HCR/GIP/03/05), para. 2, available from www.refworld.org/docid/3f5857684.html; and its accompanying Background Note, para 4, available from www.refworld.org/docid/3f5857d24.html; and Guidance Note on Extradition and International Refugee Protection (April 2008), paras. 13–16, available from www.refworld.org/docid/481ec7d92.html.

and to all persons, with only very limited derogations permitted.²⁷ Therefore, in situations that meet the threshold definition of non-international or international armed conflict, international human rights law and international humanitarian law apply concurrently and their different protections are complementary, not mutually exclusive. Both international humanitarian law and international human rights law share a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity”, such that there is often substantial overlap in the application of these two distinct bodies of law.²⁸

²⁷ In its general comment No. 31, the Human Rights Committee clarified that: “The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive” (para. 11).

²⁸ Silvia Borelli, “Casting light on the legal black hole: international law and detentions abroad in the ‘war on terror’”, *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, p. 54.

III. Right to liberty and freedom of movement

18. States have used different measures, whether legislative, administrative or operational, to prevent the departure of foreign fighters to conflict areas as well as to prevent their return. These could include travel bans, the seizure, retention, withdrawal and non-renewal of passports or identity cards, the stripping of citizenship, restrictions on travel or entry to territory and various types of house arrests or preventive detention. All of these measures have a serious impact on a number of fundamental human rights, including the rights to personal liberty and freedom of movement. They also raise a number of serious due process concerns if, for example, decisions are taken following secretive proceedings, in absentia or on the basis of vaguely defined criteria without adequate safeguards to prevent statelessness.²⁹
19. Security Council resolutions 2178 (2014) and 2396 (2017) aim to prevent inter-State travel of foreign terrorist fighters through a number of different measures:
 - (a) States are required to “prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents” (resolution 2178 (2014), para. 2 and resolution 2396 (2017), para. 2). States are also called upon to prevent foreign terrorist fighters from “crossing their borders” (resolution 2178 (2014), para. 4).
 - (b) States have a general obligation, consistently with international human rights law, international refugee law and international humanitarian law, to “prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State” for the purpose of terrorist activity or terrorist training (resolution 2178 (2014), para. 5).
 - (c) States are required to prosecute those who travel or attempt to travel for terrorist purposes; those who fund such travel and those who facilitate, encourage or recruit foreign terrorist fighters (resolution 2178 (2014), para. 6).
 - (d) States are required to prevent “entry into or transit through their territory of any individual about whom that state has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory” for the purposes of participating in travel for terrorist purposes. States are not obliged to deny entry or require departure of their own nationals or permanent residents (resolution 2178 (2014), para. 8).

²⁹ A/HRC/28/28, para. 50; and A/71/384.

- (e) States shall require airlines operating in their territory to provide advanced passenger information to appropriate national authorities in order to detect travel or prevent entry or transit of foreign terrorist fighters (resolution 2178 (2014), para. 9 “calls on States” to do this, while resolution 2396 (2017), para. 11 makes it mandatory).
 - (f) More generally, States are urged, in accordance with national and international law, to “intensify and accelerate the [timely] exchange of [relevant] operational information” concerning the “actions or movement of terrorists”, including foreign terrorist fighters (resolution 2178 (2014), para. 3 and resolution 2396 (2017), para. 5), and increase “sharing of information for the purpose of identifying [foreign terrorist fighters]” (resolution 2178 (2014), para. 11 and resolution 2396 (2017), para. 22).
20. These provisions have potential implications for international human rights law and international refugee law. This section examines these movement-restricting measures and their rights implications in more detail, focusing on the impact on people within the territory of States; the impact on those seeking to leave States; and the impact on those seeking entry or transit through States.

A. Deprivation of liberty and restrictions on the movement of individuals within the territory of States

21. The right to life, liberty and security of person is fundamental in international human rights law. It is the first substantive right protected by the Universal Declaration of Human Rights.³⁰ Deprivation of liberty involves a more severe restriction on motion than merely interfering with freedom of movement.³¹ Examples of deprivation of liberty include arrest, imprisonment, house arrest, administrative detention and involuntary transportation,³² but may also include the cumulative effects of multiple restrictions on freedom of movement when, taken together, they would amount to a de facto deprivation of liberty.³³ International human rights law protects against

³⁰ Universal Declaration of Human Rights, art. 3.

³¹ See, for example, *Karkov v. France* (CCPR/C/70/D/833/1998), paras 2.2 and 8.5, in which a requirement to live in a particular area and reporting to a police station was not sufficient to constitute deprivation of liberty. See also Human Rights Committee general comment No. 35 (2014) on liberty and security of person.

³² Human Rights Committee general comment No. 35, para. 5. For an example of house arrest being sufficient, see *Gorji-Dinka v. Cameroon* (CCPR/C/83/D/1134/2002), para. 5.4. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines deprivation of liberty as any form of detention or imprisonment or the placement of a person in a public or private custodial setting, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence, which that person is not permitted to leave at will (art. 4(1) and (2)).

³³ For example, in *Guzzardi v. Italy*, application No.7367/76, judgment, 6 November 1980, the European Court found the cumulative effect of mere restrictions on movement crossed the threshold into deprivation of liberty whereby the applicant was restricted to an island, subject to a curfew, periodic reporting requirements and restrictions on his communication with the outside world.

such deprivation of liberty, except on grounds of and in accordance with procedures established by law.³⁴ But, even assuming that a deprivation of liberty is lawful, international human rights law also absolutely prohibits any deprivation of liberty that is arbitrary. The prohibition of arbitrary detention is non-derogable³⁵ and must be understood to incorporate elements of “inappropriateness, injustice, lack of predictability and due process of law as well as elements of reasonableness, necessity and proportionality”.³⁶ The right to life is non-derogable,³⁷ and the Human Rights Committee has stated that the fundamental guarantee against arbitrary detention is also non-derogable insofar as even situations that allow for derogations in accordance with article 4 of the International Covenant on Civil and Political Rights cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.³⁸

22. In addition, international human rights law accords a right to freedom of movement within a territory, however, this is limited to persons “lawfully within the territory of a State”.³⁹ That too can only be restricted by procedures provided by law and only where proportionate and in pursuit of a legitimate aim (such as “to protect national security, public order, public health or morals or the rights and freedoms of others”).⁴⁰ Restrictions on freedom of movement such as curfews and home confinement and restrictions on where targeted people can pray can violate not only the right to freedom of movement, but also the right to freedom of religion, association and expression, and the right to privacy and family life.⁴¹
23. To prevent individuals identified as being at risk of travelling abroad to join a terrorist group, some States have adopted legislation restricting their movement within their territory, including discriminatory provisions affecting non-nationals. However, the provisions in resolution 2178 (2014) in relation to those suspected of being foreign terrorist fighters present on the territory of a State are clear and limited. They shall be

³⁴ Article 9(1) of the International Covenant on Civil and Political Rights provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. Article 5(1) of the European Convention on Human Rights provides that “everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law”. Article 7(2) of the American Convention on Human Rights provides that “no one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto”.

³⁵ Human Rights Committee general comment No. 35, para. 66.

³⁶ *Ibid.*, para. 12.

³⁷ International Covenant on Civil and Political Rights, art. 4(2).

³⁸ Human Rights Committee general comment No. 35.

³⁹ International Covenant on Civil and Political Rights, art. 12(1); Protocol No. 4 of the European Convention on Human Rights, art. 2(1); and American Convention on Human Rights, art. 22(1). However, the Universal Declaration of Human Rights, art. 13(1), provides this right to “everyone”, not just those lawfully within the territory of a State.

⁴⁰ International Covenant on Civil and Political Rights, art. 12(3). For similar provisions, see Protocol No. 4 to the European Convention on Human Rights, art. 2(1); and American Convention on Human Rights, art. 22(3).

⁴¹ Human Rights Watch, “Foreign terrorist fighter laws: human rights rollbacks under UN Security Council resolution 2178” (2 December 2016).

brought to justice and can be subject to criminal sanctions (para. 6); however, beyond that, resolution 2178 (2014) does not require per se other restrictions on those within the territory of a State. In circumstances in which resolution 2178 (2014), as far as individuals on the territory of a State are concerned, refers only to preventing travel from one country to another and to criminal sanction, there is no basis for suggesting that it requires any other forms of restriction on movement or deprivation of liberty. Any such action can only be taken on the basis of law and with due regard for the specific circumstances of the case, in conformity with the principles of necessity, proportionality, non-discrimination and other relevant aspects of international human rights law.

24. Under international human rights law, it does not matter whether those who are within the territory or subject to the jurisdiction of a State are citizens, permanent residents, present on some other basis or in an irregular situation. International human rights law instruments apply to “all individuals” (that is, everyone and all persons) falling within their scope, irrespective of whether they are citizens or non-citizens or whether they are lawfully or unlawfully present on the State’s territory or otherwise within its jurisdiction.⁴² As noted by the Human Rights Committee, “the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party”.⁴³ The Human Rights Committee has also stated that the right to liberty and security of person is applicable to all deprivations of liberty, including immigration detention.⁴⁴
25. Anyone arrested or detained has the right to be informed of the reasons for their arrest, including any charges against them,⁴⁵ and to be informed of their rights and

⁴² The International Covenant on Civil and Political Rights applies to “*all individuals* within [a State’s] territory and subject to its jurisdiction” (art. 2(1)); the European Convention on Human Rights requires States to “secure to *everyone* within their jurisdiction” the rights in the Convention; the American Convention on Human Rights requires States to “ensure to *all persons* subject to their jurisdiction” the free and full exercise of the Convention rights (art. 1). The International Covenant on Civil and Political Rights differentiates between nationals and non-nationals only with respect to the following rights, and only in limited circumstances: article 25 reserves to citizens the right to vote and take part in public affairs; and article 12 reserves the right to freedom of movement within a country to foreigners who are lawfully present within the country. There have been disputes as to the extent of the application of various human rights instruments outside the territory of States (see, for example, in relation to the International Covenant on Civil and Political Rights, the different views of the Human Rights Committee (general comment No. 31 (2004)) and of the United States of America (CCPR/C/SR.1405) on extraterritorial application; and see European Court of Human Rights, *Al-Skeini and others v. United Kingdom* (application No. 55721/07, judgment, 7 July 2011) in relation to the extraterritorial scope of the European Convention on Human Rights). In the context of migration, the jurisdiction of States outside their territory in case they exercise effective control over the people has been recognized, for instance, see European Court of Human Rights, *Hirsi Jamaa and Others v. Italy* (application No. 27765/09, judgment, 23 February 2012).

⁴³ Human Rights Committee general comment No. 31.

⁴⁴ Human Rights Committee general comment No. 35.

⁴⁵ International Covenant on Civil and Political Rights, art. 9(2); European Convention on Human Rights, art. 5(2); and American Convention on Human Rights, art. 7(4).

how to avail themselves of those rights, including the right to legal counsel.⁴⁶ Anyone arrested or detained on a criminal charge also has the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power.⁴⁷ Pre-charge detention without judicial review should not exceed 48 hours, any further delay must remain exceptional and be justified by the circumstances. In order to protect non-derogable rights, including the right to life and the prohibition of torture, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation.⁴⁸

26. Administrative or “preventive” detention for security reasons must be applied in accordance with international human rights law. All rights and guarantees applicable to detained persons must apply equally to such forms of detention. The Human Rights Committee considers that preventive detention that is not in contemplation of prosecution on a criminal charge presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention if other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify such detention, the burden of proof lies on States to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States also need to show that detention does not last longer than absolutely necessary and ensure prompt and regular review by a court or other independent tribunal, access to independent legal advice, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.⁴⁹ Immigration detention should be a measure of last resort, which must be periodically reviewed, and must comply with all safeguards applicable to any other form of detention. Immigration detention is prohibited for children.⁵⁰ Stateless persons are at particular risk of being subject to

⁴⁶ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173, annex).

⁴⁷ International Covenant on Civil and Political Rights, art. 9(3); European Convention on Human Rights, art. 5(3); and American Convention on Human Rights, art. 7(5).

⁴⁸ Human Rights Committee general comment No. 35. See also Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), which state that the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies is not derogable under international law (para. 4) and that domestic legislative frameworks should not allow for any restriction on the safeguards of persons deprived of their liberty concerning the right to bring proceedings before a court under counter-terrorism measures, emergency legislation or drug-related policies (para. 28).

⁴⁹ Human Rights Committee general comment No. 35.

⁵⁰ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration; joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return; OHCHR, “Recommended principles and guidelines on human rights at international

prolonged or indefinite immigration detention due to the obstacles of removal. As noted by the Human Rights Committee: “the inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention”.⁵¹

27. International law clearly prohibits secret detention, which violates a number of human rights and humanitarian law norms that may not be derogated from under any circumstances.⁵² By placing the detainee outside the protection of the law, secret detention creates a heightened risk of torture and enforced disappearances. If widely or systematically practiced, it may even amount to a crime against humanity.⁵³ It is not only States whose authorities keep the detainee in secret custody that are internationally responsible for violations of international human rights law. The practice of “proxy detention”, involving the transfer of a detainee from one State to another outside the realm of any international or national legal procedure (“rendition” or “extraordinary rendition”), often in disregard of the principle of non-refoulement, also involves the responsibility of the State at whose behest the detention takes place.⁵⁴ The Geneva Conventions, applicable to all armed conflicts, also prohibit secret detention under any circumstances.

Guidance

States may not, in purported reliance on resolution 2178 (2014) or resolution 2396 (2017), restrict the movement, arrest, detain or otherwise restrict the liberty of those who are suspected foreign fighters except on such grounds and in accordance with such procedure as are established by law. Any restrictions must be provided by law, necessary, proportionate and consistent with other rights such as the freedom of religion, association and expression and the right to a fair trial, privacy and family life, and consistent with all international legal obligations.

In order to protect non-derogable rights, including the right to life and the prohibition of torture, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation. Persons unlawfully or arbitrarily deprived of their liberty shall be immediately released and shall be entitled to reparation, including compensation, for the period of time unlawfully or arbitrarily detained.

borders”, guideline 8; and OHCHR and Global Migration Group, “Principles and guidelines supported by practical guidance on the human rights protection of migrants in vulnerable situations”, principle 8.

⁵¹ Human Rights Committee general comment No. 35, para. 18.

⁵² “Secret detention” is understood to mean the detention of a person in circumstances where the person is not permitted any contact with the outside world (also known as “incommunicado detention”) and when the authorities refuse to confirm or deny, or when they actively conceal, the fact of the detention or the fate or whereabouts of the detainee. See A/HRC/13/42.

⁵³ International Convention for the Protection of All Persons from Enforced Disappearance; CTITF, Basic Human Rights Reference Guide on detention in the context of countering terrorism; and A/HRC/13/42.

⁵⁴ A/HRC/13/42.

Administrative or preventive detention for security reasons should be avoided as far as possible, and all safeguards relating to deprivation of liberty apply equally to this kind of detention.

Secret detention and any form of unofficial detention must never be used, and should be explicitly prohibited, including for the detention of terrorist suspects. Rendition is prohibited, and lawful transfer must be subject to due process oversight and review. Institutions strictly independent of those that have been allegedly involved in secret detention should investigate promptly any allegations of secret detention and rendition. Those individuals who are found to have participated in secretly detaining persons and any unlawful acts perpetrated during such detention, including their superiors if they ordered, encouraged or consented to secret detentions, should be prosecuted without delay and, where found guilty, given sentences commensurate with the gravity of the acts perpetrated.⁵⁵

B. Preventing an individual from leaving a State

28. International human rights law accords every person the right to “leave any country, including his own”.⁵⁶ This right imposes negative obligations on the State of residence not to prevent people from leaving a country, and positive obligations on the State of nationality to facilitate travel, for example requiring it to issue a passport.⁵⁷
29. Resolution 2178 (2014), paragraph 2, provides that States shall “prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents”, while paragraph 2 of resolution 2396 (2017) has similar language. Resolution 2178 (2014) also requires States to criminalize foreign terrorist fighter-related travel.⁵⁸ Measures aimed at preventing or sanctioning travel intended for terrorist purposes would normally qualify as having a legitimate aim. However, insofar as such measures have the effect of preventing or interfering with the ability of individuals to leave the territory of a State, whether their own State of nationality or not, it has implications for international human rights law. As with the right to freedom of movement within a State, the right to leave a State can only be restricted by procedures “provided by law” and only where “necessary to protect national security, public order ..., public health or morals or the rights and freedoms of

⁵⁵ Ibid.

⁵⁶ International Covenant on Civil and Political Rights, art. 12(2); Protocol No. 4 of the European Convention on Human Rights, art. 2(2); American Convention on Human Rights, art. 22(2); and Universal Declaration of Human Rights art. 13(2).

⁵⁷ See, for example, Human Rights Committee, *Montero v. Uruguay*, communication No. 106/1981, para 9.4; and general comment No 27, para. 9.

⁵⁸ See section VIII below on criminal justice measures

- others”.⁵⁹ The Human Rights Committee has stated that to be permissible, any restrictions “must be necessary in a democratic society for the protection of these purposes”.⁶⁰
30. In relation to any border control measure, or denial of travel documentation, which have the effect of prohibiting an individual leaving a country because they are believed to be a foreign fighter, the “provided by law” requirement means that it is not lawful for a general discretion to impose a travel ban to be accorded to public officials. Under international human rights law the criteria for imposing a travel ban must be stated in clear published terms, and in a form that is accessible to the public at large. It must state what must be proven and by what standard of proof, before a travel ban can be imposed. The criteria must be sufficiently precise so that an individual can know what conduct will potentially lead to the imposition of a travel ban.
 31. Any restriction on the right to leave a country must be “necessary”, for example, for the protection of national security. That means the restriction must meet a “pressing social need” and be “proportionate to the legitimate aim being pursued”.⁶¹ There must be a fair balance struck between the needs of the general community and the protection of the rights of the individual.⁶² In applying a limitation on freedom of movement, a State must use “no more restrictive means than are required for the achievement of the purpose of the limitation”.⁶³
 32. If any individual claims that he or she was wrongfully prevented from leaving a country—for example, because the criteria for such a measure was not met or because the travel ban was not proportionate—he or she is entitled to complain to a competent authority which must be capable of granting an “effective remedy”.⁶⁴ This is critically important. In the context of an accusation as serious as involvement in terrorism, and where the consequences are as severe as refusal to allow a person to leave a country, it is difficult to see how a remedy will be “effective” unless the authority which hears the complaint is judicial in nature or at least follows procedures which have the attributes of judicial/court processes.⁶⁵ This means that the person complaining of an interference with his or her rights is entitled to “a fair and public hearing by a competent,

⁵⁹ International Covenant on Civil and Political Rights, art. 12(3). For similar language, see Protocol No. 4 of the European Convention on Human Rights, art. 2(2); and American Convention on Human Rights, art. 22(3).

⁶⁰ Human Rights Committee general comment No. 27.

⁶¹ European Court of Human Rights, *The Sunday Times v. United Kingdom*, application No. 6538/74, judgment, 26 April 1979, paras. 59 and 67, in relation to the European Convention on Human Rights.

⁶² *Ibid.*, *Sporrong and Lönnroth v. Sweden*, application No. 7151–7152/75, judgment, 23 September 1982, para. 69.

⁶³ E/CN.4/1985/4, annex, para. 11; also Human Rights Committee general comment No. 27.

⁶⁴ International Covenant on Civil and Political Rights, art. 2(3); European Convention on Human Rights, art. 13; Universal Declaration of Human Rights, art. 8; also American Convention on Human Rights, art. 25.

⁶⁵ For similar conclusions in relation to European Union law, see Court of Justice of the European Union, *European Commission and others v. Kadi*, joined cases Nos. C-584, 593, 595/10 P, judgment, 18 July 2013, paras. 97–98, and in relation to domestic law in the United Kingdom, see Supreme Court, *Her Majesty's Treasury v. Ahmed and others*, case No. [2010] UKSC 2, judgment, 27 January 2010.

independent and impartial tribunal established by law”.⁶⁶ In addition, the person must be able to “ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons” so that it is possible for him or her to respond to allegations and so that the court can meaningfully review the lawfulness of the measures taken against him or her.⁶⁷

Guidance

Travel bans preventing individuals from leaving a state or the denial of travel documents must be necessary and proportionate, non-discriminatory and may only be imposed when an individual’s travel would pose a threat to national security and no less restrictive measure would avert that threat. Such measures must be compliant with states’ obligations under international law.

If States are seeking to restrict the right of any person to leave the country, either by use of border control or denial of travel documents, they must set out in clear and published terms the criteria for determining that a person is a terrorist⁶⁸ and the standard of proof they apply to ascertain if a person meets the criteria. They must also ensure adequate safeguards and effective remedies against abuse.

A person subject to a travel ban or denied travel documents must be given the opportunity in timely judicial or equivalent proceedings to challenge the imposition of the ban on the basis that they do not meet the criteria for the ban or that it is not proportionate. In order to make such a challenge effective, the person must be told sufficient of the facts that led to the ban to enable him/her to make meaningful representations in response.

Anyone claiming to be unlawfully prevented from leaving a country must be entitled to an effective remedy.

C. Preventing an individual from entering or transiting through a State

33. The right to freedom of movement includes the right to enter one’s own country.⁶⁹ For non-nationals, the principle of non-refoulement and the prohibition of collective expulsions set limits to States’ ability to prevent individuals entering or transiting through their territory.

⁶⁶ International Covenant on Civil and Political Rights, art. 14(1); European Convention on Human Rights, art. 6(1); American Convention on Human Rights, art. 8(1); and Universal Declaration of Human Rights, art. 10.

⁶⁷ *European Commission and others v. Kadi*, para. 100.

⁶⁸ See section VIII.A below on the definition of terrorism.

⁶⁹ International Covenant on Civil and Political Rights, art. 12(4); Protocol No. 4 of the European Convention on Human Rights, art. 3(2); American Convention on Human Rights, art. 22(5); and Universal Declaration of Human Rights, art. 13(2).

34. Resolution 2178 (2014), paragraph 8, provides that States shall prevent “entry into or transit through their territory of any individual about whom that state has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit” for the purposes of participating in listed terrorist-related acts. The obligation under the paragraph excludes their “own nationals or permanent residents”.
35. As explained by the Human Rights Committee in its general comment No. 27,⁷⁰ the scope of “own country” is broader than the concept “country of nationality”, and it covers at the very least an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered a mere alien, such as nationals of a country who have been stripped of their nationality in violation of international law. The language of article 12 (4) of the International Covenant on Civil and Political Rights, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.⁷¹ While the right to freedom of movement is not absolute, limitations must be lawful, pursuant to a legitimate aim and necessary to achieve that aim. The Committee specified that there were few, if any, circumstances in which the deprivation of the right to enter one’s own country could be reasonable. It also specified that a State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country. The Human Rights Committee, in its general comment No. 15,⁷² noted that, while the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party and that it is in principle a matter for the State to decide who it will admit to its territory, in certain circumstances, an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise. Resolution 2178 (2014), paragraph 8, must thus be implemented in compliance with these obligations under international human rights law.
36. If an individual arrives at the border or enters into the territory of a State and is then removed, this may have implications both for international human rights law and international refugee law. Under international human rights law, the prohibition of refoulement entails an obligation not to extradite, deport, expel, return or otherwise remove a person, whatever his or her status, when there are substantial grounds for believing that he or she would be at risk of being subject to serious violations of human rights, including torture or cruel, inhuman and degrading treatment or punishment, in the place to which he or she is to be transferred or removed.⁷³ The prohibition

⁷⁰ Human Rights Committee general comment No. 27.

⁷¹ See section IV below on arbitrary deprivation of nationality.

⁷² Human Rights Committee general comment No. 15 (1986) on the position of aliens under the Covenant, para. 5.

⁷³ Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; International Covenant on Civil and Political Rights, art. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 16(1); Human Rights Committee general comment No. 20 (1992) on the pro-

of refoulement is absolute and it does not matter for these purposes under international human rights law if the individual poses a danger to national security or not.⁷⁴ Collective expulsions are strictly prohibited, and individual assessment mechanisms must be in place and implemented with respect to due process guarantees.⁷⁵

37. Under international refugee law, the non-refoulement principle provides that removing a refugee is prohibited if it would lead to their “life or freedom [being] threatened on account of ... race, religion, nationality, membership of a particular social group or political opinion”,⁷⁶ unless there are reasonable grounds to consider the individual a danger to the security of the country or if, having been convicted of a particularly serious crime, the person constitutes a danger to the community of the country.⁷⁷ The exceptions to this principle, found in article 33 (2) of the 1951 Convention relating to the Status of Refugees, should be interpreted restrictively and applied in a procedure which offers adequate safeguards. In this respect, it is important to note that there is little evidence that refugees are more prone to radicalization than others, and research shows that very few refugees have actually carried out acts of terrorism.⁷⁸ In the clear majority of cases, refugees and other migrants do not pose a risk to national security, but are in fact at risk, fleeing the regions where terrorist groups are the most active.⁷⁹
38. The General Assembly has urged States to refrain from returning persons, including in cases related to terrorism, to their countries of origin or a third State whenever such transfer would be contrary to their obligations under international law, in particular

inhibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 9; Human Rights Committee general comment No. 31, para. 12; Committee on the Rights of the Child general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, paras. 27–28, 58 and 84; Committee on Migrant Workers general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 50; Committee on the Elimination of Discrimination against Women general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, paras. 17–23; Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child, para. 46. Pursuant to article 3 of the European Convention on Human Rights, the prohibition on non-refoulement also applies to other forms of ill-treatment, including torture, see European Court of Human Rights, *Saadi v. Italy*, application No. 37201/06, judgment, 28 February 2008, para. 125.

⁷⁴ Both the Human Rights Committee and the Committee against Torture have affirmed the absolute and non-derogable nature of the prohibition of refoulement (see Convention against Torture, art. 3; and International Covenant on Civil and Political Rights, art. 7) and in cases involving people who have committed serious crimes (for example, *V.X.N. and H.N. v. Sweden* (CAT/C/24/D/130-131/1999) or were involved in terrorism (for example, *T.P.S. v. Canada* (CAT/C/24/D/99/1997); *Nasirov v. Kazakhstan* (CAT/C/52/D/475/2011); *Agiza v. Sweden* (CAT/C/34/D/233/2003); *Ahani v. Canada* (CCPR/C/80/D/1051/2002); and *Alzery v. Sweden* (CCPR/C/88/D/1416/2005)).

⁷⁵ Protocol No. 4 of the European Convention on Human Rights, art. 4. See European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*; also International Covenant on Civil and Political Rights, art. 13; Convention against Torture, art. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22; A/HRC/23/46, para. 56; OHCHR, “Recommended principles and guidelines on human rights at international borders”.

⁷⁶ 1951 Convention relating to the Status of Refugees, art. 33(1).

⁷⁷ *Ibid.*, art. 33(2).

⁷⁸ A/71/384, para. 8.

⁷⁹ *Ibid.*, para. 9.

international human rights law, international humanitarian law and international refugee law.⁸⁰ An alien lawfully in the territory of a State may be expelled only in pursuance of a decision reached in accordance with law.⁸¹ The Human Rights Committee has noted that if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13 of the International Covenant on Civil and Political Rights.⁸² Due process and procedural guarantees in the context of returns applies to all migrants, regardless of status.⁸³

39. If the decision that there are “reasonable grounds” to believe entry is being sought in order to commit acts of terrorism because an individual is on a terrorist watch list, the provisions in chapter VII below, concerning information exchange, data collection and analysis also apply.

Guidance

Everyone has the right to enter his or her own country. Any limitations to that right must be lawful, pursuant to a legitimate aim and necessary and proportionate to achieve that aim. Collective expulsions are strictly prohibited. States may only expel a person who is lawfully in the territory, or whose legality of entry or stay is disputed, in pursuance of a decision reached in accordance with law.

If States are seeking to prevent entry or remove individuals from their territory, they must respect the absolute principle of non-refoulement under customary law as well as under international human rights law, notably, under the Convention against Torture or, insofar as they come within the Refugee Convention, must not place them at risk of persecution on the grounds identified therein, taking into account the narrow exceptions that exist under its provisions.

If databases are used to identify suspected “foreign fighters” or “terrorists”, the provisions set out in section VII below must also be complied with.

⁸⁰ General Assembly resolution 70/148, para. 6(m).

⁸¹ International Covenant on Civil and Political Rights, art. 13; Protocol No. 7 to the European Convention on Human Rights, art. 1(1); and American Convention on Human Rights, art. 22(6). The expulsion of a refugee is only permitted on grounds of national security or public order, and may only be effected pursuant to a decision reached in accordance with due process of law. See 1951 Convention relating to the Status of Refugees, art. 32.

⁸² Human Rights Committee general comment No. 15, para. 9.

⁸³ OHCHR and Global Migration Group, “Principles and guidelines supported by practical guidance on the human rights protection of migrants in vulnerable situations”; and OHCHR, “Recommended principles and guidelines on human rights at international borders”.

IV. Arbitrary deprivation of nationality

40. International human rights law includes the right of everyone to a nationality and provides that no one shall be arbitrarily deprived of his or her nationality⁸⁴ and that every child has a right to acquire a nationality,⁸⁵ although there is no right to a specific nationality. As affirmed by the International Law Commission, the right of States to decide who their nationals are is not absolute and, in particular, States must comply with their human rights obligations concerning the granting and loss of nationality.⁸⁶ The prohibition of arbitrary deprivation of nationality has been widely recognized as a norm of customary international law.⁸⁷ In order not to be arbitrary, deprivation of nationality must be in conformity with domestic law and comply with specific procedural and substantive standards of international human rights law, in particular the principle of proportionality. The deprivation of nationality, especially for dual nationals, has become increasingly common against the background of the terrorism threat associated with foreign fighters. Some States also allow the deprivation of nationality for naturalized mono-nationals, thereby leaving them stateless.⁸⁸
41. The 1961 Convention on the Reduction of Statelessness restricts the situations in which States parties may lawfully deprive a person of nationality. It provides that a State shall not deprive a person of his or her nationality if such deprivation would render him or her stateless.⁸⁹ However, there are certain exceptions to the rule, the most relevant being that a person may be deprived of nationality and become stateless (if the State has specified retention of such right at time of signature or ratification of or accession to the Convention) if he or she has conducted himself or herself in a manner seriously prejudicial to the vital interests of the State.⁹⁰ The European Convention on Nationality allows loss of nationality, *inter alia*, for persons who serve voluntarily in a foreign military force,⁹¹ and States may consider that this applies to foreign fighters.

⁸⁴ Universal Declaration of Human Rights, art. 15; European Convention on Nationality, art. 4; American Convention on Human Rights, art. 20.

⁸⁵ International Covenant on Civil and Political Rights, art. 24(3); and Convention on the Rights of the Child, art. 7(1).

⁸⁶ A/61/10, chap. IV on diplomatic protection.

⁸⁷ The General Assembly, in its resolution 50/152 of 9 February 1996, recognized the fundamental nature of the prohibition of arbitrary deprivation of nationality. See also A/HRC/13/34, para. 21.

⁸⁸ Geneva Academy of International Humanitarian Law and Human Rights, "Foreign fighters under international law", Briefing No. 7 (October 2014); and Human Rights Watch, "Foreign terrorist fighter laws: human rights rollbacks under UN Security Council resolution 2178".

⁸⁹ 1961 Convention on the Reduction of Statelessness, art. 8(1).

⁹⁰ *Ibid.*, art. 8(3)(a)(ii).

⁹¹ *Ibid.*, art. 7(1)(c).

However, the same Convention prohibits deprivation of nationality even where a person's conduct is seriously prejudicial if it renders the individual stateless.⁹²

42. Given the significant impact that any interference with the enjoyment of nationality has on the enjoyment of rights, the loss or deprivation of nationality must meet certain conditions in order to comply with international law, in particular the prohibition of arbitrary deprivation of nationality. These conditions include serving a legitimate purpose, being the least intrusive instrument to achieve the desired result and being proportional to the interest to be protected. Where loss or deprivation of nationality leads to statelessness, the impact on the individual is particularly severe. International law therefore strictly limits the circumstances in which the loss or deprivation of nationality leading to statelessness can be recognized as serving a legitimate purpose.⁹³
43. Due process rights must be respected, as well as the right to family life and the best interests of the child. Deprivation of nationality for dual citizens can result in serious human rights consequences if their second country cannot confirm their citizenship or refuses to accept them, and could thus lead to indefinite immigration detention. There could also be a risk of torture or other human rights violations if forcibly returned to the second home country, in violation of the principle of non-refoulement.⁹⁴
44. Deprivation of nationality can also be counterproductive by preventing the return of someone who may want to leave a terrorist organization and who does not, or no longer, constitute(s) a threat. The impossibility of returning could backfire and lead to further radicalization.⁹⁵

⁹² Ibid., art. 7(3).

⁹³ A/HRC/25/28, para. 4; also Court of Justice of the European Union, *Rottmann v. Freistaat Bayern*, case No. C-135/08, judgment, 2 March 2010; Committee on the Elimination of Racial Discrimination general recommendation No. 30 (2004) on discrimination against non-citizens, para. 16; Committee on the Elimination of Discrimination against Women general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations, paras. 58–61; and general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, paras. 9–11, 51–58, 60 and 63(e) and (h)–(j).

⁹⁴ Human Rights Watch, “Foreign terrorist fighter laws: human rights rollbacks under UN Security Council resolution 2178”.

⁹⁵ International Centre for Counter-Terrorism, “Repressing the foreign fighters phenomenon and terrorism in Western Europe: towards an effective response based on human rights” (November 2016).

⁹⁶ Geneva Academy of International Humanitarian Law and Human Rights, “Foreign fighters under international law”, Briefing No. 7 (October 2014).

⁹⁷ A/HRC/25/28.

Guidance

Arbitrary deprivation of nationality is prohibited under international law. States should therefore ensure that deprivation is not arbitrary (i.e., deprivation of nationality must serve a legitimate purpose, be the least intrusive instrument to achieve the desired result and be proportional to the interest to be protected taking into account the severe impact of statelessness) and that adequate procedural safeguards are in place. States should also ensure that safeguards to prevent statelessness are incorporated in their domestic law and implemented effectively.

Where international law recognizes, as a matter of exception, that loss or deprivation of nationality may lead to statelessness, these exceptions must be narrowly construed.

Even where loss or deprivation of nationality does not lead to statelessness, States should weigh the consequences of loss or deprivation of nationality against the interest that it is seeking to protect, and consider alternative measures that could be imposed, such as travel bans or confiscation of travel documents.

Decisions relating to nationality should be issued in writing and open to effective administrative or judicial review, including on substantive issues. If the decision to deprive someone of their nationality is taken while they are abroad, they may find it impossible to challenge, and may also miss the deadline to file an appeal.⁹⁶ In the context of loss or deprivation of nationality, a person should continue to be considered as a national during the appeals procedure.⁹⁷

In addition to providing for the possibility to appeal and related due process guarantees, States should ensure that there is an effective remedy available where a decision on nationality is found to be unlawful or arbitrary. This must include, but is not necessarily limited to, the possibility of restoration of nationality.

Deprivation of nationality may be counterproductive by denying the opportunity for deradicalization, reintegration and rehabilitation into society.

V. Women involved in foreign fighter activities

45. The General Assembly has urged States to ensure that gender equality and non-discrimination are taken into account when shaping, reviewing and implementing all counter-terrorism measures, and to promote the full and effective participation of women in those processes.⁹⁸ It has further called upon States to integrate a gender analysis in relation to the drivers of radicalization of women to terrorism and to consider the impacts of counter-terrorism strategies on women's human rights.⁹⁹ The Convention on the Elimination of All Forms of Discrimination against Women aims to eliminate all forms of discrimination against women on the basis of sex, and requires States to take all appropriate measures to guarantee women the equal recognition, enjoyment and exercise of all human rights and fundamental freedoms on a basis of equality with men.¹⁰⁰
46. Both the Security Council Committee established pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida, and associated individuals, groups, undertakings and entities, and the Counter-Terrorism Committee have reported that the foreign terrorist fighter mobilization includes a significant number of women and sometimes whole families relocating. They note that it is not always clear whether women travel to engage in terrorist acts, to look for partners or to support their families, and whether entire families can be implicated in the crimes committed.¹⁰¹
47. As noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Special Rapporteur on counter-terrorism and human rights), while women are victims of terrorism and counter-terrorism measures,¹⁰² they may also be volitional actors and should be considered as key stakeholders in counterterrorism measures.¹⁰³ Women become foreign fighters for a multitude of reasons, some join freely, others under coercion or distress. Women are more likely than men to experience sexual and/or physical abuse by extremist organizations. While both men and women returnees face various forms of stigmatization and marginalization, returning women who are imprisoned experience higher

⁹⁸ General Assembly resolution 70/148, para. 6(t).

⁹⁹ General Assembly resolution 70/291, para. 12.

¹⁰⁰ Convention on the Elimination of All Forms of Discrimination against Women, art. 1 and 3.

¹⁰¹ S/2015/123, annex, para. 14; and S/2015/338, annex, para. 20.

¹⁰² See also S/2017/249, paras. 8–9 on the use of sexual violence as a tactic of terrorism and on the impact of counter-terrorism measures.

¹⁰³ A/64/211.

rates of physical and sexual abuse while in detention, and when exiting prison, they may face particular challenges due to the lack of economic opportunities, strained family ties and negative stigma in their communities.¹⁰⁴

48. Until relatively recently, women had been broadly invisible in terrorism and counter-terrorism discourses. The adoption of resolution 2242 (2015), in which the Security Council requested the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate to integrate gender as a cross-cutting issue throughout the activities within their mandate, has provided some remedy to that imbalance. In resolution 2396 (2017), the Security Council also emphasizes that women associated with foreign terrorist fighters returning or relocating may have served in different roles, including as supporters, facilitators or perpetrators of terrorist acts, and require special focus when developing tailored prosecution, rehabilitation and reintegration strategies. It further stresses the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, and to do so taking into account gender and age sensitivities (para. 31). However, when women come into view in terrorism and counter-terrorism policy, they typically do so as the wives, daughters, sisters and mothers of terrorist actors, or as the archetypal victims of senseless terrorist acts. Women perpetrators have been largely ignored, although acts of terrorist violence perpetrated by women are increasingly visible, including women as suicide bombers and women exercising leadership roles in terrorist organizations. It is also critical to note that definitions of terrorism remain highly gendered, with deliberate acts of sexual violence when used by terrorist organizations as a method and means of terrorism going unrecognized by domestic legislation. This means, in practice, that these victims of terrorism are ignored, stigmatized and marginalized, which excludes them from the redress and support that are recognized as vital for victims of terrorism.¹⁰⁵

49. Rape and other forms of gender-based violence are used in many cases as a form of torture against detained female terrorism suspects.¹⁰⁶ As noted by the Committee on the Elimination of Discrimination against Women:

“Women suffer from discrimination in criminal cases owing to a lack of gender-sensitive, non-custodial alternatives to detention, a failure to meet the specific needs of women in detention and an absence of gender-sensitive monitoring and independent review mechanisms. The secondary victimization of women by the criminal justice system has an impact on their access to justice, owing to their heightened vulnerability to mental and physical abuse and threats during arrest, questioning and detention”.¹⁰⁷

¹⁰⁴ University of Chicago Law School, International Human Rights Clinic, “Gender-sensitive and gender-effective strategies in preventing and countering violent extremism”.

¹⁰⁵ A/72/495; Security Council resolution 2349 (2017); also S/2017/249.

¹⁰⁶ A/64/211, para. 44.

¹⁰⁷ Committee on the Elimination of Discrimination against Women general recommendation 33 (2015) on women’s access to justice, para. 48

Guidance

States should integrate a gender and rights-based analysis on the drivers of radicalization of women to terrorism into relevant programmes, consider the impacts of counter-terrorism strategies on women's human rights and seek greater consultations with women and women's organizations when developing strategies to counter terrorism and violent extremism conducive to terrorism.¹⁰⁸ The analysis should guide the design and implementation of community-based initiatives aimed at preventing the recruitment of women by extremist groups.

States should develop and implement gender-sensitive training for all security sector officials who may interact with returnees. This should include training of border control and law enforcement officers in evidence-based risk assessment that takes into consideration specific issues relating to interviewing women and girls, in full compliance with human rights obligations and the rule of law, including the identification of women and girls who have been subject to sexual or gender-based violence. States should also increase the number of women in their security agencies, especially law enforcement and counter-terrorism units, and should raise practitioners' awareness of specific issues relating to women violent extremists.¹⁰⁹

States should take effective measures to protect women against secondary victimization in their interactions with law enforcement and judicial authorities, and consider establishing specialized gender units within law enforcement, penal and prosecution systems.¹¹⁰ States should ensure that conditions in detention centres comply with international standards, in particular the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

States should implement tailored and gender-sensitive rehabilitation and reintegration programmes targeting female returnees. It is essential that reintegration programmes engage community members in order to mitigate stigmatization, prevent the recruitment of youth at-risk and, therefore, foster sustainability to their long-term social and economic reintegration.

States should ensure accountability for sexual and gender based crimes committed by foreign fighters, and ensure redress and support for the victims.

¹⁰⁸ As recommended in General Assembly resolution 70/291.

¹⁰⁹ S/2015/975, annex.

¹¹⁰ Committee on the Elimination of Discrimination against Women general recommendation 33, para. 51(c).

VI. Children affected by or involved in foreign fighter activities

50. Compared with previous generations of foreign fighters, there is a significant proportion of children, even among active militants.¹¹¹ The increasing number of boys and girls under the age of 18 allegedly involved in terrorism-related activities requires an appropriate response by States that is grounded in international human rights law and the rule of law. Different categories of children are affected by and involved in terrorist activities—as victims, witnesses and alleged offenders. One recent trend in global terrorism is the high number of children who are drawn to violence, recruited, and involved in terrorism-related activities. Increasingly, children are recruited by armed groups using terrorist tactics within or outside their country. Some are forcibly abducted and conscripted, some are enticed by promises of money or other material advantages, some join voluntarily, and some have little or no choice but to accompany their parents or other family members.¹¹² Moreover, there are many children born in conflict zones to mothers and fathers who travelled there as foreign fighters.
51. Security Council resolution 2178 (2014) calls upon States to prevent the recruitment of foreign terrorist fighters, including children (para. 4), while resolution 2396 (2017) calls upon Member States to assess and investigate suspected foreign terrorist fighters and their accompanying family members, including spouses and children (para. 29) and stresses the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, and to do so taking into account gender and age sensitivities (para. 31). Resolution 2396 (2017) deals with women and children together, despite the fact that different international legal standards apply. While all general international human rights instruments apply to women and children, the rights of women and children are precisely articulated in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, respectively.
52. All children under the age of 18, including children whose parents are foreign fighters and children who are recruited themselves, benefit from the rights offered to them under the Convention on the Rights of the Child. The recruitment of children is a violation of international human rights law,¹¹³ and the mere fact of having travelled

¹¹¹ S/2015/358, para 28.

¹¹² GCTF, Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context.

¹¹³ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, art. 4; and International Labour Organization, Worst Forms of Child Labour Convention, 1999 (No. 182), art. 3.

to join a terrorist group cannot by itself be considered as being criminal on the part of the child. Given their potential status as victims of terrorism as well as of other violations of international law, every child alleged as, accused of or recognized as having infringed the law, particularly those who are deprived of their liberty, as well as child victims and witnesses of crimes, should be treated in a manner consistent with his or her rights, dignity and needs, in accordance with applicable international law, in particular obligations under the Convention on the Rights of the Child.¹¹⁴ The emphasis when dealing with child returnees should therefore be on rehabilitation and reintegration, although prosecution may remain an option in appropriate cases. The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles), adopted in February 2007, provide guidance, inter alia, on the prevention of unlawful recruitment, the treatment of children accused of crimes under international law, and their release and reintegration. Article 3 of the Convention on the Rights of the Child provides that a child's best interests shall be a primary concern in all actions affecting them.

53. For children who have been recruited and who are being dealt with by the juvenile justice system, the Convention on the Rights of the Child, in particular articles 37 and 40, apply. The Global Counterterrorism Forum Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context (GCTF Memorandum) provides guidance on the development and implementation of policies regarding children in terrorism cases in order to enhance the juvenile justice system in a counterterrorism context. The GCTF Memorandum notes that particular attention should be given to alternatives to prosecution, and that any justice action undertaken concerning the child should aim at his or her reintegration into society. A child subject to detention is likely to suffer immediate stigmatization, disruption of education and social development, and further severance from their community, thus jeopardizing the possibility of effective reintegration and rehabilitation. Not all child returnees are dealt with by the criminal/juvenile justice system, particularly those who are very young. These children have unique needs for specialized child-sensitive rehabilitation and reintegration measures.
54. Some children are born to foreign fighters in conflict zones, including as a result of rape. Such children may be victims of serious human rights abuses due to their family situation and thus should be considered as entitled to the full range of remedies and support available to victims of terrorism. They may have stigma attached to them, and may have difficult access to birth registration. States must ensure that their domestic law provides safeguards to fulfil the right of the child to acquire a nationality.¹¹⁵ This includes providing access to nationality for all children born abroad to one of their nationals who would otherwise be stateless.¹¹⁶ In this regard, States should take into account the difficulties that may exist in proving the identity

¹¹⁴ General Assembly resolution 70/291, para. 18.

¹¹⁵ Convention on the Rights of the Child, art. 7.

¹¹⁶ A/HRC/25/28, para. 43.

of the parents of children born to members of a terrorist group in conflict zones, including lack of birth registration and the likelihood that one or both parents are deceased, and flexibly adapt criteria and procedures to the situation on the ground.

Guidance

While Security Council resolution 2178 (2014) does not explicitly reflect a minimum age for liability of individuals it seeks to target, States must take every measure to ensure respect for the rights of individuals under the age of 18 years in line with the Convention on the Rights of the Child.¹¹⁷

Children should be regarded primarily as victims and treated as such, including those associated with foreign fighters or born to their members, although this does not exclude prosecution of children above the minimum age of criminal responsibility in appropriate cases.

Special care must be taken for children who have been separated from their parents, which significantly increases their vulnerability. They need to be reunited with their parents swiftly or, if not possible, an appropriate guardian needs to be appointed. States should take action to bring these children from the conflict zone to the safety of their parents' country of origin, particularly if the parents are dead or detained.

Children under the age of 18 who are alleged to be foreign fighters should be dealt with in accordance with juvenile justice standards, making their best interests a primary consideration, in accordance with the Convention on the Rights of the Child.

States should consider, and apply where appropriate, alternatives to prosecution for children under the age of 18, including during the pre-trial stage and always give preference to the least restrictive means possible. Children should be detained only as a last resort and for the shortest period necessary, and separated from adult detainees.

States should develop child-sensitive and rights-based rehabilitation and reintegration programmes for children involved in terrorism-related activities to aid their successful return to society.

States should ensure that the births of children born to foreign fighters are registered and that a nationality is secured.

¹¹⁷ A/HRC/28/28, para. 49.

VII. Information exchange, data collection and analysis

55. Under international human rights law,¹¹⁸ no one may be subjected to “arbitrary or unlawful” interference with his or her privacy, family, home or correspondence, nor to “unlawful attacks on his or her honour and reputation”. Furthermore, under international human rights law everyone has the “right to the protection of the law against such interference or attacks”.¹¹⁹ An interference with the right to privacy will be arbitrary if it does not occur pursuant to a legal regime which is “compatible with the rule of law”. This means that there must be “adequate safeguards” to prevent abuse, the law must be “foreseeable, that is, formulated with sufficient precision to enable the individual—if need be with appropriate advice—to regulate his conduct”¹²⁰ and must “indicate with sufficient clarity the scope of any ... discretion conferred on the competent authorities and the manner of its exercise”.¹²¹
56. The gathering, storage and use of data for surveillance can have an impact on a number of human rights, including the rights to privacy, freedom of peaceful assembly and association, and the freedom of movement, especially when they are linked to law enforcement practices such as red flagging and travel ban lists. For an interference to be in line with international human rights law, the national law allowing it must be sufficiently accessible, clear and precise so that an individual may look to the law and ascertain who is authorized to conduct surveillance and under what circumstances. Surveillance must be based on reasonable suspicion, and any order authorizing it must be sufficiently targeted. Prior judicial authorization and effective independent oversight during and after surveillance are vital safeguards against arbitrariness.¹²²
57. In a report on privacy in the digital age, the United Nations High Commissioner for Human Rights noted that Governments frequently justified digital communications surveillance programmes on the grounds of national security, including the risks posed by terrorism. While surveillance on the grounds of national security or for the prevention of terrorism or other crime may be a “legitimate aim” for purposes

¹¹⁸ International Covenant on Civil and Political Rights, art. 17(1); European Convention on Human Rights, art. 8(1); American Convention on Human Rights, art. 11(1); and Universal Declaration of Human Rights, art. 12.

¹¹⁹ International Covenant on Civil and Political Rights, art. 17(2)–(3); American Convention on Human Rights, art. 11(2)–(3); and European Convention on Human Rights, art. 8(2), which, although worded differently, provides the same protection against arbitrary and unnecessary interference with privacy.

¹²⁰ European Court of Human Rights, *Gillan and Quinton v. United Kingdom*, para. 76.

¹²¹ *Ibid.*

¹²² A/HRC/34/61; A/HRC/27/37, para. 24; also CCPR/C/GBR/CO/7, para. 24.

of an assessment from the viewpoint of article 17 of the International Covenant on Civil and Political Rights, which provides the right to privacy, the degree of interference must, however, be assessed against the necessity of the measure to achieve that aim and the actual benefit it yields towards such a purpose.¹²³

58. Pursuant to Security Council resolution 2396 (2017), paragraph 11, Member States shall require airlines operating in their territories to provide advanced passenger information to the appropriate national authorities, in accordance with domestic law and international obligations, in order to detect the departure from their territories, or attempted travel to, entry into or transit through their territories, by means of civil aircraft, of foreign terrorist fighters. Resolution 2396 (2017) further urges Member States to expeditiously exchange information concerning the identity of foreign terrorist fighters (para. 6) and to consider, where appropriate, downgrading for official use intelligence threat and related travel data related to foreign terrorist fighters and individual terrorists (para. 8). The resolution decides that Member States shall develop the capability to collect, process and analyse passenger name record data and to ensure that such data is used by and shared with all their competent national authorities (para. 12). It also decides that Member States shall develop watch lists or databases of known and suspected terrorists, including foreign terrorist fighters, for use by law enforcement, border security, customs, military, and intelligence agencies to screen travellers and conduct risk assessments and investigations (para. 13). The resolution further decides that Member States shall develop and implement systems to collect biometric data, which could include fingerprints, photographs, facial recognition, and other relevant identifying biometric data (para. 15). The implementation of those provisions must be done in strict compliance with international human rights law.
59. While recognizing that the use of technology and databases and the exchange of information plays a key role in preventing terrorism, the collection, analysis and sharing of data and the security of the data bases has implications for international human rights law and raises important considerations for the right of individuals to be protected by law against unlawful or arbitrary interference in their privacy, as well as against discrimination. A key element of respect for the right to privacy is the protection of personal data.¹²⁴ Data protection is now so important that it is “emerging as a distinct human or fundamental right”.¹²⁵ The concerns about privacy arise in this context in relation to the recording, retaining, processing and sharing of personal information on computers and databases. It is well recognized that such activities have potentially serious consequences for individual privacy and should only be

¹²³ A/HRC/27/37.

¹²⁴ Article 7 of the Charter of Fundamental Rights of the European Union protects the right to respect for private life, while article 8 provides for the protection of personal data, which are closely related. The Court of Justice of the European Union held in *Digital Rights Ireland v. Minister of Communications, Marine and Natural Resources*, case Nos. C 293/12 and C-594/12, judgment, 8 April 2014, the rights in article 8 are “especially important for the right to respect for private life enshrined in article 7” (para. 53).

¹²⁵ A/HRC/13/37, para. 12.

permitted if substantial legal protections are in place to ensure information is not stored, accessed or shared except in a manner which is fair, necessary and proportionate. The increased sharing of information between law enforcement and intelligence agencies in different jurisdictions has raised risks, for example, that such information may have been obtained by illegal means. It has also raised additional implications for accountability.¹²⁶

60. The gathering and holding of personal information must be regulated by law, and effective measures have to be taken 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 should never be used for purposes incompatible with international human rights law. Everyone should have the right to ascertain whether, and if so, what personal data is stored in automatic data files, and for what purposes; which public authorities or private individuals or bodies control or may control their files; the right to request rectification or elimination, to protect themselves against any unlawful attacks and to have an effective remedy against those responsible.¹²⁷
61. In the context of protecting human rights while countering terrorism, the Special Rapporteur on counter-terrorism and human rights has observed that:

“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.”¹²⁸
62. The General Assembly has affirmed that the same rights that people have offline must also be protected online, including the right to privacy, and called upon States to respect and protect the right to privacy, including in the context of digital communication.¹²⁹ It has urged all States to respect and protect the right to privacy in accordance with international human rights law, and called upon States, while countering terrorism and violent extremism conducive to terrorism, to review their procedures, practices and legislation regarding the surveillance of communications,

¹²⁶ See statement by the Assistant Secretary-General for Human Rights at the Special meeting of the Counter-Terrorism Committee with international, regional and subregional organizations on “International Judicial and Law Enforcement Cooperation in Counter-Terrorism Matters pursuant to Security Council resolution 2322 (2016) and Other Relevant Council Resolutions”, New York, 21 June 2017, available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21789&LangID=E.

¹²⁷ Human Rights Committee general comment No. 16 (1988) on the right to privacy, paras. 10–11.

¹²⁸ A/HRC/13/37, para. 12.

¹²⁹ General Assembly resolution 68/167.

their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law. It also urged States to take measures to ensure that any interference with the right to privacy is regulated by law, which must be publicly accessible, clear, precise, comprehensive and non-discriminatory, and that such interference is not arbitrary or unlawful, bearing in mind what is reasonable to the pursuance of legitimate aims.¹³⁰

63. The General Assembly has urged States, while ensuring full compliance with their international obligations, to include adequate human rights guarantees in their national procedures for the listing of individuals and entities with a view to combating terrorism.¹³¹ The Assembly has also urged that the decision to list individuals and entities should be based on fair and clear procedures, and that regular reviews of names on the list are conducted; maximum specificity in identifying individuals and entities to be targeted; and that fair and clear procedures for de-listing exist early in sanctions regimes.

Guidance

States should review their national laws, policies and practices for surveillance in order to ensure their full conformity with international human rights law, including the right to privacy, the right to be protected against unlawful attacks against honour and reputation, freedom of peaceful assembly and association, and freedom of movement. Where there are shortcomings, States should take steps to address them, including through the adoption of a clear, precise, accessible, comprehensive and non-discriminatory legislative framework.

There must be no secret surveillance system that is not under review of an independent oversight body, and all interferences must be authorized through an independent body.¹³² Steps should be taken to ensure that effective and independent oversight regimes and practices are in place, with attention to the right of victims to an effective remedy.¹³³

Increased border controls and data sharing must respect the principle of non-discrimination. Practices that allow systematic checks of individuals who are considered to pose a risk following a risk assessment must be based on objective, specific intelligence and behavioural indicators, and not on broad profiles based on ethnicity, religion or race.¹³⁴

¹³⁰ General Assembly resolutions 70/148 and 71/199; Human Rights Council resolution 35/34 and A/HRC/34/61.

¹³¹ General Assembly resolution 63/185, para. 20 and resolution 70/148, para. 13.

¹³² A/HRC/13/37.

¹³³ A/HRC/27/37.

¹³⁴ A/71/384.

If States collect, process or store information that an individual is suspected of involvement in terrorism or foreign fighter-related activity, they should:

- (i) Make public the fact that they are doing so.
- (ii) Ensure that any collection, processing or storing of information that interferes with the right to privacy is both necessary and proportionate to the specific risk being addressed.
- (iii) Make the grounds for registration on the database (i.e. what criteria is used to determine involvement in terrorism) sufficiently clear and “open to public scrutiny and knowledge”.¹³⁵
- (iv) Make public which are the authorities competent to order registration of information on a database, the duration of the storage of information, the precise nature of the data collected, the procedures for storing and using the collected data as well as the existing controls and guarantees against abuse.
- (v) Where information about individuals has been stored without their knowledge, they should be informed of that fact as soon as law enforcement activities are no longer likely to be prejudiced.¹³⁶
- (vi) Establish, and make public, fair and transparent processes by which individuals can secure removal of information about them from a database in appropriate cases—including access to an independent review body capable of deciding whether they meet the criteria for inclusion on the database and retention of information about them is necessary.
- (vii) Create effective independent oversight bodies to review data collection, storage, retention and sharing to ensure doing so is strictly necessary and proportionate and is occurring in a fair, non-discriminatory manner.
- (viii) Make clear and explicit the purposes for which any information is obtained, and ensure that information obtained for one purpose is not retained and processed for other purposes.¹³⁷
- (ix) Ensure that redress is provided for in cases of abuse.¹³⁸

¹³⁵ European Court of Human Rights, *Shimovolos v. Russia*, application No. 30194/09, judgment, 21 June 2011, para. 70.

¹³⁶ Council of Europe Committee of Ministers recommendation No. R(87) 15 regulating the use of personal data in the police sector (17 September 1987), principles 6 and 2.2.

¹³⁷ European Union, Directive 95/46/EC of the European Parliament and of the Council (24 October 1995) on the protection of individuals with regard to the processing of personal data and on the free movement of such data, art. 6(1)(b); and E/CN.4/2005/103, para. 68.

¹³⁸ A/HRC/28/28, para. 53.

VIII. Criminal justice measures

64. Any criminal process must comply with the international human rights law principle that there can be no punishment without law. Under international human rights law, no one shall be held guilty of an offence on account of any act or omission that did not constitute an offence at the time it was committed.¹³⁹ As noted by the Counter-Terrorism Committee, it is incumbent on States to ensure respect for the principle of legality and the presumption of innocence, neither of which, according to the Human Rights Committee, may be subject to derogation by States parties to the International Covenant on Civil and Political Rights, even in times of emergency.¹⁴⁰
65. Resolution 2178 (2014) recalls the Council's decision in resolution 1373 (2001) that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and that their domestic law establishes "serious criminal offences" applicable to: (a) their nationals or other individuals who travel or attempt to travel from their territories for the purpose of participating in terrorist acts or receiving terrorist training; (b) those who fund travel for terrorist purposes; and (c) those who organize or otherwise facilitate such travel (para. 6). Both resolutions 2178 (2014) and 2396 (2017) call upon States to develop and implement prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters.

A. Definition of terrorism

66. Resolution 2178 (2014) calls upon States to implement the resolution in compliance with international human rights law. Any national definitions of terrorism must therefore be precise and in accordance with the principle of legality. The General Assembly has urged States to ensure that their laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law.¹⁴¹ The Counter-Terrorism Committee has recommended that States ensure that terrorist acts are defined in national legislation in a manner that is proportionate, precise and consistent with the international counter-terrorism instruments, and ensure that measures taken to stem the flow of foreign terrorist fighters comply with all obligations under

¹³⁹ International Covenant on Civil and Political Rights, art. 15; European Convention on Human Rights, art. 7; American Convention on Human Rights, art. 9; and Universal Declaration of Human Rights, art. 11(2).

¹⁴⁰ S/2015/338; also International Covenant on Civil and Political Rights, art. 4(2); European Convention on Human Rights, art. 15; and American Convention on Human Rights, art. 27.

¹⁴¹ General Assembly resolution 70/148, para. 6(o).

international law, in particular international human rights, refugee and humanitarian law.¹⁴²

67. While calling for human rights compliance, resolution 2178 (2014) does not specify how its provisions are to be incorporated into national legislation. States must therefore be diligent in ensuring that measures they adopt are clear and precise concerning to whom they are to be applied; that the standard for enforcement is precise, adequate and lawful; and that terms such as “terrorist” and “fighters” are applied on the basis of clear and established legal procedures, rather than in an arbitrary, discriminatory or indiscriminate manner”.¹⁴³ Concern has also been expressed that the criminalization of offences, such as receiving training for terrorism or travelling abroad for the purpose of terrorism, would rely on national definitions of terrorism that are sometimes overly broad or vague. In criminalizing the conduct that supports terrorist acts, as required by paragraph 6, States should pay particular attention to respecting the principle of legality, and particularly the requirement that provisions establishing offences must be formulated with sufficient precision so as to give “fair notice” of what conduct is prohibited as a criminal offence.
68. In order to facilitate prosecutions, legislation that may fall short of human rights standards has been adopted. The Special Rapporteur on counter-terrorism and human rights has recommended that, in criminalizing training for terrorist purposes or travelling abroad for the purpose of terrorism, the specific intent to carry out, contribute to or participate in an act of terrorism should be an element of the crime. He also noted that:

“Some jurisdictions have enacted as offences the entering or remaining in a ‘declared area’ in which a ‘listed organization is engaging in hostile activity’ or travelling to a ‘country designated to be a terrorist training country’. The offence is considered to have been committed regardless of whether there was any terrorist purpose to the travel, that is, it is sufficient that the individual entered the area or the country without being able to show that the purpose of the travel was covered by one of the exceptions. Those provisions reverse the burden of proof, placing the onus on individuals to prove that their travel falls within an exception. Such legislative techniques may conflict with the right to a fair trial, in particular the respect for the presump-

¹⁴² S/2015/975, annex.

¹⁴³ The High Commissioner for Human Rights has noted that “the reference made by the Council in resolution 2178 (2014) to ‘terrorism in all forms and manifestations’ as one of the most serious threats to international peace and security, without qualification or further definition, has prompted well-founded concerns that the resolution may fuel the adoption of repressive measures at the national level against otherwise lawful, non-violent activities of groups or individuals. The lack of an explicit exemption for acts that otherwise may be lawful under international humanitarian law is also a cause for concern.” The High Commissioner also noted that “particularly in view of the legally binding nature of Security Council resolution 2178 (2014), concerns also have been raised at the lack of definition of the terms ‘terrorism’ or ‘extremism’, as well as to references in the resolution to ‘terrorists’ as a category of individuals in addition to specific acts to be sanctioned” (A/HRC/28/28, paras. 46–47). See also A/HRC/29/51.

tion of innocence under article 14 of the International Covenant on Civil and Political Rights, which is a non-derogable right”.¹⁴⁴

69. Security Council resolution 1566 (2004) characterizes terrorism as “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism” (para. 3). Article 2 of the International Convention for the Suppression of the Financing of Terrorism and article 2 of the draft Comprehensive Convention on International Terrorism also contain definitions of terrorism. Although international humanitarian law does not provide a definition of terrorism, it specifically prohibits “measures” of terrorism¹⁴⁵ and prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”.¹⁴⁶
70. The Special Rapporteur on counter-terrorism and human rights has suggested the following definition of terrorism, which may provide guidance to States:¹⁴⁷
- “Terrorism means an action or attempted action where:
1. The action:
 - (a) Constituted the intentional taking of hostages; or
 - (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
 - (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
 2. The action is done or attempted with the intention of:
 - (a) Provoking a state of terror in the general public or a segment of it; or
 - (b) Compelling a Government or international organization to do or abstain from doing something; and
 3. The action corresponds to:
 - (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
 - (b) All elements of a serious crime defined by national law.”

¹⁴⁴ A/71/384, para. 50.

¹⁴⁵ Geneva Convention relative to Civilian Persons in Time of War (1949) (Fourth Geneva Convention), art. 33.

¹⁴⁶ Additional Protocol I to the 1949 Geneva Conventions, art. 51; and Additional Protocol II, art. 13.

¹⁴⁷ A/HRC/16/51, para. 28.

Guidance

Where States link counter-terrorism measures to a definition of terrorism or acts of terrorism in their domestic legislation, this definition must be clear and precise and not overly broad, and conviction on any terrorism offence must relate to a crime that constituted a criminal offence under national or international law at the time when the act was committed.

States must ensure that national counter-terrorism legislation is limited to the countering of terrorism as properly and precisely defined on the basis of the provisions reflected in the international counter-terrorism instruments, with strict adherence to the principle of legality.¹⁴⁸ Any definition of terrorism should be fully consistent with international human rights law and international humanitarian law. Definitions not in accordance with this should be repealed or revised.

The seriousness of, and punishment for, a criminal conviction must be proportionate to the culpability of the perpetrator. No one should be convicted of participating in a terrorist act, or facilitating or funding terrorism, unless it can be shown that they knew or intended to be involved in terrorism as defined under the national law.

B. Prosecution of suspected foreign fighters, right to a fair trial and due process¹⁴⁹

71. The prosecution of suspected foreign fighters who have returned must also comply with international human rights law. The Counter-Terrorism Committee has noted that, in most States, prosecutions of foreign terrorist fighters can be undermined by difficulties in collecting admissible evidence abroad, particularly from conflict zones, or in converting intelligence into admissible evidence from information obtained through information and communications technology, particularly social media. It further noted that the pre-emptive investigation and prosecution of suspected foreign terrorist fighters is a further challenge for all regions, particularly in the light of due process and human rights concerns.¹⁵⁰ The United Nations High Commissioner for Human Rights has expressed concern that the increased reliance on intelligence has had a deleterious effect on criminal justice in many countries.¹⁵¹ Additionally, while administrative measures may play an important role, an over-reliance on such measures may challenge the primacy of the criminal justice system, where such measures effectively displace criminal prosecutions.
72. Security Council resolution 2322 (2016) focuses on international law enforcement and judicial cooperation to counter terrorism, and highlights the need for enhanced cooperation in relation to foreign terrorist fighters. In that respect, the Counter-Terrorism

¹⁴⁸ A/72/316, para, 47.

¹⁴⁹ For a more comprehensive overview, see CTITF Basic Human Rights Reference Guide on the right to a fair trial and due process in the context of countering terrorism (October 2014).

¹⁵⁰ S/2015/975, annex.

¹⁵¹ A/HRC/16/50.

Committee Executive Directorate has noted the challenge of inconsistent compliance with human rights obligations. Respect for human rights, including fair trial guarantees and the rule of law, is essential for effective international cooperation. Disregard for human rights obligations and commitments undermines international counterterrorism cooperation and the available channels for assisting in investigations and prosecutions relating to transnational terrorist acts, and is the most important “transformative trigger” that pushes an individual to join a violent extremist organization.¹⁵²

73. States must ensure fairness at all stages in a prosecution. In particular, they must guarantee the right to a fair trial by an independent and impartial tribunal and must not rely on evidence or intelligence obtained through torture. The General Assembly has urged States to ensure that the interrogation methods used against terrorism suspects are consistent with their international obligations and are reviewed on a regular basis to prevent the risk of violations of their obligations under international law, including international human rights and refugee and humanitarian law.¹⁵³
74. States must respect the right to a fair trial in any criminal proceedings, including in relation to terrorism offences. The right to a fair trial is a fundamental guarantee of human rights and the rule of law. It is protected by various human rights instruments¹⁵⁴ and also by international humanitarian law.¹⁵⁵ While the right to a fair trial is not listed expressly as a non-derogable right in international human rights law instruments,¹⁵⁶ the right may not be subject to derogation if that would circumvent the protection of non-derogable rights (such as the right not to be subject to torture or other ill-treatment and the presumption of innocence).¹⁵⁷ In addition, principles of the rule of law and legality require that fundamental requirements of a fair trial must be respected even when derogation of specific aspects of fair process are permitted.¹⁵⁸

¹⁵² Counter-Terrorism Committee Executive Directorate, “Current state of international law enforcement and judicial cooperation against terrorism: gaps and recommendations to the Counter-Terrorism Committee”.

¹⁵³ General Assembly resolution 70/148, para. 6(q).

¹⁵⁴ International Covenant on Civil and Political Rights, art. 14; European Convention on Human Rights, art. 6; and American Convention on Human Rights, art. 8.

¹⁵⁵ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) (First Geneva Convention), art. 49, fourth paragraph; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) (Second Geneva Convention), art. 50, fourth paragraph; Convention relative to the Treatment of Prisoners of War (1949) (Third Geneva Convention), arts. 102–108; Fourth Geneva Convention, arts. 5 and 66–75; Additional Protocol I, art. 75(4); and Additional Protocol II, art. 6(2).

¹⁵⁶ The revised Arab Charter of Human Rights expressly states that the right to a fair trial is non-derogable (see art. 4(2)). However, that right is not listed as a non-derogable right in International Covenant on Civil and Political Rights, art. 4(2); European Convention on Human Rights, art. 15; nor American Convention on Human Rights, art. 27.

¹⁵⁷ Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 6.

¹⁵⁸ A/63/223, para. 12; and CTITF Basic Human Rights Reference Guide on the right to a fair trial and due process in the context of countering terrorism (October 2014).

75. The right to a fair trial in the context of criminal proceedings has a series of different elements, They include the following:
- (a) Criminal charges must be determined by a competent, independent and impartial tribunal established by law.¹⁵⁹ Civilians should not be tried by military tribunals, save in strictly exceptional cases where the regular civilian courts are unable to undertake the trials and recourse to military courts is unavoidable. Trial by military or special tribunals must comply with human rights standards in all respects, including legal guarantees for the independent and impartial functioning of such tribunals.¹⁶⁰
 - (b) A criminal trial must in general be held in public, and any exclusion of the public from any part of proceedings will need to be clearly justified, necessary and proportionate.¹⁶¹
 - (c) A person charged with an offence shall be presumed innocent until proven guilty,¹⁶² and cannot be compelled to testify against themselves.¹⁶³
 - (d) A person charged with a criminal offence must be informed promptly, and in a language they understand, of the nature of the accusation against them.¹⁶⁴ They must then be tried without undue delay.¹⁶⁵
 - (e) The accused must have adequate time and facilities to prepare a defence¹⁶⁶ and must be tried in their presence and given the opportunity to defend themselves in person or through legal assistance.¹⁶⁷ If an accused does not have the means to pay for legal assistance it must be provided for free when the interests of justice

¹⁵⁹ International Covenant on Civil and Political Rights, art. 14(1); European Convention on Human Rights, art. 6(1); American Convention on Human Rights, art. 8(1).

¹⁶⁰ CTITF Basic Human Rights Reference Guide on the right to a fair trial and due process in the context of countering terrorism.

¹⁶¹ International Covenant on Civil and Political Rights, art. 14(1); European Convention on Human Rights, art. 6(1); American Convention on Human Rights, art. 8(5); also Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, art. 21.

¹⁶² International Covenant on Civil and Political Rights, art. 14(2); European Convention on Human Rights, art. 6(2); American Convention on Human Rights, art. 8(2).

¹⁶³ International Covenant on Civil and Political Rights, art. 14(3)(g); American Convention on Human Rights, art. 8(2)(g).

¹⁶⁴ International Covenant on Civil and Political Rights, art. 14(3)(a); European Convention on Human Rights, art. 6(3)(a); American Convention on Human Rights, art. 8(2)(b).

¹⁶⁵ International Covenant on Civil and Political Rights, art. 14(3)(c); European Convention on Human Rights, art. 6(1); American Convention on Human Rights, art. 8(1).

¹⁶⁶ International Covenant on Civil and Political Rights, art. 14(3)(b); European Convention on Human Rights, art. 6(3)(b).

¹⁶⁷ International Covenant on Civil and Political Rights, art. 14(3)(d); European Convention on Human Rights, art. 6(3)(c); American Convention on Human Rights art. 8(2)(d).

- so require.¹⁶⁸ If the accused cannot understand or speak the language used in court they must be provided with access to an interpreter for free.¹⁶⁹
- (f) The principle of equality of arms applies to all criminal proceedings, including when intelligence information is introduced as evidence. It means that the accused must have access to the records and documents relied upon by the prosecution as well as material that is potentially exculpatory which is in the possession of the State. Accused persons are entitled to examine witnesses against them and to obtain the examination and attendance of witnesses under the same conditions as prosecution witnesses.¹⁷⁰
- (g) Everyone convicted of a crime shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law.¹⁷¹
76. The requirements of a fair trial set out above apply to terrorism cases no less than to any other criminal offence. The best way to ensure that counter-terrorism criminal processes comply with human rights standards is to apply the same processes to terrorism cases as to other crimes. It may, however, be permissible for some changes to be made to trial processes because of the particular challenges of prosecuting terrorism offenses (such as measures that protect the identity of vulnerable witnesses¹⁷² or using military rather than civilian courts where even high-security civilian courts are inadequate and “recourse to military courts is unavoidable”).¹⁷³ Where such departures from ordinary processes are made, they must be shown to be clearly necessary and they must be consistent with the minimum requirements of a fair trial. In addition, they should be time-limited and subject to “sunset clauses” as well as independent review.
77. In relation to non-criminal proceedings involving allegations of terrorism, it has been held that it may be possible for the State to rely upon “closed material” that is not shown to the accused. This can only apply if the State can establish that disclosure of the material would harm national security and that the accused is told, at least, the “gist” of the Government’s case against them.¹⁷⁴ These closed material provisions, however, do not apply to criminal cases. Using secret material in criminal proceedings is inconsistent with the principles of a fair trial.¹⁷⁵ The right of an individual charged

¹⁶⁸ International Covenant on Civil and Political Rights art. 14(3)(d); European Convention on Human Rights, art. 6(3)(c); American Convention on Human Rights, art. 8(2)(e).

¹⁶⁹ International Covenant on Civil and Political Rights, art. 14(3)(f); European Convention on Human Rights, art. 6(3)(e); American Convention on Human Rights, art. 8(2)(a).

¹⁷⁰ International Covenant on Civil and Political Rights, art. 14(3)(e); European Convention on Human Rights, art. 6(3)(d); American Convention on Human Rights, art. 8(2)(f).

¹⁷¹ International Covenant on Civil and Political Rights, art. 14(5).

¹⁷² A/HRC/22/26, para. 39, in which it was noted that “good practice examples were provided to suggest that, consistent with fair trial requirements, a witness could be protected while still providing evidence relevant for trial, through for example video testimony from remote locations or distortion of oral testimony”.

¹⁷³ *Abbassi v. Algeria* (CCPR/C/89/D/1172/2003), para. 8.7.

¹⁷⁴ *Her Majesty’s Treasury v. Ahmed and others*; and *European Commission and others v. Kadi*.

¹⁷⁵ Human Rights Committee general comment No. 32, para. 33; also CCPR/C/CAN/CO/5, para. 13.

with a criminal offence to examine witnesses against him or her is a critical element of a fair process. The use of anonymous witnesses must be restricted to cases where this is necessary to prevent intimidation of witnesses or to protect their privacy or security and must in all cases be accompanied by sufficient safeguards to ensure a fair trial.

Guidance

Criminal processes in terrorism cases must comply with the requirements of a fair trial just as in any other case. While some special measures may be necessary in terrorism cases (for example to protect the identity of vulnerable witnesses) any such measures must be consistent with the minimum requirements of a fair process, they should be subject to a sunset clause and independent review, and they cannot permit a person to be convicted of a criminal offense without permitting them to see all of the evidence being used against them.

Information obtained through the use of torture or other forms of cruel, inhuman or degrading treatment shall be inadmissible as evidence. Torture is strictly prohibited under international law.

The use of military courts to try civilians will only be legitimate if regular civilian courts are unable to undertake the trials and recourse to military courts is unavoidable.

C. Rehabilitation and reintegration of returnees

78. International human rights law provides that the essential aim of the penitentiary system shall be the reformation and social rehabilitation of prisoners, and that children shall be separated from adults and be accorded treatment appropriate to their age and legal status.¹⁷⁶ Resolution 2396 (2017) calls upon States to consider appropriate prosecution, rehabilitation and reintegration measures in compliance with domestic and international law (para. 29) and implement comprehensive and tailored prosecution, rehabilitation and reintegration strategies (para. 30) with special focus when developing tailored strategies for women and children (para. 31). As noted by the Counter-Terrorism Committee, the employment of rigid prosecution policies and practices against foreign terrorist fighters can be counterproductive to the implementation of comprehensive strategies to combat foreign terrorist fighters and violent extremism. Prisons may provide a safe haven for terrorists to network, recruit and radicalize. Prison settings can promote violent extremism, but can also present opportunities for preventing radicalization and promoting disengagement or deradicalization.¹⁷⁷ The Counter-Terrorism Committee has noted three major themes in returnee policies: screening of returnees,

¹⁷⁶ International Covenant on Civil and Political Rights, art. 10(3); American Convention on Human Rights, art. 5(5)–(6).

¹⁷⁷ S/2015/975, annex.

de-radicalization policies and reintegration into society.¹⁷⁸ In its guiding principles on foreign terrorist fighters (Madrid Guiding Principles),¹⁷⁹ the Counter-Terrorism Committee noted that States should ensure that their competent authorities are able to apply a case-by-case approach to returnees, on the basis of risk assessment, the availability of evidence and related factors. In assessing alternatives to incarceration, Members States should adopt a “comprehensive, multidisciplinary approach that involves all branches of Government, as well as community and civil society stakeholders” as an effective and long-term response. States should develop and implement strategies for dealing with specific categories of returnees, in particular children, women, family members and (other) potentially vulnerable individuals. The Committee also noted in the Madrid Guiding Principles that States should consider appropriate administrative measures and/or rehabilitation and reintegration programmes as alternatives to prosecution in appropriate cases. Assessments should be conducted to determine the level of culpability and threat posed and thereby determine the appropriate way to handle each individual.

79. Resolution 2396 (2017) further recognizes the role civil society organizations can play, including in the health, social welfare and education sectors in contributing to the rehabilitation and reintegration of returning and relocating foreign terrorist fighters and their families (para. 32).

Guidance

Rehabilitation and reintegration strategies and de-radicalization programmes consistent with international human rights law should be developed and implemented along with the criminal justice measures. Alternative approaches to incarceration should be considered, based on risk assessment, availability of evidence and other factors. Interventions should engage government authorities, community members and civil society stakeholders as an effective long-term response.

Rehabilitation and reintegration programmes should be complemented by comprehensive strategies and community-based initiatives that prevent violent extremism, in particular the recruitment and radicalization of at-risk youth.

Considering that prisons have been found in some cases to be grounds for recruitment, a combination of judicially mandated de-radicalization, rehabilitation programs, and potential house arrest should be considered.¹⁸⁰

Tailored rehabilitation and reintegration strategies should be developed for different categories of returnees, including women and children.

States should engage proactively with community members and civil society organizations when designing and implementing rehabilitation and reintegration strategies, as requested by resolution 2396 (2017).

¹⁷⁸ S/2015/358, para. 58.

¹⁷⁹ S/2015/939, annex II.

¹⁸⁰ PRIO Centre on Gender, Peace and Security, GPS Policy Brief 01, 2017, available from <https://www.prio.org/utility/DownloadFile.ashx?id=1219&type=publicationfile>.

D. Special laws, sunset clauses and review mechanisms

80. Special laws seeking to deal with the particular threat posed by terrorism are not necessarily incompatible with international human rights law, provided they are proportionate to the terrorist threat a country faces and comply with the requirements described above. There is, however, a risk that measures which are enacted to deal with a particular emergency will continue in effect when the emergency has passed and the measures are no longer necessary. They will then cease to be proportionate, and their operation will be inconsistent with international human rights law principles. If these measures entail derogation from human rights instruments, States are required to report on the reasons for such derogation, and the date on which the derogation has been terminated.¹⁸¹
81. One way to protect against anti-terrorism provisions continuing when they are no longer necessary, and to prevent what were initially intended to be extraordinary measures becoming normalised and becoming de facto permanent, is to ensure that the provisions include “sunset clauses”, requiring the renewal of anti-terrorism laws after a fixed period as well as regular review of counter-terrorism provisions.¹⁸² As suggested by the Special Rapporteur on counter-terrorism and human rights, reviews of anti-terrorism provisions should include annual government review of, and reporting on, powers that are being exercised, annual independent review of the overall operation of counter-terrorism laws and periodic parliamentary review.¹⁸³ The Counter-Terrorism Committee has recommended that States take steps to subject proposed measures against foreign terrorist fighters to public debate and human rights review prior to adoption, and consider the use of sunset clauses, as appropriate; and recall the importance of independent review, oversight and accountability mechanisms, including with regard to the activities of security agencies and measures that result in the deprivation of liberty.¹⁸⁴
82. The Secretary-General has recommended that States should undertake a regular review to ensure the compliance of national counter-terrorism laws and practices with international human rights law, including those related to due process, such as the right to a fair trial, the rights to freedom of opinion, expression, peaceful assembly and association, and the right to privacy, in order to ensure that counter-terrorism measures are specific, necessary, effective and proportionate. This may involve reviewing counter-terrorism legislation before its adoption, incorporating time limitations into such laws, establishing procedural safeguards and independent oversight bodies for law enforcement and intelligence agencies and conducting periodic reviews of

¹⁸¹ International Covenant on Civil and Political Rights, art. 4(3); European Convention on Human Rights, art. 15; American Convention on Human Rights, art. 27.

¹⁸² A/HRC/16/51, paras. 19–20.

¹⁸³ *Ibid.*, para. 20.

¹⁸⁴ S/2015/975, annex.

sanction measures. The validity of any exceptional measure should be restricted in time through the inclusion of a sunset clause.¹⁸⁵

Guidance

Emergency measures must comply with international human rights law and be necessary and proportionate and monitored.

If compelling reasons require the establishment of specific powers for certain authorities:

- (a) Such powers should be contained in stand-alone legislation capable of being recognized as a unique exception to general legal constraint and not be absorbed into ordinary law;
- (b) If these powers involve derogations from international human rights law instruments, they must be duly reported to the relevant international bodies, including the reasons for derogation and the duration of the measure.
- (c) The provisions under which such powers are established should be subject to sunset clauses and periodic review, including by an independent reviewer to ensure the provisions that may have been necessary at one point in time remain proportionate and effective and consistent with states' international legal obligations;
- (d) The need for new exceptional powers should be subject to a stricter and more compelling test if there has been a long-term emergency in place.

¹⁸⁵ A/72/316; also A/HRC/28/28, para. 55.

IX. Effective remedy for those whose rights have been violated

83. International human rights law provides a legal obligation to provide victims of human rights violations with an effective remedy.¹⁸⁶ The Human Rights Committee has confirmed that the right to an effective remedy, of which the duty to investigate is an integral part, is non-derogable and inherent within the entirety of the International Covenant on Civil and Political Rights.¹⁸⁷ The General Assembly has urged States, while countering terrorism, to ensure that any person who alleges that their human rights or fundamental freedoms have been violated has access to a fair procedure for seeking full, effective and enforceable remedy within a reasonable time, and that victims receive adequate, effective and prompt reparation, which should include, as appropriate, restitution, compensation, rehabilitation and guarantees for non-recurrence, including ensuring accountability for those responsible for such violation.¹⁸⁸
84. Denial of an effective remedy for a breach of human rights is itself a violation of international human rights law,¹⁸⁹ and it is a key premise of human rights law that “adequate safeguards and effective remedies [must] be provided by law against illegal or abusive imposition or application of limitations on human rights”.¹⁹⁰ Where it is claimed that the limitation on human rights is necessary because of public safety, national security or an emergency, there must therefore be effective remedies to ensure that such claims are not abused and that they can be evaluated by independent processes if challenged.¹⁹¹
85. In addition, where it comes to the attention of a State that, in taking counter-terrorism measures, its officials may have committed serious human rights violations, including to the right to life or the right not to be subjected to torture or inhuman and degrading treatment, the State has an obligation to conduct a prompt, independent and effective investigation open to public scrutiny.¹⁹² The investigative obligation

¹⁸⁶ International Covenant on Civil and Political Rights, art. 2(3)(a); Universal Declaration of Human Rights, art. 8; American Convention on Human Rights, art. 25; European Convention on Human Rights, art. 13.

¹⁸⁷ Human Rights Committee general comment No. 29, para. 14.

¹⁸⁸ General Assembly resolution 70/148, para. 6(r); also A/HRC/16/51, para. 22.

¹⁸⁹ International Covenant on Civil and Political Rights, art. 2(3); European Convention on Human Rights, art. 13; American Convention on Human Rights, art. 25.

¹⁹⁰ E/CN.4/1985/4, annex, para. 18.

¹⁹¹ *Ibid.*, paras. 24, 31, 34 and 56.

¹⁹² *Al-Skeini and others v. United Kingdom*, paras. 163–167. For an example of the application of these principles to human rights violations in the context of counter-terrorism measures, see *El-Masri v. The former Yugoslav Republic of Macedonia*, application No. 39630/09, judgment, 12 December 2012; and A/HRC/22/52, paras. 28–30.

arises whether or not a complaint is made by the alleged victim or anyone else. The investigation must be capable of ensuring that those who are responsible for committing violations are identified and punished, and of determining if wider state failings allowed the violations to occur. In the absence of such an investigation, the prohibition on human rights violations would be “ineffective in practice” as “agents of the state [would be able] to abuse the rights of those within their control with virtual impunity”.¹⁹³ Furthermore, investigation by the State are “essential in maintaining public confidence in [the State’s] adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”¹⁹⁴

86. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹⁹⁵ underscore the need for victims to be treated with humanity and respect for their dignity and human rights, and emphasize that appropriate measures should be taken to ensure their safety, physical and psychological wellbeing and privacy, as well as those of their families. The Basic Principles and Guidelines outline the remedies to be made available to victims of violations of international human rights and humanitarian law. They require States to ensure that their domestic law makes available adequate, effective, prompt and appropriate remedies, including reparation in respect of all violations of human rights. This includes the victim’s right to equal and effective access to justice, effective and prompt reparation for harm suffered, and access to relevant information concerning the violations and reparation mechanisms. The Basic Principles and Guidelines also outline certain obligations on States to provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law, and to establish national programmes for reparation and other assistance to victims, if the parties liable for the harm suffered are unable or unwilling to meet their obligations. Remedial provisions should be framed in sufficiently broad terms so as to enable effective remedies to be provided according to the requirements of each particular case, including, for example, release from arbitrary detention, compensation and the exclusion of evidence obtained in violation of human rights.¹⁹⁶
87. Additionally, guidance may be sought from the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, which is a civil society initiative focusing on delivering justice through reparation programmes for women and girls who are victims of sexual violence in conflict situations.¹⁹⁷

¹⁹³ *El-Masri v. The former Yugoslav Republic of Macedonia*.

¹⁹⁴ *Al-Skeini and others v. United Kingdom*.

¹⁹⁵ General Assembly resolution 60/147, annex.

¹⁹⁶ A/HRC/16/51.

¹⁹⁷ See https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf.

Guidance

Those who claim that their rights have been violated by counter-terrorism measures must be able to access a competent authority to determine their claim, and, if their claim is upheld, to accord them an effective remedy. Remedies should be provided on a non-discriminatory, gender-sensitive basis.

Where it comes to the State's attention that its agents may have committed serious human rights violations, it must conduct a prompt, independent and effective investigation that is open to public scrutiny to determine whether a violation took place, how it was allowed to occur and to hold those responsible to account. Victims must be granted procedural rights, such as the right to participate in proceedings and to be kept apprised of proceedings.

Victims must be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological wellbeing and privacy, as well as those of their families.

X. Preventing and countering violent extremism and incitement

88. Tackling some of the underlying causes and drivers of conflict that make people vulnerable to recruitment by terrorist groups is important. Responding to “violent extremism” can, however, have human rights implications, and measures that do not respect human rights can end up making people more, not less, vulnerable to joining or being recruited by extremist groups.¹⁹⁸ The Counter-Terrorism Committee has warned that counter-terrorism measures that do not fully respect human rights and the rule of law contribute to radicalization and may fuel foreign terrorist fighter mobilization.¹⁹⁹ The United Nations Educational, Scientific and Cultural Organization (UNESCO) points to the same mechanism in the field of preventing violent extremism.²⁰⁰ To effectively complement counter-terrorism measures in the long run, preventive measures must be based on respect for human rights and the rule of law.
89. Resolution 2178 (2014) calls upon States to enhance efforts to counter “violent extremism, which can be conducive to terrorism, including preventing radicalization, recruitment, and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters” (para. 15). Resolution 2396 (2017) calls upon States to “develop and implement risk assessment tools to identify individuals who demonstrate signs of radicalization to violence” (para. 38).
90. If measures are taken to investigate those who are considered “violent extremists” or if their names are added to databases of suspected “extremists”, that will have potential implications for the right to privacy as well as the presumption of innocence. If individuals are detained or otherwise have their freedom of movement restricted, that will have implications for the right to liberty, and criminal proceedings taken against suspected “extremists” engage fair trial rights. In addition, if steps are taken to prevent individuals expressing “extremist” views, that will interfere with the right to freedom of expression,²⁰¹ which, as has repeatedly been emphasized, requires protection not only for “‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive

¹⁹⁸ Human Rights Council resolution 30/15, p. 2; Security Council resolution 2178 (2014), seventh preambular paragraph; and A/HRC/33/29.

¹⁹⁹ S/2014/807, annex, para. 25; and S/2015/123, annex, para. 30.

²⁰⁰ UNESCO, “Preventing violent extremism through education: a guide for policy-makers” (2017).

²⁰¹ International Covenant on Civil and Political Rights, art. 19; European Convention on Human Rights, art. 10; American Convention on Human Rights, art. 13.

or as a matter of indifference, but also to those that offend, shock or disturb”.²⁰² If those infringements with privacy, liberty, movement, fair trial and freedom of expression are to be lawful, they must be necessary, proportionate, have a sufficiently clear and foreseeable legal basis, and they must contain sufficient safeguards against arbitrary application, to be consistent with the rule of law.

91. The Secretary-General’s Plan of Action on Preventing Violent Extremism recalls the critical role of respect for human rights in preventing violent extremism. It notes that human rights violations such as torture or violations of due process rights can play a role in radicalization, and expresses the need to complement countering violent extremism with preventive measures, including legislation, policies, strategies and practices that are in line with Member States’ obligations under international law, in particular international human rights law.²⁰³ While the Plan of Action does not define “violent extremism”, it cautions that any domestic definitions must be consistent with States’ obligations under international law, in particular international human rights law.²⁰⁴ The Special Rapporteur on counter-terrorism and human rights has warned against the use of new terminology that has the same shortcomings as the term “terrorism” and that, given the absence of a definition at the international level and broad national definitions, a new term may prove even more dangerous for human rights than the term “terrorism”.²⁰⁵ Likewise, when the terms “extremism” or “radicalization” are used to cover non-violent activity, there are risks of human rights violations.²⁰⁶ The Special Rapporteur on counter-terrorism and human rights expressed concern that the term “extremism” has been used by several States prior to the adoption of resolution 2178 (2014), not as part of a strategy to counter violent extremism, but as an offence in itself. In that context, it has attracted well-founded concern that the vagueness of the concept could lead to its use against members of religious minorities, civil society, human rights defenders, peaceful separatist and indigenous groups, journalists or political activists.²⁰⁷ It may be used to crack down on legitimate political expression and to limit the participation of civil society in accountability, transparency and critique of the state. If the definition of “violent extremism” is insufficiently precise it may also offend against the requirement of legal certainty. Interference with the right to privacy or with freedom of expression

²⁰² European Court of Human Rights, *VgT Verein gegen Tierfabriken v. Switzerland*, application No. 24699/94, judgment, 28 June 2001, para. 66. The Court held that protection for the expression of ideas that offend shock and disturb is required by the “demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’” and that any restrictions on the exercise of the right to freedom of political expression must “be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political”. See also European Court of Human Rights, *Handyside v. United Kingdom*, application No. 5493/72, judgment, 7 December 1976.

²⁰³ A/70/674.

²⁰⁴ *Ibid.*, para. 5.

²⁰⁵ A/HRC/31/65.

²⁰⁶ A/HRC/33/29, paras. 6–7 and 61.

²⁰⁷ A/HRC/31/65, para. 21.

must be “provided by law” or “prescribed by law” which, as set out above, means that the interference must occur pursuant to rules that are “foreseeable, that is, formulated with sufficient precision to enable the individual—if need be, with appropriate advice—to regulate his conduct.”²⁰⁸

92. The Madrid Guiding Principles indicate that the Internet and other modern communications technologies are a vital means to seek, receive and impart information and ideas, and States must ensure that any measures, including enforcement actions taken to restrict freedom of expression, comply with their obligations under international human rights law (principle 14). The blocking or removal of specific content online has been used by States as a measure to prevent radicalization, violent extremism and the recruitment of foreign fighters; counter incitement to acts of terrorism; and stop the dissemination of terrorist material. However, States must provide evidence-based justification of the necessity and proportionality of such interference with freedom of expression.²⁰⁹
93. Provisions which seek to restrict or deter “extremist” speech also risk interfering with the expression of political opinions. While the right to freedom of expression under international human rights law is not absolute, any restriction on such expression must be shown to be strictly necessary to protect public order (*ordre public*) or national security.²¹⁰ As the European Court of Human Rights has held “there is little scope ... for restrictions on political speech or on debate of questions of public interest”.²¹¹ Indeed, the House of Lords of the United Kingdom has interpreted the European Court’s free speech provisions as follows: “freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts”.²¹² Peacefully expressing views, including those related to religious beliefs or cultural practices, however extreme they may be regarded by the majority, should never be restricted unless it is clear that they incite violence or are otherwise associated with terrorism or criminal activity.²¹³
94. Where those measures may dissuade political or other expression, legal certainty is all the more important. Otherwise there is a risk of a chilling effect on free speech. As domestic courts have held: “Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ ... than if the boundaries of the forbidden areas were

²⁰⁸ *Gillan and Quinton v. United Kingdom*, para. 76.

²⁰⁹ A/HRC/33/29, para. 54.

²¹⁰ International Covenant on Civil and Political Rights, art. 19(3)(b) concerning freedom of expression. However, under article 18(3) of the Covenant, freedom to manifest one’s religion or beliefs may not be restricted on the ground of “national security”.

²¹¹ European Court of Human Rights, *Wingrove v. United Kingdom*, application No. 17419/90, judgment, 25 November 1996, para. 58.

²¹² United Kingdom, House of Lords, *Regina (ProLife Alliance) v. British Broadcasting Corporation*, case No. [2003] UKHL 23, judgment, 10 April 2003, para. 6.

²¹³ A/HRC/31/65, paras. 38–39.

clearly marked”²¹⁴ and thus in the context of free speech “a degree of precision is required so that the individual will be able to know with some confidence where the boundaries of legality may lie”.²¹⁵

95. Discrimination in the enjoyment of human rights on grounds such as race or religion is prohibited by international human rights law.²¹⁶ If measures which interfere with privacy or freedom of expression or other human rights are taken against individuals because of their race or religion, that will, in itself, constitute a breach of international human rights law. Such discrimination is not limited to decisions which are motivated by conscious animus or prejudice towards some particular racial or religious group. If statements made by an individual are more likely to be interpreted as “violent extremist” if that individual is a member of one religious or racial group than if they are a member of another, that will constitute discrimination even if the discriminator has no intention to discriminate and bears no ill-will towards the members of a particular racial or religious group. In this respect, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has noted that counter-terrorism measures have disproportionately affected Muslims as well as migrants, refugees and asylum seekers.²¹⁷
96. Security Council resolution 1624 (2005) requires the Counter-Terrorism Committee to assist Member States in preventing incitement to commit terrorist acts. In its global survey of the implementation of Security Council resolution 1624, the Counter-Terrorism Committee Executive Directorate noted that States should ensure that incitement offences are defined clearly and narrowly, so as not to include within their scope forms of expression that may be protected by international human rights law.²¹⁸ There is no permissible restriction on the freedom to have or adopt a religion or belief and the right to hold an opinion.²¹⁹ Restrictions are only permissible on the manner in which these are expressed.²²⁰ The law does not permit a “balancing act” between the nature of a threat or security risk and the extent to which these freedoms are restricted. Rather, restrictions must be proscribed by international human rights law. However, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.²²¹ The 2012

²¹⁴ United States of America, Supreme Court, *Grayned v. City of Rockford*, case No. 70-5106, decision, 26 June 1972.

²¹⁵ United Kingdom, Judicial Committee of the Privy Council, *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and others*, case No. [1998] UKPC 30, judgment, 30 June 1998.

²¹⁶ International Covenant on Civil and Political Rights, art. 2(1); European Convention on Human Rights, art. 14; American Convention on Human Rights, art. 1.

²¹⁷ A/72/287.

²¹⁸ S/2016/50.

²¹⁹ International Covenant on Civil and Political Rights, arts. 18(1) and 19(1); European Convention on Human Rights, arts. 9(1) and 10(1); American Convention on Human Rights, arts. 12(1) and 13(1).

²²⁰ International Covenant on Civil and Political Rights, art. 18(3) and 19(3); European Convention on Human Rights, art. 9(2) and 10(2); American Convention on Human Rights, arts. 12(3) and 13(2).

²²¹ International Covenant on Civil and Political Rights, art. 20(2); also American Convention on Human Rights, art. 13(5).

Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence²²² provides useful guidance on the lawful prohibition of incitement to hatred. It proposes a six-part threshold test for expressions considered as criminal offences:

Context: Speech should be placed within the social and political context at the time of dissemination. The context can help identify intent, the target group, likelihood of act resulting from speech and causation.

Speaker: The speaker's position or standing in the context of the audience to whom speech is directed should be considered.

Intent: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence, recklessness and dissemination alone do not suffice. It must activate a triangular relationship between the object and subject of the speech and the audience.

Content and form: Content analysis of the speech is key to proving that incitement occurred or was likely to occur. The courts may consider the degree of provocation, directness of words as well as the form, style, nature of arguments deployed.

Extent of the speech act: Related elements include the reach of the speech act, its public nature, its magnitude, size of the audience, means of dissemination (e.g. leafleting, broadcasting, internet post), the frequency and quantity of communications.

Likelihood, including imminence: Incitement is an inchoate crime, i.e. the action advocated in speech does not have to be committed to constitute the crime. However, some degree of risk of resulting harm must be identified. Courts must determine a reasonable probability that speech would succeed in inciting actual action against the target group, recognizing that the chain of causation should be rather direct.

97. Violent extremism does not evolve in a vacuum. It cannot be predicted by one variable alone. A recent study by the United Nations Development Programme, entitled "Journey to extremism in Africa",²²³ notes that, when asked why they had joined a violent extremist group, 71 per cent of those interviewed identified "government action", including "killing of a family member or friend" and "arrest of a family member or friend". The study notes that this large percentage illustrates that, in a majority of cases, State action appears to be a primary factor pushing individuals into violent extremism in Africa.²²⁴
98. There is a need to take a more comprehensive approach, which encompasses not only ongoing, essential security-based counter-terrorism measures but also systematic

²²² A/HRC/22/17/Add.4, appendix, para. 29.

²²³ See <http://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf>.

²²⁴ Ibid.

preventive measures, that directly address the drivers of violent extremism.²²⁵ These measures embrace “soft power” fields such as education, culture, media and communication, with the aim of building the knowledge, skills, values and attitudes that people need to be able to contribute to a more inclusive, just and peaceful world.

99. The United Nations High Commissioner for Human Rights has urged States, as part of their efforts to stem the flow of foreign fighters, to integrate compliance with their obligations under international human rights law by stepping up efforts, inter alia, to address the conditions conducive to terrorism and to counter violent extremism, including by fostering engagement between communities and the authorities in order to build trust, supporting local ownership of initiatives and developing positive counter-narratives. The role of civil society should be supported through the creation of an enabling environment, including through the adoption of legislation protecting the space afforded to civil society and the promotion of non-discriminatory measures.²²⁶
100. Resolution 2178 (2014) encourages States to engage relevant local communities and non-governmental actors in developing strategies to counter the “violent extremism narrative that can incite terrorist attacks” and address the conditions conducive to extremism, by empowering “youth, families, women, religious, cultural and education leaders” (para. 16).
101. Any programming aimed at countering or preventing violent extremism should be based on needs assessments that are gender sensitive and that meaningfully involve relevant stakeholders and affected groups.²²⁷ Over-emphasis on the family structure as the front-line of prevention can lead to stereotyping and instrumentalizing of women, as well as the reallocation of resources that ultimately target boys and men rather than the empowerment of women.²²⁸ The most effective programmes targeting women, as well as youth, are peer-driven and aimed at developing life skills, such as conflict management, teamwork, tolerance and empathy. Direct engagement in small groups has shown the highest effectiveness, in particular with youth at imminent risk of joining violent extremist groups, rather than large scale online and offline counter-narrative campaigns.²²⁹
102. Security actors may play a constructive role in the prevention of terrorism and countering of violent extremism, however, the nature and extent of their involvement need to be tailored to the needs of the community. It has been detrimental to Government-community relations when a counter-terrorism agenda has been confused or mixed with a community cohesion or development agenda. Military counter-terrorism interventions that were not articulated to support broader political and stabilization objectives have not led to improvement of the security situation or decrease in

²²⁵ See A/70/674.

²²⁶ A/HRC/28/28, para. 56.

²²⁷ A/HRC/33/29, para. 30.

²²⁸ *Ibid.*, para. 35.

²²⁹ *Ibid.*, para. 44.

the presence of terrorist groups. Furthermore, social, education and other policies or programmes will be less effective and civil society space may shrink if they are approached through a security mindset. Such an approach may also pose serious human rights concerns, above all in cases in which civil servants involved in education, social service or even health delivery programmes bear a statutory obligation to share information about those with whom they interact. Whenever such obligation exists, transparency about it with the beneficiaries of such services is paramount.²³⁰

Guidance

Measures to counter violent extremism or terrorism should be combined with preventive efforts in line with Member States' obligations under international human rights law, encompassing the fields of education, culture, youth, gender equality, media and communication to promote a culture of peace in the long term. At the request of Governments, national and regional plans of action may be developed with the support of international organizations.

Measures taken against individuals who are said to be involved in violent extremism and which interfere with their rights to, inter alia, privacy, liberty, movement, due process, religious freedom, participate in cultural life or freedom of expression, must be necessary, proportionate, non-discriminatory and subject to a legal regime which is clear and foreseeable.

Legislation must comply fully with the principle of legality as enshrined in article 15 of the International Covenant on Civil and Political Rights such that criminal liability is narrowly and clearly defined. Any definition of "violent extremism" must be sufficiently precise so that individuals will know what forms of expression or what action by them might lead to their being regarded as violent extremists and have steps being taken against them and that it does not have a chilling effect and deter legitimate political expression.

The right to hold an opinion, to participate in cultural life and the freedom to have or adopt a religion or belief of one's choice cannot be subject to any restrictions. Restrictions on the manifestation of religion or beliefs must be prescribed by law, necessary for the protection of public safety, order, health, morals or the fundamental rights and freedoms of others, and proportionate. However, freedom to manifest one's religion or beliefs may not be restricted on the ground of "national security".

Measures to prevent and counter violent extremism online should clearly set out the legal basis, criteria and guidance on when, how and to what extent online content is blocked, filtered or removed. States have to provide evidence that the perceived benefits of content blocking outweigh the importance of the Internet as a tool to maximize the number and diversity of voices in the discussion of numerous issues.²³¹ Complete network shutdowns and blocking access to certain platforms are at odds with the individualized assessment required for lawful restrictions to freedom of expression, which involves evidence-based justification of the necessity and proportionality of the interference.

²³⁰ Ibid., para. 32.

²³¹ See A/HRC/33/29, para. 54.

Laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and creates a danger of criminal action”.²³²

For the offence of incitement to terrorism to comply with international human rights law,²³³ it:

- (a) Must be limited to the incitement to conduct that is truly terrorist in nature, in line with the definitions of terrorism above;
- (b) Must restrict the freedom of expression no more than is necessary for the protection of national security, public order and safety or public health or morals;
- (c) Must be prescribed by law in precise language, including by avoiding reference to vague terms such as “glorifying” or “promoting” terrorism;
- (d) Must include an actual (objective) risk that the act incited will be committed;
- (e) Should expressly refer to two elements of intent, namely intent to communicate a message and intent that this message incites the commission of a terrorist act;
- (f) Should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to “unlawful” incitement to terrorism.

States should ensure that their counter-extremism measures do not negatively impact civil society’s rights to freedom of association, expression, assembly and privacy, and that the principles of necessity, proportionality and non-discrimination are respected in the implementation of these measures.²³⁴

States should ensure constant monitoring of the human rights impact of “counter violent extremism” measures, particularly on women, children and religious communities, and create independent oversight mechanisms that review the operations of government bodies involved in implementing such efforts.

When a statutory obligation exists for civil servants engaged in education, social and health services to share information about those with whom they interact with law enforcement officers, this should be made clear to the beneficiaries from the outset.

Participation in any programme to prevent or counter violent extremism should be on a voluntary basis. Any related initiatives must neither be devised nor implemented in a manner that would result in discrimination or racial or religious profiling.²³⁵

²³² See A/63/337, para. 62.

²³³ See A/HRC/16/51, para. 31.

²³⁴ See A/HRC/31/65.

²³⁵ See A/HRC/33/29, para. 45.

