HUMAN RIGHTS WATCH

In the Name of Security

Counterterrorism Laws Worldwide since September 11

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Summary

During a protest in Turkey in 2010, two students unfurled a banner that read, "We want free education, we will get it." For this act and participation in other non-violent political protests, the students were convicted of membership in an armed group and sentenced in 2012 to eight years and five months in prison. In recent years, Turkish authorities have prosecuted hundreds of activists for participating in such protests.

In the United Kingdom from 2007 to 2011, police stopped and searched more than half a million people—including railway enthusiasts, children, and photographers—without reasonable suspicion of wrongdoing. Most of those searched were ethnic minorities. None was found guilty of a terrorism-related offense.

In Ethiopia, a federal court in January 2012 convicted three local journalists and two political opposition members of conspiracy to commit terrorist acts and participation in a terrorist organization. The evidence consisted primarily of online articles critical of the government and telephone discussions regarding peaceful protest actions. The authorities denied all five defendants access to counsel during three months in pretrial detention and failed to investigate allegations that two of the journalists had been tortured.

These actions violated well-established rights under international law to due process, free expression, or privacy. Yet in all three countries, authorities carried out the searches, arrests, and prosecutions using domestic counterterrorism legislation passed in the wake of the September 11, 2001 attacks on the United States.

More than 140 governments have passed counterterrorism legislation since September 11. Indeed, many countries have passed multiple counterterrorism laws or revised old legislation, expanding their legal arsenal over time. The impetus for the lawmaking has varied: in some cases it has been major attacks targeting the country; in many others, it has been a response to United Nations Security Council resolutions or pressure from countries such as the United States that suffered or feared attacks.

Mass attacks on the general population have caused immense harm. The September 11 attacks killed close to 3,000 people. In Pakistan alone, more than 10 times that number

have been killed in bombings and other attacks on civilians in the decade since. As the UN Security Council noted in its preamble to Resolution 1456 in 2003, "any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians." In keeping with their duty to ensure respect for the right to life, states have a responsibility to protect all individuals within their jurisdiction from such attacks.

Yet these post-September 11 laws, when viewed as a whole, represent a broad and dangerous expansion of government powers to investigate, arrest, detain, and prosecute individuals at the expense of due process, judicial oversight, and public transparency. Such laws merit close attention, not only because many of them restrict or violate the rights of suspects, but also because they can be and have been used to stifle peaceful political dissent or to target particular religious, ethnic, or social groups.

Of particular concern is the tendency of these laws to cover a wide range of conduct far beyond what is generally understood as terrorist. More often than not, the laws define terrorism using broad and open-ended language. While governments have publicly defended the exceptional powers available to police and other state authorities under these laws by referencing the threat of terrorism, some of the conduct they cover may have little connection to such potential attacks.

Many of the counterterrorism laws also contain changes to procedural rules—which are designed to ensure that the justice system provides due process—that jeopardize basic human rights and fair trial guarantees. Some changes enhance the ability of law enforcement officials to act without the authorization of a judge or any other external authority. Others grant authorizing power to prosecutors, or other members of the executive branch, who may have a particular stake in the outcome of police investigations. These procedural changes not only increase the likelihood of rights violations, including torture and ill-treatment, but also decrease the likelihood that those responsible will be discovered and punished.

At least 51 countries had counterterrorism laws prior to the September 11 attacks. In the ensuring 11 years, Human Rights Watch has found, more than 140 countries enacted or revised one or more counterterrorism laws, 130 of which we examined for this report.[1]

In the Name of Security offers a detailed breakdown of eight elements common to most post–September 11 counterterrorism laws that raise human rights concerns, as well as a discussion of where such laws diverge. The eight elements are:

1) definitions of terrorism and terrorist acts;
2) designations of terrorist organizations and banning membership in them;
3) restrictions on funding and other material support to terrorism and terrorist organizations;
4) limitations on expression or assembly that ostensibly encourage, incite, justify, or lend support to terrorism;
5) expansions of police powers that undermine basic rights, including powers to conduct warrantless arrests, searches, surveillance, and property seizures, and to detain suspects incommunicado and without charge; as well as restrictions on challenging wrongful detention or seeking accountability for police abuses;
6) creation of special courts and modifications of trial procedures (including evidentiary rules) to favor the prosecution by limiting defendants' due process rights;
7) imposition of the death penalty for terrorism-related offenses; and
8) creation of administrative detention and "control order" mechanisms.

While this list covers most of the elements of greatest concern from a human rights perspective, it is not comprehensive; counterterrorism laws also commonly address immigration restrictions—addressed only briefly in this report—as well as money-laundering, bank secrecy, and other issues.

Moreover, the overly broad legislation documented in this report represents only one aspect of abuses committed in the name of counterterrorism. Many countries commit human rights violations against terrorism suspects—such as torture, ill-treatment, and

[1] These figures include countries that have enacted laws exclusively on terrorist financing and countries that have revised existing criminal codes to incorporate counterterrorism provisions.

enforced disappearance—without making any effort to legitimize them through law. In other cases, states insist that emergency or other special powers, often issued through executive fiat, apply to terrorist threats.

The United States, for example, responded to the September 11 attacks by adopting a war paradigm for what the administration of President George W. Bush called the "war on terror." Under this model, the United States sought to bypass criminal law and human rights safeguards for alleged terrorists by asserting that it was in a global armed conflict with al Qaeda and affiliated groups; that such laws were inapplicable; and that if any law applied to counterterrorism efforts, it was the laws of war for capture, detention, and attack. Under the Obama administration, both the rhetoric and practice have changed—the illegality of torture is recognized, as are other human rights protections—yet US counterterrorism actions, such as targeted killings outside of clear war zones, remain based on this war paradigm.

Other countries have long sought to discredit rebel forces by calling them "terrorists." However, since September 11, several governments have sought to redefine longstanding armed conflicts as part of the "global war on terror" for internal political purposes or to gain international support. Russia, for example, repackaged the conflict in Chechnya from a separatist conflict to a struggle against international terrorists. Uzbekistan did the same to justify its conviction of Muslims for religious activities it deemed at variance with state ideology.

There have been positive developments in recent years. As a result of court challenges or public pressure, some countries have rolled back especially problematic provisions in their counterterrorism laws or resisted moves that would strengthen them at the expense of rights.

The United Kingdom in 2011 allowed the period in which a terrorism suspect could be detained without charge to revert from 28 days to 14 days—the level it had been prior to the London Underground bombings of July 2005. Norway in 2011 rebuffed calls for its definition of terrorism to be broadened following an attack by a xenophobic extremist that killed 77 people; the country's prime minister vowed instead to respond with "more openness, more democracy and more humanity."

But in many cases the reforms have been grossly insufficient. The United Kingdom's 14-day pre-charge detention period still exceeds international standards for being promptly informed of any criminal charges and remains double the one-week maximum that the government permitted prior to 2005. Malaysia's Security Offences (Special Measures) Bill of 2012, which authorities touted as a replacement to the draconian Internal Security Act of 1960 that allowed indefinite detention without trial, still allows pre-charge detention of 28 days.

The UN Security Council now directs states to ensure that counterterrorism measures comply with international human rights law, but it has not reformed most terrorism-related mandates that experts—including the UN special rapporteur on human rights and counterterrorism—consider a threat to fundamental rights. Each year, more countries enact counterterrorism legislation with sweeping powers and dangerously broad language.

The Security Council should ensure that all resolutions concerning the obligations of states to combat terrorism comply with international human rights law, refugee law, and international humanitarian law. The Security Council and other UN bodies should also play a leading role in helping states to reform existing counterterrorism laws; release all persons arbitrarily arrested under these laws for exercising their rights to freedom of expression, association, or assembly; and provide fair retrials to suspects unfairly prosecuted under such laws.

Such measures are necessary not only to bring states into compliance with international law; they also help fulfill states' broader duty to protect those in their jurisdiction. As the UN Global Counter-Terrorism Strategy of 2006 notes, violations of human rights are among the conditions "conducive to the spread of terrorism," even though they can never excuse or justify terrorist acts.

Recommendations

To National Governments

- Establish an expert commission to review domestic counterterrorism legislation to ensure that the definitions of terrorist acts are narrowly crafted, covering only conduct that is "genuinely of a terrorist nature," as set out by the UN special rapporteur on human rights and counterterrorism.
- Direct the expert commission to assess whether existing counterterrorism legislation is consistent with international human rights standards, with particular attention to whether the laws:
    - empower the police and other security forces at the expense of human rights protections;
    - hinder or prevent the judiciary from safeguarding the rights of detainees;
    - facilitate the use of torture or other ill-treatment;
    - deny basic trial rights;
    - expand reliance on detention without charge;
    - violate rights to basic liberties, such as freedom of expression; or
    - impose the death penalty.
- Provide retrials in fair and impartial proceedings to all suspects who received unfair trials as a result of counterterrorism laws that failed to meet international human rights standards.
- Release all persons who were arbitrarily arrested under counterterrorism laws for exercising their rights to freedom of expression, association, or peaceful assembly.
- Provide redress—including financial compensation, rehabilitation, and formal acceptance of state responsibility—to victims of abusive counterterrorism measures.
- When drafting counterterrorism legislation or revising existing legislation, solicit input from a wide range of civil society groups, including international organizations with relevant expertise.

To United Nations Bodies

To the Security Council

- Ensure that all resolutions concerning the obligations of states to combat terrorism emphasize states' obligations to comply with international human rights law, refugee law, and humanitarian law.

To the Counter-Terrorism Committee (CTC)

- In assessing states' implementation of their obligations under Security Council resolutions on counterterrorism, including Resolutions 1373 (2001) and 1624 (2005), give greater attention to human rights concerns in all communications with states.

To the Counter-Terrorism Committee Executive Directorate (CTED)

- Incorporate human rights concerns into all technical assistance recommendations relating to states' counterterrorism legislation.
- Expand the number of human rights officers on staff, so that every on-site visit that CTED undertakes includes at least one human rights officer.

To the Terrorism Prevention Branch of the UN Office on Drugs and Crime (UNODC)[2]

- Convene an expert group meeting on counterterrorism legislation, which brings together government officials, UN personnel, and nongovernmental human rights defenders, with the goal of strengthening the capacity of states to combat terrorism consistent with human rights standards.
- Incorporate human rights concerns into all technical assistance recommendations relating to states' counterterrorism legislation.

[2] The Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC/TPB) assists states in becoming parties to and implementing relevant protocols relating to terrorism and in strengthening international cooperation mechanisms in criminal matters related to terrorism, including through national capacity-building. See, for example, "The United Nations Global Counter-Terrorism Strategy," adopted September 8, 2006, A/RES/60/288, http://www.un.org/terrorism/strategy-counter-terrorism.shtml (accessed May 29, 2012).

I. UN Security Council: Unprecedented Mandates

Following the September 11 attacks, the UN Security Council passed several resolutions pressing—and in some cases mandating—all UN member states to enact strong counterterrorism legislation. The result was a flood of new and revised laws that granted special law-enforcement and other prosecutorial powers to the police and other authorities, while broadening the scope and increasing the penalties for alleged terrorist activities.

These laws continued a historical pattern in which governments have responded to politically motivated acts of violence—assassinations, bombings, and armed attacks—on high-profile targets by expanding existing laws and granting security forces special powers.

In the months following anarchist August Vaillant's bombing of the French National Assembly in 1893, for example, the French Third Republic enacted measures that became known as the *lois scélérates* ("villainous laws") because of their severe restrictions on free speech.[3]

Following the 1981 assassination of Egyptian President Anwar Sadat by conservative Islamist army officers, Egypt passed an emergency law that created special security courts and gave the military sweeping powers of search and arrest.[4] The law endured for 31 years, only to be briefly replaced with a similar decree by the military-led government when an Islamist candidate was poised to win the 2012 presidential elections.[5]

Many laws granting extraordinary powers are colonial legacies or responses to nationalist or other insurgent movements. Malaysia's Internal Security Act of 1960, which until its repeal in 2012 allowed indefinite preventive detention of alleged terrorists and other national security suspects, was inspired by the Emergency Regulations Ordnance 1948

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[3] Olivier Cahn, "The Fight Against Terrorism and Human Rights," in Marianne Wade and Almir Maljevic, eds., *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications* (Springer Science + Business Media, 2009), chapter 17, p. 467.

[4] "Egypt's Chance to End State of Emergency," Human Rights Watch news release, May 30, 2012, http://www.hrw.org/news/2012/05/30/egypt-parliament-s-chance-end-state-emergency.

[5] An Egyptian court suspended the decree on June 25, 2012, less than two weeks after it went into effect. See "Egypt court rules military cannot arrest civilians," The Associated Press, June 25, 2012, http://hosted.ap.org/dynamic/stories/M/ML_EGYPT?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2012-06-26-13-44-12 (accessed June 24, 2012).

that the British used against Communist insurgents in pre-independence Malaya.[6] Special powers introduced by the British in Northern Ireland in 1922 were renewed in various forms throughout and beyond the "Troubles" until they were replaced by UK-wide counterterrorism laws in 2000.[7]

But the number of counterterrorism laws passed largely in response to the Security Council's post-September 11 resolutions was unprecedented.[8] More than 140 countries have enacted or revised one or more counterterrorism laws, according to Human Rights Watch's accounting—many of which violate or undermine fundamental liberties such as freedoms of expression, association, and religion, or deprive suspects of due process or the right to a fair trial.[9]

The Security Council called on member states "to redouble their efforts to prevent and suppress terrorist acts," as part of their obligations to maintain international peace and security.[10] In some resolutions, the call was mandatory.[11] Yet the Security Council gave insufficient attention to ensuring that governments' counterterrorism responses were in keeping with international human rights standards.[12] Only gradually did its resolutions emphasize the need to protect civil liberties and due process from abusive counterterrorism legislation and policies.

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[6] For more on the Internal Securities Act, see Human Rights Watch, *Malaysia – In the Name of Security: Counterterrorism and Human Rights Abuses under Malaysia's Internal Security Act*, May 2004, http://www.hrw.org/reports/2004/05/24/name-security.

[7] International Commission of Jurists (ICJ), *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, http://ejp.icj.org/IMG/EJP-Report.pdf (accessed May 17, 2012), p. 41.

[8] See Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011), p. 45. For more on the UN response to September 11 see chapter 2 of *The 9/11 Effect,* as well as James Cockayne, Alistair Millar, David Cortright, and Peter Romaniuk*, Reshaping United Nations Counterterrorism Efforts*, Center for Global Counterterrorism Cooperation, March 2012, http://www.globalct.org/images/content/pdf/reports/Reshaping_UNCTEfforts_Blue-Sky-Thinking.pdf (accessed June 27, 2012), Part I.

[9] This figure includes substantive counterterrorism-related revisions to criminal codes as well as a small number of laws on terrorist financing.

[10] UN Security Council, Resolution 1368 (2001), S/RES/1368 (2001) http://www.unhcr.org/refworld/docid/3c4e94557.html (accessed June 20, 2012), para. 4.

[11] See, for example, UN Security Council, Resolution 1373 (2001), S/RES/1373, September 28, 2001, http://www.unhcr.org/refworld/docid/3c4e94552a.html (accessed June 22, 2012). Chapter VII of the UN Charter sets out the Security Council's powers to maintain international peace and security: http://www.un.org/en/documents/charter/chapter7.shtml (accessed June 19, 2012), para 4.

[12] Indeed, the director of the Counter-Terrorism Committee (CTC), created by the UN Security Council to monitor implementation of Resolution 1373 and subsequently Resolution 1524, said in 2002 that "human rights law is outside the scope of the CTC's mandate." The director at the time was Jeremy Greenstock, then-UK Ambassador to the UN. See Roach, *The 9/11 Effect*, p. 45-46.

Acts of terrorism are an indefensible attack on the right to life. As the UN Global Counter-Terrorism Strategy of 2006 notes, states have a responsibility to protect all individuals within their jurisdiction from such attacks.[13] This responsibility stems from the primary duty of states to ensure respect for the right to life.[14]

However, even in the context of countering terrorism, states must meet their obligations under international human rights and humanitarian law. This, too, is noted in the UN Global Counter-Terrorism Strategy, which states that, "The promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing."[15]

A number of UN Security Council resolutions passed in the wake of September 11 have failed to adequately reinforce that standard.

Security Council Resolution 1373, sponsored by the United States and adopted 17 days after the September 11 attacks, has been the centerpiece of the council's approach to counterterrorism.[16] It requires all states to "work together urgently to prevent and suppress terrorist acts," including by "taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of

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[13] UN Global Counter-Terrorism Strategy, resolution and annexed Plan of Action, September 8, 2006, A/RES/60/288, http://www.un.org/depts/dhl/resguide/r60.htm (accessed June 22, 2012), Plan of Action, Pillar I.

[14] The right to life is protected under international human rights treaties, such as the International Covenant on Civil and Political Rights, and regional treaties. See International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, http://www2.ohchr.org/english/law/ccpr.htm (accessed May 10, 2012), art. 6.

Regional human rights bodies have extended that duty to include protection from acts of terrorism. See, for example, the Council of Europe Committee of Ministers' *Guidelines on Human Rights and the Fight against Terrorism* of July 11, 2002, which in preamble (f) refers to the "imperative duty of States to protect their populations against possible terrorist acts," http://www1.umn.edu/humanrts/instree/HR%20and%20the%20fight%20against%20terrorism.pdf (accessed June 18, 2012). Similarly, the Inter-American Commission on Human Rights noted in its *Report on Terrorism and Human Rights* of October 22, 2002 that the state has the "right and duty to guarantee the security of all," http://www.cidh.oas.org/Terrorism/Eng/toc.htm (accessed June 18, 2012), para. 107.

[15] UN Global Counter-Terrorism Strategy, resolution and annexed Plan of Action, Pillar IV. UN Security Council resolutions such as 1456 (2003), Annex, para. 6, and 1624 (2005), para. 4, discussed in further detail below, also reference states' obligation to uphold international human rights, but without similar emphasis. See UN Security Council Resolution 1456 (2003), S/RES/1456 (2003), http://www.un.org/apps/news/docs.asp?Topic=Terrorism&Type=Resolution (accessed May 25, 2012), Annex, para. 6; and UN Security Council Resolution 1624 (2005), S/RES/1624 (2005), http://www.un.org/Docs/sc/unsc_resolutions05.htm (accessed May 29, 2012), para. 4.

[16] See Eric Rosand, Alistair Millar, and Jason Ipe, "The UN Security Council's Counterterrorism Program: What Lies Ahead?" International Peace Institute, October 13, 2007, http://www.ipinst.org/publication/policy-papers/detail/105-the-un-security-councils-counterterrorism-program-what-lies-ahead.html (accessed June 24, 2012), p. 4.

terrorism."[17] Resolution 1373 directs all UN member states to enact criminal, financial, and administrative measures aimed at individuals and al Qaeda's entities considered perpetrating or supporting acts of terrorism.[18] By acting under Chapter VII of the UN charter, the Security Council, at least on paper, can take action against any member state that fails to comply with the resolution.[19]

The resolution opened the door to abusive domestic legislation largely by what it did not say; it makes no reference to member states' obligations to respect international human rights law (except in one narrow sense) or international humanitarian law, the laws of war.[20] The resolution provides states broad leeway to create their own definitions. Government officials have frequently cited Resolution 1373 to justify abusive counterterrorism laws.[21] In 2009 UN High Commissioner for Human Rights Navanethem Pillay said that by serving as a vehicle for "numerous" states to enact provisions that "derogate from binding international human rights instruments," Resolution 1373 has had "a very serious negative impact on human rights."[22]

In 2002 the Security Council also expanded its existing blacklist of individuals and entities believed to be associated with the Taliban and al Qaeda into a list with no global or temporal limitations. The Security Council had created the Al Qaeda and Taliban Sanctions List in 1999 through Resolution 1267 in response to al Qaeda attacks the previous year on the US embassies in Kenya and Tanzania. It first expanded the list through a separate resolution in 2000 and extended it beyond Afghanistan to any location in the world in

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[17] UN Security Council, Resolution 1373 (2001), http://www.unhcr.org/refworld/docid/3c4e94552a.html.

[18] Ibid.

[16] Charter of the United Nations, June 26, 1945, http://www.un.org/en/documents/charter/, Chapter VII.

[20] UN Security Council, Resolution 1373 (2001). See also Human Rights Watch, *Hear No Evil, See No Evil: The U.N. Security Council's Approach to Human Rights Violations in the Global Counter-Terrorism Effort*, August 2004, http://www.hrw.org/legacy/backgrounder/un/2004/un0804/.

[21] The justice minister in Swaziland, for example, in 2008 described the country's new terrorism law, which it used to ban the leading opposition party as a terrorist organization, as "part of the UN conventions" that Swaziland ratified. "Justice Minister Ndumiso defends Terrorism Act," *Times of Swaziland*, November 25, 2008, http://uk.groups.yahoo.com/group/SAK-Swazinewsletter/message/149 (accessed May 29, 2012). See also the case of India cited in Anil Kalhan, et al., "Colonial Continuities: Human Rights, Terrorism, and Security Laws in India," *Columbia Journal of Asian Law*, vol. 20, no. 1, 2006, www.abcny.org/pdf/ABCNY_India_Report.pdf, p. 213-224.

[22] "Address of UN High Commissioner for Human Rights Navanethem Pillay to the Counter-Terrorism Committee of the Security Council," October 29, 2009, http://www.un.org/en/sc/ctc/docs/rights/2009_10_09_hchr_brief.pdf (accessed May 25, 2012), p. 6.

2002. Together, the three resolutions require UN member states to subject all those listed to asset freezes, travel bans, and arms embargoes.[23]

Listings on the Security Council's blacklist have often been based on secret information. The resolutions contain no defined limits on who could be declared targets, the duration of sanctions, or, initially, mechanisms to remove someone from the list.[24] Resolution 1373 further expanded the regime created under Resolution 1267 by requiring states to freeze assets and entities of those "who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts," without requiring that they be linked to the Taliban or al Qaeda.[25]

Security Council Resolution 1624 of 2005 calls on UN member states to pass laws that prevent and prohibit incitement to commit acts of terrorism and to deny safe haven to persons against whom there is "credible and relevant information" that implicates them in such conduct.[26]

Since 2003 Security Council resolutions have gradually directed states to ensure that counterterrorism measures comply with international human rights law.[27] Among the most important of these is Resolution 1456 of 2003, which calls on states to "ensure that any measure taken to combat terrorism comply with all their obligations under international law ... in particular international human rights, refugee, and humanitarian law."[28] In 2005 the UN Counter-Terrorism Committee, established by the Security Council to monitor compliance with Resolution 1373, appointed a human rights advisor to its executive

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[23] UN Security Council, Resolution 1267 (1999), S/RES/1267 (1999); Resolution 1333 (2000), S/RES/1333 (2000); Resolution 1390 (2002), S/RES/1390 (2002); all resolutions available at: http://www.un.org/Docs/sc/committees/1267/1267ResEng.htm (accessed June 18, 2012). See also Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted sanctions, preemptive security and fundamental rights*, European Center for Constitutional and Human Rights, December 10, 2010, http://www.ecchr.eu/index.php/ecchr-publications/articles/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.html (accessed May 29, 2012).

[24] Sullivan and Hayes, *Blacklisted*, p. 13.

[25] UN Security Council, Resolution 1373 (2001), http://www.un.org/Docs/scres/2001/sc2001.htm, para. 1(c).

[26] UN Security Council, Resolution 1624 (2005), S/RES/1624 (2005), http://www.un.org/Docs/sc/unsc_resolutions05.htm (accessed May 29, 2012), para. 1(c).

[27] For additional discussion of UN counterterrorism reforms and human rights, see James Cockayne, Alistair Millar, David Cortright, and Peter Romaniuk, *Reshaping United Nations Counterterrorism Efforts*, Center on Global Counterterrorism Cooperation, March 2012, http://www.globalct.org/images/content/pdf/reports/Reshaping_UNCTEfforts_Blue-Sky-Thinking.pdf (accessed May 25, 2012), p. 7-9.

[28] United Nations Security Council, Resolution 1456 (2003), S/RES/1456 (2003), http://www.un.org/apps/news/docs.asp?Topic=Terrorism&Type=Resolution (accessed May 25, 2012), Annex, para. 6.

directorate.[29] (However, the advisor was not allowed to advise the Counter-Terrorism Committee until 2006.[30]) In 2010 the Security Council encouraged the committee's executive directorate to further incorporate human rights into its work.[31] The Security Council also supported a statement by the UN General Assembly that respect for human rights and the rule of law are the "fundamental basis of the fight against terrorism" and that violations of human rights can be "conducive to the spread of terrorism."[32]

In response to mounting criticism and legal challenges, the Security Council has also started to reform the Al Qaeda and Taliban Sanctions List.[33] In December 2009, for example, it passed a resolution creating an ombudsman to mediate requests from individuals, organizations, and companies to be delisted and mandated swift processing of their applications. However, the ombudsman does not have the authority even to make recommendations to the listing committee, a body consisting of state representatives that reaches decisions confidentially.[34] In 2011 the Security Council split the sanctions list into two, one for al Qaeda and one for the Taliban, and modified the regimens for each.[35]

These reforms still fall short. As Martin Scheinin, the then-UN special rapporteur on human rights and counterterrorism, said in his final report to the UN General Assembly in August 2010, the counterterrorism regime created by the Security Council in some cases "continues to pose risks to the protection of a number of international human rights

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[29] Security Council Counterterrorism Committee web page, "Protecting Human Rights While Countering Terrorism," http://www.un.org/en/sc/ctc/rights.html (accessed June 12, 2012). See also Rosand, et al., "The UN Security Council's Counterterrorism Program," http://www.ipinst.org/publication/policy-papers/detail/105-the-un-security-councils-counterterrorism-program-what-lies-ahead.html, p. 16.

[30] Rosand, et al., "The UN Security Council's Counterterrorism Program," http://www.ipinst.org/publication/policy-papers/detail/105-the-un-security-councils-counterterrorism-program-what-lies-ahead.html, p. 16.

[31] UN Security Council, Resolution 1963 (2010), S/RES/1963 (2010), http://www.un.org/Docs/sc/unsc_resolutions10.htm (accessed May 25, 2012), para. 10.

[32] Ibid. The Security Council was reaffirming language used in the UN Global Counter-Terrorism Strategy of 2006, A/RES/60/288, http://www.un.org/depts/dhl/resguide/r60.htm (accessed June 28, 2012), Plan of Action, Pillars I and IV.

[33] The court challenges also prompted the EU in 2009 to adopt procedural and due process reforms to the implementation of the UN 1267 blacklist regime. See Council of the European Union Regulation 1286/2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:346:0042:0046:EN:PDF (accessed June 12, 2012). For a detailed analysis, see Sullivan and Hayes, *Blacklisted*, http://www.ecchr.eu/index.php/ecchr-publications/articles/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.html, p. 57-61.

[34] UN Security Council, Resolution 1904 (2009), S/RES/1904 (2009), http://www.un.org/Docs/sc/unsc_resolutions09.htm (accessed May 29, 2012).

[35] UN Security Council, Resolution 1988 (2011), S/RES/1988 (2011); Resolution 1989 (2011), S/RES/1989 (2011); both resolutions available at http://www.un.org/Docs/sc/unsc_resolutions11.htm (accessed June 18, 2012).

standards."[36] He later noted that the procedures for terrorist listing and delisting under the Al Qaeda and Taliban Sanctions List by the Security Council's 1267 Committee still did not meet international human rights standards concerning due process or fair trial.[37] Scheinen's successor as special rapporteur, Ben Emmerson, has expressed similar concern about continuing violations of human rights and fundamental freedoms in the context of countering terrorism, as has the UN Human Rights Council.[38]

[36] Martin Scheinin, "Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," UN Doc. A/65/258 (2010), http://www.un.org/ga/search/view_doc.asp?symbol=A/65/258 (accessed May 25, 2012), para. 39.

[37] "Human rights/Counter terrorism: the new UN listing regimes for the Taliban and Al-Qaida: Statement by the special rapporteur on human rights and counter terrorism, Martin Scheinin," UN Office of the High Commissioner for Human Rights news release, June 29, 2011, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E (accessed May 25, 2012).

[38] See "Intervention by Ben Emmerson, special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," Secretary-General's Symposium on International Counter-Terrorism Cooperation, New York, September 19, 2011, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11430&LangID=E (accessed June 26, 2012); and Human Rights Council, 19th Session, Agenda Item 3, March 12, 2012, A/HRC/19/L.25, http://ap.ohchr.org/documents/alldocs.aspx?doc_id=19740 (accessed June 28, 2012).

II. Definitions of Terrorism and Terrorist Acts

Dozens of the counterterrorism laws passed since 2001 include broadly worded definitions of terrorism and terrorist acts. While there is no single definition of terrorism under international law,[39] definitions put forward in various international treaties typically center on the use of violence for political ends.[40] In practice, the new counterterrorism laws vary widely from country to country and frequently cover acts unrelated to violence.

The most common and frequently the most serious problem in legal definitions of terrorism under national laws is that they are overbroad and vague. As a basic legal principle, such laws fail to give reasonable notice of what actions are covered. Many are so broad that they cover common crimes that should not reasonably be deemed terrorist or acts that should not be considered crimes at all. Their scope leaves them susceptible to arbitrary and discriminatory enforcement by the authorities—often against religious or ethnic communities, political parties, or other particular groups.[41] In Australia, for example, community lawyers and civil society groups have reported the disproportionate use of counterterrorism measures against Muslim, Kurdish, Tamil, and Somali communities.[42]

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[39] More than seven decades after the League of Nations first proposed a legal definition of terrorism in 1937, at least 250 definitions are in use worldwide, according to Alex Schmid, former officer-in-charge of the UN Terrorism Prevention Branch. See Alex Schmid, "The Definition of Terrorism," in Alex Schmid, ed., *The Routledge Handbook of Terrorism Research* (Abingdon, Virginia: Routledge, 2011), http://books.google.com/books?id=_PXpFxKRsHgC&pg=PA, 39 (accessed June 20, 2012), p. 39. Among other obstacles to a common definition, states continue to disagree over when and whether to include activities of liberation movements and state military forces. See Report of the UN General Assembly Ad Hoc Committee, Twelfth Session, February 25-26, 2008 and March 6, 2008, A/63/37, http://www.un.org/terrorism/adhoccom.shtml (accessed June 22, 2012).

[40] Since 1994, for example, the UN General Assembly has defined terrorism as "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes" and condemned them as "in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them." See UN Declaration on Measures to Eliminate International Terrorism, annex to UN General Assembly resolution 49/60, December 9, 1994, UN Doc. A/Res/60/49, http://www.un.org/documents/ga/res/49/a49r060.htm (accessed June 20, 2012).

[41] As the UN special rapporteur on human rights and countering terrorism has noted, many countries have overbroad definitions of terrorism that are used by government authorities "to stigmatize political, ethnic, regional or other movements they simply do not like." See Security Council Counter-Terrorism Committee, "Statement by Mr Martin Scheinin, special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," October 24, 2005, http://www.un.org/en/sc/ctc/docs/rights/2005_10_24_rapporteur.pdf (accessed June 12, 2012), para. 7a.

[42] Human Rights Law Centre, *Review of Australia's Counter-Terrorism and National Security Legislation,* October 26, 2011, http://www.hrlc.org.au/files/HRLC-Submission-to-National-Security-Legislation-Monitor.pdf (accessed June 12, 2012), sec. 3.2. In 2010 the UN Committee on the Elimination of Racial Discrimination underscored Australia's obligation to "ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin." See UN Committee on the Elimination of Racial Discrimination, "Concluding Observations on Australia," UN Doc CERD/C/AUS/CO/15-17 (2010), http://www2.ohchr.org/english/bodies/cerd/cerds77.htm (accessed June 12, 2012), para. 12.

The vagueness of many counterterrorism laws is often found in their reliance on terms such as "public order" and "public safety." While such terms are consistent with international law if narrowly and precisely defined, they are dangerous if left open-ended: they lend themselves to extremely broad interpretations that can be and have been used to quash legitimate activities and speech under the guise of countering terrorism. Rarely do counterterrorism laws provide clear and precise definitions of these terms.

Human Rights Watch found more than 130 counterterrorism laws that included one or more vague terms such as "public order" without properly defining them. More than half those laws included at least two ambiguous definitions, and five failed to identify what constituted a terrorist act at all.

To a large extent, counterterrorism laws cover acts that are already illegal under existing domestic criminal law, such as murder, assault, and kidnapping. They do not generally impose criminal penalties on what was previously considered lawful conduct; rather, they more often establish special procedures for investigating and prosecuting crimes that fall within terrorism acts and impose enhanced punishments on the perpetrators of these crimes.

Legal definitions of terrorism generally specify two or three basic elements: the act and purpose, or the act, intent, and purpose. The crime of terrorism is typically characterized as an act carried out with a particular intent—for example, the intent to kill—and for a specific purpose, such as coercing or intimidating a government or population into performing or abstaining from an action.

Most counterterrorism laws make reference to one or more of the following four general categories of harm: 1) serious physical harm to a person or persons—in other words killing or injuring one or more people, or damaging public health more broadly; 2) serious property damage, particularly damage that is likely to cause serious harm to people; 3) harm to vital infrastructure, such as power, food, or water supplies; medical services; or monetary and electronic systems; and, most broadly, 4) harm to national security, defense, or "public order."

The major legal innovation is the element of terrorist purpose or motivation: the requirement that, for example, the acts be carried out in order to influence or coerce the government or to intimidate, panic, or terrorize the public or a section of the public.

This is also the area in which various countries' laws differ most significantly, with some requiring that the purpose be to terrify or intimidate the population; others specifying that the action must be intended to advance a political, religious, or ideological cause; and others broadly covering any threat to national unity, harmony, or public order.

The UN special rapporteur on human rights and counterterrorism addressed the issue of defining conduct that is "genuinely of a terrorist nature." In his view, the concept of terrorism includes only those acts or attempted acts "intended to cause death or serious bodily injury" or "lethal or serious physical violence" against one or more members of the population, or that constitute "the intentional taking of hostages" for the purpose of "provoking a state of terror in the general public or a segment of it" or "compelling a Government or international organization to do or abstain from doing something."[43]

Similarly, the UN Secretary-General's High Level Panel on Threats, Challenges and Change concluded that for a violent act to be deemed terrorist, its purpose must be "to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."[44]

Few terrorism definitions are so narrowly drawn. In general, definitions of terrorism tend to cover acts carried out for a wide variety of purposes, often with no requirement that they cause or intend to cause death or serious injury, and without specifying the level of physical property damage required to render an act terrorist. Criminalizing acts that merely aim to "influence the government" as terrorism, for example, could easily be used to prosecute journalists for reporting on corrupt state practices or the activities of rebel groups. Labeling a labor strike or a political demonstration as terrorist can be a means to suppress legitimate protest.

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[43] The special rapporteur called on states to adopt this definition. See "Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ten areas of best practices in countering Terrorism," UN Doc. A/HRC/16/51, December 22, 2010, http://ap.ohchr.org/documents/alldocs.aspx?doc_id=18100 (accessed June 18, 2012), para. 28. Scheinin's successor, Ben Emmerson, has stated he intends to "adopt and build" on these recommended practices. "Intervention by Ben Emmerson," September 19, 2011, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11430&LangID=E.

[44] UN High Level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility," UN Doc. A/59/565 (2004), http://www.un.org/secureworld/report.pdf (accessed May 11, 2012), para. 164(d).

- Saudi Arabia's draft Penal Law for Crimes of Terrorism of 2011 includes among terrorist crimes actions that "insult the reputation of the state," "disturb public order," or "inflict damage upon one of its public utilities or its natural sources."[45] The law also criminalizes "describing the king—or the crown prince—as an unbeliever, doubting his integrity [or] defaming his honesty."[46]

- Azerbaijan's 1999 Law on Combating Terrorism holds that terrorist acts must have as their aim "undermining public security, spreading panic among the population or forcing State authorities or international organizations to take decisions that comply with the demands of terrorists."[47] The first phrase—"undermining public security"—is so vague and overbroad that it could be applied to a wide range of otherwise lawful activities.

- Australia's overly broad definition of "terrorist act" does not require an element of intention to cause death or serious bodily injury, or the taking of hostages."[48]

- Under the Syrian Penal Code, terrorism is broadly defined as "all acts intended to create a state of fear which are committed by means such as explosives, military weapons, inflammable materials, poisonous or burning products or epidemic or microbial agents likely to cause public danger."[49]

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[45] "Saudi Arabia's Draft Counterterrorism Law a Setback for Human Rights," Human Rights Watch memorandum, August 2, 2011, http://www.hrw.org/news/2011/08/02/saudi-arabia-s-draft-counterterrorism-law-setback-human-rights. For a copy of the law in Arabic, see Saudi Arabia's Penal Law for Crimes of Terrorism and Its Financing, 2011, http://www.amnesty.org/sites/impact.amnesty.org/files/PUBLIC/Saudi%20anti-terror.pdf (accessed May 16, 2012), art. 1.

[46] Saudi Arabia's Penal Law for Crimes of Terrorism, 2011, art. 29.

[47] Law of the Republic of Azerbaijan on Combating Terrorism, 1999, http://www.unhcr.org/refworld/pdfid/4417f4dd4.pdf (accessed May 11, 2012), art. 1.

[48] Australia's Criminal Code, schedule to the Criminal Code Act 1995 (Australia's Criminal Code), sec. 100.1(1), as amended by the Security Legislation Amendment (Terrorism) Act 2002, http://www.comlaw.gov.au/Details/C2012C00451/Download (accessed June 7, 2012). Both the UN special rapporteur on human rights and countering terrorism and the UN Human Rights Council (UNHRC) have expressed concern over Australia's definition of a "terrorist act." See UNHRC, "Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism," UN Doc A/HRC/4/26/Add.3 (2006), http://pacific.ohchr.org/docs/AustraliaA.HRC.4.26.Add.3.pdf (accessed June 12, 2012), para. 15; and UN Human Rights Committee, "Concluding Observations: Australia," UN Doc. CCPR/C/AUS/CO/5 (2009), http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm (accessed June 12, 2012), para. 11.

[49] Syrian Penal Code, originally enacted 1948, https://www.unodc.org/tldb/showDocument.do?documentUid=1480 (accessed June 13, 2012), art. 304. Full code in Arabic available at https://www.unodc.org/tldb/pdf/Syria/Syria_PenalCode2004AR.pdf.

- Tunisia's 2003 counterterrorism and money laundering law states that a terrorist offense is "any offense, regardless of its motive, connected to an individual or collective enterprise aiming at terrorizing one person or a group of people and spreading fear among the population, for the purpose of, among other things, influencing state policies and compelling it to act in a particular way or preventing it from so acting; or disturbing public order or international peace and security, or attacking people or facilities, damaging buildings housing diplomatic missions, prejudicing the environment, so as to endanger the life of its inhabitants, their health or jeopardizing vital resources, infrastructures, means of transport and communications, computer systems or public services."[50] Under that definition, a demonstration by truck drivers that blocks a major highway overpass could be classified as a terrorist act.

- A 2008 amendment to the UK's counterterrorism law refers to the goal of advancing a "political, religious, racial or ideological cause."[51]

- Zimbabwe's Suppression of Foreign and International Terrorism Act of 2011 includes in its intent requirement the vague and potentially broad phrase "usurping the functions" of the government.[52]

Given the vagueness and breadth of the "purpose" requirements of many counterterrorism laws—and the potentially wide variety of actions they cover—prosecutors in many countries have enormous latitude in deciding which offenses to prosecute as terrorist. In many cases, they have used these laws to prosecute regular criminal offenses.

In dozens of countries, acts of political dissent that result in property damage, such as demonstrations, may be prosecuted as terrorism where the element of terrorist intent is

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[50] Tunisia's Loi Contre le Terrorisme et le Blanchiment de L'Argent, 2003, https://www.unodc.org/tldb/showDocument.do?documentUid=1836&country=TUN&language=FRE (accessed May 11, 2012), art. 4. See also Human Rights Watch, *Tunisia's Repressive Laws: The Reform Agenda*, December 2011, http://www.hrw.org/reports/2011/12/16/tunisia-s-repressive-laws-0 (accessed May 23, 2012).

[51] The United Kingdom's Terrorism Act, 2000, as amended by the Counter-Terrorism Act of 2008, http://www.legislation.gov.uk/ukpga/2000/11 (accessed May 18, 2012), art. 1(1)(c).

[39] Zimbabwe's Suppression of Foreign and International Terrorism Act, 2006, brought into effect July 2011, http://www.kubatana.net/html/archive/legisl/061215sfitbill2.asp?sector=..&year=0&range_start=1 (accessed May 7, 2012), art. 2(1)(a).

broadly defined (for example, to "disrupt the public order" or "endanger public safety") and where crimes resulting in property damage or damage to infrastructure are covered:

- Ethiopia's Anti-Terrorism Proclamation of 2009 contains an overly broad definition of "terrorist acts" that could be used to prosecute a wide range of conduct far beyond the limits of what can reasonably be considered terrorist activity. Besides violent acts and kidnapping, an act that "causes serious damage to property" or "disruption or interference of a public service" may be deemed terrorist under the law if carried out for a specified purpose. This definition is so broad that a nonviolent political protest that disrupts traffic might be labeled a "terrorist act," and even those who merely express support for a peaceful political protest could be deemed terrorists.[53]

- El Salvador's Special Law against Acts of Terrorism of 2006 does not even include an explicit definition of terrorism.[54] The closest it comes is in article 1, which provides that the purpose of the law is to prevent and punish crimes that "by their form of execution, or means and methods employed, show the intention to provoke a state of alarm, fear or terror in the population, by putting in imminent danger or affecting people's life or physical or mental integrity, or their valuable material goods, or the democratic system or security of the State, or international peace."[55] In 2007 Salvadoran authorities used the law to prosecute 13 political protesters for rallying against a national water decentralization plan. The defendants had allegedly blocked public roads and thrown rocks at police.[56] Following an international uproar, a special counterterrorism court dropped the charges in February 2008 at the request of El Salvador's attorney general.[57]

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53 Ethiopia's Anti-Terrorism Proclamation, No. 652/2009, http://www.unhcr.org/refworld/country,,NATLEGBOD,,ETH,,4ba799d32,0.html (accessed May 16, 2012), art. 3.

54 The definitions section of the law defines "aircrafts in flight," "aircrafts in service," "firearms," and "explosives," among other fairly unambiguous terms, but not terrorism itself. El Salvador's Ley Especial Contra Actos de Terrorismo, 2006, https://www.unodc.org/tldb/pdf/El_Salvador_Ley_Especial_Contra_Actos_De_Terrorismo.pdf (accessed May 1, 2012), art. 4.

55 Ibid., art. 1.

56 "El Salvador Terrorism Law Misused against Protesters," Human Rights Watch news release, http://www.hrw.org/news/2007/07/30/el-salvador-terrorism-law-misused-against-protesters, July 31, 2007.

57 The charges were reduced to disorderly conduct and ultimately dropped. "Cambian el delito a los detenidos en Suchitoto en 2007," Elsalvador.com, February 13, 2008, http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6342&idArt=2074852 (accessed May 29, 2012). See also "Terrorism Charges Dropped Against Suchitoto 13," Committee in Solidarity with the People of El Salvador (CISPES), February 13, 2008, http://www.cispes.org/action-alerts/alert-update-terrorism-charges-dropped-against-%E2%80%98suchitoto-13%E2%80%99/ (accessed May 18, 2012).

Bahrain: Protesters Prosecuted as "Terrorists"

Bahrain's overly expansive definition of terrorism in its Law with Respect to Protection of the Community against Terrorist Acts of 2006 includes actions whose aim is "disrupting the public order," "threatening the Kingdom's safety and security," or "damaging national unity."[58] The terms "disrupt" and "threaten" exceed the required purpose as defined by the UN special rapporteur on counterterrorism and the UN High Panel, which state that the intent must be to "intimidate" a population or "compel" a government or organization.[59] Bahrain's definition includes the act of intimidation, which exceeds UN guidance by encompassing acts that do not cause or are not intended to cause death or serious harm.[60]

Bahrain has used such overly broad definitions of terrorism to detain scores of protesters and to convict several opposition leaders, including many involved in the country's pro-democracy demonstrations in 2011. Several defendants have made credible allegations of torture and other ill-treatment during their detention and Human Rights Watch has documented additional procedural and substantive violations of due process.[61]

A special military court in June 2011 convicted 21 opposition leaders—seven *in absentia*—for national security crimes including acts of "terrorism," such as making speeches critical of Bahrain's human rights record and calling for and participating in street protests four months earlier at which calls were made for the establishment of a republic. The court sentenced eight defendants to life in prison and the rest to terms of up to 15 years, based in part on the sentencing provisions of the 2006 counterterrorism law. A civilian appeals court was re-trying the defendants at this writing; the Bahraini authorities had rejected

[58] Bahrain's Law with Respect to Protection of the Community against Terrorist Acts, No. 58 of 2006, https://www.unodc.org/tldb/showDocument.do?documentUid=8520 (accessed May 8, 2012), art. 1.

[59] See UN High Level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility," UN Doc. A/59/565 (2004), http://www.un.org/secureworld/report.pdf (accessed May 11, 2012), para. 164(d).

[60] Bahrain's Law with Respect to Protection of the Community against Terrorist Acts, No. 58 of 2006, https://www.unodc.org/tldb/showDocument.do?documentUid=8520 (accessed May 8, 2012), art. 1.

[61] See "Bahrain: Free Protesters Immediately," Human Rights Watch news release, April 20, 2012, http://www.hrw.org/news/2012/04/30/bahrain-free-protest-leaders-immediately; and Human Rights Watch, *No Justice in Bahrain: Unfair Trials in Military and Civilian Courts,* February 28, 2012, http://www.hrw.org/reports/2012/02/28/no-justice-bahrain-0, Chapter III.

calls from human rights organizations, including Human Rights Watch, to release the 14 accused who were detained in Bahrain pending the trial's outcome.[62]

Eleven of the defendants were among 25 protesters and other activists who were tried in 2010—two *in absentia*—for operating a "terror network." One of them, Abdul-Jalil al-Singace, was a leader in the Haq Group political opposition movement. Authorities arrested him in 2010 upon his return from the UK, where he had criticized the Bahraini government's human rights record at a public event in the House of Lords.[63]

During that so-called "terror network" trial, several defendants gave credible testimony of torture and other ill-treatment that included threats; harassment; extended detention in solitary confinement; regular beatings to the head, chest, and other sensitive areas with fists and kicks; beatings on the soles of the feet with sticks or hoses; sleep deprivation; forced standing; denial of access to the bathroom; and electric shocks. Human Rights Watch secured independent evidence—including photographs and medical reports by government doctors—that corroborated a number of these accounts.[64]

Pursuant to article 27 of the counterterrorism law, the authorities deprived the 23 defendants in their custody of access to counsel and relatives and held them in pretrial incommunicado detention for 15 days before presenting them to the public prosecutor.[65] In a number of instances, they barred counsel from attending interrogations and denied them the opportunity to review investigative materials before the start of trial.[66]

King Hamad bin Isa al-Khalifa released the defendants in February 2011 in what the Bahraini authorities described as a goodwill gesture, but many were re-arrested in the following weeks during street protests.[67]

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62 "Bahrain: Free Protesters Immediately," Human Rights Watch news release, 2012.

63 Human Rights Watch, *No Justice in Bahrain*, chapter III.

64 Ibid.

65 Bahrain's Law with Respect to Protection of the Community against Terrorist Acts, No. 58 of 2006, https://www.unodc.org/tldb/showDocument.do?documentUid=8520, art. 27. See also Human Rights Watch, *No Justice in Bahrain*, chapter III.

66 Ibid.

67 Ibid.

Protecting Peaceful Dissent

Concern for protecting human rights has been evident in the legislation of various countries. At least 15 governments have enacted counterterrorism laws that specifically protect peaceful political dissent such as protests or advocacy. A few have rebuffed calls for overly broad definitions of terrorism or terrorist acts.

- In Australia, the criminal code specifies that "advocacy, protest, dissent or industrial action" cannot be deemed "terrorist acts" if those activities were not intended to cause death or serious physical harm, to endanger the life of someone other than the actor, or, "to create a serious risk to the health or safety of the public."[68] Canada's criminal code contains an almost identical provision. The United Kingdom lacks such an exemption.[69]

- Sweden and Norway specify in their counterterrorism laws that the acts characterized as terrorist must already be defined as criminal.[70] Norway also rejected calls for its definition of terrorism to be broadened following two attacks by an anti-immigrant extremist in July 2011 that killed 77 people; the country's prime minister vowed instead to respond with "more openness, more democracy and more humanity."[71]

Exemptions

Politically motivated acts of violence targeting other persons are covered under the vast majority of counterterrorism laws if they satisfy the purpose requirement. However, underscoring the notion that "one person's terrorist is another's freedom fighter," a few laws carve out exemptions for acts committed in the service of certain favored political goals:

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[68] Australia's Criminal Code, sec. 100.1, as amended by the Security Legislation Amendment (Terrorism) Act 2002, http://www.comlaw.gov.au/Details/C2012C00451/Download (accessed June 7, 2012).

[69] Canada's Criminal Code, section 83.ol(1)(b)(ii). See also Kent Roach, "A Comparison of Australian and Canadian Anti-Terrorism Laws (2007)," *University of New South Wales Law Journal*, vol. 30, 2007, http://ssrn.com/abstract=1646679 (accessed June 18, 2012), p. 57.

[70] Section 3 of Sweden's 2003 Act on Criminal Responsibility for Terrorist Offenses lists 19 specific criminal acts and links them directly to previously established penal provisions. Sweden's Act on Criminal Responsibility for Terrorist Offenses, No. 148 of 2003, http://www.isp.se/documents/public/se/pdf/lagar/2003_148e.pdf (accessed June 13, 2012), sec. 3; see also Norway's General Civil Penal Code, amended in 2005, http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf (accessed June 13, 2012), sec. 147.

[71] "EU: Rights Abuse at Home Ignored," Human Rights Watch news release, January 22, 2012, http://www.hrw.org/news/2012/01/22/eu-rights-abuse-home-ignored.

- The preamble to Zimbabwe's counterterrorism act of 2011 purports to recognize that "national liberation movements" are not subject to the law's provisions, although the law's operative text does not specifically exempt such groups. The preamble states that Zimbabwe "recognises that any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces ... shall not, for any reason … be considered a terrorist activity."[72]

- The preamble to South Africa's 2004 counterterrorism law states that international law "recognizes acts committed in accordance with such international law during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, as being excluded from terrorist activities." Unlike Zimbabwe's counterterrorism law, the operative text of the South African law also implements this principle. It specifically exempts acts "committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism," from being deemed terrorist.[73]

[72] Zimbabwe's Suppression of Foreign and International Terrorism Bill, 2006, http://www.kubatana.net/docs/legisl/supp_foreign_int_terror_bill_rev_061215.pdf, preamble.

[73] South Africa's Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No. 33 of 2004, https://www.unodc.org/tldb/pdf/South_Africa_Anti_Terr_Act.pdf (accessed May 10, 2012), preamble. The law entered into force in 2005.

III. Designating Terrorist Organizations and Criminalizing Membership

Many counterterrorism laws ban organizations deemed to be terrorist and impose a range of financial sanctions on them. They also frequently criminalize membership in banned organizations, without reference to the actions or the intent of the individual members.

The European Union and many individual countries duplicate or include in their own "blacklists" the UN Security Council's lists of more than 300 individuals or entities allegedly linked to al Qaeda and another 129 linked to the Taliban.[74] The UN's Al Qaeda Sanctions List subjects individuals, entities, and groups on the list to immediate asset freezes and travel bans and outlaws the direct or indirect sale or supply to them of arms and related material, including technical advice.[75]

The UN special rapporteur on human rights and counter-terrorism concluded in 2011 that the lists, particularly the one related to al Qaeda, do not meet international human rights standards for due process or fair trial.[76]

International law ensures the right to form associations, and any restrictions placed on that right must be "necessary in a democratic society for national security or public safety, public order, … the protection of public health or morals or the protection of the rights and freedoms of others," and must be the least restrictive possible.[77] Restrictions on the right

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[74] UN Security Council Committee, "The List established and maintained by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) with respect to individuals, groups, undertakings and other entities associated with Al-Qaida," http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml (accessed June 11, 2012); UN Security Council Committee, "The List of individuals and entities established pursuant to resolution 1988 (2011)," http://www.un.org/sc/committees/1988/pdf/1988List.pdf (accessed June 11, 2012).

[75] Ibid. The UN Security Council established the Al-Qaida and Taliban Sanctions Committee under Resolution 1267 of October 15, 1999 with the aim of pressuring the Taliban government in Afghanistan to hand over Osama bin Laden. Security Council Resolution 1390 of 2002 converted the list into a global, consolidated list of alleged Taliban and Al Qaida members, without any temporal or geographic limitations. The Security Council split the group into two in 2011. See Security Council Committee Established Pursuant to Resolution 1988 (2011), UN Security Council, June 17, 2011, http://www.un.org/sc/committees/1988/ (accessed May 22, 2012).

[76] "The new UN listing regimes for the Taliban and Al-Qaida: Statement by the special rapporteur on human rights and counter terrorism," http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E.

[77] ICCPR, http://www2.ohchr.org/english/law/ccpr.htm, art. 22. See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel, 2005), p. 504-508.

to freedom of association may not discriminate on the basis of religion, race, political opinion, or other prescribed status.[78]

As with definitions of terrorism, states' legal definitions of terrorist organizations vary widely:

- In Uzbekistan, amendments to the Code of Criminal Procedure criminalize "the creation of, leadership of, [or] participation in religious extremist, separatist, fundamentalist or other forbidden organizations," even though the law contains no definition of the words "extremism" or "fundamentalism" and outlaws such activity even where the organization's activities or ideology are non-violent.[79] Article 159 of the Uzbek Criminal Code, one of the provisions most commonly used to try alleged terrorism suspects, criminalizes attempts at the "overthrowing of the constitutional order."[80] Since the 1990s, the Uzbek authorities have used these provisions to convict thousands of men from the country's Muslim majority for ideas or activities at variance with state ideology. Following the September 11 attacks, the government intensified the crackdown and justified it as necessary to fight global terrorism. Primary targets have included imams and their followers and Hizb ut-Tahrir, an Islamist movement that seeks implementation of a strict Islamic doctrine and the creation of an Islamic caliphate in Central Asia.[81]

  Under the criminal code, organizing an "illegal" religious group (a group that is merely unregistered), or resuming such a group's activities after it has been denied registration or ordered to disband, are criminal offenses punishable by up to five years in prison. Those who participate in "prohibited"—alleged extremist—groups face imprisonment for up to 20 years.[82] Uzbek courts have often ignored the distinction between illegal and prohibited groups. Prison administrations require

[78] ICCPR, http://www2.ohchr.org/english/law/ccpr.htm, art. 2.

[79] Uzbekistan's Criminal Code, arts. 242-244, as amended by the Law of August 29, 2001, http://legislationline.org/download/action/download/id/1712/file/a45cbf3cc66c17f04420786aa164.htm/preview (accessed June 13, 2012).

[80] Ibid., art. 159. Uzbekistan also passed the Law on Combat of Terrorism of 2000, http://www.legislationline.org/documents/id/7633 (accessed June 13, 2012).

[81] See Human Rights Watch, *Creating Enemies of the State: Religious Prosecution in Uzbekistan,* March 2004, http://www.hrw.org/reports/2004/03/29/creating-enemies-state-0, p. 1-6 and Chapter III. See also Letter from Human Rights Watch to the Prosecutor General of the Republic of Kazakhstan regarding 29 Asylum Seekers, December 2, 2010, http://www.hrw.org/news/2010/12/01/kazakhstan-letter-prosecutor-general-regarding-29-asylum-seekers.

[82] Letter from Human Rights Watch to the Prosecutor General of the Republic of Kazakhstan regarding 29 Asylum Seekers, 2010, http://www.hrw.org/news/2010/12/01/kazakhstan-letter-prosecutor-general-regarding-29-asylum-seekers.

religious and political prisoners convicted of terrorism-related offenses to wear special markings indicating their criminal status.[83] Thousands of individuals convicted under these statutes, amid credible reports of confessions procured through the use of torture, remain in prison in Uzbekistan.[84]

- Zimbabwe's Suppression of Foreign and International Terrorism Act of 2011 defines foreign or international terrorist organizations as groups formed with a view to "overthrowing or taking over the government … by unlawful means or usurping the functions of such government," "conducting a campaign or assisting any campaign" to achieve such goals, or "engaging in foreign or international terrorist activity."[85]

- Amendments to Canada's Criminal Code in 2001 define a "terrorist group" as "an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity." The code also defines terrorist groups as those already listed by executive decree as having "knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity," as well as those that have "knowingly acted on behalf of, at the direction of or in association with an entity that has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity." This broader, executive-decree definition does not require terrorism to be the group's purpose.[86]

- The EU's common definition of terrorism of 2002 covers "a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences."[87]

- Australia's criminal code gives the governor general broad powers to outlaw organizations as "terrorist" on the basis that, among other actions, they "advocate" in favor of a terrorist act—without any need for the organization to be

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[83] See Human Rights Watch, *Creating Enemies of the State,* p. 258.

[84] See Human Rights Watch, *Creating Enemies of the State,* 2004; see also Human Rights Watch World Report *2012* (New York: Human Rights Watch, 2012), Uzbekistan chapter, http://www.hrw.org/world-report-2012/world-report-2012-uzbekistan.

[85] Zimbabwe's Suppression of Foreign and International Terrorism Bill, 2006, http://www.kubatana.net/docs/legisl/supp_foreign_int_terror_bill_rev_061215.pdf, art. 2.

[86] Canada's Criminal Code, arts. 83.01 and 83.33, as amended by the Anti-terrorism Act (S.C. 2001, c. 41) of December 2001, http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html (accessed June 12, 2012).

[87] Council Framework Decision of 13 June 2002 on combating terrorism, 2002/475/JHA, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0475:EN:NOT (accessed June 13, 2012), art. 2(1).

actively involved in a terrorist act.[88] As the Human Rights Law Centre of Australia noted in 2011, the broad definition of "advocate," which includes praising a terrorist act or indirectly urging the doing of a terrorist act, may "unjustifiably infringe" on the rights to freedom of expression and association. This criminalization of association could implicate members of proscribed organizations who are caught up in the loosely framed definition but not personally involved in unlawful activity.[89]

The process by which groups are designated as terrorist also varies greatly, although a lack of due process is a common denominator. The designated groups are rarely given an opportunity to challenge their designation, either before or after being designated:

- In Zimbabwe, the minister of home affairs has the power to designate organizations as terrorist simply upon "consultation" with the minister of foreign affairs, although the designation may be contested.[90]

- Uganda's 2002 Anti-Terrorism Act allows the minister of internal affairs to declare an organization "terrorist" without challenge in court and without any substantive requirements.[91]

- Australia only allows review of the legal process under which an organization is proscribed as "terrorist." There is no review of the factual merits of the designation.[92] Australian law does not require notification to persons or organizations that they are under consideration for proscription.[93]

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[88] Australia's Criminal Code, secs. 102.1(1a), 102.3, and 102.8.as amended by the Anti-Terrorism Act, No. 144 of 2005, http://www.comlaw.gov.au/Details/C2012C00451/Download.

[89] Human Rights Law Centre, *Review of Australia's Counter-Terrorism and National Security Legislation,* October 28, 2011, http://www.hrlc.org.au/files/HRLC-Submission-to-National-Security-Legislation-Monitor.pdf (accessed June 12, 2012), sec. 3.2.

[90] Zimbabwe's Suppression of Foreign and International Terrorism Bill, 2006, http://www.kubatana.net/docs/legisl/supp_foreign_int_terror_bill_rev_061215.pdf, art. 8(1).

[91] Uganda's Anti-Terrorism Act, No. 14 of 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=6589 (accessed June 13, 2012), art. 10.

[92] Judicial review under Australia's Administrative Decisions (Judicial Review) Act 1977 is confined to review of the legal process by which the decision was made.

[93] Australia's Criminal Code, sec. 102.1, as amended by the Anti-Terrorism Act, No. 144 of 2005, http://www.comlaw.gov.au/Details/C2012C00451/Download, sets out the process for proscribing an organization. See also Human Rights Law Centre, *Review of Australia's Counter-Terrorism and National Security Legislation,* http://www.hrlc.org.au/files/HRLC-Submission-to-National-Security-Legislation-Monitor.pdf, sec. 3.2.

India: Banned Groups

Under the Unlawful Activities (Prevention) Act of 1967, most recently amended in 2008, India has banned 35 groups, as well as every person and entity on the UN's Al Qaeda sanctions list, as terrorist organizations. Proscribed groups range from Lashkar-e-Taiba— the Pakistan-based organization behind the Mumbai attacks that killed 166 people in 2008—to the Students Islamic Movement of India (SIMI), a student organization that claims it seeks the "liberation of India" from Western influences but does not publicly advocate violence.[94]

India's Home Ministry can designate a group to be a "terrorist organization," "terrorist gang," or "unlawful association" with immediate effect. Where a group is declared an "unlawful association," the government has up to six months to establish the basis for this declaration before a specially constituted tribunal composed of a high court justice nominated by the central government.

The government must show only on the balance of probabilities—not beyond a reasonable doubt—that it has sufficient cause for declaring the associational unlawful. It can withhold evidence from the proscribed association, but not the tribunal, on the grounds that the public interest requires non-disclosure.

However, even the limited review procedures available to "unlawful" groups are not available to groups declared to be "terrorist" organizations or gangs. A group declared to be a terrorist organization or gang can apply to the central government and, if the application is rejected, to a review committee chaired by a sitting or retired high court justice, to have the declaration revoked. But it cannot introduce new evidence or present witnesses in support of its application.[95]

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94 Indian Ministry of Home Affairs, List of Organisations Declared as Terrorist Organisations Under the Unlawful Activities (Prevention) Act, 1967, http://www.mha.gov.in/uniquepage.asp?Id_Pk=292 (accessed June 13, 2012).

95 India's Unlawful Activities (Prevention) Act (UAPA) of 1967, amended 2008, http://www.nia.gov.in/acts/The%20Unlawful%20Activities%20%28Prevention%29%20Act,%201967%20%2837%20of%201967%29.pdf (accessed May 25, 2012), secs. 3, 36, 37. See also The Unlawful Activities (Prevention) Amendment Bill, No. 76-C of 2008, https://www.unodc.org/tldb/pdf/India/THE_UNLAWFUL_ACTIVITIES_BILL2008.pdf (accessed May 25, 2012). See also Human Rights Watch, *India – Back to the Future: India's 2008 Counterterrorism Laws*, July 2010, http://www.hrw.org/reports/2010/07/28/back-future-0 (accessed May 25, 2012), chapter 4; and Human Rights Watch, *The "Anti-Nationals": Arbitrary Detention and Torture of*

Membership in an unlawful association or a terrorist organization or gang is punishable by up to two years of imprisonment. In the case of a terrorist organization or gang that is "involved in" a terrorist act, membership is punishable by up to life imprisonment—irrespective of whether the member had any involvement in the act.[96]

Dozens of men in India have been repeatedly rounded up and detained for being members of the banned student organization SIMI, which India designated a terrorist group almost immediately after the September 11 attacks in the United States.[97]

In Jaipur, for example, 14 men were detained for more than three years as suspects in a 2008 bombing in the city that killed 70 people; the primary evidence against them was their SIMI membership. In December 2011 a "fast-track" court acquitted all of them of links to the blast.[98]

In 2008 a special tribunal lifted the ban on SIMI, but the country's chief justice reinstated it the next day at the request of the central government.

Unsurprisingly, given the malleability of the definitions, the number and type of organizations deemed to be terrorist varies greatly from country to country:

- Canada has designated 44 organizations worldwide as terrorist, while its ally New Zealand has designated 71—nearly twice as many.[99]

Terrorism Suspects in India, February 2011, http://www.hrw.org/reports/2011/02/01/anti-nationals (accessed May 25, 2012), chapter VIII.

[96] India's UAPA, secs. 10, 20, amended 2008, http://www.nia.gov.in/acts/The%20Unlawful%20Activities%20%28Prevention%29%20Act,%201967%20%2837%20of%201967%29.pdf.

[97] Human Rights Watch interviews with human rights defenders, Delhi, Ahmedabad, Azamgahr, Mumbai, June-July 2009. See also Human Rights Watch, *India – Back to the Future.*

[98] "Jaipur serial blasts: 14 alleged SIMI activists acquitted," *The Times of India*, December 10, 2011, http://articles.timesofindia.indiatimes.com/2011-12-10/jaipur/30501516_1_jaipur-serial-blasts-sajid-mansoori-simi-activists (accessed May 25, 2012).

[99] Canada Public Safety website, http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx (accessed June 12, 2012); New Zealand Police website, "New Zealand's designated terrorist individuals and organizations," http://www.police.govt.nz/service/counterterrorism/designated-terrorists.html (both accessed June 12, 2012).

- The US State Department's list of Foreign Terrorist Organizations (FTOs) at this writing listed 51 groups. The majority were Muslim, followed by Communist and nationalist or separatist groups.[100] The US Treasury Department list of terrorism suspects includes hundreds more individuals and groups.[101]

- The EU list of terrorist organizations and individuals, originally created in December 2001, at this writing included 12 individuals and 25 organizations, not all of them associated with al Qaeda or the Taliban.[102] The EU list does not include the hundreds of individuals and groups on member states' lists.

- In 2008 Swaziland, Africa's last absolute monarchy, placed the country's main opposition party, the People's United Democratic Movement (PUDEMO), as well as three other opposition groups on a list of terrorist organizations under its Suppression of Terrorism Act. Swaziland passed the counterterrorism law that year in response to an attempted bombing.[103] In 2010 authorities in Swaziland arrested Sipho Jele, a timber industry worker, for wearing a PUDEMO t-shirt at a Worker's Day rally. Three days after his arrest, Jele was found dead in his cell; authorities claimed he hanged himself but they refused to conduct an autopsy.[104]

- Listings for Hezbollah, a Lebanon-based political and military organization composed primarily of Shia Muslims, underscore the enormous inconsistencies among countries' designations of terrorist groups. Hezbollah is listed as a terrorist organization by the United States, Canada, and Israel, as well as Australia and the

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[100] US Department of State, "Foreign Terrorist Organizations," January 27, 2012, http://www.state.gov/j/ct/rls/other/des/123085.htm (accessed May 29, 2012).

[101] US Department of the Treasury, Office of Foreign Assets Control, "Specially Designated Nationals And Blocked Persons," June 21, 2012, http://www.treasury.gov/ofac/downloads/t11sdn.pdf (accessed June 22, 2012). This list also includes persons blacklisted for reasons other than terrorism.

[102] Council of the European Union, "Council Implementing Regulation (EU) No 1375/2011," December 22, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:343:0010:0013:EN:PDF (accessed May 24, 2012). See also "Council Decision 2012/150/CFSP of 13 March 2012 amending Decision 2011/872/CFSP updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism," March 13, 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:074:0009:01:EN:HTML (accessed May 24, 2012).

[103] See Swaziland's Suppression of Terrorism Bill, No.5 of 2008, http://m.idasa.org/media/uploads/outputs/files/Suppression%20of%20Terrorism%20Act%202008.pdf (accessed May 30, 2012), sec. 28. See also "Swaziland: Suppression of Terrorism Act Undermines Human Rights in Swaziland," International Bar Association, January 8, 2009, http://www.amnesty.org/en/library/asset/AFR55/001/2009/en/810fa017-dce1-11dd-bacc-b7af5299964b/afr550012009en.html (accessed May 30, 2012).

[104] "Swazi opposition rejects coroner custody death report," Agence France Presse, March 9, 2011, http://swazimedia.blogspot.com/2011/03/pudemo-on-jele-inquest-verdict.html (accessed May 29, 2012).

UK (both of which ban Hezbollah's military wing but not its political party). But it is not banned by France—which maintains close ties to Lebanon, its former colony—or the EU (in large part at France's insistence), Russia, and Arab and Muslim countries.

- In 2002 China successfully gained US support for its efforts to place the East Turkestan Islamic Movement (ETIM), a separatist organization founded by Turkic-speaking Uighurs in China's western Xinjiang province, on the UN list of terrorist organizations. There was no significant reported militant activity by ETIM; Chinese authorities claimed that individuals disseminating peaceful religious and cultural messages in Xinjiang were terrorists who had simply changed tactics.[105]

Penalties for Membership

A designation of "terrorist" usually results in authorities banning the designated group, freezing its assets, and blocking its commercial activities. Participants in the organization may face criminal prosecution and severe penalties for the mere fact of membership, even without evidence that they acted in support of the group's unlawful activities:

- In Zimbabwe, a criminal conviction for being a member of a designated foreign terrorism organization is punishable by five years of imprisonment, while being a leader or officer of a designated foreign terrorist organization is punishable by 10 years of imprisonment.[106]

- Bahrain's 2006 counterterrorism law prescribes a minimum five-year prison sentence for anyone convicted of joining a terrorist group "while being aware of its terrorist objectives." Leadership of such a group—or the creation, establishment, organization, or management of such a group—is punishable by life imprisonment.[107]

  Bahrain's counterterrorism law also penalizes membership in groups based abroad. The penalty for association with foreign-based groups that intend to commit

[105] Human Rights Watch, *Devastating Blows: Religious Repression of Uighurs in Xinjiang,* April 2005, http://www.hrw.org/sites/default/files/reports/china0405.pdf, p. 8.
[106] Zimbabwe's Suppression of Foreign and International Terrorism Bill, 2006, http://www.kubatana.net/docs/legisl/supp_foreign_int_terror_bill_rev_061215.pdf, art. 9.
[107] Bahrain's Law with Respect to Protection of the Community against Terrorist Acts, 2006, https://www.unodc.org/tldb/showDocument.do?documentUid=8520, art. 6.

terrorist acts against Bahrain or foreign countries carries a minimum five-year sentence; if the group actually commits terrorist acts, all associated with it are subject to life imprisonment.[108]

- El Salvador's counterterrorism law provides that those who belong to a terrorist organization, "with the goal of carrying out any of the offenses contemplated in the present Law," face prison terms of 8 to 12 years. The requirement that the defendant's goal must be to carry out acts of terrorism is not found in most other countries' laws. Leaders or other higher-ranking members of terrorist groups face terms of 10 to 15 years after conviction.[109]

- In the United Arab Emirates, the 2004 counterterrorism law makes joining or participating "in any manner" in a terrorist organization punishable by up to life imprisonment. The law requires that the person know the objectives of the organization.[110]

[108] Ibid., art. 12.

[109] El Salvador's Ley Especial Contra Actos de Terrorismo, 2006, https://www.unodc.org/tldb/pdf/El_Salvador_Ley_Especial_Contra_Actos_De_Terrorismo.pdf, art. 13.

[110] United Arab Emirates' Decree By Federal Law No. 1 of 2004 on Combating Terrorism Offenses, https://www.unodc.org/tldb/showDocument.do?documentUid=6397 (accessed June 12, 2012), art. 5.

US Definitions: Far-Reaching Consequences

Broad definitions in US law of "terrorist organizations" have had far-reaching consequences for non-citizens who may be subject to mandatory detention, for the ability of refugees to be granted protection from persecution, and for the rights to freedom of speech and association. This is particularly the case when these provisions are combined with equally sweeping definitions of "terrorist activity" or "material support" to "terrorist organizations" (see chapter below).

The USA PATRIOT Act of 2001 amended US immigration law to require the detention of non-citizens alleged to be affiliated with terrorist organizations pending their removal from the United States, creating mandatory and potentially indefinite terms of detention (repeated periods of six months if the non-citizen is believed by the attorney general to pose a national security threat) and leaving only very limited access to judicial review by habeas corpus petition.[111]

Prior to September 11, US immigration law prevented entry to the US of non-citizens who engaged in "terrorist activity" or provided "material support to terrorist organizations."[112] The USA PATRIOT Act expanded the definitions of terrorist organizations to groups publicly listed by the US State Department, as well as two or more individuals who engage in, or have a subgroup that engages in, what the immigration law defines as "terrorist activity."[113] "Terrorist activity" was, in turn, expanded to include a range of unlawful uses of a weapon or dangerous device other than for mere personal monetary gain.[114] Similarly, in 2005, the REAL ID Act amended US immigration law to make deportable any non-citizen involved in any of a long list of inadmissibility grounds, which, in effect, barred them from any form of asylum.[115]

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[111] See 8 U.S.C. sec. 1226a; see also *Al-Marri v. Pucciarelli, 534 F.3d 213, 240, 248-49 (4th Cir. 2008)* (per curiam) (Motz, J., concurring) (discussing provisions of the Patriot Act), cert. granted, *129 S. Ct. 680 (2008).*

[112] US Immigration and Nationality Act, sec. 212(a)(3)(B).

[113] US Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (USA PATRIOT Act), sec. 411(a)(1)(G).

[114] Ibid., sec. 211.

[115] US REAL ID Act of 2005 (contained in Pub. L. No. 109-13, 119 Stat. 231 (2005). See Melanie Nezer and Anwen Hughes, *"Understanding the Terrorism-Related Inadmissibility Grounds: A Practitioner's Guide,"* in *Immigration & Nationality Law Handbook* (2009-10 Edition), American Immigration Lawyers Association, 2009, p. 578.

The broadened definitions in the USA PATRIOT and REAL ID Acts have obstructed the entry to the United States of refugees who themselves had been victims of abuse, including rape survivors forced into domestic servitude by rebel groups and those forced to pay money, serve as porters and cooks, or provide medical care to rebels.[116] Some discretion to waive the bar was adopted in law and regulations starting in 2007.[117] However, triggering such discretion is difficult for many refugees and asylum seekers and can be administratively complex, since in many cases three executive departments must agree to waive the bar.

[116] See Human Rights First, "The Road to Absurdity—A Brief History of the 'Terrorism'-Related Provisions of the Immigration and Nationality Act," in *Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States*, November 2009, http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf (accessed June 24, 2012), p. 19; Georgetown University Law Center, Human Rights Institute, Refugee Fact Finding Investigation, "Unintended Consequences: Refugee Victims of the War on Terror," May 2006, http://scholarship.law.georgetown.edu/hri_papers/1/ (accessed June 23, 2012), p. 29.

[117] The Department of Homeland Security (DHS) issued a memorandum providing detailed guidance to asylum officers on granting a waiver to section 212(a)(3)(B) for designated groups and individual asylum applicants on a case-by-case basis. If it could be shown by a totality of the circumstances that an applicant provided material support under duress, this bar to asylum would not apply. An individual applicant must first establish prima facie eligibility for asylum, and then undergo background and security checks to demonstrate that he or she poses no danger to the US. Once this is determined, DHS must assess whether material support was given under duress, whether the applicant could have avoided providing material support, the severity and type of harm inflicted or threatened, to whom it was directed, the perceived imminence of the harm threatened, and the perceived likelihood that the harm would be inflicted. DHS must also take into consideration when looking at the totality of the circumstances the type, amount, and frequency of material support; "the nature of activities committed by the terrorist organization[;] the [applicant's] . . . awareness of those activities[;] the length of time since material support was provided[; and] the applicant's conduct since that time." Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26138, May 8, 2007. In addition, waivers requiring agreement among three executive agencies were provided in the Immigration and Nationality Act H.R. 2764, S. 1922 (110th Cong.)(2007) (enacted into public law Dec. 26, 2007), and in the Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007).

IV. Material Support of Terrorism and Terrorist Organizations

Fundraising for the purposes of terrorism, providing funds to organizations defined as terrorist, or providing other forms of material support are also acts made criminal under many counterterrorism laws. Material support provisions are ostensibly intended to deter and punish those who would support a terrorist organization without taking part in terrorist acts. But such provisions can be readily abused when combined with overly broad definitions of terrorism, terrorist groups, or material support itself, and there is a lack of due process for material support suspects.

Nearly 100 counterterrorism provisions reviewed by Human Rights Watch define material support for terrorism as a crime. Of those, 32 required neither knowledge nor intent that the support could result in a terrorism-related offense—recklessness was sufficient.

- US federal criminal laws prohibit the provision of "material support or resources" to designated terrorist organizations and the provision of "material support" for the commission of certain offenses that such groups might commit.[118] Material support has been defined to include, among other things, the provision of financial services, currency, lodging, and transportation. Following the September 11 attacks, the USA PATRIOT Act and the US Intelligence Reform and Terrorism Prevention Act expanded those laws to prohibit the provision of "expert advice or assistance," "personnel," "service," and "training" to terrorist organizations.[119]

  In *Holder v. Humanitarian Law Project,* the US Supreme Court in 2010 rejected arguments that these post-September 11 provisions unconstitutionally infringe upon rights of freedom of speech or association, even when the activities undertaken were intended solely to promote peaceful dispute resolution and compliance with international law.[120] Plaintiffs in that case included persons who

[118] 18 U.S.C. 2339A and 2339B.

[119] US Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, Section 6603, 118 Stat. 3762 (2004); USA PATRIOT Act Improvement and Reauthorization Act, P.L. 109-177, sec. 104, 120 Stat. 195 (2006).

[120] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (U.S. 2010), http://supreme.justia.com/cases/federal/us/561/08-1498/ (accessed May 21, 2012).

sought to advocate for nonviolence and respect for human rights with the Kurdistan Workers' Party, an armed Kurdish organization in Turkey that the US secretary of state had designated as a "foreign terrorist organization."[121]

The court held, by a vote of six to three, that the US Constitution permitted criminal prosecution of such activity. It ruled that there was no requirement that the expert advice, services, or training be intended to aid terrorist groups, simply that it must be provided "in coordination" with a terrorist group. The interpretation left open the possibility that conduct such as the provision of legal assistance to alleged terrorism suspects could be prosecuted.[122] The sweeping legal restrictions—written so that they apply abroad, possibly even to non-US staff working in foreign organizations—made humanitarian groups fearful of operating in regions of famine-stricken Somalia controlled by the armed Islamist group al-Shabaab. In 2011 the US government issued new guidelines on Somalia indicating that it was relaxing the enforcement of sanctions relating to al-Shabaab, but without changing the underlying legal rules.[123]

- France's Internal Security Act of 2003 amended the penal code to include the so-called "pimping for terrorism" offense, in which individuals can be charged with support for terrorist activities if they are unable to substantiate an income commensurate with their lifestyle while being closely associated with individuals who engage in terrorist acts.[124]

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[121] Human Rights Watch joined an amicus ("friend of the court") brief, along with eight other conflict resolution and human rights groups, in the case of *Holder v. Humanitarian Law Project.* In the brief, the groups argued that the statute could be used to prosecute them if they worked with members of organizations the US had designated as terrorist groups, even if the work was intended to help those groups understand, respect, and apply international law to their conduct. See *Brief Amicus Curiae of the Carter Center and other humanitarian groups in support of Humanitarian Law Project, et al.,* November 23, 2009, http://www.aclu.org/free-speech/holder-v-humanitarian-law-project-amicus-brief-carter-center-et-al (accessed June 24, 2012).

[122] Ibid. See also "Supreme Court: Ruling a Blow to Free Speech," Human Rights Watch news release, June 22, 2010, http://www.hrw.org/news/2010/06/22/us-supreme-court-ruling-blow-free-speech.

[123] Joanne Mariner, "Starvation in Somalia," Justia.com, August 3, 2011, http://verdict.justia.com/2011/08/03/starvation-in-somalia (accessed June 23, 2012).

[124] The offense is punishable by up to seven years in prison and a 100,000 Euro (US$125,000) fine. See France's Code Pénal, art. 421-2-3, as amended by the Internal Security Act (Loi pour la sécurité intérieure), Law 239 of March 18, 2003, http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=8D3EABB310D1EC52543B680ADB7AD45C.tpdjo03v_2?idArticle=LEGIARTI000006418434&cidTexte=LEGITEXT000006070719&dateTexte=20120622, art. 45. See also Letter from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism to the President of the Security Council, March 29, 2004, S/2004/226, http://www.unhcr.org/refworld/docid/46dc1eb5c.html (both links accessed June 22, 2012).

- Afghanistan's Law on Combat against Terrorist Offenses of 2008 defines "support" as "providing financial source [sic], residence, training, shelter, counsel and assistance, falsification of identification, communication equipment, and weapon, chemical, nuclear and other explosive substances, human resources, transportation services and other facilities."[125] While the law stipulates that the person's assistance must be intended to "complete the commission of offences," its overly vague language leaves the interpretation open to abuse.[126]

- In Australia, amendments to the criminal code in 2005 outlaw the act of intentionally providing "support or resources" to an organization that would help that organization engage in planning, assisting, or fostering the commission of a terrorist act.[127] However, the overly broad language does not specify that the "support" must be "material." The amendments also bar persons from intentionally making funds available to another person where the first person is "reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act."[128]

- Under Zimbabwe's 2006 counterterrorism law, a person who "solicits, invites or encourages moral or material support" for a designated terrorist organization commits an offense punishable by imprisonment of up to five years.[129]

[125] Afghanistan's Law on Combat against Terrorist Offenses of 2008, UN unofficial English translation, www.icj.org/IMG/Afghan_Law_English.pdf (accessed June 7, 2012), art. 3(4).

[126] Ibid., art. 19(3).

[127] Australia's Criminal Code, sec. 102.7, as amended by the Anti-Terrorism Act, No. 144 of 2005, http://www.comlaw.gov.au/Details/C2012C00451/Download.

[128] Ibid. The maximum penalty for being "reckless" in this way is life imprisonment: sec. 103.2(1).

[129] Zimbabwe's Suppression of Foreign and International Terrorism Bill, 2006, http://www.kubatana.net/docs/legisl/supp_foreign_int_terror_bill_rev_061215.pdf, art. 10.

V. Limiting Free Expression

Dozens of countries' counterterrorism laws impose criminal penalties on speech, publications, or other forms of expression that encourage, justify, incite, or lend support to terrorism. Security Council Resolution 1624 of 2005 explicitly calls on states to "adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to [p]rohibit by law incitement to commit a terrorist act or acts.[130] Consistent with international protections on the right to freedom of expression, governments may prosecute speech that incites criminal acts—speech that directly encourages the commission of a crime, is intended to result in criminal action, or is likely to result in criminal action—whether or not criminal action does, in fact, result.[131] Yet laws that impose criminal punishment for what has been called "indirect incitement"—for example, justifying or glorifying terrorism—encroach on expression protected under international human rights law.

Since 2001 there has been a clear trend toward tightening restrictions on speech perceived as encouraging terrorism. Human Rights Watch found more than 50 laws that limit speech that encourages, justifies, or supports terrorism but does not incite acts of terrorism.

- In 2008 Swaziland used its newly enacted counterterrorism law to arrest Mario Masuku, leader of the banned PUDEMO political opposition movement, on a charge of making a statement that provided "support to the commission of a terrorist act" and held him for 340 days before a court acquitted him.[132] Swaziland had designated PUDEMO a terrorist organization under its counterterrorism law, as noted above. Authorities also detained Masuku for several hours in 2010 for

[130] UN Security Council Resolution 1624 (2005), S/RES/1624 (2005), http://www.un.org/Docs/sc/unsc_resolutions05.htm (accessed May 29, 2012), para. 1(c).

[131] The ICCPR provides in article 19(2) that "[e]veryone shall have the right to freedom of expression." Under article 19(3), the right to free expression may be restricted only where provided by law and necessary to "respect … the rights or reputations of others," and for "the protection of national security or of public order (ordre public), or of public health or morals." Any such restrictions must be provided under law and comply with the strict tests of necessity and proportionality. See UN Human Rights Committee, General Comment No. 34 on Article 19, Freedoms of opinion and expression, September 12, 2011, http://www2.ohchr.org/english/bodies/hrc/comments.htm, (accessed June 20, 2012), para. 22.

[132] Sarah Hager, "Mario Masuku Acquitted in Swaziland," Amnesty International, September 23, 2009, http://blog.amnestyusa.org/africa/mario-masuku-acquitted-in-swaziland/ (accessed May 30, 2012).

"mentioning" PUDEMO at the funeral of a man who died in police custody after being arrested for wearing a PUDEMO t-shirt at a Workers Day rally.[133]

- The UAE's 2004 counterterrorism law provides for up to five years of imprisonment for anyone who promotes, orally or in writing, any of the offenses set out in the law.[134]

- Under Bahrain's 2006 counterterrorism law, anyone who "promotes any activities that constitute a crime for implementing a terrorist objective" is subject to a fine and possible prison sentence. A prison sentence of up to five years is imposed "upon everyone who holds or possesses personally or through another person a document or publication containing the aforesaid promotion where it is intended to be distributed and also upon everyone who holds or possesses any means of printing, recording, or publicizing regardless of the type thereof whether used or intended for use even on a temporary basis for printing, recording or broadcast of such promotion."[135]

- El Salvador's counterterrorism law prescribes a prison sentence of 5 to 10 years for anyone who "publicly advocates for" or "incites" terrorism.[136] However it does not define "advocate" or "incite."

- Saudi Arabia's draft counterterrorism law of 2011 criminalizes setting up or publishing a website "to facilitate communicating with leaders or any member of terrorist organizations or to propagate their ideas"—but includes no definition of what constitutes a terrorist organization.[137]

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[133] "Swazi opposition head charged with terrorism," IOL News, May 22, 2010, http://www.iol.co.za/news/africa/swazi-opposition-head-charged-with-terrorism-1.484807#.T8fUWYH4J2Q (accessed May 31, 2012). See also Freedom House, "Troubling Decline in Rights in Swaziland," http://www.freedomhouse.org/article/troubling-decline-rights-swaziland, (accessed May 31, 2012).

[134] UAE's Decree by Federal Law No. 1 of 2004 on Combating Terrorism Offences, https://www.unodc.org/tldb/showDocument.do?documentUid=6397, art. 8.

[135] Bahrain's Law with Respect to Protection of the Community against Terrorist Acts, 2006, https://www.unodc.org/tldb/showDocument.do?documentUid=8520, art. 11.

[136] El Salvador's Ley Especial Contra Actos de Terrorismo, https://www.unodc.org/tldb/pdf/El_Salvador_Ley_Especial_Contra_Actos_De_Terrorismo.pdf, art. 8.

[137] Saudi Arabia's Penal Law for Crimes of Terrorism and Its Financing, 2011, art. 43. See also "Saudi Arabia's Draft Counterterrorism Law a Setback for Human Rights," Human Rights Watch news release, 2011, http://www.hrw.org/news/2011/08/02/saudi-arabia-s-draft-counterterrorism-law-setback-human-rights.

- Turkey's counterterrorism law, revised in 2006, imposes criminal penalties including fines and imprisonment up to five years on those who "make propaganda in connection with [terrorist organizations]."[138] The law provides for harsher penalties for those who do so using the media.[139] A Council of Europe expert committee in 2007 criticized the provision, finding it to be "ambiguous and written in wide and vague terms."[140]

- Russia's counterterrorism law of 2006 allows authorities to deny journalists access to special "counterterrorism operations" zones where law enforcement officials have sweeping powers of search and arrest. Authorities have invoked this provision to prevent journalists from reporting on law enforcement crackdowns in areas of the volatile North Caucasus region such as Ingushetia.[141] The Federal Law on the Mass Media was also amended in 2006 to restrict reporting of counterterrorism operations.[142] The amendments ban the media from publicly justifying terrorism—a loose term that could be used as a censoring tool.[143] They also stipulate that "the procedure for collection of information by journalists in the territory of a counterterrorism operation shall be defined by the head of the counterterrorism operation."[144] They forbid media outlets from disseminating information on special means, techniques, and tactics used in connection with an

[138] Turkey's Law on Fight Against Terrorism, No. 3713 of 1991, art. 7. For translation of relevant articles see Human Rights Watch, *Protesting as a Terrorist Offense: The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey*, November, 2010, http://www.hrw.org/node/93926, appendix I.

[139] Ibid.

[140] Committee of Experts on Terrorism, Council of Europe, "Respect for human rights in the fight against terrorism: Introductory Memorandum," April 20, 2007, http://www.libertysecurity.org/IMG/pdf_CODEXTER_2007_14_E_PACE.pdf (accessed June 14, 2012), para. 101.

[141] Human Rights Watch, *Russia – As If They Fell From the Sky,* June 2008, http://www.hrw.org/reports/2008/06/24/if-they-fell-sky, p. 29.

[142] The amendments were made via Federal Law No. 153 on Introducing Amendments into Specific Legislative Action of the Russian Federation in connection with the Adoption of Federal Law on Ratification of the Council of Europe Convention on Prevention of Terrorism and Federal Law on Counteracting Terrorism, (О внесении изменений в отдельные законодательные акты Российской Федерации в связи с принятием Федерального закона "О ратификации Конвенции Совета Европы о предупреждении терроризма" и Федерального закона "О противодействии терроризму"), adopted June 27, 2006. Ibid., 33.

[143] It is not clear whether in this context justification must be interpreted the way it is defined in the commentary to the article 205-2 of the Criminal Code, that is, as public assertions that terrorist ideology and practices are justifiable and should be supported. This lack of clarity potentially makes it possible to use broader interpretation in connection with administrative suits against media outlets. Ibid.

[144] Russia's Federal Law on Mass Media, No. FZ-2124-1, as amended by Federal Law No. 153. See also Human Rights Watch, *As If They Fell From the Sky*, 2008, http://www.hrw.org/reports/2008/06/24/if-they-fell-sky, p. 33.

operation.[145] In addition, media cannot be used "for dissemination of materials containing public incitement to terrorist activity, of providing public justification of terrorism, or of other extremist materials."[146]

- Twenty-nine European countries have signed the Council of Europe Convention on the Prevention of Terrorism, which requires states to criminalize "public provocation" of terrorism, a crime that could include indirect incitement.[147] The convention defines public provocation as the public dissemination of a message "with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed."

Ethiopia: Journalists Sentenced as "Terrorists"

In June 2012, Ethiopia's Federal High Court used the country's deeply flawed Anti-Terrorism Proclamation of 2009 to convict six journalists—along with 18 others including political opposition leaders—on terrorism-related charges, despite a lack of evidence and failure to investigate allegations that some defendants had been tortured. It was the country's third high-profile "terrorism" verdict in six months.[148]

Eskinder Nega Fenta, an independent journalist and blogger who had been honored earlier in the year with the prestigious PEN/Goldsmith Freedom to Write award, was convicted of conspiracy to commit terrorist acts, which carries a sentence of 15 years to life imprisonment or death, as well as "encouragement of terrorism," and "high treason." The five other journalists were convicted *in absentia*.[149]

[145] By law, the ban is only applicable to the situations when such coverage may interfere with the conduct of the operation and threaten people's lives and health. The formula, however, is vague and therefore indirectly encourages a very broad application of the ban. Ibid.

[146] Russia's Federal Law on Mass Media, No. FZ-2124-1, as amended by Federal Law No. 153, art. 4.

[147] Council of Europe Convention on the Prevention of Terrorism, 2005, http://conventions.coe.int/Treaty/en/Treaties/Html/196.htm (accessed May 25, 2012), art. 5. As of May 25, 2012, 14 others had signed but not yet ratified.

[148] "Ethiopia: Terrorism Law Used to Crush Free Speech," Human Rights Watch news release, June 27, 2012, http://www.hrw.org/node/108325.

[149] Ibid.

Eleven journalists have been convicted under the counterterrorism law, along with at least 4 opposition supporters and 19 others.

The June 2012 convictions were based on the counterterrorism law's most problematic provisions. Two of the journalists tried *in absentia*, Mesfin Negash and Abiye Tekle Mariam, were convicted under the law's article on support for terrorism, which contains a vague prohibition on "moral support."[150] This provision is contrary to the principle of legality, which requires that persons be able to determine what acts would constitute a crime. Only journalists have been charged and convicted under this article.

All 24 defendants were initially charged with "terrorist acts," which are defined so broadly that authorities can use the law to prosecute lawful, peaceful dissent.[151] Similarly, all defendants were initially charged with "encouragement of terrorism."[152] The law's definition of this offense does not require a link to incitement but includes the publication of statements "likely to be understood as encouraging terrorist acts." This could lead to charges for merely publishing the names of organizations or individuals deemed to be terrorists.

The defendants had no access to legal counsel during almost two months of pre-trial detention. Complaints of mistreatment and torture by defendants were not appropriately investigated.

Nathnael Mekonnen told the court that during his pre-trial detention he was tortured for 23 days, including being beaten, forced to stand for hours upon end, deprived of sleep, and having cold water repeatedly poured over him at the country's notorious Maekelawi facility. Credible sources told Human Rights Watch that the court did not investigate his complaints. According to credible sources, Andualem Arage lodged a complaint after he was beaten by a convicted prisoner on February 15 in Kaliti prison, but his complaint was dismissed. The court prevented further questioning by defense attorneys and accepted

[150] Ethiopia's Proclamation on Anti-Terrorism, 2009, http://www.unhcr.org/refworld/country,,NATLEGBOD,,ETH,,4ba799d32,0.html (accessed June 27, 2012), art. 5.
[151] Ibid., art. 3.
[152] Ibid., art. 6.

as fact the response by the prison administrator that contradicted Andualem's claims, without further investigation, the sources said.[153]

In January 2012, Ethiopia's Federal High Court used the counterterrorism law to convict three other journalists—as well as two political opposition members—of conspiracy to commit terrorist acts and participation in a terrorist organization, despite a lack of evidence and failure to investigate allegations that two of the reporters also had been tortured in detention. All five defendants were denied access to counsel during three months in pretrial detention.

According to the charge sheet, the evidence against the journalists consisted primarily of online articles critical of the government and telephone discussions regarding peaceful protest actions. Journalists Woubshet Taye Abebe of the now-defunct weekly *Awramba Times* and Reeyot Alemu Gobebo of the weekly *Feteh* were sentenced to 14 years in prison, while Elias Kifle, editor of the online *Ethiopian Review,* who was tried *in absentia*, received a life sentence.[154]

That ruling came one month after two Swedish journalists were each sentenced to 11 years in prison on charges of "rendering support to terrorism," based on their having illegally entered Ethiopia to investigate and report on abuses in Ogaden, eastern Ethiopia's Somali region.[155]

Possession of Publications

Even the possession of publications that support terrorism has been made a criminal offense in some countries:

- Under the UK's 2000 counterterrorism law, the possession of articles connected to terrorism—including terrorism-related publications or videos—is a criminal offense,

[153] "Ethiopia: Terrorism Law Used to Crush Free Speech," Human Rights Watch news release, June 27, 2012, http://www.hrw.org/node/108325.

[154] "Ethiopian Anti-Terrorism Law to Quell Dissent," Human Rights League of the Horn of Africa, press release, February 4, 2012, http://humanrightsleague.com/2012/02/ethiopian-anti-terrorism-law-to-quell-dissent/ (accessed May 31, 2012).

[155] "Ethiopia: Terrorism Verdict Quashes Free Speech."

so long as there is minimal showing that the person's possession of the items may be related to plans to commit terrorism. Specifically, the law provides that "[a] person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism."[156]

Another provision of the same law criminalizes the possession of documents containing information "of a kind likely to be useful to a person committing or preparing an act of terrorism." This extremely broad provision—which seemingly could bar, for example, possessing a map of London—also provides that a person charged with violating the law may defend against prosecution by proving that he has "a reasonable excuse for his action or possession."[157]

- Bahrain's 2006 counterterrorism law provides that possessing a publication that promotes or approves of terrorist acts is a crime punishable by five years of imprisonment.[158]

- Uzbekistan's Criminal Code criminalizes the "publishing, storing, and distributing of materials containing ideas of religious extremism and fundamentalism."[159] Since Uzbekistan's laws lack any precise definition of the terms "religious extremism" and "fundamentalism," they can be applied to practically any kind of religious literature and, in practice, have been used expansively to persecute citizens for their perceived religious or political convictions under the guise of counterterrorism. Many Uzbeks have been imprisoned for possessing or distributing the literature of Hizb ut-Tahrir, an Islamist movement that seeks implementation of a strict Islamic doctrine and the creation of an Islamic caliphate in Central Asia.[160] In some cases, the authorities rounded up and imprisoned members of Hizb ut-Tahrir study groups and charged them with crimes including intent to commit subversion for reading traditional Islamic texts as well as literature published by Hizb ut-Tahrir.[161]

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[156] UK Terrorism Act, 2000, http://www.legislation.gov.uk/ukpga/2000/11, sec. 57.

[157] Ibid., sec. 58.

[158] Bahrain's Law with Respect to Protection of the Community Against Terrorist Acts, 2006, https://www.unodc.org/tldb/showDocument.do?documentUid=8520, art. 11.

[159] Uzbekistan's Criminal Code, art. 244-1 , as amended by the Law of August 28, 2001, http://legislationline.org/download/action/download/id/1712/file/a45cbf3cc66c17f04420786aa164.htm/preview.

[160] Human Rights Watch, *Creating Enemies of the State,* March 2004, http://www.hrw.org/sites/default/files/reports/uzbekistan0304.pdf, p. 53, 82, 137-40.

[161] Ibid., p. 137-40.

VI. Restricting Peaceful Assembly

Some counterterrorism laws specifically target demonstrations. In 2006 the UN special rapporteur on human rights and counterterrorism noted "with concern the increase of infringements upon the exercise of the right to freedom of assembly and association in the name of counter-terrorism." Any limitations on this right "must be narrowly construed as to their objective, i.e. counter-terrorism."[162] Yet laws infringing on these rights continue to be used to quash legitimate protest.

The right to peaceful assembly is protected under international law. The International Covenant on Civil and Political Rights allows restrictions on peaceful assembly only when "necessary in a democratic society in the interests of national security or public safety, public order, … the protection of public health or morals or the protection of the rights and freedoms of others."[163]

Some counterterrorism laws contain vaguely worded provisions that open the door to far-reaching restrictions on assembly. Saudi Arabia's draft counterterrorism law, for example, would criminalize "organizing a demonstration, participating in its organization, assisting, calling for, or inciting it," without any reference to terrorist acts.[164] The same article also criminalizes raising "banners or pictures that infringe upon the country's unity or its safety, or that call for sedition and division among individuals in society, or inciting such acts."

[162] "Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," UN Doc. A/61/267 (2006), http://ap.ohchr.org/documents/alldocs.aspx?doc_id=12600 (accessed June 13, 2012), para. 22.

[163] ICCPR, http://www2.ohchr.org/english/law/ccpr.htm, art. 21.

[164] Saudi Arabia's Penal Law for Crimes of Terrorism and Its Financing, 2011, art. 47. See also "Saudi Arabia's Draft Counterterrorism Law a Setback for Human Rights," http://www.hrw.org/news/2011/08/02/saudi-arabia-s-draft-counterterrorism-law-setback-human-rights.

Turkey: Jailed for Victory Signs

Since 2008, the courts in Turkey have convicted hundreds of Kurdish protesters simply for participating in protests the government deems to be sympathetic to the outlawed armed Kurdistan Workers' Party (PKK). The arrests are part of a broader crackdown that also targets legal Kurdish political parties and perceived sympathizers of the PKK and its alleged urban wing, the Union of Kurdistan Communities (KCK). In 2010 Human Rights Watch documented 26 cases of protesters prosecuted as terrorists under counterterrorism provisions enacted since 2005 for activities such as shouting slogans, making victory signs, holding up banners, and in some cases throwing stones.[165]

The government has similarly arrested individuals for alleged association with armed revolutionary leftist political groups, among them the Revolutionary People's Liberation Party/Front (DHKP-C), which Turkey lists as a terrorist organization. A number of journalists have been among those imprisoned on terrorism charges for alleged association with a group known as the Ergenekon gang, which allegedly plotted coups against the government. Other examples of cases include:

- A university student, Murat Işıkırık, served a sentence of six years and three months for making a victory sign at the March 2006 funeral procession in Diyarbakır for four PKK members, and clapping during a March 2007 protest on the campus at Diyarbakır's Dicle University. Released in November 2011, he faces further possible prison sentences of around 20 months for "making propaganda for a terrorist organization" for the same activities.

- A mother of six, Vesile Tadik, was sentenced to seven years in prison for holding up a banner with a slogan "The approach to peace lies through Öcalan" during a December 2009 protest in Kurtalan, Siirt, against the prison conditions of the imprisoned PKK leader Abdullah Ocalan. Her case is on appeal.

[165] Human Rights Watch, *Protesting as a Terrorist Offense*.

- In June 2012, a Turkish court convicted students Berna Yılmaz and Ferhat Tüzer to prison sentences of eight years and five months for acts that included unfurling a banner at a protest that read, "We want free education, we will get it," during an event attended by Turkish Prime Minister Recep Tayyip Erdoğan in March 2010. The students were convicted of membership in an armed organization (DHKP/C) and making propaganda for the organization staging that protest, as well as for participating in similar non-violent protests against the United States, the International Monetary Fund, and the World Bank. They spent 19 months in detention during their trial and were released from prison in 2011. If the Court of Cassation upholds their sentences they will spend four more years in prison.[166]

In most cases, the courts charged or convicted protesters, activists, and others using two provisions of the Turkish Penal Code and Turkey's counterterrorism law of 2006. Article 220/6 of the penal code states that "a person who commits a crime on behalf of the organization *although he or she is not a member of the organization* shall also be punished as though a member of the organization" (emphasis added). Article 2/2 of Turkey's Anti-Terror Law includes a similar provision: "A person who is not a member of a terrorist organization, but commits a crime on behalf of the organization, is also deemed to be a terrorist offender and is punished as a member of the organization."[167] Article 314/2 of the penal code criminalizes membership in an armed organization.[168] The courts also have charged journalists and others with "knowingly and willingly helping an organised criminal group" under article 220/7 of the penal code.

[166] Case documents, including indictment and decision, on file with Human Rights Watch.

[167] Turkey's Law on Fight Against Terrorism, No. 3713 of 1991, art. 2/2.

[168] See Human Rights Watch, *Protesting as a Terrorist Offense*, chapter 4 and appendix I.

VII. Broad Police Powers

More than 120 counterterrorism laws vastly expand police powers to surveil, search persons and property, make arrests, and seize objects and contraband in cases the police deem related to terrorism, in many cases without judicial warrant. By enhancing the ability of police forces to act without judicial approval, and lowering—or removing altogether—the grounds of reasonable suspicion or probable cause ordinarily required to justify police interference, these laws may violate the right to privacy and encourage racial profiling and the targeting of minorities.

As the Commonwealth Human Rights Initiative (CHRI) warned in 2007, "[counterterrorism] laws, based on police discretion, reduce the potential for oversight by courts and other accountability bodies, thereby creating an environment favourable to police misconduct and human rights abuses."[169]

Warrantless Arrests and Searches

Several countries have enacted provisions permitting the police to conduct warrantless arrests and searches in "urgent" situations. Because many such laws do not provide a clear definition of "urgency" or specific criteria to serve as guidelines in determining whether a case is urgent, they grant broad discretion to police to enter premises and search persons without prior judicial authorization.

Such provisions can significantly reduce a suspect's ability to challenge the legality of a police search. This right is explicitly denied where the provisions include clauses immunizing the police from civil or criminal liability for their actions (see section below). Even under laws that do not specifically preclude challenges to the legality of police actions, courts may have no way of determining whether a case was legitimately one of "urgency" if the law does not provide clear criteria upon which to make that judgment:

- The counterterrorism laws of Tanzania, Mauritius, and Gambia all include provisions that grant police a range of powers that can be exercised without a

[169] Commonwealth Human Rights Initiative (CHRI), "Stamping Out Rights: The impact of anti-terrorism laws on policing," 2007, http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/chogm_report_2007.pdf (accessed June 27, 2012), p.27.

warrant in cases of urgency, where an officer above a certain rank determines that applying for a warrant would cause a delay prejudicial to public safety or public order. In such cases, the police are empowered to enter and search premises, search any persons or vehicles therein, seize property, and detain or arrest individuals.[170]

- Zambia's counterterrorism law permits warrantless searches and seizures of property—but not warrantless arrests—in cases of "urgency" in which the process of obtaining a warrant would cause a delay that might be prejudicial to public safety or order.[171]

- Under Uganda's counterterrorism law, if an investigating officer has reasonable grounds to believe that a case is one of "great urgency" and that "in the interest of the State, immediate action is necessary," the officer may grant written authorization for any other officer to enter and search premises, search the persons therein, and seize and retain property, all without a warrant.[172] Police powers granted under these provisions include the power to search for material categorized as "excluded material," including personal business records held in confidence, human tissue or fluid taken for medical purposes held in confidence, and journalistic material held in confidence.[173]

- Malaysia's Security Offences (Special Measures) Bill of 2012, which at this writing had been passed but not activated, allows police to make an arrest without a warrant if the officer merely "has reason to believe" that the person may be involved in security offenses, many of which are vaguely defined.[174] It also gives the

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[170] Gambia's Anti-Terrorism Act, 2002, as amended by the Anti-Terrorism Amendment Act, 2008, https://www.unodc.org/tldb/showDocument.do?documentUid=2488 (accessed June 13, 2012), art. 57. Mauritius' Prevention of Terrorism Act, No. 2 of 2002, https://www.unodc.org/tldb/pdf/Mauritius_Prevention_of_Terrorism_Act_2002.pdf, (accessed June 13, 2012), art. 23-24. Tanzania's Prevention of Terrorism Act, No. 21 of 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=3302, (accessed June 13, 2012), art. 29

[171] Zambia's Anti-Terrorism Act 2007, No. 21 of 2007, https://www.unodc.org/tldb/pdf/ZAMBIA_Anti-terrorism_Act_2007.pdf (accessed June 13, 2012), art. 33. Again, the standard for the warrantless searches is "reason to suspect," whereas the standard required of a judge issuing a warrant is "reasonable grounds for believing."

[172] Uganda's Anti-Terrorism Act of 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=6589, art. 12.

[173] Ibid., schedule 3(3).

[174] Malaysia's Security Offences (Special Measures) Bill, 2012, http://www.parlimen.gov.my/files/billindex/pdf/2012/DR152012E.pdf (accessed May 15, 2012), art. 4. The law was passed by Parliament in 2012, but Malaysia's king must assent to the bill and the Federal Gazette must publish it before it takes effect. See also "Malaysia: Security Bill Threatens Basic Liberties," Human Rights Watch news release, http://www.hrw.org/news/2012/04/10/malaysia-security-bill-threatens-basic-liberties, April 10, 2012.

police broad powers to conduct searches and intercept communications without judicial warrant. The government promoted the bill as a rights-respecting reform of the notorious Internal Security Act, which allowed indefinite detention without charge or trial of alleged terrorists and other national security suspects.[175]

- The UK's 2000 Terrorism Act outlines a framework in which a police officer above a certain rank may authorize the warrantless search of a premises (and persons therein) where the officer has reasonable grounds to believe that the case is one of "great emergency" and that "immediate action is necessary."[176] The law does not, however, require officers to have reason to believe that the material being sought will be of value to a terrorist investigation.[177] No criteria are set out by the law to serve as guidelines in making such a determination.[178]

- Australia's Crimes Act, as amended in 2010, grants federal police broad powers to enter private premises without a warrant if the officer suspects that a "thing" is on the premises that is relevant to a terrorism offense and that there is a serious and imminent threat to a person's life, health, or safety.[179] The Crimes Act does not define the term "thing."

Hungary's TEK: "Orwellian Powers"

Hungary's Counter-Terrorism Centre, known by its Hungarian acronym TEK, is a counterterrorism force established in September 2010 that can engage in secret surveillance, searches, and data collection without a judicial warrant.[180] The government

[175] "Malaysia: Security Bill Threatens Basic Liberties."

[176] The UK's Terrorism Act, 2000, http://www.legislation.gov.uk/ukpga/2000/11, schedule 5, sec. 15. The provision requires the authorizing officer to inform the secretary of state as soon as is reasonably practicable upon making an order for a search.

[177] This is the standard required by the legislation for a judge to grant a search warrant. Ibid., schedule 5, sec. 1(5), as amended by the Terrorism Act of 2006.

[178] Ibid.

[179] Australia's Crimes Act 1914, sec. 3UEA, as amended by the National Security Legislation Act of 2010, http://www.comlaw.gov.au/Details/C2012C00416 (accessed June 7, 2012).

[180] Hungary's Counter-Terrorism Centre (TEK) was established under Government Decree 232/2010 of August 19, 2010. It was approved as an official police force by Parliament on December 6, 2010 as part of amendments to the Hungarian Act XXXIV of 1994 on the Police, https://www.unodc.org/tldb/showDocument.do?documentUid=3289&node=docs&cmd=add&country=HUN (accessed June 26, 2012).The detailed rules of its responsibilities are defined by Government Decree 295/2010 of December 22,

created the TEK to protect Hungary during its six-month rotating presidency of the European Union in January 2011, but retained the force after its rotation ended.[181]

According to Kim Lane Scheppele, director of the Program in Law and Public Affairs at Princeton University, the TEK operates outside the regular security force command structure and has "amassed truly Orwellian powers, including virtually unlimited powers of secret surveillance and secret data collection."[182]

The TEK can secretly enter and search homes, engage in wiretapping, make audio and video recordings of people, search mail and packages, and confiscate electronic data such as the content of computers and email. Ordinary police in Hungary are allowed to enter homes or wiretap phones only after obtaining a warrant from a judge. The TEK, whose chief is appointed by the prime minister, requires only the approval of the justice minister to carry out such activities.[183]

The TEK also can compel financial and communications companies and state agencies to secretly hand over data on individuals—including bank records, phone logs, and tax filings—without requiring that the requests be linked to criminal investigations or approved by a prosecutor.[184]

In 2012 the Budapest-based Eotvos Karoly Public Policy Institute filed a petition in Hungary's Constitutional Court seeking to annul the provisions on secret surveillance without a judicial warrant, arguing that they violated the constitutional right to privacy.[185]

2010. See Hungarian Interior Ministry Constitutional Protection Office website, http://ah.gov.hu/english/html/tek.html (accessed June 19, 2012).

[181] The TEK prompted jokes worldwide in October 2011 when it announced the seizure of 100 machine guns, automatic pistols, and sniper rifles that later turned out to have been disabled props for scenes from "World War Z," a Brad Pitt movie being shot in Budapest. Dave Itzkoff,"Brad Pitt, Zombies and Weapons: A Mystery in Hungary," *The New York Times*, October 11, 2011, http://artsbeat.blogs.nytimes.com/2011/10/11/brad-pitt-zombies-and-weapons-a-mystery-in-hungary/ (accessed June 19, 2012).

[182] See Kim Lane Scheppele, "The New Hungarian Secret Police," NYTimes.com, April 19, 2012, http://krugman.blogs.nytimes.com/2012/04/19/the-new-hungarian-secret-police/ (accessed June 19, 2012).

[183] The Bureau of National Security has had similar powers of secret searches, requiring only approval by a minister, since 1995.

[184] Scheppele, "The New Hungarian Secret Police."

[185] "Secret Surveillance Rules Unconstitutional" ("Alkotmányellenesek a titkos megfigyelés szabályai"), Eotvos Karoly Public Policy Institute, June 11, 2012 (in Hungarian), http://www.ekint.org/ekint/ekint.news.page?nodeid=532 (accessed June 24, 2012).

Random Searches in Designated Areas

Many counterterrorism laws also permit what are essentially random police searches of persons and their property within designated areas, which in some cases encompass vast territory. Most such laws permit the designation of these areas by a member of the executive branch, at the request of the police, or by a member of the police force, on vaguely defined terms that are difficult to review in court.

These laws may encroach on the internationally protected right to privacy, which has been interpreted to include the right to be free from arbitrary interference even if that interference is otherwise authorized by law.[186] In addition, laws permitting such broad use of search powers may, in practice, have a disproportionate effect on minorities and sanction racial profiling by the police:

- In Russia, Federal Law No. 35 on Counteracting Terrorism of 2006—enacted in the context of the ongoing conflict with Islamist militant groups in the North Caucasus—vastly expanded the concept of a "counterterrorism operations regime" as part of its efforts to quash insurgency groups in the region.[187] While Russia's previous counterterrorism law provided for territorial limitations on a counterterrorism operation zone (a delimited territory, or a building or vehicle and the territory adjacent to it), the 2006 law allows the head of counterterrorism operations in the region where the operation is conducted to determine the territorial and temporal scope of the operation.[188] During counterterrorism operations, security services and law enforcement may conduct warrantless

[186] Article 17 of the ICCPR provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." It also provides that "Everyone has the right to the protection of the law against such interference or attacks." ICCPR, http://www2.ohchr.org/english/law/ccpr.htm, art. 17. The Human Rights Committee has stated that "The expression 'arbitrary interference' is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances." UN Human Rights Committee, "The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)," General Comment No. 16, Thirty-second session, 04/08/1988, http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/23378a8724595410c12563ed004aeecd?Opendocument (accessed May 10, 2012), para. 4.

[187] Russia's Federal Law No. 35-FZ on Counteracting Terrorism (2006), which replaced the 1998 Law on Fighting Terrorism, https://www.unodc.org/tldb/showDocument.do?documentUid=7494 (accessed June 6, 2012), art. 11. See also Human Rights Watch, *As if They Fell From the Sky*, p. 28.

[188] Ibid.

document checks and personal searches and impose limits on the free movement of people and vehicles.[189]

The law does not specify preconditions that must exist for launching a counterterrorism operation. It only stipulates that a "counterterrorism operation is conducted to repress a terrorist attack if there is no way to do so by other means."[190] The law gives local security services the right to launch counterterrorism operations in their respective territories and exclusive rights and responsibility to determine the targets, timing, scope, and subjects of the operations.[191] It provides for large-scale use of military forces in counterterrorism operations.[192] The restrictions are similar to those invoked under a state of emergency. But in contrast to a state of emergency, counterterrorism operations are not subject to parliamentary control and do not need to be reported to the UN or the Council of Europe.[193]

- Australia's Crimes Act, as amended in 2005, grants the federal police powers to question, search, and seize property from individuals and vehicles in areas that are designated "prescribed security zones" by the executive, without requiring officers to have reasonable suspicion that searched persons might have committed, be committing, or be about to commit a terrorist act.[194] The designation of an area as a "prescribed security zone" is made by the ministers of home affairs and justice at the request of a police officer, if the officer considers that doing so would assist in "preventing" terrorist activity or responding to activity that has already occurred. The designation may remain in force for up to 28 days—a period that imposes a potentially unnecessary or disproportionate restriction on freedom of assembly and expression.[195]

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[189] For more details on the use of the counterterrorism law and other violations in Chechnya, see Human Rights Watch, *As If They Fell from the Sky*, 2008, http://www.hrw.org/ru/node/62157/section/7, Chapter 5.

[190] Russia's Federal Law No. 35-FZ on Counteracting Terrorism (2006), art.12.1.

[191] Ibid., art. 12.2.

[192] Ibid., art. 9.

[193] Russia's Federal Constitutional Law on a State of Emergency states that the invocation of a state of emergency must be endorsed by the upper house of the Russian parliament. According to this law, the invocation of a state of emergency must also be reported without delay to the UN secretary general and the Council of Europe secretary general, who should be provided with a list of Russia's respective obligations under international treaties from which Russia would be derogating during the period of the state of emergency and a description of the scope of those derogations with regard to specific rights. See also Human Rights Watch, *As if They Fell From the Sky*, 2008, p. 30.

[194] Australia's Crimes Act 1914, sec. 3UB, as amended by the Anti-Terrorism Act, No. 144 of 2005, http://www.comlaw.gov.au/Details/C2012C00416 (accessed June 22, 2012).

[195] Ibid., secs. 3UI, 3UJ. The UN special rapporteur on the promotion and protection of human rights while countering terrorism has expressed concern over for this portion art of Australia's legislation, writing that, "Under the Anti-Terrorism Act

UK: Abusive "Stop-and-Search" Power

Hundreds of thousands of people were stopped and searched without reasonable suspicion of wrongdoing under a provision of the UK's 2000 counterterrorism law before it was scaled back in 2011 and replaced the following year.

The safeguards in the 2000 law were inadequate, and the absence of a requirement of suspicion led to improper and inconsistent use of the law, which damaged relations between the police and ethnic minority communities.[196]

Section 44 of the law allowed an officer of the rank of assistant chief constable or commander of a London police force to authorize the police to stop and search both vehicles and pedestrians within a certain area, without requiring any reasonable suspicion of the commission of an offense.[197] In 2011 the UK replaced these powers with a temporary order that required that the officer making the authorization "considers it necessary for the prevention of acts of terrorism," although it did not provide criteria for making such a determination.[198] In 2012 the UK permanently repealed the section 44 power and replaced it with the Protection of Freedoms Act, which permits an authorization to be made where a senior officer "reasonably suspects that an act of terrorism" will take place and the authorization is "necessary to prevent such an act."[199]

(No. 2) 2005 the powers of the Australian Federal Police have been extended to include the ability to conduct random searches where the Attorney-General has declared an area or place to be a 'specified security zone.' Although certain safeguards against abuse of these powers exist, the special rapporteur is of the view that the 28-day life of such declarations imposes a potentially unnecessary or disproportionate interference upon liberty and security. He urges Australia to consider shortening the life of declarations and to ensure that this measure is not capable of use to restrict the ability of persons to undertake lawful demonstrations." UNCHR, "Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism," UN Doc A/HRC/4/26/Add.3 (2006), http://pacific.ohchr.org/docs/AustraliaA.HRC.4.26.Add.3.pdf (accessed June 12, 2012), para. 68.

[196] Human Rights Watch, *United Kingdom – Without Suspicion: Stop and Search under the Terrorism Act 2000*, July 2010, http://www.hrw.org/reports/2010/07/05/without-suspicion.

[197] The UK's Terrorism Act, 2000, http://www.legislation.gov.uk/ukpga/2000/11, secs. 44-47. For useful discussion of these powers and their use, see Clive Walker, "'Know Thine Enemy as Thyself': Discerning Friend from Foe under Anti-Terrorism Laws," *Melbourne University Law Review*, vol. 32, 2008, mulr.law.unimelb.edu.au/go/32_1_9 (accessed June 25, 2012), p. 275-301.

[198] The UK's Terrorism Act (Remedial) Order 2000, No. 631 of 2011, http://www.legislation.gov.uk/uksi/2011/631/article/3/made (accessed May 25, 2012), sec. 3.

[199] The UK's Protection of Freedoms Act 2012, secs.60-61, http://www.legislation.gov.uk/ukpga/2012/9/enacted (accessed June 13, 2012).

About 550,000 people were stopped and searched throughout the UK between April 2007 and October 2010 alone under section 44 of the law, yet not one person was successfully prosecuted for a terrorism offense as a result.[200] Human Rights Watch's research found that the police were stopping and searching railway enthusiasts, photographers, and young children. Human Rights Watch also gathered anecdotal evidence that in some cases white people were being stopped specifically to mask the extent to which ethnic minorities were being targeted.[201]

The UK temporarily suspended the stop-and-search power after the European Court of Human Rights in 2010 rejected a final appeal by the UK against a ruling by the court that the provisions violated the right to a private life and lacked "adequate legal safeguards against abuse."[202] In 2008 the UN special rapporteur on freedom of religion or belief concluded that the measure had a disproportionate impact on ethnic and religious minorities including persons of South Asian origin and Muslims.[203] That same year, the UN Human Rights Committee recommended that the UK review the stop-and-search provision to ensure it was exercised in a non-discriminatory manner.[204]

Expanded Surveillance Powers

Surveillance operations conducted by the police can involve serious infringements on private life and commonly require the prior authorization of a judge. Counterterrorism laws in more than 100 countries grant increased powers to the police to conduct surveillance without such prior court approval, instead allowing authorities who may lack impartiality, such as the public prosecutor or the executive, to authorize the surveillance. This greatly

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[200] "UK: Terrorism Search Power Violates Rights," Human Rights Watch news release, July 4, 2010, http://www.hrw.org/news/2010/07/02/uk-terrorism-search-power-violates-rights; "UK: Proposed Counterterrorism Reforms Fall Short," Human Rights Watch news release, February 11, 2011, http://www.hrw.org/news/2011/02/11/uk-proposed-counterterrorism-reforms-fall-short.

[201] Human Rights Watch, *Without Suspicion*; "UK: Terrorism Search Power Violates Rights."

[202] "UK: Terrorism Search Power Violates Rights," Human Rights Watch, July 4, 2010. See also European Court of Human Rights, *Gillan and Quinton v. The United Kingdom* (Application no. 4158/05) judgment of June 28, 2010, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860909&portal=hbkm&source=externalbydocnumber (accessed May 10, 2012), para. 87.

[203] Asma Jahangir, "Report of the special rapporteur on freedom of religion or belief: Mission to the United Kingdom of Great Britain and Northern Ireland," UN Doc A/HRC/7/10/Add.3, February 7, 2008, http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.htm (accessed May 10, 2012), para. 41.

[204] Concluding Observations of the Human Rights Committee for the United Kingdom, 93rd Session, Geneva, 7-25 July 2008, UN Doc. CCPR/C/GBR/CO/6, July 30, 2008, www.icj.org/IMG/CO_UK.pdf (accessed May 7, 2012), para. 29.

increases the risk that individuals will have their privacy violated or be deprived of their liberty on vague and unspecified grounds:

- Malaysia's Criminal Procedure Code (Amendment) Act of 2004 empowers the public prosecutor to authorize the police to intercept mail or telephone calls, enter any premises and install a device for the interception of communications, or require a communications service provider to intercept a communication. The provision sets a low standard for the exercise of these powers, requiring only that the public prosecutor consider the communication "likely to contain any information relating to the commission of a terrorist offence," without requiring that such a determination be made on any objectively verifiable grounds.[205]

- Uganda's 2002 counterterrorism law allows the minister of internal affairs to grant broad powers to members of the police force, armed forces, or other security forces to intercept communications and "otherwise conduct surveillance" of persons suspected of committing terrorism offenses, without court approval.[206] Powers granted to authorized officers include intercepting telephone calls, faxes, and emails; monitoring meetings; accessing bank accounts; and searching the premises of any person. The provisions specify that an authorized officer may make copies of communications, take photographs, or "do any other thing reasonably necessary" for the purposes of the subsection. The law also deems evidence collected as a result of such surveillance admissible in court.[207]

- Italy's 2005 counterterrorism law enhances pre-existing powers of the intelligence services to conduct surveillance through the use of preventive wiretaps. Article 4 of the legislation allows such services to conduct wiretaps if a public prosecutor of an appeals court authorizes them as "indispensable" to gain information for the prevention of terrorism or subversive activities.[208]

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[205] Malaysia's Criminal Procedure Code (Amendment) Act, 2004, http://www.parlimen.gov.my/files/billindex/pdf/2004/DR162004E%281%29.pdf (accessed May 10, 2012), art. 106c.

[206] Uganda's Anti-Terrorism Act of 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=6589, art. 19(1).

[207] Ibid., art. 22.

[208] Italy's Urgent Measures to Combat International Terrorism (Misure urgenti per il contrasto del terrorismo internazionale), No. 144, 2005, https://www.unodc.org/tldb/showDocument.do?documentUid=3078 (accessed June 18, 2012), art. 4. For a more detailed outline of these provisions see Vania Patanè, "Recent Italian Efforts to Respond to Terrorism at the Legislative Level," *Journal of International Criminal Justice*, vol. 4, no. 5, 2006, http://jicj.oxfordjournals.org/content/4/5/1166.abstract (accessed June 22, 2012).

- Indonesia's 2002 counterterrorism law grants the police broad powers to intercept mail and packages delivered by post and other means, or to intercept phone communications for up to a year, in cases where a magistrate has ordered an investigation.[209]

Expanded Powers to Seize and Question

The counterterrorism laws of some countries bolster the ability of police officers to seize property without a warrant and question suspects without regular due process protections during the course of terrorism investigations:

- Australia's Crimes Act, as amended in 2005, allows authorized categories of police officers to demand the production of documents thought on reasonable grounds to be relevant to the investigation of a serious terrorism offense, without the prior authorization of a judge. The law makes it an offense to not comply with such a request by the police.[210]

- Amendments introduced in 2005 to Italy's Penitentiary Law grant law enforcement officials expanded authority to question prison inmates seeking information relevant to crimes of terrorism. The police already had authority to conduct interrogations without guaranteeing detainees the right against self-incrimination in organized crime cases. Interviews conducted under this section of the Penitentiary Law may be carried out without the presence of a lawyer and, in cases the police designate as urgent, do not require prior judicial authorization.[211]

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[209] The law provides that "Based on adequate preliminary evidence . . . the investigators shall be authorized to: (a) open, examine and confiscate mail and packages by post or other means of delivery, which are in connection with the criminal act of terrorism under investigation" and (b) "intercept any conversation by telephone or other means of communication suspected of being used to prepare, plan and commit a criminal act of terrorism." Indonesia's Government Regulation in lieu of Legislation No. 1/2002 on Combating Criminal Acts of Terrorism, October 18, 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=2927&country=INS&language=ENG (accessed May 7, 2012), sec. 31(1).

[210] Australia's Crimes Act 1914, secs. 3ZQN and 3ZQS, as amended by the Anti-Terrorism Act, No. 144 of 2005, http://www.comlaw.gov.au/Details/C2012C00416.

[211] Italy's Urgent Measures to Combat International Terrorism, 2005, https://www.unodc.org/tldb/showDocument.do?documentUid=3078, art. 18. As explained by law professor Vania Patanè, "[t]he possibility of carrying out investigative interviews, provided for by Article 18 *bis* of the Penitentiary Law, allowing law enforcement agencies to question prison inmates to get any information deemed to be helpful for the prevention and repression strategies relating to organized crime, has been extended (by Executive Decree 144/05) to any offenses referred to in Article 270 *bis* of the Criminal Code. This amendment aims at obtaining the collaboration of those who can provide the competent authority with useful information for the prevention or the repression of terrorism, whether by identifying new paths for investigation or by collecting data which may be of any help to the development of already instituted proceedings.

- The UK 2008 Counter-Terrorism Act broadens police powers to question individuals after charges have been filed. Ordinarily, police powers to conduct post-charge questioning are strictly circumscribed under English law, and usually restricted to exceptional circumstances. Under the 2008 law, however, a judge may authorize the police to question an accused for a period of 48 hours, according to a set of broadly defined criteria: that it is "necessary in the interests of justice," that the police investigation is being conducted "diligently and expeditiously," and that the questioning will not "interfere unduly with the preparation of the person's defence."[212] The law permits further 48-hour periods of questioning if authorized by a judge.

  The law also permits adverse inferences to be drawn at trial from an accused's failure to answer police questions.[213] While post-charge questioning is an appropriate method of limiting lengthy pre-charge detention, allowing adverse inferences to be drawn from a suspect's silence violates the rights to remain silent and against self-incrimination.[214]

Such informal, unrecorded interviews, are carried out without the presence of defence counsel and without judicial control: for that reason, their legitimacy could be open to question, even if they fall within those activities, aimed at prevention, of an administrative rather than a judicial nature." Patanè, "Recent Italian Efforts to Respond to Terrorism at the Legislative Level," http://jicj.oxfordjournals.org/content/4/5/1166.abstract, p. 1174.

[212] UK Counter-Terrorism Act, 2008, http://www.legislation.gov.uk/ukpga/2008/28 (accessed May 10, 2012), sec. 22. See also Human Rights Watch, *Briefing on the Counter-Terrorism Bill 2008*, July 2008, http://www.hrw.org/reports/2008/07/01/briefing-counter-terrorism-bill-2008. For useful discussion of post-charge questioning in the UK, see Clive Walker, "Post-Charge Questioning of Suspects," *Criminal Law Review*, 2008, p. 509-524.

[213] UK Criminal Justice and Public Order Act, 1994, sec. 34, as amended by the Counter-Terrorism Act of 2008, http://www.legislation.gov.uk/ukpga/1994/33/part/III/crossheading/inferences-from-accuseds-silence (accessed June 25, 2012).

[214] Drawing adverse inferences from a failure or refusal to answer questions fundamentally undermines the right to silence and the prohibition on self-incrimination guaranteed under article 6(1) of the ECHR and article 14 of the ICCPR. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf (accessed June 22, 2012), art. 6(1). See also Human Rights Watch, *Briefing on the Counter-Terrorism Bill 2008*, p. 11.

VIII. Extending Pre-Charge Police Custody

More than 40 countries have extended the period during which a terrorism suspect may be detained by the police prior to being brought before a judge or charged with a crime. The lengths of these extensions vary by country, as they did prior to the new legislation. The laws also differ on when and even whether a judicial authority must give prior approval for the detention.

Prolonged detention without charge, particularly when coupled with restrictions on detainees' ability to challenge that detention in court, creates conditions conducive to torture and other ill-treatment that will go unnoticed by the courts and unsanctioned by law.

Prolonged pre-charge detention, particularly when not authorized by a judge, may also violate the right to liberty under international law. The International Covenant on Civil and Political Rights (ICCPR) states that anyone arrested or detained for a criminal offense "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."[215] Furthermore, anyone deprived of his liberty by arrest or detention has the right to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[216] The UN Human Rights Committee, an international expert body that monitors state compliance with the ICCPR, has explicitly interpreted this provision to apply to "all persons deprived of their liberty by arrest or detention," including persons held in pre-charge detention.[217]

Although international law does not impose specific limits on the length of time a person may be held before being brought before a judge, any prolonged period in police custody

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[215] ICCPR, art. 9(3). The Human Rights Council held in *Kelly v. Jamaica* that the complainant "was detained for some five weeks before he was brought before a judge or judicial officer entitled to decide on the lawfulness of his detention. The delay of over one month violates the requirement, in article 9, paragraph 3, that anyone arrested on a criminal charge shall be brought 'promptly' before a judge or other officer authorized by law to exercise judicial power." *Paul Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987 at 60 (1991), para. 5.6.

[216] ICCPR, art. 9(4). The European Convention on Human Rights also provides that persons arrested or detained "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power." See ECHR, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf (accessed May 15, 2012), article 5(3).

[217] See Human Rights Committee, General Comment no. 8: Right to liberty and security of persons (Art. 9), June 30, 1982, http://www.unhchr.ch/tbs/doc.nsf/0/f4253f9572cd4700c12563ed00483bec?Opendocument (accessed June 22, 2012), paras. 1, 3. See also ICCPR, art. 9(4).

is not consistent with human rights standards. The Human Rights Committee has stated that "in criminal cases any person arrested or detained has to be brought 'promptly' before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days."[218] In evaluating the European Convention's provision on arbitrary detention, the European Court of Human Rights held that the "degree of flexibility attaching to the notion of 'promptness' is limited" and that consideration of the particular features of each case "can never be taken to the point of impairing the very essence of the right guaranteed … that is to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority."[219]

Pre-Charge Detention Periods of a Few Hours

The following countries have extended the maximum length of police custody by a number of hours:

- In Australia, police may detain an individual in order to investigate possible involvement in a terrorist offense for an initial questioning period of four hours, extendable by the appropriate judicial officer for an additional 20 hours—24 hours total—if necessary to preserve or obtain evidence of that crime.[220] The initial four-hour period does not include up to seven days of "dead time"—periods during which the detainee is sleeping, receiving medical attention, being paraded for identification purposes, or communicating with a lawyer, friend, relative, or interpreter.[221] Non-terrorism suspects may be held for four hours, with the possibility of extension for another eight hours—12 hours total.[222] As noted elsewhere in this report, however, other provisions of Australian law allow for longer detention periods for alleged terrorism suspects.

[218] See Human Rights Committee, General Comment No. 8, para. 2.

[219] European Court of Human Rights, *Case of Brogan and Others v. The United Kingdom*, Application no 11209/84, 11234/84, 11266/84, 11386/85, November 29, 1988, .pdf (accessed June 22, 2012), p. 6-7.

[220] Australia's Crimes Act 1914, secs. 23DB(5) and 23DF(7), as amended by the Anti-Terrorism Act of 2004, http://www.comlaw.gov.au/Details/C2012C00416.

[221] Ibid., sec. 23DB(9) and (11).

[222] Ibid., secs. 23C(4), 23DA(7).

- Italy's 2005 counterterrorism law doubles from 12 to 24 the number of hours that a suspect may be held prior to being charged.[223] The detention does not require any prior judicial authorization and persons detained under these provisions are not entitled to access legal counsel.[224]

Pre-Charge Detention for Several Days

Several countries have extended potential pre-charge detention periods to a few days:

- Under France's 2006 counterterrorism law, French police may, in exceptional cases, request a judicial order to hold a person for up to six days without charge or without being presented to a judge.[225] A Council of Europe expert committee in 2007 concluded that this extended time period "raises questions concerning [the law's] compatibility with *Brogan and Others v. United Kingdom,*" in which the European Court of Human Rights ruled that a period longer than four days and six hours was too long to be held without judicial review.[226] Prior to the law's passage, the standard 24-hour initial detention before judicial review could be extended by a judge an additional 72 hours, for a total of four days, in cases of organized crime, terrorism, and drug trafficking. Four days remains the standard length of police custody in terrorism investigations.

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[223] Italy's Urgent Measures to Combat International Terrorism, 2005, https://www.unodc.org/tldb/showDocument.do?documentUid=3078, art. 10.

[224] According to one expert, "The power of the police to hold a suspect, or any person able to provide useful information to the investigating authorities, when their identity cannot be established or can be established only with difficulty—either because they refuse to be identified or give false personal particulars or false identity documents—has been increased. Such persons may now be held for up to 24 hours, without having access to a lawyer, to enable their identification to be verified (article 349, code of criminal procedure), if such identification appears to be of special complexity or the assistance of a consular authority is necessary. This measure does not require judicial approval (*convalada*); the law simply provides for the prosecutor to be properly informed, so he can order the immediate release of the detained person if he ascertains that the statutory requirements are not fulfilled." Patanè, "Recent Italian Efforts to Respond to Terrorism at the Legislative Level," http://jicj.oxfordjournals.org/content/4/5/1166.abstract, p. 1176.

[225] France's Code de procédure pénale, art. 706-88(1), as amended by art. 17 of the Loi n. 2006-64 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers, http://www.legifrance.gouv.fr/affichCode.do;jsessionid=FB0D2453F1850B439B4ED122802FACE8.tpdjo13v_1?idSectionTA=LEGISCTA000006167521&cidTexte=LEGITEXT000006071154&dateTexte=20120618 (accessed June 18, 2012).

[226] Committee of Experts on Terrorism, Council of Europe, "Respect for human rights in the fight against terrorism," 2007, http://www.libertysecurity.org/IMG/pdf_CODEXTER_2007_14_E_PACE.pdf, para. 71. In *Brogan and Others v. United Kingdom*, the European Court of Human Rights in 1988 found that the UK's pre-charge detention of four men for periods ranging from four days, six hours to six days, sixteen-and-a-half hours violated article 5, para. 3 of the European Convention on Human Rights (ECHR), which requires that all persons detained be brought "promptly" before a judge. European Court of Human Rights, *Brogan and Others v. The United Kingdom*, http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Brogan&sessionid=95841134&skin=hudoc-en, p. 6.

- Antigua and Barbuda's 2005 counterterrorism law allows a judge to authorize the police to detain an individual for up to five days in order to prevent the commission of a terrorist offense or interference in the investigation of a terrorist offense.[227]

- Under the Philippines' 2007 counterterrorism law, police may detain an individual suspected of having committed a terrorist offense or of links to an imminent terrorist offense without a judicial arrest warrant, and thus without charge and without judicial review, for a maximum of three days.[228] In cases involving non-terrorism offenses, such detention is limited to 12 to 36 hours, depending on the seriousness of the offense.[229]

Pre-Charge Detention for a Week or Longer

A number of countries allow pre-charge detention for a week or longer:

- From 2006 to 2011, UK counterterrorism law allowed the detention of a person suspected of a terrorism-related offense for up to 28 days without charge, provided a judicial authority approved the detention beyond an initial 48-hour maximum.[230] In January 2011, the UK allowed the maximum period to revert to 14 days.[231] The UK had extended its maximum pre-charge detention period from seven days under the

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[227] Antigua & Barbuda's Prevention of Terrorism Act, No. 12 of 2005, https://www.unodc.org/tldb/pdf/Antingua_and_Barbuda_Prevention_of_Terrorism_Act_%282005%29.pdf (accessed May 15, 2012), art. 22. Article 22 reads, "(3) A Judge to whom an application is made under subsection (1) may make an order for the detention of the person named in the application if the judge is satisfied that the written consent of the Attorney General has been obtained as required by subsection (2) and that there are reasonable grounds for suspecting that – (a) the person is preparing to commit an offence under this Act; or (b) is interfering, or likely to interfere with, an investigation into an offence under this Act. (4) An order under subsection (3) shall be for a period not exceeding 48 hours in the first instance and may, on application made by a police officer or an officer of the [Office of National Drug and Money Laundering Control Policy], be extended for a further period, provided that the maximum period of detention under the order does not exceed 5 days."

[228] The Philippines' Human Security Act of 2007, No. 2137 of 2007, https://www.unodc.org/tldb/showDocument.do?documentUid=7635 (accessed May 15, 2012), secs. 18-19. The legislation does provide several limitations on these expanded police powers. Namely, a) police require written authorization from the Anti-terrorism Council created by the legislation in order to detain a person, and b) police are required to present the person immediately upon arrest, at any time of day or night, before any judge at his or her office or residence such that the judge may inquire into the reasons for detention and determine whether or not the person detained has been subjected to any form of torture. On the other hand, these requirements seem only to apply to a suspect detained for a terrorist offense that has already occurred; they appear inapplicable in the case of a person detained for what is believed to be an imminent terrorist offense.

[229] The Revised Penal Code of the Philippines, Act. No. 3815 of 1930, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_revised_penal_code.pdf (accessed June 18, 2012), art. 125.

[230] UK Terrorism Act 2000, schedule 8, sec. 23, as amended by the Terrorism Act 2006, http://www.legislation.gov.uk/ukpga/2000/11 (accessed June 18, 2012).

[231] Alan Travis, "Theresa May allows 28-day limit on detaining terror suspects without charge to lapse," *The Guardian*, January 19, 2011, http://www.guardian.co.uk/politics/2011/jan/19/28-day-limit-terror-suspects-lapse (accessed May 15, 2012).

2000 counterterrorism law, to 14 days under the 2003 law, to 28 days in 2006.[232] Then-British Prime Minister Tony Blair's government had in 2005 asked Parliament to approve a 90-day detention period in terrorism cases,[233] and his successor, Gordon Brown, unsuccessfully sought extension of the period to 56 days and then 42 days in 2008.[234]

- Malaysia's Security Offences (Special Measures) Bill of 2012, which has yet to take effect, would reduce the initial period of pre-charge detention for terrorism and other high-security suspects from the current 60 days to 28 days. However, the shorter period still exceeds international standards for prompt judicial review, particularly when combined with other provisions, such as delays of 48 hours before the suspect is allowed access to a lawyer.[235] The bill is to replace the Internal Security Act, which allowed virtually indefinite detention without charge.[236] Almost 4,500 people were detained under the Internal Security Act between 2000 and 2010.[237]

- Indonesia's counterterrorism law of 2002 establishes a seven-day detention period under which a person suspected of a terrorist offense may be held without charge and without judicial monitoring.[238] This contrasts with the standard one-day detention period provided for in the Criminal Procedure Code.[239]

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[232] UK Terrorism Act 2006, http://www.legislation.gov.uk/ukpga/2006/11, sec. 23(6-7).

[233] Matthew Tempest, "Blair defeated on terror bill," *The Guardian*, November 9, 2005, http://www.guardian.co.uk/politics/2005/nov/09/uksecurity.terrorism (accessed May 15, 2012).

[234] Nicholas Watt, "Brown abandons 42-day detention after Lords defeat," *The Guardian*, October 13, 2008, http://www.guardian.co.uk/politics/2008/oct/13/terrorism-uksecurity1 (accessed May 15, 2012).

[235] Malaysia's Security Offences Bill, 2012, http://www.parlimen.gov.my/files/billindex/pdf/2012/DR152012E.pdf (accessed June 22, 2012), arts. 4-5.

[236] ISA section 73 provided for an initial detention period of up to 30 days by any police officer, which could be extended to 60 days by the home minister for activity "in any manner prejudicial to the security of Malaysia … or to the maintenance of essential services therein or to the economic life thereof." At the end of two months, section 8 allowed for a detention period of two years, indefinitely renewable, when the home minister "satisfied that the detention… is necessary with a view to preventing [the detainee] from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof." The home minister had the authority to choose the place of detention and to dictate the conditions of detention. See Human Rights Watch, *Malaysia – In the Name of Security*, May 2004, http://www.hrw.org/reports/2004/05/24/name-security.

[237] Liz Gooch, "Malaysia Weighs End to Indefinite Detention," *The New York Times,* April 10, 2012, http://www.nytimes.com/2012/04/11/world/asia/malaysian-government-proposes-ending-indefinite-detentions.html?_r=1 (accessed May 25, 2012).

[238] Indonesia's Government Regulation on Combating Criminal Acts of Terrorism, 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=2927&country=INS&language=ENG, sec. 28.

[239] Indonesia's Code of Criminal Procedure, Act No. 8 of 1981, https://www.unodc.org/tldb/showDocument.do?documentUid=8084 (accessed May 15, 2012), arts. 19, 122.

- Trinidad and Tobago's Anti-Terrorist Act of 2005 allows the detention of a person accused of involvement in a terrorist offense for up to 14 days without charge if they are interfering with or likely to interfere with that investigation, provided a judge approves the detention.[240] Under ordinary criminal law, a suspect must be charged in court within 48 hours of arrest.[241]

- An executive decree amending Fiji's Public Order Act in 2012 allows pre-charge detention of suspects, including terrorist suspects, for two days, with an extension of 14 additional days at the request of the police commissioner and with the consent of the interior minister.[242]

- Algeria's Code of Criminal Procedure generally permits two days of pre-charge detention—"garde à vue." Amendments passed in 2006 permit a total detention period of 12 days for persons suspected of "subversive or terrorist acts."[243] Algerian law does not guarantee access to legal counsel during this period, although it grants the detainee access to relatives.[244]

- Morocco's 2003 counterterrorism law allows pre-charge detention of 96 hours, renewable twice, with the permission of the prosecutor. This effectively means that persons detained under suspicion of terrorism can be held without being charged or brought before a judge for a total of 12 days.[245] The law also allows prosecutors

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[240] Trinidad and Tobago's Anti-Terrorist Act, Act No. 26 of 2005, http://www.ttparliament.org/legislations/a2005-26.pdf (accessed May 15, 2012), art. 23.

[241] US State Department Bureau of Democracy, Human Rights, and Labor, "Country Report on Human Rights Practices – 2011: Trinidad and Tobago," 2011, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=186546 (accessed May 30, 2012), sec. 1d.

[242] Fiji's Public Order (Amendment) Decree 2012, http://203.97.34.63/Public%20Order%20Decree.htm (accessed May 25, 2012), part 4A, art. 17A(2).

[243] Algeria's Loi no. 06-22 du 29 Dhou El Kaada 1427 correspondant au 20 décembre 2006 modifiant et complétant l'ordonnance no. 66-155 du 9 juin 1966 portant code de procédure pénale, http://www.joradp.dz/TRV/FPPenal.pdf (accessed June 7, 2012), art. 51.

[244] See Algeria's Code of Criminal Procedure, art. 51bis 1, (Loi no. 01-08 du 26 juin 2001).

[245] Morocco's Law no. 03-03 on Combating Terrorism (Loi no. 03-03 relative à la lutte contre le terrorisme), 2003, https://www.unodc.org/tldb/showDocument.do?documentUid=1840&country=MOR&language=FRE (accessed May 16, 2012), amending arts. 66 and 80 of the Code of Criminal Procedure. Article 66(4) reads, "When dealing with a terrorism offense, the period of custody shall be ninety-six hours renewable twice for a period of ninety-six hours each time upon written authorization of the Public Ministry." See also Human Rights Watch, *Morocco – Stop Looking for Your Son: Illegal Detentions Under the Counterterrorism Law*, October 2010, http://www.hrw.org/node/93799/section/7 (accessed June 25, 2012).

to delay access to counsel for up to six days during *garde à vue* for suspects accused of terrorism-related offenses.[246]

- Under Swaziland's 2008 counterterrorism law, a judge can extend the detention of suspects to prevent the commission of terrorism offenses, or interference in the investigation of such offenses, for up to one week. An initial detention order is limited to 48 hours but may be extended to a maximum of 7 days.[247] The law does require the authorizing judge to specify the place and conditions under which the person shall be detained, as well as video recording of the detainee "so as to constitute an accurate, continuous and uninterrupted record of the detention of that person for the whole period of the detention."[248]

- Under Zambia's 2007 counterterrorism law, a police officer may, with the consent of the attorney general, seek a judge's order to detain a suspect for 14 days, with an extension to a total of 30 days, when there are "reasonable grounds to believe or suspect" that the person is "preparing to commit" or "is interfering, or is likely to interfere with" a terrorism-related offense.[249] The law provides that a detention order must specify the place of detention and conditions relating to access to a government medical official and the continuous video recording of the individual's detention.[250]

Pre-Charge Detention for a Month or Longer

At the far end of the spectrum, several countries allow pre-charge detention periods for a month or longer:

- Amendments passed in 2008 to India's counterterrorism law allow a judge to double pre-charge detention from the 90 days allowed under the Indian criminal

[246] Morocco's Law No. 03-03 on Combatting Terrorism, amendments to art. 66(9). The prosecutor can delay a detainee's access to counsel for an additional 48 hours after the first renewal of the 96-hour detention period.

[247] Swaziland's Suppression of Terrorism Bill, 2008, http://m.idasa.org/media/uploads/outputs/files/Suppression%20of%20Terrorism%20Act%202008.pdf (accessed May 16, 2012), art. 23(4).

[248] Ibid., art. 23(5).

[249] Zambia's Anti-Terrorism Act 2007, No. 21 of 2007, https://www.unodc.org/tldb/pdf/ZAMBIA_Anti-terrorism_Act_2007.pdf (accessed May 10, 2012), art. 31.

[250] Ibid.

code to 180 days upon a vaguely defined special request from a prosecutor. The law allows the suspect to remain in police custody for up to 30 days of that period, double the 15-day maximum period allowed under the Indian criminal code.[251] The Indian state of Maharashtra allows for similar detention periods.[252] Investigating police in India may also request that a terrorism suspect be returned to police custody for further questioning after being released to judicial custody.[253]

- Amendments in 2009 to Pakistan's 1997 anti-terror law triple the maximum period that a terror suspect may be detained—from 30 days to 90 days—without the possibility to challenge the detention in court.[254]

- Russia amended its Code of Criminal Procedure in 2004 to allow detention of alleged terrorism suspects for 30 days without charge, compared to 10 days for other criminal offenses.[255]

- Ethiopia's Anti-Terrorism Proclamation of 2009 provides for "terrorist suspects" to be held for up to four months without charge.[256]

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[251] See sec. 43D of India's Unlawful Activities (Prevention) Act (UAPA), which modifies sec. 167 of the Indian Code of Criminal Procedure. These amendments were passed following the November 2008 attacks in Mumbai and are copied verbatim from the Prevention of Terrorism Act 2002, which was repealed in 2004. India's UAPA, sec. 43D, amended 2008, http://www.nia.gov.in/acts/The%20Unlawful%20Activities%20%28Prevention%29%20Act,%201967%20%2837%20of%201967%29.pdf.

[252] Maharashtra Control of Organized Crime Act of 1999, sec. 21(2). Copy on file with Human Rights Watch.

[253] India's UAPA, sec. 43(D)2(b), amended 2008, http://www.nia.gov.in/acts/The%20Unlawful%20Activities%20%28Prevention%29%20Act,%201967%20%2837%20of%201967%29.pdf. Human Rights Watch in 2009 interviewed relatives and lawyers of Indian terrorism suspects who said they did not complain to judges of torture and other abuse in police custody for fear of being further abused if they were remanded to the same police. One mother said that when she asked her son why he did not complain to the magistrate about being tortured by police, he replied, "We have to go back to the police. We have to live here." A lawyer explained that he did not file a direct complaint in court of the torture his client had endured in part because the detainee had warned him, "If you trouble them, they will trouble me." Another lawyer said that his client was under severe police intimidation and had told him, "We have all been tortured and beaten. They have threatened us that if we reveal any of this we will never get out." See Human Rights Watch, *The "Anti-Nationals,"* http://www.hrw.org/node/95609/section/7, chapter VIII.

[254] Pakistan's Ordinance No. XXI of 2009, to further amend the Anti-terrorism Act, 1997, http://www.icj.org/IMG/Ordinance.pdf (accessed May 16, 2012), art. 9.

[255] Russia's Code of Criminal Procedure, art 100(2), as amended by Federal Law on Amending the Criminal Procedure Code of the Russian Federation, No. 18-FZ April 22, 2004, http://legislationline.org/documents/section/criminal-codes.

[256] Ethiopia's Proclamation on Anti-Terrorism, 2009, http://www.unhcr.org/refworld/country,,NATLEGBOD,,ETH,,4ba799d32,0.html, art. 20.

- Saudi Arabia's draft counterterrorism law of 2012 would allow investigators of the Interior Ministry to order up to 120 days of incommunicado detention of terrorism suspects, and a court may extend that period indefinitely.[257]

- In Lebanon, an amendment to article 108 of the Code of Criminal Procedure adds terrorism to the list of crimes for which there is no time limit on pre-charge detention. Article 108 already allowed such detention of suspects in cases involving "homicide, felonies involving drugs and endangerment of state security, felonies entailing extreme danger," and for persons convicted of a previous crime.[258]

- Under amendments enacted in 2002, Australia's Security Intelligence Organisation may, with the consent of the attorney general and an authorized judge, detain a person for up to one week without charge for the purpose of collecting intelligence about a terrorist offense.[259] The provisions permit the indefinite extension of that detention in successive seven-day increments ("rolling warrants") as justified by additional information. The detainee must be informed about the warrant authorizing the detention as well as his or her right to contact a lawyer.[260]

Pre-Charge Detention without Judicial Authorization

In addition to increasing the duration of permissible detention, several countries have increased the length of time a person may be held without judicial authorization or review of the reasons for detention. The duration of detention without judicial order varies greatly.

- In Israel, a 2006 law on criminal procedures for Israeli detainees suspected of security offenses extends the maximum detention period without being presented to a judge from two to four days.[261] Palestinian residents of the West Bank and

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[257] Saleh al Amer, "The Draft Anti-Terrorism Law in Saudi Arabia: Legalizing the Abrogation of Civil Liberties," *Jadaliyya*, http://www.jadaliyya.com/pages/index/4839/the-draft-anti-terrorism-law-in-saudi-arabia_legal (accessed May 30, 2012).

[258] Lebanese Code of Criminal Procedure, as amended by the Act of June 26, 2010, http://www.stl-tsl.org/en/documents/relevant-law-and-case-law/applicable-law/lebanese-code-of-criminal-procedure (accessed May 29, 2012), art. 108.

[259] Australian Security Intelligence Organisation (ASIO) Act of 1979, secs. 34F and 34G, as amended by the ASIO Legislation Amendment (Terrorism) Act 2002, http://www.comlaw.gov.au/Details/C2012C00260 (accessed June 11, 2012).

[260] Ibid., secs. 34G, 34S.

[261] Israel's Criminal Procedures (Detainees Suspected of Security Offenses) (Temporary Provision) Law (2006), art. 3(a)(1-3), as amended, December 27, 2007 and December 26, 2010. The law's validity was originally limited to 18 months, but was later extended until December 31, 2012. The law allows a detainee to be held for 48 hours without being presented before a

Gaza are subject to other laws and military orders, and may be detained without judicial authorization for up to eight days under military orders, and for up to 14 days without judicial review under the 2002 Unlawful Combatants Law.[262]

- In Bahrain, the 2006 counterterrorism law has doubled pre-charge detention without judicial authorization from 7 to 15 days.[263]

judge to review their detention, and an additional period of 24 hours if the Israeli General Security Services (GSS) believe that the delay that a judicial hearing would cause to the investigation would harm human life; and an additional 24 hours upon written request, for the same reason, by the GSS to a judge. To access the law in Hebrew, see http://www.nevo.co.il/law_html/law01/999_640.htm#_ftn1 (accessed June 27, 2012), English translation available at: http://nolegalfrontiers.org/en/israeli-domestic-legislation/criminal-procedure/criminal02. See also the Association for Civil Rights in Israel (ACRI), "The State of Human Rights in Israel and the Occupied Territories, 2008," ("2008 report"), http://www.acri.org.il/pdf/state2008.pdf (accessed June 13, 2012), p. 27, and ACRI, 2009 report, http://www.internal-displacement.org/8025708F004CE90B/%28httpDocuments%29/DCAB8357D4610EB7C125768D00637837/$file/ACRI_Dec09.pdf (accessed June 12, 2012), p. 24.

[262] Israel's Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009, article 33(b), English translation available at http://nolegalfrontiers.org/en/military-orders/mil01 and see US Department of State Department Bureau of Democracy, Human Rights, and Labor, "Country Report on Human Rights – 2011: Israel and occupied territories" (Palestinian security detainees are subject to the jurisdiction of Israeli military law, which permits eight days' detention before appearing before a military court). Israel's Incarceration of Unlawful Combatants Law (2002), amended in August 7, 2008, and July 28 , 2010, available at http://www.nevo.co.il/law_html/law01/187m1_001.htm (accessed June 27, 2012); English translation of 2002 version (without amendments) available at http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf (accessed June 22, 2012), art. 5(a); see ACRI 2008 report, http://www.acri.org.il/pdf/state2008.pdf, pp. 26-28.

[263] Bahrain's Law with Respect to Protection of the Community against Terrorist Acts, 2006, https://www.unodc.org/tldb/showDocument.do?documentUid=8520, art. 27.

IX. Incommunicado Detention

At least a dozen counterterrorism laws permit or encourage incommunicado detention during pre-charge custody, restricting detainees' right to receive visits by legal counsel, family members, and other interested third parties.

Restrictions are usually for a specified time but in some cases also limit the circumstances in which lawyers may be present, as well as the kinds of communication detainees may have with their counsel, family members, or other third parties that are not found in the regular criminal procedure law.

The connection between incommunicado detention and the use of torture has long been recognized. The UN Committee Against Torture has stated that even where incommunicado detention does not involve the complete isolation of a detainee, "the incommunicado regime, regardless of the legal safeguards for its application, facilitates the commission of acts of torture and ill-treatment."[264] The UN Human Rights Committee recommends that states enact provisions against incommunicado detention.[265] The International Convention for the Protection of All Persons from Enforced Disappearance, which went into effect in 2010 and has been ratified by 33 states, bars incommunicado detention.[266]

Restrictions on Legal Counsel

More than two dozen counterterrorism laws specifically limit suspects' ability to meet with a lawyer:

- France reformed its code of criminal procedure in 2011 to ensure that all detainees, including terrorism suspects, have access to a lawyer while in police custody,

[264] Committee against Torture, "Conclusions and recommendations of the Committee against Torture: Spain," UN Doc. CAT/C/CR/29/3 (2002), http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CAT.C.CR.29.3.En?OpenDocument (accessed May 16, 2012), para. 10.

[265] Human Rights Committee, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (art. 7), 03/10/1992, http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/6924291970754969c12563ed004c8ae5?Opendocument (accessed May 16, 2012), para. 11.

[266] International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), entered into force Dec. 23, 2010, http://www2.ohchr.org/english/law/disappearance-convention.htm (accessed June 18, 2012), art. 17(1).

including during interrogations, but it curtailed that access in exceptional cases for high-security suspects including alleged terrorists. All detainees are guaranteed access to counsel at the outset of detention but in terrorism-related cases, the prosecutor may delay that access for 24 hours. A special "liberty and detention" judge can then order two subsequent postponements of one day each, in cases of imminent threat of a terrorist attack or because authorities deem it " imperative" for international cooperation. These exceptions mean that terrorism suspects may be held and interrogated in police custody for up to three days before having access to a lawyer, as was the rule prior to the 2011 reform. If police custody is prolonged beyond three days, the terrorism suspect has access to a lawyer every 24 hours. Each client-lawyer interview is limited to 30 minutes.[267]

- Under schedule 8 of the UK's Terrorism Act of 2000, access to a lawyer can be delayed for up to 48 hours if the police believe the access would interfere with evidence or lead to the alerting of other suspects.[268] The UN Human Rights Committee in 2008 expressed concern about this feature of the law.[269] The UK police also may require that a detainee speak with a legal representative "only in the sight and hearing of a qualified officer" for the same reason.[270]

- Mauritius' 2002 counterterrorism law provides that persons arrested on suspicion of terrorist offenses may be held in police custody for up to 36 hours and that a superintendent of police may order that detainees be denied access to anyone other than "a police officer not below the rank of Inspector, or a Government Medical

[267] France's Code de procédure pénale, art. 706-88, 706-88-1, as amended by Law No. 2011-392 of April 14, 2011, http://www.legifrance.gouv.fr/affichCode.do;jsessionid=A0BCA19765EB13AE1FCF1736E2E36063.tpdjo15v_1?idSectionTA=LEGISCTA000006167521&cidTexte=LEGITEXT000006071154&dateTexte=20120514.

[268] UK Terrorism Act, 2000, as amended by the Terrorism Act 2006, http://www.legislation.gov.uk/ukpga/2000/11, schedule 8(8).

[269] The Human Rights Committee has explained, "The Committee considers that the State party has failed to justify this power, particularly having regard to the fact that these powers have apparently been used very rarely in England and Wales and in Northern Ireland in recent years. Considering that the right to have access to a lawyer during the period immediately following arrest constitutes a fundamental safeguard against ill-treatment, the Committee considers that such a right should be granted to anyone arrested or detained on a terrorism charge." Concluding Observations of the Human Rights Committee for the United Kingdom, 93rd Session, Geneva, 7-25 July 2008, UN Doc. ICCPR/C/GBR/CO/6, July 30, 2008, www.icj.org/IMG/CO_UK.pdf (accessed May 7, 2012), para. 19.

[270] UK Terrorism Act 2000, http://www.legislation.gov.uk/ukpga/2000/11, schedule 8, secs. 8, 9. The law also allows a delay if contacting a lawyer would serve to alert persons suspected of having committed an offense "thereby making it more difficult to prevent an act of terrorism," even though the same law states that detainees have the right "to consult a solicitor as soon as is reasonably practicable, privately and at any time." Ibid., schedule 8, secs. 8(4), 7(1).

Officer."[271] The order requires only that the officer has reasonable grounds to believe that access to other persons will lead to interference with evidence, lead to the alerting of other suspects, or hinder the search and seizure of terrorist property.

- Gambia's 2002 counterterrorism law contains a virtually identical provision to Mauritius law.[272]

Other laws concerning access to legal representation allow longer periods of incommunicado detention:

- Under revisions made in 2012 to China's Criminal Procedure Law, authorities may detain suspects in detention for up to six months at a location determined by the police in cases involving terrorism, state security, or serious instances of corruption. The revisions require law enforcement authorities to notify relatives or counsel within 24 hours of a detention; however, police are not required to disclose where or why the authorities are holding the detainee.[273]

- Saudi Arabia's 2011 draft counterterrorism law would restrict the rights of terrorism suspects to be represented by a lawyer in every stage of criminal proceedings, including during the interrogation, as Saudi law currently provides for other categories of suspects. Article 13 restricts a suspect's recourse to a lawyer to "a period of sufficient time, determined by the investigation agency before raising the charges to court."[274]

- Amendments to Spain's criminal procedural code passed in 2003 more than doubled the period of time a terrorism suspect could be held in incommunicado detention, to a total of 13 days upon the authorization of a judge. The amendment

[271] Mauritius Prevention of Terrorism Act, 2002, https://www.unodc.org/tldb/pdf/Mauritius_Prevention_of_Terrorism_Act_2002.pdf, art. 27.

[272] Gambia Anti-Terrorism Act, 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=2488, art. 60.

[273] China Criminal Procedure Law, amendments to art. 73 enacted on March 14, 2012, http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf. See also "China: Don't Legalize Secret Detention," Human Rights Watch news release, September 1, 2011, http://www.hrw.org/news/2011/09/01/china-don-t-legalize-secret-detention.

[274] Saudi Arabia Penal Law for Crimes of Terrorism and Its Financing, 2011, art. 13. See also "Saudi Arabia's Draft Counterterrorism Law a Setback for Human Rights," Human Rights Watch news release, August 2, 2011, http://www.hrw.org/news/2011/08/02/saudi-arabia-s-draft-counterterrorism-law-setback-human-rights.

allowed five days in police custody followed by five days in judicial custody, with an additional three days of pre-trial incommunicado detention at any time after the 10-day period has expired.[275]

- In Israel, the 1996 law on criminal procedures for Israeli detainees suspected of security offenses extended the time period during which a detainee can be barred from contacting counsel to a total of 21 days.[276] Israel's 2002 Unlawful Combatants Law, as amended, also allows Palestinian detainees to be denied access to lawyers for up to 21 days.[277] Further, Israeli military authorities may issue "prevention orders" barring Palestinian detainees' access to lawyers for purposes of interrogation for up to 90 days, with renewals if authorities deem them necessary.[278]

- Under amendments in 2005 to Australia's criminal code, a person subject to a preventive detention order has the right to contact and communicate with a lawyer, unless the police successfully obtain a "prohibited contact order."[279] Although detainees may contact a family member, they are restricted in what can be communicated and may not disclose the fact that a detention order has been made, the fact of the detention, or the period for which he or she is being held.[280] The contact is limited to "letting the person contacted know that the person being detained is safe but is not able to be contacted for the time being."[281] All contact with lawyers and visitors may be monitored by police exercising the preventive

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[275] Spain's Criminal Procedure Act, article 509.2, as amended by Law No. 15 of 2003 (Ley Orgánica 15/2003) on November 23, 2003, http://noticias.juridicas.com/base_datos/Penal/lecr.html (accessed June 22, 2012). See also Human Rights Watch, *Setting an Example? Counter-Terrorism Measures in Spain*, January 2005, http://www.hrw.org/node/11860/section/6, section "Counter-terrorism procedures under Spanish law."

[276] Israel's Criminal Procedures (Enforcement Authority: Arrests) Law (1996), para. 35(d). English translation available at http://nolegalfrontiers.org/en/israeli-domestic-legislation/criminal-procedure/criminal03 (accessed June 27, 2012). See also ACRI, 2008 report, http://www.acri.org.il/pdf/state2008.pdf, pp. 26-27.

[277] Article 6(a)(2) allows the state to deny detainees access to a lawyer for 21 days; further, article 6(a)(4) allows a district court to extend the detention for another 48 hours if the detainee appeals the state's 21-day detention order to the Supreme Court, if informed that the state intends to appeal against the Supreme Court's decision: http://www.nevo.co.il/law_html/law01/187m1_001.htm. See ACRI 2008 report, http://www.acri.org.il/pdf/state2008.pdf, p. 26.

[278] Israel's Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009, arts. 57-59. English translation available at http://nolegalfrontiers.org/en/military-orders/mil01/74-security-provisions-chapter3-21-69 (accessed June 27, 2012).See also US State Department Bureau of Democracy, Human Rights, and Labor, "Country Report on Human Rights Practices – 2011: Israel and the Occupied Territories," 2011, http://www.state.gov/documents/organization/187889.pdf (accessed June 12, 2012), p. 37.

[279] Australia's Criminal Code, sec. 105.37; see also prohibited contact orders in secs. 105.14A, 105.15 and 105.16.

[280] Ibid, sec. 105.35(2).

[281] Ibid, sec. 105.35(1).

detention order.[282] The provisions also require that any detainee's communication with lawyers, family members, or employers be made in a way that can be monitored by the police. The law does, however, provide that such communications are not admissible as evidence against the person in court.[283]

Delaying Notification to Family Members

Several countries—including Australia, noted above—passed laws in the wake of September 11 permitting the police to delay notifying family members and other third parties—in addition to lawyers—that an individual is being held and to otherwise restrict or deny their communications with or access to interested third parties:

- The UK police may delay implementing detainees' rights to have a friend, relative, or interested third party informed of their whereabouts if they have "reasonable grounds for believing" it would hinder the investigation, even though these rights are explicitly affirmed in the same counterterrorism law.[284]

- The expanded provisions for incommunicado detention in Spain nullify the right of persons detained to have a family member or other third party notified of the fact of detention and the place where they are being held. Moreover, the right to receive visitors and otherwise correspond with a religious minister, relative, or other interested party who might advise the detainee is also rescinded in terrorism cases.[285]

- As noted above, in Israel a 1996 law applicable to detainees suspected of security offenses, and the 2002 Unlawful Combatants Law applicable to non-citizens, allow for detention without the ability to contact lawyers for up to 21 days. In practice, Israeli authorities have also prevented Palestinians from contacting their families

[282] Australia's Criminal Code, http://www.comlaw.gov.au/Details/C2012C00451, sec. 105.38.

[283] Australia's law states that, "(1) The contact the person being detained has with another person under section 105.35 or 105.37 may take place only if it is conducted in such a way that the contact, and the content and meaning of the communication that takes place during the contact, can be effectively monitored by a police officer exercising authority under the preventative detention order." Ibid., sec. 105.38.

[284] UK Terrorism Act, 2000, http://www.legislation.gov.uk/ukpga/2000/11, schedule 8, secs. 6, 8.

[285] Spain's Ley de Enjuicimiento Criminal, originally enacted 1882, as modified in 2003, 15/2003, modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, http://www.legislationline.org/documents/action/popup/id/3813 (accessed May 16, 2012), arts. 520, 527.

for extended periods and from seeing doctors of their choosing.[286] The UN Committee Against Torture concluded in 2009 that Palestinians detained under Israeli administrative detention regulations, particularly when detained inside Israel rather than in the occupied territories, "may be de facto in incommunicado detention for an extended period, subject to renewal."[287]

[286] See "Israel: Hunger Striker's Life at Risk," Human Rights Watch news release, February 11, 2012, http://www.hrw.org/news/2012/02/11/israel-hunger-striker-s-life-risk.

[287] Committee Against Torture, "Concluding Observations: Israel," June 23, 2009, UN Doc. CAT/C/ISR/CO/4, http://www2.ohchr.org/english/bodies/cat/cats42.htm (accessed June 19, 2012), para. 17.

X. Restricting Rights to Challenge Detention

A small number of counterterrorism laws have provisions that restrict the rights of detainees to learn the basis for their detention or to participate in court procedures related to their cases prior to trial. Such restrictions may violate detainees' right to challenge the basis for their detention, a right provided under international law:[288]

- Bahrain's 2006 law permits a 10-day extension of the initial 5-day period of detention without charge (as ordered by a public prosecutor rather than judicial authority) and authorizes security forces to request extensions on the basis of confidential information that is neither provided to detainees nor can be challenged by them in court.[289]

- According to Israel's 2006 criminal procedure provisions applicable to detainees suspected of security offenses, in some cases a judge may order the detention of a detainee for up to 20 days in a hearing where the detainee is not present.[290] Under Israel's 2002 Unlawful Combatants Law, a person does not have the right to be present when the "incarceration order" is granted, although the order must "be brought to the attention of the prisoner at the earliest possible date."[291] Finally, court hearings to authorize continued detention are conducted *in camera* (not in public) and the court may rely on secret evidence not provided to the detainee or defense counsel if the court "is convinced that disclosure of the evidence … is likely to harm State security or public security."[292]

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[288] See ICCPR, http://www2.ohchr.org/english/law/ccpr.htm, art. 9(4) ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful").

[289] Bahrain's Law with Respect to Protection of the Community against Terrorist Acts, https://www.unodc.org/tldb/showDocument.do?documentUid=8520, arts. 27-28.

[290] Criminal Procedures (Detainees Suspected of Security Offenses) (Temporary Provision) Law (2006), art. 5. A judge may order detention this way at a second hearing in cases where a first hearing was previously held at which the detainee was present, and where during the first hearing, the judge ordered his detention for less than the 20-day maximum extension of detention. The police or security forces may request that a detainee not be notified of the judge's order.

[291] Unlawful Combatants Law., art. 3(b-c); art. 3(g) requires the chief of staff to issue an order for the continued detention of an unlawful combatant within 96 hours of the arrest.

[292] Unlawful Combatants Law, art. 5(e-f).

- While counterterrorism legislation in the UK affords detainees the opportunity to set forth the reasons against extending their detention before a judge and states that they are "entitled to be legally represented at the hearing," it also allows judges to exclude both detainees and their lawyers from any and all parts of those hearings at their discretion.[293]

- Turkey's Anti-Terror Law, revised in 2006, allows for a partial or total restriction of the right of a suspect and the defense lawyer to access the case file and the evidence against a suspect on the grounds that the criminal investigation may be endangered.[294] At this writing, the Turkish government was preparing to limit this period of restriction to three months after Council of Europe Commissioner for Human Rights Thomas Hammarberg raised concerns that the current provisions could prevent suspects from effectively challenging the lawfulness of their detention, making the provisions incompatible with the case law of the European Court of Human Rights.[295]

[293] UK Terrorism Act, 2000, http://www.legislation.gov.uk/ukpga/2000/11, schedule 8, sec. 33.

[294] Turkey's Law on Fight Against Terrorism, No. 3713 of 1991, art. 10(d).

[295] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, "Administration of Justice and protection of human rights in Turkey," January 10, 2012, CommDH(2012)2, https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2005423&SecMode=1&DocId=1842380&Usage=2 (accessed May 17, 2012), p. 18-19.

XI. Reducing Police Accountability

In some countries, provisions in counterterrorism legislation protect or even explicitly immunize members of the police or other security forces from civil or criminal liability for serious violations of human rights. Such provisions subvert the rule of law and run contrary to the right to an effective remedy under international law, which requires states to ensure that individuals whose rights are violated have the means to legal recourse.[296] In addition, these laws may have the effect of condoning abuses by the security forces and as such may affect state compliance with other international obligations, such as the prohibition on torture and other ill-treatment and infringements on the right to privacy. Some countries also absolve other government officials from accountability for abuses committed during enforcement of their counterterrorism laws.

Explicit Immunity Provisions

Some counterterrorism laws contain sweeping immunity provisions for the police when injury, death, or damage to property occurs as a result of their actions:

- Mauritius' counterterrorism law of 2002 grants law enforcement officers immunity from civil or criminal liability for the use of force "as may be necessary for any purpose" that results in injury or death to any person or damage or loss of any property.[297]

- Gambia's 2002 counterterrorism law contains an almost identical provision to that of Mauritius.[298]

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[296] Article 2 of the ICCPR states that "(3) Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted." ICCPR, http://www2.ohchr.org/english/law/ccpr.htm, art. 2(3).

[297] Mauritius' counterterrorism law states, "A police officer who uses such force as may be necessary for any purpose, in accordance with this Act, shall not be liable, in any criminal or civil proceedings, for having, by the use of force, caused injury or death to any person or damage to or loss of any property." Prevention of Terrorism Act, 2002, https://www.unodc.org/tldb/pdf/Mauritius_Prevention_of_Terrorism_Act_2002.pdf, art. 24(8).

[298] Gambia's Anti-Terrorism Act, 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=2488, art. 57(8).

- Belarus' 2002 law states that "people involved in the fight against terrorism, in accordance with the legislation of RB [Republic of Belarus], are exempt from responsibility for damage inflicted during the conduct of a counterterrorism operation." It does not define "people."[299]

Other countries have passed laws that contain immunity provisions precluding court challenges to any action taken by the police in furtherance of the law:

- Before its repeal in 2004, India's Prevention of Terrorism Act of 2002 provided that "no suit, prosecution or other legal proceeding" could be brought against either the federal or state governments or their authorities or "any other authority on whom powers have been conferred" under the Act "for anything which is in good faith done or purported to be done in pursuance" of the act. It also shielded any serving or retired member of the armed forces or paramilitary forces from prosecution for counterterrorism acts taken "in good faith."[300] (Under India's Armed Forces (Special Powers) Act of 1958, armed forces have for decades enjoyed immunity for actions in "disturbed" areas that include shooting to kill and warrantless search and arrests.)[301]

- A counterterrorism law enacted in 2005 in Antigua and Barbuda contains a provision that prevents any civil or criminal legal proceedings against the police commissioner or the director of the Office of National Drug and Money Laundering Control Policy for exercising their powers to seize property they suspect to be connected to the commission of a terrorist offense.[302]

- Uganda's 2002 counterterrorism law contains a provision under which "no police officer or other public officer or person assisting such an officer is liable to any civil

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[299] Belarus' Law on The Fight Against Terrorism, #77- Ç of 2002, https://www.unodc.org/tldb/pdf/Law_of_the_Republic_of_Belarus_on_the_Fight_Against_Terrorism_2001.pdf (accessed May 11, 2012), art. 21.

[300] India's Prevention of Terrorism Act, 2002, http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm (Accessed May 26, 2012), sec. 57.

[301] "India: Repeal Armed Forces Special Powers Act," Human Rights Watch news release, October 19, 2011, http://www.hrw.org/news/2011/10/19/india-repeal-armed-forces-special-powers-act.

[302] Antigua and Barbuda's Prevention of Terrorism Act, No. 12 of 2005, https://www.unodc.org/tldb/pdf/Antingua_and_Barbuda_Prevention_of_Terrorism_Act_%282005%29.pdf (accessed May 17, 2012), art. 25(8).

proceedings for anything done by him or her, acting in good faith, in the exercise of any function conferred on that officer under this Act."[303]

- Sri Lanka's 2006 counterterrorism regulations include a provision providing immunity to any public servant or other person "specifically authorized by the Government of Sri Lanka to take action" under the laws, "provided that such person has acted in good faith and in the discharge of his official duties."[304]

- Saudi Arabia's draft 2011 counterterrorism law "exempts [all government officials] from criminal responsibility that may attach to them in carrying out the duties in this law."[305]

[303] Uganda's Anti-Terrorism Act of 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=6589, art. 32. See also Human Rights Watch, *Uganda – Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda*, April 2009, http://www.hrw.org/sites/default/files/reports/uganda0409web.pdf.

[304] Sri Lanka's Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations, No. 7 of 2006, https://www.unodc.org/tldb/showDocument.do?documentUid=7890 (accessed May 17, 2012), art. 19.

[305] Saudi Arabia's Penal Law for Crimes of Terrorism, 2011, art. 38.

XII. Military and Other Special Courts

Some countries have established special counterterrorism courts that do not meet international standards for independence and impartiality or that restrict guaranteed procedural rights of defendants. In some cases, special courts were established years earlier, but their use expanded dramatically following the attacks of September 11 or large-scale attacks by armed groups in the country in question. At least four countries have granted military courts jurisdiction over terrorism prosecutions, while at least three dozen allow the use in regular courts of special procedures for terrorism suspects—many of which violate international law, such as shifting the burden of proof to the defendant for certain offenses.

According to the UN Human Rights Committee,

> Trials of civilians by military or special courts should be exceptional,[306] i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.[307]

Human Rights Watch opposes all special courts for so-called national security crimes because they too easily can be and too often are used to try peaceful dissidents on politically motivated charges, and because important due process protections for suspects and evidentiary standards are often lacking or fall far short of international human rights standards.

The right to justice and a fair trial is guaranteed in international human rights law. The International Covenant on Civil and Political Rights (ICCPR) states that any hearing must take place in open court before a "competent, independent and impartial tribunal."[308] Closed hearings are permitted only in exceptional cases for narrowly tailored reasons of

[306] Human Rights Committee, General Comment No. 31: On the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, May 26, 2004, http://www2.ohchr.org/english/bodies/hrc/comments.htm (accessed June 25, 2012), para. 11.

[307] Human Rights Committee, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial, August 23, 2007, http://www2.ohchr.org/english/bodies/hrc/comments.htm (accessed June 25, 2012), para. 22.

[308] ICCPR, http://www2.ohchr.org/english/law/ccpr.htm, art. 14.

privacy, justice, or national security. Among other fair trial protections, the ICCPR provides for the right of the accused to counsel, to be present at hearings, and to call and examine witnesses.[309] The United States is among the more notorious examples of countries whose special courts erode fair-trial rights:

- The United States created military commissions at the US military base at Guantanamo Bay, Cuba to try suspects apprehended in the "global war on terror." Originally authorized by then-president George W. Bush in November 2001, they were reauthorized in modified form via legislation passed by Congress in 2006 and again in 2009 after Barack Obama was elected president. The military commissions provide significantly fewer due process protections than US federal courts. Defense Department authority to appoint the military judges and intervene in other aspects of the case undermines the independence of the commissions and fair trial rights. The ad hoc nature of commission procedures ensures an uneven playing field between prosecution and defense.[310] While the previous military commissions law barred torture, it allowed evidence obtained by cruel, inhuman, or degrading treatment and in some circumstances may have allowed evidence obtained by torture. Current military commission rules do not permit evidence obtained directly by torture; however, so-called "derivative evidence" obtained by torture may be admitted, as well as coerced evidence from someone other than the defendant.[311]

- In response to a string of deadly attacks in Nigeria by militant groups including Boko Haram, President Goodluck Jonathan in 2012 reportedly was preparing

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[309] Article 14 of the ICCPR states, "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; … (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. ICCPR, http://www2.ohchr.org/english/law/ccpr.htm, art. 14(3).

[310] US Manual For Military Commissions, 2010, http://www.defense.gov/news/d2010manual.pdf. See Rule 304(a)(5)(A) and (B) and Rule 304(a)(2)-(4). For more on the flawed nature of the military commissions, see Kenneth Roth, "Justice Cheated," *The International Herald Tribune*, May 6, 2012, http://www.hrw.org/news/2012/05/06/justice-cheated, and "U.S. Military Commission Trials for 9/11 Suspects a Blow to Justice," Human Rights Watch news release, April 4, 2011, http://www.hrw.org/news/2011/04/04/us-military-commission-trials-911-suspects-blow-justice.

[311] Known as "fruit from the poisoned tree," derivative evidence is evidence that ordinarily would be subject to exclusion in a common law court because it is obtained by illegal or improper conduct, but that a court admits anyway on grounds that it would inevitably have been discovered by lawful means.

amendments to the country's counterterrorism law of 2011 that would require groups designated as "enemy combatants" to be tried before military panels rather than civilian courts. Local media quoted a presidential source as saying the measure aimed to "curb the excesses of some lawyers" in civilian court.[312]

- Malaysia's counterterrorism law of 2012, which has yet to take effect, allows courts to shield the identity of certain prosecution witnesses from defendants and their attorneys, depriving them of their right to cross-examine the witnesses against them.[313] The law permits the use in court of any information obtained in raids and investigations, as well as all intercepted communications—potentially encouraging the unlawful collection of evidence.[314] It also permits a court to order the continued detention of an acquitted defendant pending the exhaustion of all prosecution appeals, thus allowing the authorities to keep a person who has been found not guilty behind bars for years.[315]

- Russia in 2009 amended the country's penal code to end jury trials for terrorism or treason suspects and gave prosecutors broader investigative authority in such cases. The provisions ordered terrorism suspects to be tried instead by three-judge panels.[316] Russia's Constitutional Court in 2010 rejected arguments that the amendments violated Russia's Constitution, which guarantees the right to trial by jury and bars passage of laws that abrogate or derogate from human rights, ruling that jury trials only apply to cases involving the death penalty.[317]

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[312] Chuks Okocha and Michael Olugbode, "FG to Amend Anti-Terrorism Act," *Thisday* (Lagos), May 6, 2012, http://www.thisdaylive.com/articles/fg-to-amend-anti-terrorism-act/115242/ (accessed June 6, 2012).

[313] Malaysia's Security Offences Bill, 2012, http://www.parlimen.gov.my/files/billindex/pdf/2012/DR152012E.pdf, art. 14.

[314] Ibid., arts. 20, 24.

[315] Ibid., art. 30. See also "Malaysia: Security Bill Threatens Basic Liberties," Human Rights Watch news release, April 10, 2012, http://www.hrw.org/news/2012/04/10/malaysia-security-bill-threatens-basic-liberties; and Mickey Spiegel, "Smoke and Mirrors: Malaysia's 'New' Internal Security Act," *East West Center Asia Pacific Bulletin*, No. 167, 2012, http://www.eastwestcenter.org/sites/default/files/private/apb167_0.pdf (accessed June 22, 2012).

[316] The amendments applied to Russia's Criminal Procedure Code, arts. 205 (terrorist act), 278 (violent seizure of power or forcible retention of power) and 279 (armed rebellion). Devin Montgomery, "Russia president approves law ending jury trials for treason and terrorism," *Jurist*, January 2, 2009, http://jurist.org/paperchase/2009/01/russia-president-approves-law-ending.php (accessed May 31, 2012).

[317] Russia's Constitution, http://www.constitution.ru/en/10003000-03.htm (accessed June 6, 2012), arts. 47, 55, and 123. See also "Russia Constitutional Court upholds ban on jury trials for terrorism suspects," *Jurist*, April 20, 2010, http://jurist.org/paperchase/2010/04/russia-constitutional-court-upholds-ban.php (accessed May 31, 2012).

- Yemen's Specialized Criminal Court—established in 1999 to hear cases related to crimes such as terrorism and piracy—routinely fails to meet "fair and public hearing" standards of the ICCPR. The court dramatically increased its activities after September 11, prosecuting dozens of alleged terrorism cases. Yemeni lawyers representing suspects prosecuted by the special court have repeatedly alleged they are not allowed to see clients' case files in full or for sufficient time and that the proceedings are plagued with irregularities and result in convictions for which little or no evidence is put forward.[318]

- Turkey's special aggravated felony courts, established in their present form in 2004, prosecute terrorism offenses as well as crimes against state security and organized crime. They depart from ordinary criminal procedures on multiple levels, some of which restrict defense rights. Among these are longer police custody and prison detention periods, with the upper limit for detention on remand being twice as long as is the case with other offenses tried in regular aggravated felony courts; special restrictions to the case file and evidence; and the power to disregard the few restrictions under the county's counterterrorism law to the state's interceptions of communications and surveillance.[319] Council of Europe Commissioner for Human Rights Thomas Hammarberg has raised concerns about restriction of the right to defense before these courts and "the potential creation of a two-track justice system."[320]

[318] Human Rights Watch, *Report on Human Rights in Yemen: Submitted by Human Rights Watch To the UN Human Rights Committee on the Occasion of its Review of Yemen in March 2012*, February 2012, http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HRW_Yemen_HRC104.pdf (accessed May 17, 2012), p. 10.

[319] Turkey's Law on Fight Against Terrorism, No. 3713 of 1991, arts. 10(d) and 10(f).

[320] Hammarberg, "Administration of Justice and protection of human rights in Turkey," 2012, https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2005423&SecMode=1&DocId=1842380&Usage=2, p. 20-22.

Saudi Arabia: Closed Proceedings

In Saudi Arabia, terrorism suspects are tried by a Specialized Criminal Court whose existence the authorities revealed in 2008 without publication of any authorizing law.[321] The court's decisions are subject to executive approval; for example, the minister of interior, but not the court, can release a convicted prisoner serving a sentence (as well as a pre-trial detainee).[322]

In 2008 the Justice Ministry announced it had appointed certain sitting judges to constitute the court to hear a first set of close to 1,000 terrorism cases to begin in 2009. The special court held all trials *in camera* and did not allow the accused the right to access legal counsel. It convicted 330 persons and acquitted only one in the first set of trials.[323]

In April 2011 a prosecution spokesperson said that over 2,000 suspects were being referred to trial before the special court, while another 5,000 suspects had been released after "repenting." In June 2011 local but not international media were allowed access to some trials, though reporting appeared to be heavily censored or self-censored.[324]

The special court is empowered to hear witnesses and experts without the presence of the accused or their lawyer, who only receive a notice of the contents of what was said without revealing the identity of the expert, making it difficult to challenge the veracity or validity of the testimony.[325] It can conduct trials *in absentia*, and those who are convicted are only granted the right of appeal, not of retrial, if apprehended.[326]

A Human Rights Watch investigation found that the special court is increasingly used

[321] "Saudi Arabia Draft Counterterrorism Law a Setback for Human Rights," Human Rights Watch news release, August 2, 2011, http://www.hrw.org/news/2011/08/02/saudi-arabia-s-draft-counterterrorism-law-setback-human-rights. See also Saudi Arabia's Penal Law for Crimes of Terrorism, 2011.

[322] Saudi Arabia's Penal Law for Crimes of Terrorism, 2011, art. 59.

[323] "Saudi Arabia Draft Counterterrorism Law a Setback for Human Rights."

[324] Ibid.

[325] Saudi Arabia's Penal Law for Crimes of Terrorism, 2011, art. 15.

[326] Ibid., art. 12.

to try peaceful dissidents and human rights activists on politically motivated charges in proceedings that violate the right to a fair trial.[327] In April 2012, for example, the court sentenced a rights activist and a political dissident to prison for peacefully questioning abuse of government power. The charges against the rights activist and the dissident do not allege that they used or incited violence.

In 2012 activist Muhammad al-Bajadi was tried by a special court. Al-Bajadi is a founding member of the Saudi Association for Civil and Political Rights (ACPRA), which the government has not licensed. Intelligence agents had arrested al-Bajadi on March 20, 2012, after several dozen families of detainees had gathered in front of the Interior Ministry in Riyadh to press officials for the release of their relatives, some of whom had been detained for seven or more years without trial.

On April 10 the court sentenced al-Bajadi to four years in prison and banned him from foreign travel for another five years for unlawfully establishing a human rights organization, distorting the state's reputation in media, impugning judicial independence, instigating relatives of political detainees to demonstrate and protest, and possessing censored books.

On April 11, 2012 the court also sentenced Yusuf al-Ahmad, an academic and cleric, to five months in prison for "incitement against the ruler, stoking divisions, harming the national fabric, diminishing the prestige of the state and its security and judicial institutions, and producing, storing, and publishing on the internet things that can disturb public order." On July 7, 2011 al-Ahmad had published a video on his Twitter account in which he called on King Abdullah to release arbitrarily detained persons.

Other countries have established special rules for terrorism trials that represent an erosion of due process guarantees under the state's normal criminal procedure or international law. For example, some rules allow hearsay evidence that would be inadmissible in regular court, permit the use of confessions made under torture or duress, and establish strict limits on the appeal of convictions:

[327] "Saudi Arabia: Abolish Terrorism Court," Human Rights Watch news release, April 27, 2012, http://www.hrw.org/news/2012/04/27/saudi-arabia-abolish-terrorism-court (accessed May 17, 2012).

- Ethiopia's Anti-Terrorism Proclamation of 2009 provides for the use of "hearsay or indirect evidence" in court without any limitation. Ethiopia's Code of Criminal Procedure bars courts from using forced confessions or statements.[328] However, there is no similar provision in the counterterrorism law. Official intelligence reports also are admissible, even if they do not disclose their source or how their information was gathered.[329] In this manner, intelligence reports based on information gathered through torture could be admitted into evidence at trial; if defense counsel cannot ascertain the methods by which intelligence is collected, they cannot show it has been collected in a coercive manner.[330]

Some rules shift the burden of proof to the accused, jeopardizing the right to be presumed innocent under international law.[331] According to the International Commission of Jurists, "If a disproportionate burden is placed on the accused to prove facts, or to prove a lack of criminal intention, the [right to be presumed innocent] is effectively set aside."[332]

- Uganda's Anti-Terrorism Act imposes up to five years of imprisonment for destroying material likely to be relevant to an investigation, "*unless the accused persons can prove* that they had no intention of concealing any information contained in the material in question from the person carrying out the investigation."[333]

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[328] Ethiopia, Criminal Procedure Code, Proclamation No. 185 of 1961, http://www.unhcr.org/refworld/country,,,LEGISLATION,ETH,,492163ac2,0.html (accessed June 13, 2012), art. 35(2).

[329] Ethiopia Proclamation on Anti-Terrorism, 2009, http://www.unhcr.org/refworld/country,,NATLEGBOD,,ETH,,4ba799d32,0.html, art. 23.

[330] Article 19(5) of the 1994 Ethiopian Constitution states that no persons arrested can be compelled to make confessions or admissions that could be used against them, and that evidence obtained under coercion is not admissible in court. Constitution of the Federal Democratic Republic of Ethiopia, 1994, http://www.wipo.int/wipolex/en/text.jsp?file_id=193667 (accessed June 13, 2012), art. 19(5); Ethiopia, Criminal Procedure Code, Proclamation No. 185 of 1961, http://www.unhcr.org/refworld/country,,,LEGISLATION,ETH,,492163ac2,0.html (accessed June 13, 2012), art. 35(2).

[331] See ICCPR, art. 14(2) ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."). According to the Human Rights Committee, "The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle." Human Rights Committee, General Comment No. 32, http://www2.ohchr.org/english/bodies/hrc/comments.htm).

[332] International Commission of Jurists (ICJ), *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, http://ejp.icj.org/IMG/EJP-Report.pdf, p. 155.

[333] Uganda's Anti-Terrorism Act of 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=6589, art. 17. See also Human Rights Watch, *Open Secret*, chapter XI, emphasis added.

- In India, a counterterrorism amendment passed in 2008 directs special courts to presume the guilt of an accused in two circumstances without a showing of criminal intent. The first is if arms, explosives, or other specified substances were recovered from the accused and there is reason to believe they or similar items were used to commit an offense under the Unlawful Activities (Prevention) Act. The second is in cases where fingerprints or other "definitive evidence" suggesting involvement were found at the site or on anything used in the commission of the offense.[334] In such cases, the burden of proof is placed on the accused to prove their innocence. This measure undermines India's constitutionally guaranteed right to a fair trial and creates enormous risks of wrongful prosecution, particularly given the record of the Indian police in fabricating evidence.[335]

[334] India's UAPA, sec. 43E, amended 2008, http://www.nia.gov.in/acts/The%20Unlawful%20Activities%20%28Prevention%29%20Act,%201967%20%2837%20of%201967%29.pdf.

[335] While the Indian Constitution does not expressly guarantee the presumption of innocence, the Supreme Court of India has included such a presumption in its holdings concerning the constitutional right to a fair trial. See India Supreme Court, *State of Punjab v. Baldev Singh,* AIR 1999 SC 2378, July 21, 1999. Human Rights Watch has documented the widespread fabrication of evidence by Indian police as well as the use of forced confessions to convict alleged terrorism suspects. See for example Human Rights Watch, *Broken System: Dysfunction, Abuse and Impunity in the Indian Police,* August 2009, http://www.hrw.org/reports/2009/08/04/broken-system-0; and *The "Anti-Nationals,"* http://www.hrw.org/reports/2011/02/01/anti-nationals.

XIII. Death Penalty

Counterterrorism laws unsurprisingly prescribe tougher penalties for terrorism-related offenses than do ordinary criminal laws for the same underlying acts. Human Rights Watch found that more than 120 countries had enacted laws with heightened penalties for terrorism-related acts since September 11. Security Council Resolution 1373 called for those responsible for perpetrating or supporting terrorist acts to be prosecuted by terrorism-specific domestic laws and regulations for which "the punishment duly reflects the seriousness of such terrorist acts."[336]

At least 30 countries that maintain the death penalty include capital punishment as a sentence for certain terrorist acts. These include Bahrain, China, Ethiopia, India, Indonesia, Iraq, Morocco, Pakistan, Qatar, Somalia, Syria, the United Arab Emirates, and the United States. The list also includes Arab countries with laws based on Sharia, or Islamic law. Terrorist crimes in Saudi Arabia, for example, are considered crimes of *hiraba;* these crimes are said to warrant the highest penalties set out in the Quran, including the death penalty.[337]

International law discourages the use of the death penalty and mandates that it only be applied to the most serious crimes, such as those resulting in death or serious bodily harm.[338] In 2008 the UN General Assembly adopted a resolution entitled "Moratorium on the use of the death penalty," in which 104 states voted in favor.[339] Human Rights Watch opposes the death penalty in all circumstances as cruel and inhuman punishment, one that is plagued with arbitrariness, prejudice, and error wherever it is applied.

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[336] UN Security Council, Resolution 1373 (2001), http://www.unhcr.org/refworld/docid/3c4e94552a.html, para. 2(e).

[337] See Fathi Hasan Attwah, "Committed to Combat Terrorism," *Saudi Gazette*, September 17, 2001; and Interpol, "National Laws: Saudi Arabia," 2001, http://www.interpol.int/Public/BioTerrorism/NationalLaws/SaudiArabia.pdf (accessed June 22, 2012).

[338] ICCPR, http://www2.ohchr.org/english/law/ccpr.htm, art. 6(2).

[339] "Moratorium on the use of the death penalty," UN General Assembly resolution 62/149, adopted on December 18, 2008, A/RES/62/149, http://www.unhcr.org/refworld/docid/47c814e32.html (accessed June 22, 2012). See also "UN Resolution on Moratorium on the Use of the Death Penalty: Call on Nigeria to Abstain," Human Rights Watch news release, December 12, 2008, http://www.hrw.org/news/2008/12/12/un-resolution-moratorium-use-death-penalty-call-nigeria-abstain.

Belarus: Executions Defying Stay Order

In March 2012 Belarus executed two men convicted on terrorism-related charges for a deadly bombing the previous year, ignoring a request from the UN Human Rights Committee to stay the execution until the committee considered one suspect's petition that his conviction was based on an unfair trial and a forced confession.

In November 2011 a Belarus court convicted Uladzislau Kavalyou and Dzmitry Kanavalau of carrying out an attack on the Minsk metro in April 2011 that killed 15 people and wounded hundreds. Kanavalau was found guilty of committing terrorist attacks and producing explosives. Kavalyou was found guilty of assisting him and failing to inform the authorities.[340] Both were sentenced to death.

Independent experts and human rights groups repeatedly expressed their concerns about due process and other fair trial violations during the investigation and trial. Kavalyou's mother alleged in a petition to the Human Rights Committee that her son was tortured into confessing.[341] No forensic evidence was presented at the trial linking either defendant to the explosion. Relatives were only notified of the executions after the two men had been put to death.[342]

The Human Rights Committee called the executions "flagrant violations" of Belarus' legal obligations. It stated that it "had asked the Belarus authorities to stay the execution pending its consideration of the case. Such requests are binding as a matter of international law."[343]

Belarus is the only remaining country in Europe that uses the death penalty. It was among the first countries to pass a counterterrorism law following the September 11 attacks.[344]

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340 "Belarus must release bodies of convicts executed over Minsk metro bombing," Amnesty International news release, March 19, 2012, https://www.amnesty.org/en/news/belarus-must-release-bodies-convicts-executed-over-minsk-metro-bombing-2012-03-19 (accessed June 8, 2012).

341 "Belarus: Abolish the Death Penalty," Human Rights Watch news release, March 19, 2012, http://www.hrw.org/news/2012/03/19/belarus-abolish-death-penalty.

342 "Belarus must release bodies of convicts," Amnesty International.

343 Human Rights Committee, "UN human rights panel deplores Belarus execution," March 19, 2012, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11987&LangID=E (accessed June 23, 2012).

Capital Punishment for Non-Lethal Crimes

While in some countries capital punishment may only be imposed when an act of terrorism results in a person's death, in more than a dozen others it is prescribed as a penalty for crimes that do not result or threaten death or serious injury:

- Under Syria's penal code, any terrorist act that results in a person's death is punishable by the death penalty, as is any terrorist act that results in the destruction (even partial) of a public building or transportation vessel.[345]

- Indonesia's 2002 counterterrorism regulations establish the death penalty as a possible sentence for acts of terrorism including those that do not cause death or serious injury. For example, the death penalty may be used to punish the act of transporting or hiding a firearm or "other dangerous material," if the material is transported or hidden with the intent of committing a terrorist act. Incitement to terrorism is also punishable by death or by life imprisonment.[346]

- Saudi Arabia's draft 2011 counterterrorism law introduces the death penalty for 23 acts and specifies minimum sentences, typically 10 to 25 years, without also specifying a maximum sentence. The law would allow the death penalty for crimes that threaten rather than involve violence.[347]

- The United Arab Emirates' 2004 counterterrorism law effectively allows the death penalty for anyone who is involved in the successful perpetration of a terrorist act, such as organizing or running a terrorist organization, inciting someone to commit a terrorist act that causes death, and hijacking a means of transport to commit a

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[344] Belarus' Law on the Fight against Terrorism of 2002, https://www.unodc.org/tldb/pdf/Law_of_the_Republic_of_Belarus_on_the_Fight_Against_Terrorism_2001.pdf (accessed May 11, 2012).

[345] Syria's Penal Code, https://www.unodc.org/tldb/showDocument.do?documentUid=1480, art. 305.

[346] Indonesia's Government Regulation on Combating Criminal Acts of Terrorism, 2002, https://www.unodc.org/tldb/showDocument.do?documentUid=2927&country=INS&language=ENG (accessed May 7, 2012), secs. 6, 9, 14.

[347] "Saudi Arabia's Draft Counterterrorism Law a Setback for Human Rights," http://www.hrw.org/news/2011/08/02/saudi-arabia-s-draft-counterterrorism-law-setback-human-rights.

terrorist act that causes death. If the terrorist act in question is planned but not carried out successfully, the penalty is life imprisonment.[348]

- Not all countries have increased penalties for terrorist acts. In 2007 Peru's Congress tabled draft legislation submitted the previous year by President Alan Garcia that proposed to prescribe the death penalty for certain terrorist offenses, but only following court challenges.[349] The legislation would have violated the rule in the American Convention on Human Rights that the set of crimes punishable by the death penalty should not be expanded.[350]

[348] UAE's Decree by Federal Law No. 1 of 2004 on Combating Terrorism Offences, https://www.unodc.org/tldb/showDocument.do?documentUid=6397 (accessed May 18, 2012), arts. 3, 6, 9, 14-16.

[349] "Congreso archiva pena de muerte para los terroristas," *El Comercio*, January 10, 2007, http://elcomercio.pe/ediciononline/html/2007-01-10/onEcPortada0649039.html (accessed May 29, 2012).

[350] American Convention on Human Rights ("Pact of San José, Costa Rica"), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), http://www.oas.org/juridico/english/treaties/b-32.html (accessed May 18, 2012), art. 4(2).

XIV. Preventive Detention and "Control Orders"

More than a dozen countries have initiated or expanded the use of administrative (or preventive) detention or restrictions on suspects' activities as part of counterterrorism efforts.

Administrative detention entails the deprivation of liberty by the executive with no intent to prosecute the individual through the criminal justice system. In theory, detainees are not deprived of their liberty as punishment for past acts but in order to prevent future unlawful acts. Consequently, administrative detention results in the detention or restriction on movements of persons—sometimes indefinitely—without charging them with a criminal offense or bringing them to trial.

Under administrative or preventive detention law, detainees may be held in police custody or in in the custody of the military or the intelligence services. A number of countries, particularly in Asia and the Middle East, inherited administrative detention laws from colonial governments, which frequently had used them to quash local independence movements.

International human rights law permits administrative detention only under narrow circumstances.[351] However, countries often use administrative detention for matters that fall squarely within the application of existing criminal law, with the intent of avoiding the scrutiny of an independent and qualified justice system. Or they use such laws to deprive individuals of fundamental freedoms—such as the rights to association, expression and peaceful assembly—protected under international law. As such, administrative detention subverts the rule of law by granting executive officials powers that should properly be the domain of the judiciary.

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[351] While international law does not prohibit all forms of administration detention, "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge … and shall be entitled to trial within a reasonable time or to release." ICCPR, art. 9(3). The ICCPR does not have an exhaustive list of the permitted grounds for detention but provides that, "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, art. 9(4). The European Convention on Human Rights prohibits detention for reasons of public order without a declaration of a state of emergency. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf (accessed May 17, 2012), arts. 5 and 15.

Administrative Detention

Administrative detention laws may limit detention to a few days or effectively allow indefinite detention:

- Since the September 11 attacks, the United States has asserted wartime powers in the US Constitution and domestic laws to indefinitely detain several hundred terrorism suspects without charge and in many cases without judicial review. In March 2009 the government asserted in court filings that a resolution passed by Congress immediately after the September 11 attacks was the legal basis for detaining thousands of detainees without charge at Guantanamo Bay as well as in Bagram, Afghanistan, and elsewhere.[352] The resolution, the 2001 Authorization for Use of Military Force (AUMF), allowed the president to use military force against persons responsible for the September 11 attacks or anyone who harbored those responsible.[353]

  Provisions applicable to terrorism suspects in the US National Defense Authorization Act (NDAA) for Fiscal Year 2012 codify indefinite detention into domestic law. The provisions permit the indefinite detention of detainees at the US military base at Guantanamo Bay, Cuba, as well as of any future terrorism suspects.[354]

  The law also bars the transfer of detainees currently held at Guantanamo Bay into the United States for any reason, including for trial. In addition, it extends restrictions, imposed in 2011, on the transfer of detainees from Guantanamo to home or third countries—even those cleared for release by the US government.[355]

  Of the 169 detainees who remain at Guantanamo—some of whom have been held for over a decade—only six have been formally charged.[356]

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[352] "US: Prolonged Indefinite Detention Violates International Law," Human Rights Watch news release, January 24, 2011, http://www.hrw.org/news/2011/01/24/us-prolonged-indefinite-detention-violates-international-law.

[353] US Authorization for Use of Military Force, P.L. 107-40; 50 U.S.C. 1541 note, http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf (accessed June 6, 2012).

[354] US National Defense Authorization Act (NDAA) for Fiscal Year 2012, P.L. 112-81, http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf (accessed June 5, 2012). See also "US: Refusal to Veto Detainee Bill A Historic Tragedy for Rights," Human Rights Watch news release, December 15, 2011, http://www.hrw.org/news/2011/12/14/us-refusal-veto-detainee-bill-historic-tragedy-rights.

[355] US NDAA for Fiscal Year 2012, P.L. 112-81, http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf.

[356] Human Rights Watch, "The Guantanamo Trials," May 2012, http://www.hrw.org/features/guantanamo.

- In Australia, the Criminal Code permits preventive detention for up to 96 hours if the arresting officer has "reasonable grounds" to suspect an imminent threat of a terrorist act and that the detention would "substantially assist" in preventing the attack.[357] The first 48 hours can be authorized by a senior member of the Australian federal police, and an additional 48 hours can be authorized by a specifically designated sitting or retired judge, a federal magistrate, or an administrative appeals tribunal member.[358] The amendments allow the detention to remain virtually secret, with no provisions for appeal.[359]

- Until their expiration in 2007, amendments to Canada's criminal code permitted the police to detain a person for a total of 72 hours without charge if they determined it was necessary to prevent terrorist activity.[360] The measure allowed a police officer to apply for an arrest warrant on the basis of "reasonable grounds" to believe that a terrorist activity would be carried out, but with the lower standard of "reasonable suspicion" that the detention of the targeted person was necessary to prevent the terrorist activity.[361]

[357] Australia's Criminal Code, sec. 105.4, as amended by the Anti-Terrorism Act of 2005, http://www.comlaw.gov.au/Details/C2012C00451

[358] Ibid., sec. 105.1-105.11. See also Roach, "A Comparison of Australian and Canadian Anti-Terrorism Laws," http://ssrn.com/abstract=1646679, p. 72-73.

[359] Ibid. Sections 105.34-39 set out the limits on contact and disclosure of preventative detention and sections 105.14A, 105.15, and 105.16 set out procedures whereby police can seek orders prohibiting detainees from all outside contact.

[360] Former sec. 83.3 of Canada's Criminal Code, as amended by the Anti-terrorism Act 2001, http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html. The amendments lapsed under a sunset clause in 2007, but the government was seeking to renew them in 2012. Section 503 of the Criminal Code limits pre-charge detention to 24 hours.

[361] Ibid. See also Roach, "A Comparison of Australian and Canadian Anti-Terrorism Laws," p. 71.

Bosnia and Herzegovina: Detention of Foreign Suspects

Following the attacks of September 11, 2001, Bosnia and Herzegovina came under pressure from the United States and other governments to clamp down on former foreign fighters with alleged links to terrorist groups, such as by stripping naturalized Bosnians of their citizenship. In 2008 Bosnia passed a law permitting indefinite detention of foreign terrorism suspects without charge, even when the authorities are not taking active steps to remove them from the country.
The six suspects detained under that law include Imad al-Husin, who remains behind bars in defiance of a court ruling and who has never seen nor been able to contest the evidence that led the Bosnian authorities to conclude that he is a threat to national security.[362]

Syrian-born al-Husin, who served in the El Mujahid unit of foreign fighters in the Bosnian army during the armed conflict in the early 1990s, was stripped of his Bosnian citizenship in 2001 on unspecified security grounds and has been detained without charge since 2008.

In 2012 the European Court of Human Rights blocked Bosnia's efforts to deport al-Husin to Syria on grounds that he risked ill-treatment if returned to Syria because of widespread torture in detention there and the country's general security situation. The court also found that his extended immigration detention in Bosnia at a time when the government was not taking active steps to deport him violated his right to liberty.[363]

The court called on Bosnian authorities find a third country that would accept al-Husin, bring criminal charges against him, or release him.[364] Bosnia's allies have been silent about al-Husin's indefinite detention without charge.[365]

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[362] Lydia Gall, "Bosnia is Learning Wrong Counterterrorism Lessons," *BalkanInsight*, May 16, 2012, http://www.hrw.org/news/2012/05/16/bosnia-learning-wrong-counterterrorism-lessons.

[363] *Al Husin v. Bosnia and Herzegovina*, appl. No. 3727/08, paras. 65-66. Judgment of February 7, 2012. http://www.unhcr.org/refworld/docid/4f310b822.html (accessed June 6, 2012).

[364] Ibid. See also "Bosnia: European Court Halts Syria Deportation," Human Rights Watch news release, February 7, 2012, http://www.hrw.org/news/2012/02/07/bosnia-european-court-halts-syria-deportation.

[365] Gall, "Bosnia is Learning Wrong Counterterrorism Lessons," http://www.hrw.org/news/2012/05/16/bosnia-learning-wrong-counterterrorism-lessons.

Security forces in the Middle East and elsewhere have held terrorist suspects in administrative detention with little regard for basic due process rights:

- Singapore's Internal Security Act allows the indefinite detention of anyone deemed a threat to national security.[366] A number of suspected members of the Islamist militant group Jemaah Islamiyah are currently held under the law. The Internal Security Act was passed in 1960 in Malaysia; Singapore retained the law after separating from Malaysia in 1963.

- Saudi Arabia's 2011 draft counterterrorism law compels terrorism detainees to undergo "rehabilitation" measures regardless of whether they have been convicted of any crime. Article 62 sets up special centers for the education of detainees and convicts in terrorism cases, "in order to rectify their ideas, and to deepen their attachment to the homeland." Interior Ministry investigators may order a terrorism suspect or convict, "or whoever is surrounded by suspicion or instills fear," to participate in rehabilitation centers in lieu of detention.[367] The law also allows a committee set up by the Interior Ministry to continue administrative detention for persons convicted of terrorism crimes whose sentence is about to end. The committee's decisions are subject to appeal to the specialized court.[368]

[366] Singapore's Internal Security Act of 1960, Act No. 18 of 1960, revised in 1970 and 1985, http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A5ba26ddb-fd4c-4e2e-8071-478c08941758%20Depth%3A0%20ValidTime%3A02%2F01%2F2011%20TransactionTime%3A30%2F03%2F1987%20Status%3Ainforce;rec=0;whole=yes (accessed May 10, 2012), art. 8.

[367] Saudi Arabia's Penal Law for Crimes of Terrorism, 2011, art. 62.

[368] Ibid., art. 63.

Israel: Indefinite Detention

Israel's Incarceration of Unlawful Combatants Law, amended with further restrictions in 2008, allows for the administrative detention of Palestinians from the occupied territories if there is "reasonable cause to believe" that the individual "has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force" that perpetrates such acts.[369]

A person so detained may be held initially for up to 14 days prior to judicial review.[370] The law states that such a person "shall be regarded as someone whose release will harm state security as long as the hostilities of that force against the State of Israel have not ended, as long as the contrary has not been proved."[371] The law further states that the defense minister's determination that the hostilities of the force against Israel are ongoing "shall serve as evidence in any legal proceeding, unless the contrary is proved."[372] In practice, Israel has enforced the Unlawful Combatants Law against Palestinians from the Gaza Strip.

Israeli military orders also allow for the administrative detention of Palestinians.[373] Under both the Unlawful Combatants Law and military orders, a judge (or a military judge, respectively) may approve a further detention period of up to six months, a period that may be renewed indefinitely as long as the judge concurs that releasing the person would harm security.[374] Under military orders, administrative detainees

[369] Israel's Incarceration of Unlawful Combatants Law, n.5762/2002, http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf (accessed May 17, 2012), arts. 2, 3(a). The law further lists a criteria for declaring 'unlawful combatant' status to be "where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him."

[370] Israel's Unlawful Combatants Law, art. 5(a).

[371] Ibid., art. 7.

[372] Ibid., art. 8.

[373] Israel's Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009, arts. 271-294. English translation available at http://nolegalfrontiers.org/en/military-orders/milo1/67-security-provisions-chapter9-271-315 (accessed June 27, 2012).

[374] Israel's Unlawful Combatants Law, art. 5(c); Administrative Detentions Order, art. 1(b).

are detained on the basis of secret evidence, which they and their lawyers are not permitted to see, that the detainee presents a security threat.[375]

Because the military does not indict administrative detainees for any particular offense, detainees are unable to defend themselves against specific charges. The standard of evidence is also lower than in a criminal proceeding – not proof "beyond a reasonable doubt," but merely "reasonable grounds to assume" that the detainee might pose a security risk.

Israeli military prosecutors often justify the use of secret evidence on the basis that it comes from Palestinian collaborators whose lives could be endangered if the evidence were disclosed. Yet in practice, Human Rights Watch has found, military courts do not even consider alternatives that would give the semblance of balancing such concerns against due process rights, such as by redaction or partial disclosure of the confidential evidence.

Israel has asserted that the Geneva Conventions of 1949 allow it to detain Palestinians without charge for "imperative reasons of security."[376] The authoritative commentary by the International Committee of the Red Cross on the conventions states that "such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved."[377]

As of December 31, 2011, Israeli authorities were holding 307 Palestinians in administrative detention, up from 219 administrative detainees at the beginning of 2011, according to the Israel Prison Service.[378]

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375 See "Israel: Hunger Striker's Life at Risk," Human Rights Watch news release, February 11, 2012, http://www.hrw.org/news/2012/02/11/israel-hunger-striker-s-life-risk.

376 Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950, http://www.icrc.org/ihl.nsf/full/380 (accessed June 22, 2012), art. 78.

377 International Committee of the Red Cross (ICRC), commentary on Fourth Geneva Convention of 1949, art. 78, http://www.icrc.org/ihl.nsf/COM/380-600085?OpenDocument (accessed June 29, 2012).

378 See "Israel: Hunger Striker's Life at Risk."

Control Orders

Legislation in Australia, the United Kingdom, and Canada established special mechanisms known as "control orders" or "security certificates" that have allowed detention or extreme limitations on designated suspects' movements, communications, or livelihoods with the aim of preventing future terrorist activity.[379] In many cases, the provisions violate fundamental rights such as freedom of movement, association, and expression and the right to privacy and family life.[380] Although the harshest provisions in the UK and Canada were replaced following court challenges, the revised regimes remain overly restrictive:

- In Australia, control orders include prohibitions and restrictions on freedom of movement, including the use of a tracking device; communicating or associating with specified people; using specified technologies such as the internet; possessing specified substances; and engaging in specified activities including those involved in one's occupation.[381] Australia's Human Rights Law Centre has expressed concern that the process for obtaining a control order is based on secret information; is subject only to a civil standard of proof; and lacks transparency, due process, and regular review.[382]

- In Canada, the Immigration and Refugee Protection Act of 2001 allowed authorities to issue "security certificates" authorizing the prolonged detention or deportation

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[379] For Australia, see Criminal Code, div. 104, as amended by the Anti-terrorism Act, No. 144 of 2005, http://www.comlaw.gov.au/Details/C2012C00451; for Canada, see Criminal Code, art. 83.3(8), as amended by the Anti-terrorism Act of 2001, http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html; for the UK, see the Prevention of Terrorism Act, 2005, http://www.legislation.gov.uk/ukpga/2005/2, sec. 6(1b). The language specifying the purpose of such detention and restrictions varies. In the case of Australia, the purpose of control orders is to "protect the public from a terrorist act." Interim control orders can be made if the court is satisfied that the order would "substantially assist in preventing a terrorist act" or because a "person has provided training to, or received training from, a listed terrorist organization," and on the balance of probabilities the order is reasonably necessary to protect the public from a terrorist act. Australia's Criminal Code, sec. 104.4, as amended by the Anti-terrorism Act, No. 144 of 2005. For the UK, however, control orders which could potentially add up to a detention-like situation were enforced for the purposes of "preventing or restricting involvement by that individual in terrorism-related activity," a very wide-ranging category extending to "the commission, preparation or instigation of acts of terrorism" but also including "conduct which gives encouragement" to specific terrorist acts or "acts of terrorism generally." The UK's Prevention of Terrorism Act, 2005, sec. 1.

[380] In the case of the UK, see, for example, "EU: Rights Abuse at Home Ignored," Human Rights Watch news release, January 22, 2012, http://www.hrw.org/news/2012/01/22/eu-rights-abuse-home-ignored; and "UK: Proposed Counterterrorism Reforms Fall Short," Human Rights Watch news release, February 11, 2011, http://www.hrw.org/news/2011/02/11/uk-proposed-counterterrorism-reforms-fall-short.

[381] Australia's Criminal Code, sec. 104.5(3), as amended by the Anti-Terrorism Act, No. 144 of 2005, http://www.comlaw.gov.au/Details/C2012C00451; and Australia's Anti-Terrorism Act (No. 2) 2005.

[382] Human Rights Law Centre, *Review of Australia's Counter-Terrorism and National Security Legislation*, http://www.hrlc.org.au/files/HRLC-Submission-to-National-Security-Legislation-Monitor.pdf, sec. 3.6.

of non-citizens without charge or trial, based on evidence the state could withhold from detainees and their lawyers. The certificates were issued on "reasonable grounds"—a lower standard of proof than used in criminal law—and allowed the state to withhold evidence from detainees and their lawyers.[383] Among other sweeping provisions, a non-citizen could be subjected to a security certificate for alleged membership in a terrorist group even though membership alone was not a crime in Canada under the 2001 Anti-Terrorism Act. The authorities used the security certificates to detain six Muslim men for months or years without charge starting in 2001.[384] Canada revised its security certificate regime in 2008 after the Supreme Court found that the use of secret evidence that was not subject to adversarial challenge was unconstitutional.[385] The plaintiff in that case, Adil Charkaoui, was reportedly detained in part based on secret evidence obtained under torture in Morocco.[386] Reforms to the security certificates system in 2008 included the exclusion of evidence obtained through torture and other degrading treatment, as well as the lifting of a 120-day embargo on a detainee's ability to apply for a release. The revisions also allowed judges to appoint "special advocates" who could review and challenge secret evidence and attend hearings from which the detainee were excluded—but who still could not discuss the evidence with the detainees without specific judicial permission.[387]

- In the UK, the control orders in force from 2005 to 2011 contained similar restrictions to those in Australian law, but further restricted where a person could live and who was allowed entrance to their residence; allowed searches of their

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[383] Canada's Immigration and Refugee Protection Act, S.C. 2001, c. 27, of November 1, 2001, http://laws-lois.justice.gc.ca/eng/acts/I-2.5/index.html (accessed June 26, 2012), secs. 77-78, 81-83. The law, passed in November 2001, had been drafted prior to September 11 but gained momentum after that attack. See Audrey Macklin, Centre for European Policy Studies, "The Canadian Security Certificate Regime," March 2009, http://aei.pitt.edu/10757/1/1819.pdf, p. 2. Canada has used security certificates since 1978 but until 2011 they were primarily used against suspected spies or organized crime suspects who were not held for prolonged periods. See also Human Rights Watch and the University of Toronto International Human Rights Clinic, *Amicus Curiae Brief on Canada's Security Certificates Regime*, presented before the Canadian Supreme Court, February 22, 2007, http://www.hrw.org/news/2007/02/21/canadas-security-certificates-regime-human-rights-watch-and-university-toronto-inter.

[384] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011), pp. 396. The men were subsequently granted conditional freedom with severe restrictions on their movements that were similar to house arrest.

[385] *Charkaoui v. Canada* (Citizenship and Immigration), Supreme Court of Canada, 2007 SCC 9, [2007] 1 S.C.R. 350, February 3, 2007, http://scc.lexum.org/en/2007/2007scc9/2007scc9.html (accessed June 22, 2012).

[386] ICJ, *Assessing Damage, Urging Action*, 2009, http://ejp.icj.org/IMG/EJP-Report.pdf, pp. 97-100.

[387] See Canada's Act to Amend the Immigrant and Refugee Protection Act (certificates and special advocates), S.C. 2008, c. 3 February 14, 2008, http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2008_3/page-1.html (accessed June 29, 2012), secs. 82(1) and (3), 83(1.1).

residence as well as the removal of anything found therein; and, perhaps most seriously, required a person "to remain at or within a particular place or area (whether for a particular period or at particular times or generally)" for periods as long as 18 hours a day.[388] Persons subject to a control order were not allowed to know about the evidence discussed in closed hearings or to give directions to the special advocate appointed by the court to defend their interests.[389] After numerous court challenges, the control orders were replaced in 2011 by the Terrorism Prevention and Investigation Measures, which contain fewer restrictions while still imposing electronic tagging, overnight residence requirements, and limitations on association, communication, and foreign travel.[390]

- Malaysia's Security Offences (Special Measures) Bill of 2012, which is not yet in force, would permit the police to unilaterally impose electronic monitoring devices on individuals released from detention, a serious infringement of personal liberty.[391]

[388] UK Prevention of Terrorism Act 2005, http://www.legislation.gov.uk/ukpga/2005/2, sec. 1(4-5).

[389] "UK: Court Orders Violate Suspects Rights," Human Rights Watch news release, March 2, 2009, http://www.hrw.org/news/2009/03/01/uk-control-orders-terrorism-suspects-violate-rights.

[390] UK Terrorism Prevention and Investigation Measures Act, 2011, http://www.legislation.gov.uk/ukpga/2011/23/crossheading/new-regime-to-protect-the-public-from-terrorism/enacted (accessed May 18, 2012), sec. 1. Following the attacks of September 11, the UK passed the Anti-terrorism, Crime and Security Act 2001, http://www.legislation.gov.uk/ukpga/2001/24/contents; part 4 of the law permitted the indefinite detention of persons whom the authorities wanted to deport on national security grounds, but who could not be sent to their countries of origin because they would be at risk of suffering human rights violations such as torture in their homelands. In 2005, the UK replaced ATCSA with the Prevention of Terrorism Act 2005, which substituted administrative detention with "control orders."

[391] Malaysia's Security Offences Bill, 2012, http://www.parlimen.gov.my/files/billindex/pdf/2012/DR152012E.pdf, art. 7.

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Country Index

In the Name of Security

Counterterrorism Laws Worldwide since September 11

More than 140 governments around the world have passed counterterrorism laws since the attacks of September 11, 2001. Together these laws represent a dangerous expansion of state powers to investigate, detain, and prosecute individuals, often with little regard for due process and fair trial rights.

Many of these laws not only violate the rights of terrorist suspects, they also have been used to crack down on peaceful political dissent, independent media, and religious, ethnic, or social groups.

In the Name of Security analyzes eight elements of post-9/11 counterterrorism laws that raise grave human rights concerns, including vague definitions of terrorism, prolonged pre-charge detention, and sweeping powers of warrantless search and arrest. Its case studies demonstrate the ways the laws are abused in practice.

Nations have a fundamental duty to protect their populations from mass attacks. But whatever the threat, they remain obligated to protect human rights. "In the Name of Security" calls on governments to revise abusive counterterrorism laws and provide redress to those whose rights they violated. United Nations bodies including the Security Council, which after 9/11 ordered states to enact counterterrorism laws without emphasizing rights protection, should now promote legal reform.

The United Nations Security Council unanimously adopts Resolution 1373, mandating member states to pass wide-ranging counterterrorism laws, on September 28, 2001.

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