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Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism

Summary

The present report highlights developments since the last report of the United Nations High Commissioner for Human Rights in the protection of human rights and fundamental freedoms while countering terrorism, in particular the relevant developments within the Counter-Terrorism Implementation Task Force, other recent activities of the Office of the High Commissioner, and relevant recent activities of the Security Council Counter-Terrorism Committee and its Executive Directorate

The challenges to human rights in the context of counter terrorism, including legislative measures adopted by States, are examined, as are human rights issues related to the phenomenon of foreign fighters. The High Commissioner emphasizes the importance of ensuring that States integrate compliance with their obligations under international human rights law into their efforts to stem the flow of foreign fighters by stepping up initiatives to address the conditions conducive to terrorism and take measures to counter violent extremism; combat impunity and ensure accountability for any gross violation of international human rights law and serious violation of international humanitarian law; and ensure that any measures they adopt in their efforts to stem the flow of foreign fighters and prevent the commission of criminal acts comply with their obligations under international human rights law.

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I. Introduction

1. In its resolution 25/7, the Human Rights Council reaffirmed its unequivocal condemnation of all acts, methods, practices and financing of terrorism as criminal and unjustifiable. It also expressed its serious concern at the violations of human rights and fundamental freedoms, as well as of refugee and international humanitarian law, in the context of countering terrorism, and again called upon all States to ensure that any measure taken to counter terrorism complied with international law, in particular international human rights, refugee and humanitarian law. It called upon States and other relevant actors to continue to implement the United Nations Global Counter-Terrorism Strategy and its four pillars, which reaffirms respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

2. Also in resolution 25/7, the Human Rights Council encouraged the United Nations bodies, agencies, funds and programmes involved in supporting counter-terrorism efforts to continue to facilitate the promotion and protection of human rights and fundamental freedoms, as well as due process and the rule of law, while countering terrorism. It requested the United Nations High Commissioner for Human Rights to report to the Council, bearing in mind the content of resolution 25/7, in accordance with its annual programme of work. The present report is submitted pursuant to that request.

3. In the present report, the High Commissioner highlights relevant developments since the previous report,¹ in particular the recent activities of the Office of the High Commissioner (OHCHR); developments in the Counter-Terrorism Implementation Task Force; and cooperation with the Security Council Counter-Terrorism Committee and its Executive Directorate. He outlines the issues of human rights concern in the context of counter terrorism, in particular in relation to legislative measures taken by States, and addresses human rights issues relating to foreign fighters and measures taken by States to stem their flow.

II. Recent developments

A. Activities of the Office of the High Commissioner

4. In accordance with its thematic strategies for the period 2014-2017, OHCHR has prioritized support for Member States in their efforts to ensure that their security policies, strategies and measures are grounded firmly in respect for human rights and the rule of law. This includes assisting in the development and implementation of human rights-compliant security legislation; supporting security sector reform through a review of legal frameworks and support for the establishment of effective procedural safeguards and independent mechanisms for oversight; and supporting the design and delivery of human rights training to justice and security entities.

5. In her keynote statement to the International Counter-Terrorism Focal Points Conference on 13 June 2013, the previous High Commissioner urged States to take measures to address the linkages between a lack of respect for human rights and the conditions conducive to terrorism, alongside efforts to ensure effective human rights-compliant criminal justice responses to terrorism, and highlighted the critical role of civil society in this regard. In her briefing to the Counter-Terrorism Committee in October 2013,

¹ A/HRC/22/26.

she highlighted areas of ongoing concern and urged the Committee to continue its efforts to address all human rights issues relevant to the implementation of Security Council resolutions 1373 (2001) and 1624 (2005), including by promoting such good practices as reviewing counter-terrorism legislation before adoption, time-limited laws, independent oversight bodies for law enforcement and intelligence agencies, and periodic review of sanction measures.

6. OHCHR has continued to address complex legal and policy challenges relating to new technologies that are of direct relevance to States' efforts to counter terrorism. From November 2013 to March 2014, the Office partnered with the United Nations University in a research project on the application of international human rights law to national regimes overseeing governmental digital surveillance. It also launched an open consultation in February 2014, inviting the input of stakeholders on the basis of a questionnaire on the right to privacy in the context of domestic and extraterritorial surveillance. Also in February, the previous High Commissioner delivered a keynote address to an expert seminar organized by a group of States led by Germany and Brazil, and facilitated by the Geneva Academy on International Humanitarian Law and Human Rights, in which she outlined challenges to ensuring the right to privacy in the context of domestic and extraterritorial surveillance.

7. Drawing on these and other sources of information, as mandated by the General Assembly in its resolution 68/167, OHCHR prepared a report on the right to privacy in the digital age to the Human Rights Council.² In the report, OHCHR examined the protection afforded by international human rights law regarding privacy, including the meaning of "interference with privacy" in online communications, the definition of "arbitrary and unlawful" interference in this context, and the question of whose rights are protected, and where. Following consideration of the report by the Human Rights Council at its twenty-seventh session and the General Assembly at its sixty-ninth session, the Assembly adopted resolution A/C.3/69/L.26/Rev.1, which included a number of proposed follow-up measures.

8. Issues of relevance in the context of counter-terrorism were also addressed during expert panel discussions organized by the Office, on the right to privacy in the digital age, pursuant to Human Rights Council decision 25/117, held on 12 September 2014,³ and on ensuring the use of armed drones in counter-terrorism and military operations in accordance with international law, pursuant to Council resolution 25/22, held on 22 September 2014.⁴

9. The Office promoted a greater integration of a gender perspective into the context of counter-terrorism by contributing to a workshop held on 21 and 22 October 2014 on the theme "Advancing women's roles in countering violent extremism and radicalization that lead to terrorism", organized in Vienna by the Global Counterterrorism Forum and the Organization for Security and Cooperation in Europe, and a panel discussion on the theme "The role of women in countering violent extremism" organized by the United Arab Emirates and the United Nations Entity for Gender Equality and the Empowerment of Women, held on 27 October 2014 within the framework of the open debate of the Security Council on women, peace and security.

B. Activities of the Counter-Terrorism Implementation Task Force

10. The Office is an active member of the Counter-Terrorism Implementation Task Force and promotes the mainstreaming of human rights across the work of the Task Force

² A/HRC/27/37.

³ See A/HRC/28/38.

⁴ A/HRC/28/39.

and its working groups. In 2014, following a process of re-structuring of Task Force working groups, OHCHR co-chaired the Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law While Countering Terrorism, together with the Rule of Law Unit of the Executive Office of the Secretary-General. The Working Group supports the implementation of Pillar IV of the United Nations Global Counter-Terrorism Strategy and the mainstreaming of human rights and the rule of law into the implementation of all pillars of the Global Strategy.

11. Since October 2012, the Working Group, with the support of Denmark, Switzerland and the United States of America, has been implementing a long-term global project on human rights capacity-building for law enforcement officials involved in counter-terrorism that will provide States with training and technical assistance, thereby increasing their knowledge, understanding and implementation of the international human rights framework and the rule of law in preventing, responding to and investigating terrorism threats. The project has included needs-assessment workshops, held in Amman in April 2013, and Ouagadougou, in October 2013. Following the workshops, the Working Group has focused on the development of human rights training modules on the international legal and policy framework, special investigation techniques, countering violent extremism, community-oriented policing, detention, interviewing techniques and the use of force, all with a specific focus on the context of counter-terrorism.

12. The Working Group has progressed with the development of a series of reference guides aimed at providing practical guidance for national action on human rights-compliant counter-terrorism measures. With financial support through the United Nations Counter-Terrorism Centre, reference guides on the stopping and searching of persons and on security infrastructure have been updated.⁵ Other guides, on detention in the context of countering terrorism, conformity of national counter-terrorism legislation with international human rights law and the right to a fair trial and due process in the context of countering terrorism are in process of publication. A guide on the proscription of organizations is also under development.

13. In implementing its workplan for 2015, the Working Group will continue to facilitate information exchange on priority human rights and rule of law concerns, including on examples of good practices in the protection of human rights in the context of counter-terrorism, drawing on experiences at the national and regional levels. It will also assess the support and assistance currently given to Member States to ensure the promotion and protection of human rights in the context of counter-terrorism, identify gaps and weaknesses, and develop proposals for strengthening support for Member States in the protection of human rights in the context of counter-terrorism at the national level.

14. The Office also contributed to the United Nations Counter-Terrorism Centre workshop on the role of the United Nations in addressing conditions conducive to the spread of terrorism in the context of the post-2015 development agenda debate, held in New York on 7 and 8 April 2014. Chairing the session on United Nations cooperation and assistance in the fields of rule of law, human rights and good governance to address the conditions conducive to the spread of terrorism, the Assistant Secretary-General for Human Rights highlighted the significance of the protection of human rights and the rule of law for sustainable development and of addressing the conditions conducive to the spread of terrorism. At the Global Experts Meeting on Building Capacity for Terrorist Designations and Asset Freezing Regimes, held in New York on 13 and 14 May 2014, under the auspices of the Counter-Terrorism Implementation Task Force Working Group on Tackling the

⁵ The guides are available from the Task Force website at www.un.org/en/terrorism/ctitf/wg_protectingrights.shtml.

Financing of Terrorism, OHCHR briefed participants on human rights concerns relating to the listing of persons and organizations and the freezing of assets. OHCHR contributed to the Counter-Terrorism Implementation Task Force /European Union dialogues held on 13 June 2014 in New York and 20 October in Brussels. OHCHR also contributed to the United Nations Victims of Terrorism Support portal, a project of the Task Force Working Group on Supporting and Highlighting Victims of Terrorism.

C. Cooperation with the Counter-Terrorism Committee and its Executive Directorate

15. The Counter-Terrorism Committee and its Executive Directorate continue to take account of relevant human rights concerns in their work programmes focused on the implementation of Security Council resolution 1373 (2001) and 1624 (2005). On 24 October 2013, the Committee, under the chairmanship of Morocco, was briefed by the High Commissioner and discussed the impact of broad and abusive counter-terrorism laws on dissident voices, human rights defenders, journalists, minorities and indigenous peoples. The Committee also held thematic discussions on several issues relevant to resolutions 1373 (2001) and 1624 (2005) all of which had human rights aspects. This included consideration of adoption by Member States of special criminal procedures to investigate and prosecute terrorism-related offences and the human rights safeguards adopted in this regard, such as sunset clauses, the independent review of counter-terrorism legislation and consultations with civil society on draft counter-terrorism legislation.

16. Under the chairmanship of Lithuania since January 2014, the Counter-Terrorism Committee has held discussions on the use of the Internet for terrorist purposes and on respect for freedom of expression and the right to privacy, as well as a discussion on the need for counter-terrorism laws and policies not to unduly hinder humanitarian access to populations in need. The Committee also held an open special meeting on kidnapping for ransom and terrorist hostage-taking in which a member of the Human Rights Council Advisory Committee participated. In its revised process for assessing implementation of Security Council resolutions 1373 (2001) and 1624 (2014), the Committee routinely discusses with Member States a variety of human rights issues. In addition, the Committee recently conducted a preliminary analysis of gaps in the capacity of Member States to implement resolutions 1373 (2001) and 1624 (2005) that may hinder the ability of States to stem the flow of foreign terrorist fighters, as requested by the Council in its resolution 2178 (2014). This included gaps in compliance with human rights obligations and the rule of law, in particular those relating to the lack of clarity or precision in counter-terrorism laws, failure to ensure fair treatment and due process for persons accused of terrorist offences, and issues relating to compliance with international refugee law.

17. In accordance with General Assembly resolution 68/178, the Counter-Terrorism Committee Executive Directorate continued to liaise with OHCHR, the Special Rapporteur on the promotion and protection of human rights while countering terrorism and other human rights mechanisms and mandate holders, including in relation to the preparation of and follow-up to country visits and the facilitation of technical assistance. The Executive Director of the Executive Directorate met both with my predecessor and me and the Special Rapporteur on the promotion and protection of human rights while countering terrorism to discuss issues of mutual interest and concern. In October 2013, OHCHR human rights experts participated in a workshop in Islamabad convened by the Executive Directorate for South Asian police officers, prosecutors and judges on enhancing domestic and international cooperation in counter-terrorism investigations, and in December 2013, a workshop in Tunis convened by the Executive Directorate for prosecutors on the challenges of bringing terrorists acting alone or in small cells to justice. In May 2014, the Office also

contributed to a workshop in Nairobi, held pursuant to Security Council resolution 1624 (2005), on countering incitement to terrorism and enhancing cultural dialogue. The Executive Directorate continued its dialogue on relevant human rights issues with regional and subregional organizations, as well as with national and international civil society organizations. It also continued its active contribution to the Counter-Terrorism Implementation Task Force Working Group on Protecting Human Rights and the Rule of Law while Countering Terrorism, including by means of contributions to knowledge products issued by the Working Group, as well as to the design and implementation of capacity-building and technical assistance initiatives undertaken by the Working Group.

III. Issues of human rights concern

18. Events in recent months have highlighted the immense, persistent challenges faced by States in preventing acts of violence and safeguarding the security of individuals within their jurisdiction. At its open debate on terrorism in November 2014, the Security Council emphasized the expanding threat of terrorism due to “global recruitment networks, the spread of violent extremist ideologies that can be conducive to terrorism, ease of movement of terrorists, including foreign terrorist fighters, and access to significant funding streams.”⁶ During the open debate of the Council on international cooperation and violent extremism on 19 November 2014, the Secretary-General highlighted the fact that technology and globalization had made it easier for groups spurred by violent extremist ideologies to cause harm, exploit narratives and profit from illicit financing, while terrorism, drug trafficking and transnational crime grew in intensity and fed off each other.

19. The measures taken by a number of States in the wake of recent security threats have continued to raise serious human rights concerns. States have rushed to adopt emergency legislation, modify detention policies, revise criminal justice rules and practices and impose limitations to the freedoms of expression, peaceful assembly and movement. Broad-reaching surveillance practices have continued to infringe on individuals’ human rights, in particular the right to privacy, owing to a lack of adequate national legislation and enforcement, weak procedural safeguards and ineffective oversight that all contribute to a climate of impunity. Reports show that surveillance practices have had a chilling effect on freedom of expression, particularly affecting journalists whose sources are reportedly less willing to be in contact with the press out of fear that any interaction may leave a digital mark that could be used against them.

20. While States have a duty to take measures to protect populations from violence and insecurity and to deliver justice, such measures must be anchored in respect for international human rights law. Experience at the national level has demonstrated that protecting human rights and ensuring respect for the rule of law contribute to countering terrorism in particular by creating a climate of trust between the State and those under its jurisdiction, and supporting resilience of communities to threats of violent radicalism. From a criminal justice perspective, ensuring that counter-terrorism legislation and policy are grounded in human rights also helps to promote the prosecution and conviction in accordance with legally established procedures of individuals engaged in acts of terrorism. This also encourages legal consistency between national jurisdictions, thereby facilitating international cooperation. Conversely, compromising on human rights has proven corrosive to the rule of law and undermines the effectiveness of any counter-terrorism measure.

⁶ See S/PRST/2014/23.

A. Legislative measures taken by States

21. Some States have enacted broadly formulated national counter-terrorism legislation containing a definition of terrorism that lacks precision and allows for arbitrary or discriminatory enforcement by authorities, or otherwise undermines the enjoyment of human rights. An imprecise definition of a crime can lead to the criminalization of innocent conduct and to the broadening of proscribed conduct in judicial interpretation. Legislation of this type has led to the infringement of the rights to liberty and security of the person and the freedom of expression, association and assembly, and to violations of due process-related rights, including the right to a fair trial. Legislation also has been misused to curb otherwise legitimate activities and to target journalists, human rights defenders, minority groups, members of the political opposition or other individuals, some of whom have been arbitrarily detained and subjected to torture or cruel, inhuman or degrading treatment or punishment while in custody.⁷ These concerns are equally relevant to measures taken by States to curb the flow of foreign fighters (see paras. 49-50 below).

22. Legislation in some States has equated legitimate expressions of protest and opposition to the Government with terrorism, thereby effectively criminalizing freedom of expression.⁸ For example, one jurisdiction has adopted legislation that defines terrorism to include such acts as “insulting the reputation of the State or its position”, which could result in the criminalization of any discourse critical of the Government or its policies. In some jurisdictions, authorities have used broadly worded counter-terrorism laws to charge journalists and members of the political opposition with, *inter alia*, “encouraging terrorism”, thereby imposing an unjustified limitation on their right to freedom of expression. In their efforts to counter incitement to terrorism, States parties to the International Covenant on Civil and Political Rights should ensure that counter terrorism measures are compatible with article 19, paragraph 3 of the Covenant. In its general comment No. 34, the Human Rights Committee specified that offences such as the “encouragement of terrorism”, and “extremist activity” or “praising”, “glorifying” or “justifying” terrorism should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.⁹

23. States have resorted to detaining persons accused of terrorism without respect for the safeguards that are due under international law to all persons deprived of their liberty. Some have expanded the power of security forces to arrest “suspected criminals” without warrant. In some jurisdictions, legislation allows for preventive detention without appropriate safeguards, including by extending the permissible period for pre-charge detention of persons suspected of terrorist activity and the length of time a person may be held without judicial authorization or review of the reasons for detention. As a result, individuals accused of terrorist activity have been held for prolonged periods without charge or trial, in some cases without proper access to legal counsel or recourse to independent judicial review.¹⁰ Such practices violate the rights to liberty and to be free from arbitrary detention. Recently adopted legislation in one jurisdiction allows for the retrospective authorization of

⁷ See OHCHR, “UN experts urge Ethiopia to stop using anti-terrorism legislation to curb human rights”, press release, 18 September 2014.

⁸ See OHCHR, “Statement by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association at the conclusion of his visit to the Republic of Rwanda”, press release, 27 January 2014.

⁹ See CCPR/C/GC/34.

¹⁰ See UN News Centre, “Independent UN human rights expert urges Qatar to reform its justice system”, 14 January 2014; and The Malaysian Bar, “Press Release: Amendments to the Prevention of Crime Act 1959 are Regressive and a Blow to the Rule of Law in Malaysia”, 3 October 2013.

arrests and administrative detention, secret and undisclosed detention and, in certain cases, the non-disclosure of grounds for detention. Not only are such measures inconsistent with international human rights standards, they also significantly increase the risk of torture and other ill-treatment and preclude accountability where such violations are perpetrated. In its general comment No.35, the Human Rights Committee highlighted the absolute nature of the prohibition of arbitrary detention reflected in article 9 of the International Covenant on Civil and Political Rights, pointing out that administrative detention raises a severe risk of arbitrary deprivation of liberty and should only be employed in exceptional circumstances, when a present, direct and imperative threat justifies its use, and should be limited in time. Habeas corpus is a non-derogable guarantee that must be complied with in all circumstances.¹¹

24. In some States, the powers of intelligence services have been broadened to resemble those of the police, conferring upon them the powers of arrest, detention, search and seizure.¹² In certain cases, intelligence services have been afforded powers to make arrests without a warrant and to detain, with no explicit guarantee of basic due process rights, such as the right to counsel.¹³ Concerns have been raised at legislation governing the functioning of intelligence services that does not provide for sufficient control and oversight, thereby creating an accountability gap.¹⁴ The functioning of intelligence services must be subject to adequate safeguards to protect against human rights violations and to ensure accountability when violations do occur.

25. The Office has highlighted ongoing concerns regarding the potential for arbitrary or unlawful interference in the right to privacy in the context of domestic and extraterritorial surveillance.¹⁵ Concerns were raised in one State where recently adopted legislation has broadened surveillance powers by allowing for surveillance of multiple computers, including whole networks, under a single warrant; established harsher penalties for the disclosure of intelligence material; provided intelligence agents with legal immunity; and allowed for greater sharing of personal information between agencies, without either adequate safeguards or oversight, or recourse for individuals in cases where personal information has been subsequently misused or released without authorization.¹⁶ Draft legislation under consideration in another jurisdiction would allow for the outsourcing of surveillance on nationals abroad to allied foreign intelligence services, in spite of a federal court decision admonishing the intelligence service for such practices.¹⁷ Another State recently adopted emergency surveillance legislation that allows the Government to require telephone companies and Internet providers in the country and abroad to collect and store

¹¹ CCPR/C/GC/35.

¹² See Parliament of Australia, Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 17 October 2014 (available from www.aph.gov.au).

¹³ See Elizabeth LaForgia, “South Sudan lawmakers pass controversial security bill”, *Jurist*, 9 October 2014.

¹⁴ See for example Office of the Privacy Commissioner of Canada, Special Report to Parliament, 28 January 2014.

¹⁵ See A/HRC/27/37.

¹⁶ See Parliament of Australia, National Security Legislation Amendment Bill (No.1) 2014, available from www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd019. See also Australian Human Rights Commission, Submission to the Parliamentary Joint Committee on Intelligence and Security, Inquiry into the National Security Legislation Amendment Bill (No. 1) 2014, 21 August 2014.

¹⁷ See Parliament of Canada, House of Commons, Bill C-44, An Act to amend the Canadian Security Intelligence Service Act and other Acts, 27 October 2014, and Federal Court Decisions, X (Re), CSIS-30-08, 22 November 2013.

metadata of communications for a period of up to 12 months. Concerns have been expressed that such blanket data retention may allow for the monitoring of communications of persons, even those outside of the State's jurisdiction and those not suspected of any illegal activity.¹⁸ These developments all raise serious concerns about their compliance with the right of individuals to be protected by law against arbitrary or unlawful interference in their privacy.

26. States have adopted national legislation to implement targeted sanctions against individuals and organizations. While such measures can serve as an important tool for the prevention of terrorist acts, their serious potential repercussions on the human rights of those affected make efforts to ensure the right to due process of individuals affected essential.¹⁹ In some cases, such measures have given rise to the arbitrary banning of organizations based on ill-defined or vague legislation, sometimes with the objective of banning political dissent or otherwise peaceful means of expression. National legislation that fails to define "membership" or to require a link between the membership and the prohibited status or activity would be contrary to the principle of legality, in particular where such membership leads to targeted sanctions or criminal penalties, such as imprisonment. Any sanctions imposed by proscription should be a result of a clear indication, based on reasonable grounds, that the individual or entity has knowingly carried out, participated in or facilitated a terrorist act.²⁰

27. The adoption of exceptional counter-terrorism legislation may be particularly problematic when it is not a stand-alone piece of legislation but rather an amendment to existing criminal laws and procedures. Experience has shown that counter-terrorism measures introduced in moments of crisis or extreme political stress and which are intended as short-term measures can readily become entrenched with the passage of time and invoked routinely by law enforcement authorities.²¹ Much of the emergency legislation enacted by States in the wake of the terrorist attacks of 11 September 2001, for example, is still in force today. A sense of political urgency also may obstruct a proper *a priori* scrutiny of draft laws, and has led to the adoption of legislation that included imprecise definitions in counter-terrorism laws, opening the door for abuses in implementation.

28. I fully endorse the calls made in reports of the previous High Commissioner and underscore the importance of ensuring that counter-terrorism laws are consistent with human rights standards and comply with the principle of legality. Laws must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and must be made accessible to the public. Laws must not confer unfettered discretion but rather provide sufficient guidance to those charged with their application to enable them to ascertain the sort of conduct that falls within their scope.

29. Regular review of the compliance of counter-terrorism laws and practices with human rights standards is critical in order to ensure that counter-terrorism measures are specific, necessary, effective and proportionate. Good practices highlighted by the High Commissioner in previous reports include a review of counter-terrorism legislation before

¹⁸ See legislation.gov.uk, Data Retention and Investigatory Powers Act 2014 and House of Commons, Oral Answers to Questions, 10 July 2014, Communications Data and Interception (www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140710/debtext/140710-0001.htm#14071054000003).

¹⁹ See A/HRC/16/50 and A/HRC/22/26, and relevant reports of the Special Rapporteur on the promotion and protection of human rights while countering terrorism.

²⁰ See for example A/HRC/16/50 and 51.

²¹ See for example International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva, ICJ, 2009).

adoption, time-limited laws, independent oversight bodies for law enforcement and intelligence agencies, and periodic reviews of sanction measures. The validity of any exceptional measure should be restricted in time through the inclusion of a sunset clause. The compliance of such laws with human rights standards must also be subject to regular review.

30. I welcome the dialogue held at national level that accompanies the legislative process in some States, and urge all States to ensure broad and inclusive consultation with all relevant stakeholders. The experience of previous years demonstrates the benefits of the review of draft legislation by relevant domestic bodies before adoption, in particular to ensure its consistency with relevant international human rights standards.

B. Foreign fighters

31. Although the phenomenon of foreign fighters²² is not new, a reported recent increase in their numbers and in the range of countries from which they reportedly originate, the groups they join, their motivations and subsequent trajectories have highlighted the complex nature of this issue and raised concerns across the globe. While reported facts and figures vary widely, the Security Council has expressed concern at reports that more than 15,000 foreign terrorist fighters from more than 80 countries have travelled to join or fight for terrorist entities associated with Al-Qaida, including in the Syrian Arab Republic, Iraq, Somalia and Yemen, as well as several countries in the Maghreb and Sahel regions.²³ Other recent reports have highlighted instances of individuals who have travelled to join forces in fighting against such entities, for example alongside the Kurdish People's Protection Units).

32. The brutality of the criminal acts committed in the Syrian Arab Republic and in Iraq by the *takfiri*, also known as the Islamic State in Iraq and the Levant (ISIL) or Daesh, which have been bolstered through the support of foreign fighters, has given particular impetus to States to take measures to inhibit individuals from travelling for purposes of joining their ranks and to prevent the escalation of violence. The Independent International Commission of Inquiry on the Syrian Arab Republic has noted the increase in experienced and ideologically motivated foreign fighters attracted by ISIL since it proclaimed itself an Islamic caliphate. According to the Commission, while thousands of Syrians have been recruited to the ranks of ISIL its leadership structure is largely dominated by foreign fighters.²⁴

33. States have taken a wide range of administrative and legislative measures to deter individuals who have or seek to become foreign fighters. These have involved blocking the validity of travel documents, revoking citizenship, freezing financial assets and the prosecution of individuals for acts ranging from recruitment and incitement to the planning of terrorist acts. The Security Council has taken decisive action through a number of resolutions adopted under Chapter VII of the Charter of the United Nations. In its resolution 2170 (2014), the Council condemned in the strongest terms the gross, systematic and

²² The term "foreign fighters" generally refers to individuals who leave their country of origin or habitual residence, motivated primarily by ideology or religion, and become involved in violence as part of an insurgency or non-State armed group in an armed conflict (even though they may also be motivated by payment). See Geneva Academy of International Humanitarian Law and Human Rights, *Foreign Fighters under International Law*, Academy Briefing No.7, October 2014.

²³ S/PRST/2014/23. See also S/2014/770, para. 31.

²⁴ "Rule of Terror: Living under ISIS in Syria", 14 November 2014 (available from www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx), para. 13.

widespread abuse of human rights by ISIL and the Al-Nusrah Front, demanded that they and all other entities associated with Al-Qaida cease all violence and terrorist acts, and immediately disarm and disband. It also stressed the need to bring perpetrators, including foreign terrorist fighters, to justice. The Council called upon Member States to take national measures to suppress the flow of fighters to join the groups, reiterating the obligations deriving from previous counter-terrorism resolutions to prevent the movement of terrorists and their supply with arms or financial support.

34. In its resolution 2178 (2014), the Security Council condemned violent extremism and decided that Member States should, consistent with international law, prevent 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 of, or participation in terrorist acts. Expressing concern at the establishment of international terrorist networks, the Council underscored the particular and urgent need to implement the resolution with respect to foreign terrorist fighters associated with ISIL, the Al-Nusrah Front and other cells, affiliates, splinter groups or derivatives of Al-Qaida, as designated by the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011).

35. Importantly, in its resolution 2178 (2014), the Security Council also reaffirms the obligation of all Member States to comply with international human rights law when fighting terrorism, underscoring that, at a practical level, respect for human rights and the rule of law are essential to a successful counter-terrorism effort. It noted that a failure to comply with human rights and other international obligations, including under the Charter, contributed to increased radicalization and fostered a sense of impunity.

36. In addressing the flow of foreign fighters, it is critical that States integrate compliance with their obligations under international human rights law by stepping up measures to address the conditions conducive to terrorism and to counter violent extremism; by combating impunity and ensuring accountability for any gross violation of international human rights and serious violation of international humanitarian law; and by ensuring that any measures they take in their efforts to stem the flow of foreign fighters and prevent the commission of criminal acts comply with their obligations under international human rights law.

1. Addressing the conditions conducive to terrorism and countering violent extremism

37. Terrorism continues to thrive in environments where State-sponsored violence and corruption continues with impunity, in particular where tensions among ethnic, religious and linguistic groups persist and grievances between social groups fester, and where a lack of respect for the rule of law allows a climate of injustice to take root. Factors that may contribute to such conditions include violations related to prolonged, unresolved conflicts; ethnic, national and religious discrimination; political exclusion and socioeconomic marginalization; and a climate of impunity. These may all contribute to laying the groundwork for hatred and radicalize individuals who may go on to commit violent acts of terrorism. As the Secretary-General highlighted during the open debate of the Security Council on international cooperation and violent extremism on 19 November 2014, problems are further exacerbated when counter-terrorism efforts are not sufficiently targeted and entire communities feel victimized by human rights violations committed in the name of counter-terrorism.

38. In my briefing to the Security Council on the situation in Iraq on 18 November 2014, I emphasized that national and international strategies to counter ISIL have so far concentrated on a security approach, without sufficient attention to addressing these broader conditions and countering extremist ideologies. As the Council highlighted in its resolution 2178 (2014), States should engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that

can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious, cultural and education leaders, and all other concerned groups of civil society, and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion. This requires a sustained effort to foster engagement between communities and authorities in order to build trust, support local ownership of initiatives, and to develop positive counter-narratives.

39. Countering extremist discourse, promoting dialogue, protecting human rights and enhancing social cohesion may be the most effective means for countering the advocacy of extremism. Civil society actors – including religious leaders, faith-based organizations, youth groups and women’s organizations – have an important role to play in this regard.²⁵ A dynamic, diverse and independent civil society is a key element in securing sustainable human rights protection, and can help to address ideologies at the grass-roots level. The measures taken by States to counter terrorism have, however, in many places limited the ability of civil society organizations to carry out their important work, and in some cases have targeted specific ethnic or religious organizations for surveillance purposes. The efforts made by States to counter terrorism should include 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.

2. Combating impunity and ensuring accountability

40. International human rights law, which continues to apply to situations of armed conflict, imposes direct responsibility on the State in whose territory and under whose jurisdiction violations and abuses may be committed. In particular, the State has the obligation to ensure that action is taken so that violations and abuses are prevented and/or not repeated, to promptly, thoroughly, independently and impartially investigate allegations of such violations and abuses, to punish perpetrators and to ensure an adequate remedy and redress are provided to victims.

41. Members of non-State armed groups such as ISIL, including foreign fighters, are at a minimum bound by peremptory norms of international law, including prohibitions on the arbitrary deprivation of life, genocide, slavery, racial discrimination, torture and other cruel, inhuman or degrading treatment, the taking of hostages, imposing collective punishment and the arbitrary deprivation of liberty. In addition, non-State armed groups that exercise effective control over territory, such as ISIL, are increasingly considered to be bound by international human rights obligations in relation to all people within that territory. In any event, acts such as murder, torture, rape and other forms of sexual violence, or enforced disappearance, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, constitute a crime against humanity and give rise to individual criminal responsibility.

42. In situations of armed conflict, the members of ISIL, including foreign fighters, are also obliged to respect applicable rules of international humanitarian law. At a minimum, article 3 common to the four Geneva Conventions of 1949 establishes the minimum standards that all parties involved in a non-international armed conflict should observe concerning the treatment and protection of civilians, those no longer actively participating in the hostilities, and civilian objects. Customary international humanitarian law requires that the parties to the conflict take all measures to minimize the impact of violence on civilians, respect the principles of distinction and proportionality when carrying out military operations and ensure that civilians can leave areas affected by violence in safety and

²⁵ See also A/HRC/22/17/Add.4, annex, appendix, para. 36, and A/HRC/FMI/2014/3, para. 31.

dignity. Serious violations of international humanitarian law may amount to war crimes, engaging the individual criminal responsibility of those responsible.

43. As I highlighted in my briefing to the Security Council on 18 November 2014, evidence exists indicating that members of ISIL are likely responsible for war crimes and crimes against humanity, subject to determination by a competent court of law. It is also possible that, particularly in respect of the Yazidis, some of the offences constitutive of the crime of genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, have been perpetrated by individuals within the ISIL leadership. Deliberate and calculated abuses, violations and crimes committed by ISIL have been documented extensively by the Independent International Commission of Inquiry on the Syrian Arab Republic and by the United Nations Assistance Mission for Iraq and OHCHR.²⁶ These include murder and other inhumane acts, enslavement, rape, sexual slavery and other forms of sexual violence, forcible displacement, enforced disappearance and torture committed as part of a widespread and systematic attack against the civilian population in a number of governorates.

44. Accountability for all gross violations of international human rights law and serious violations of international humanitarian law through effective investigation and prosecution of those responsible is essential to ensure justice, to provide redress to victims and to prevent further violations. The responsibility for accountability falls primarily on States, which are obliged to ensure investigations and, where the evidence warrants, prosecutions of such violations, meeting minimum international standards of justice. Domestic courts in Iraq and the Syrian Arab Republic have jurisdiction over crimes committed by nationals or foreign fighters in those territories and should, whenever possible, exercise such jurisdiction. The countries of nationality of these foreign fighters should also effectively investigate and prosecute those responsible whenever they can do so.

45. In certain circumstances, where a State is unwilling or unable to investigate or prosecute those responsible for serious violations of international human rights and international humanitarian law constitutive of international crimes, the jurisdiction of the International Criminal Court may be triggered. I have made numerous calls for a referral of the situation in the Syrian Arab Republic to the Court, following findings by the Commission of Inquiry on the Syrian Arab Republic and OHCHR that international crimes have been committed on an increasingly large scale. I also have called upon Iraq to consider accession to the Rome Statute of the Court and, as an immediate step, to accept the exercise of the Court's jurisdiction with respect to the current situation. I would also hope that the Court can be enabled to exercise its jurisdiction over those foreign fighters implicated in international crimes who are nationals of States party to the court. Every measure should be taken to ensure that individuals responsible for serious violations of international law are held to account.

3. Human rights-compliant responses

46. While Security Council resolution 2178 (2014) includes important provisions for ensuring compliance with international human rights law, concerns have been raised over the broad nature of certain provisions and the potential this creates for the implementation of measures at the national level that may result in violations of human rights. The significant shortcomings in the compliance of many States with their obligations under international human rights law in the context of counter-terrorism are disturbing and provided a backdrop to these concerns. For example, the reference made by the Council in

²⁶ "Rule of Terror" (see footnote 24) and UNAMI/OHCHR, Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July – 10 September 2014.

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.

47. 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.

48. Resolution 2178 (2014) is, however, explicit in requiring States to ensure compliance with international law, including human rights law, in its implementation. States must therefore ensure that any legislation adopted on the basis of the resolution is in line with the principle of legality, as enshrined in article 15 of the International Covenant on Civil and Political Rights. This requires that the imposition of criminal liability be limited to clear and precise provisions so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation, which would unduly broaden the scope of the proscribed conduct. Overly vague or broad definitions of terrorism would not meet this requirement and may be used by States as a means to cover peaceful acts, to discriminate against particular individuals or groups or to limit any sort of political opposition.

49. 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;²⁷ 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. While the resolution does not explicitly reflect a minimum age for liability of individuals it seeks to target, States also must take every measure to ensure respect for the rights of individuals under the age of 18 years, and ensure that any measure taken to counter the flow of foreign fighters is compliant with all international legal obligations, including human rights.

50. A number of States have taken measures to curtail the movement of foreign fighters. These include travel bans, the withdrawal of passports and the denial of citizenship, all of which have an impact on the right to freedom of movement, as enshrined in article 12 of the International Covenant on Civil and Political Rights. The right to freedom of movement includes the right to enter one’s own country and, as explained by the Human Rights Committee in its general comment No. 27, 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.²⁸ 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 further specified that there were few, if any, circumstances in which the deprivation of the right to enter one’s own country could be

²⁷ See for example Human Rights Committee general comment No. 34 (CCPR/C/GC/34), para. 46, and A/HRC/22/17Add.4, annex, appendix.

²⁸ CCPR/C/21/Rev.1/Add.9, para. 20.

reasonable.²⁹ Measures such as travel bans, the revocation of passports and the denial of citizenship also raise important due process concerns, where decisions are taken following secretive proceedings, in absentia or on the basis of vaguely defined criteria without adequate safeguards to prevent statelessness.

51. International human rights law includes the right of everyone to a nationality, although there is no right to a specific nationality. 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.³⁰ These conditions also 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 the 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.

52. States should ensure that adequate procedural standards are in place to guarantee that nationality regulations are not applied arbitrarily and relevant safeguards against statelessness are implemented effectively. In particular, decisions relating to nationality should be “issued in writing and open to effective administrative or judicial review”.³¹ International law thus obliges States to provide for the meaningful review of nationality decisions, including on substantive issues.³²

53. In its resolution 2178 (2014), the Security Council also called upon States to require airlines to provide advance passenger information to the appropriate national authorities in order to detect the departure from their territories by, or attempted entry into or transit through their territories, of individuals identified as falling within the scope of the resolution. Such measures raise 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. States must ensure that any measure that interferes with the right to privacy is both necessary and proportionate to the specific risk being addressed, that procedural safeguards and effective, independent oversight is in place to ensure to prevent against discriminatory measures and/or the abusive use of personal data, and that redress is provided for in cases of abuse.

IV. Conclusions and recommendations

54. **While States have a duty to take measures to protect populations from violence and insecurity and to deliver justice, such measures must be anchored in respect for international human rights law. Experience at the national level has demonstrated that protecting human rights and ensuring respect for the rule of law contribute to countering terrorism, in particular by creating a climate of trust between the State and those under its jurisdiction, and by supporting the resilience of communities to threats of violent radicalism. Conversely, compromising on human rights has proven corrosive to the rule of law and conducive to a climate of impunity, and may**

²⁹ Ibid., para. 21.

³⁰ See A/HRC/13/34, A/HRC/19/43 and A/HRC/25/28.

³¹ A/HRC/13/34, para. 43.

³² Ibid., para. 44.

undermine the effectiveness of any counter-terrorism measure, and thereby contribute to greater radicalization.

55. I urge States to take measures to ensure that counter-terrorism laws and implementing measures are consistent with international human rights standards and compliant with the principle of legality. A regular review of the compliance of counter-terrorism laws and practices with human rights standards is critical to ensure that these measures are specific, necessary, effective and proportionate. The validity of any exceptional measure should be restricted in time through the inclusion of a sunset clause. I encourage all States, as part of the legislative process, to ensure broad and inclusive consultations with all relevant stakeholders and a review of draft counter-terrorism legislation by relevant domestic bodies before adoption to ensure that legislation is coherent with relevant international human rights standards.

56. I also urge 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:

(a) 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;

(b) To combat impunity and ensure accountability for all gross violations of international human rights law and of international humanitarian law through the prompt, thorough, independent and effective investigation and prosecution of those responsible;

(c) To ensure that any measures taken in an effort to stem the flow of foreign fighters and to prevent the commission of criminal acts comply with their obligations under international human rights law.

57. Throughout its activities in support of the implementation of the Global Counter-Terrorism Strategy, the Counter-Terrorism Implementation Task Force and its entities should intensify efforts to promote respect for human rights and the rule of law as the fundamental basis of the fight against terrorism. This should include the promotion of compliance with human rights as an integral part of assistance to States in the development and implementation of counter-terrorism-related legislation and policy. OHCHR stands ready to assist Member States in the development and implementation of human rights-compliant legislation and implementation measures, including in follow-up to Security Council resolution 2178 (2014).
