



# **“Foreign Terrorist Fighter” Laws**

Human Rights Rollbacks Under UN Security Council

Resolution 2178



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<sup>1</sup> Letta Tayler, “Foreign Terrorist Fighter’ Law: Human Rights Rollbacks Under UN Security Council Resolution 2178,” *International Community Law Review*, vol. 18, no. 5 (2016), <http://booksandjournals.brillonline.com/content/journals/10.1163/18719732-12341342>, pp. 455-482.

# I. Summary

Since 2013, at least 47 countries from Australia to Uzbekistan have enacted laws and regulations to stop their citizens from joining extremist armed groups such as the Islamic State (also known as ISIS). Collectively, these so-called “foreign terrorist fighter” (“FTF”) measures erode international human rights and the rule of law.

A majority of “FTF” measures were enacted to comply with United Nations Security Council Resolution 2178 of September 24, 2014, which requires all UN member states to take urgent action to stem the “acute and growing threat posed by foreign terrorist fighters” both at home and abroad.

Drafted primarily by the United States, Resolution 2178 requires all member states to prosecute, as “serious criminal offenses,” an array of acts that include training or fighting with foreign terrorist groups, or financing their operations.

In a grave omission, however, Resolution 2178 does not limit the actions that member states may designate as “terrorism” or “terrorist”—terms for which no universal legal definition exists. This has left governments to craft dangerously open-ended definitions that can capture a range of activities not generally considered terrorism.

Those already targeted by such laws include not only terrorism suspects but also peaceful protesters, journalists, political opponents, civil society, and members of ethnic or religious groups, many of them Muslims. The “FTF” measures that could be used against them include warrantless searches, prolonged or indefinite detention without charge or trial, travel bans, loss of dual citizenship, convictions in sham trials, and excessive punishments including death.

Since the passage of Resolution 2178, armed extremist groups such as ISIS, Al-Qaeda, and their followers have killed thousands of civilians in heinous attacks from Paris to Bamako and beyond. Confronted with this transnational threat, the UN and its member states have a responsibility to respond. Indeed, international law places an obligation on governments to protect everyone within their jurisdiction.

But as the world witnessed in the aftermath of the horrific September 11 attacks 15 years ago, responses that flout human rights lower the moral bar for governments around the globe. They also can backfire by alienating local populations and fueling the recruitment narrative of groups that depict the world as one of Western oppressors versus Muslim oppressed.

The Security Council should promptly adopt a resolution requiring that all definitions of “terrorism” and “terrorist” that member states use to implement mandates such as Resolution 2178 are fully consistent with international law. UN member states, in turn, should promptly repeal or revise overly broad or vague “FTF” measures, and press their counterterrorism partners to do the same.

## II. Methodology

This paper is based on an examination of “Foreign Terrorist Fighter” (“FTF”) laws, regulations, *fatwas*, and other decrees enacted worldwide since 2013.

Where possible, the author examined original laws and measures, supplemented by interviews with local human rights defenders and legal experts. The author also reviewed legal analyses, media reports and other secondary sources regarding the measures in question. The paper also draws extensively on previously published Human Rights Watch analysis of counterterrorism laws and policies.<sup>2</sup>

This study is not exhaustive; rather, it highlights several measures and trends of key concern from a human rights perspective. It does not list or detail every one of the world’s recent “FTF” measures. Nor does it detail the challenges to privacy rights generated by “FTF” measures on surveillance and metadata collection, or the troubling vogue of “Countering Violent Extremism” programs.

The paper refers to “FTFs” in quotation marks because there is no universally accepted legal definition of a “foreign fighter,” much less of a “foreign terrorist fighter.”<sup>3</sup>

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<sup>2</sup> See Human Rights Watch, Terrorism/Counterterrorism, <https://www.hrw.org/topic/terrorism-counterterrorism>.

<sup>3</sup> Sandra Krähenmann, “Foreign Fighters Under International Law,” Geneva Academy of International Humanitarian Law and Human Rights (2014), [https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters\\_2015\\_WEB.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf).

### III. Flawed UN Security Council Resolution 2178

Since 2013, at least 47 governments around the world have enacted one or more laws or regulations to stop their nationals and others from joining extremist armed groups in foreign countries. Most of these measures were enacted in anticipation of, or to comply with, United Nations Security Council Resolution 2178 of September 24, 2014.

Resolution 2178, drafted primarily by the United States, requires all UN member states to take action to stem the “acute and growing threat posed by foreign terrorist fighters” (“FTFs”) at home and abroad.<sup>4</sup>

The United Nations estimates that 30,000 people from about 100 countries have traveled to countries including Iraq, Syria, Afghanistan, Libya, and Yemen since 2011 to join extremist armed forces, particularly ISIS.<sup>5</sup>

Like other major UN Security Council counterterrorism resolutions enacted since the attacks of September 11, 2001, Resolution 2178 is legally binding.<sup>6</sup> It compels all UN member states to prosecute, as “serious criminal offenses,” any travel or intended travel abroad to join or train with a terrorist organization. It also requires member states to criminalize any direct or indirect fundraising or recruitment for foreign terrorist groups.<sup>7</sup>

The resolution calls on member states to share intelligence on suspected “FTFs.” It encourages states to collect and analyze travel data “without resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law,” but does not specify the need to protect privacy rights, despite widespread concerns over data collection generated by the whistleblower Edward Snowden’s 2013 revelations of the US government’s mass surveillance programs.

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<sup>4</sup> United Nations Security Council Resolution 2178 (2014), S/RES/2178 (2014)  
[http://www.un.org/en/sc/ctc/docs/2015/SCR%202178\\_2014\\_EN.pdf](http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf).

<sup>5</sup> “Top UN counter-terrorism official urges cohesive response to ‘persistent’ threat of terrorism,” UN News Centre, July 22, 2016, <http://www.un.org/apps/news/story.asp?NewsID=54537#.WHa3DxsrKUL>.

<sup>6</sup> The resolution was adopted under Chapter VII of the United Nations Charter, allowing the Security Council to direct states to take action to maintain international peace and security, <http://www.un.org/en/sections/un-charter/chapter-vii/>.

<sup>7</sup> UN Security Council Resolution 2178, S/RES/2178 (2014).

In addition, the resolution calls on governments to “enhance efforts” on “countering violent extremism” (CVE), but in terms so vague as to conflate some non-violent activities with terrorism and stigmatize Muslim communities.<sup>8</sup>

## No Limits on “Terrorism” Definition

Resolution 2178 defines “foreign terrorist fighters” as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.”

It names the Islamic State, Al-Qaeda, and the Nusra Front (a Syria-based Al-Qaeda affiliate now calling itself the Front for the Conquest of the Levant) but leaves it to individual governments to determine which other groups they should target.

Although the resolution calls on governments to uphold human rights, it does not set limitations on what “terrorism” means. This omission allows governments to criminalize as “terrorist acts” an array of internationally protected activities such as peaceful protests or freedom of expression. It also increases the risk that governments will apply the “terrorist” label to human rights defenders and humanitarian aid workers, including medical staff performing life-saving work in conflict areas such as Syria and Iraq.<sup>9</sup>

This lack of a definition of terrorism also creates the potential for unequal application of the law, in which a member state may selectively criminalize fighting by its nationals alongside parties to a conflict whom that state opposes, but not fighting by its nationals with parties it supports, even if both sides are engaged in unlawful conduct or listed as terrorist organizations.<sup>10</sup>

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<sup>8</sup> See, e.g., “UN HRC: 58 NGOs warn of harmful impact of ‘countering and preventing violent extremism,’” Article 19, February 4, 2016, <https://www.article19.org/resources.php/resource/38248/en/un-hrc:-58-ngos-warn-of-harmful-impact-of-%E2%80%9Ccountering-and-preventing-violent-extremism%E2%80%9D>; and “21 Groups Oppose ‘Strong Cities’ CVE Initiative in New York, Citing Civil Liberties Concerns,” Brennan Center for Justice, New York University, September 21, 2015, <https://www.brennancenter.org/analysis/21-groups-oppose-strong-cities-cve-initiative-new-york-citing-civil-liberties-concerns>.

<sup>9</sup> See, e.g., Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Harvard Law School Program on International Law and Armed Conflict, September 2015, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2657036](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657036).

<sup>10</sup> The UN Working Group on Mercenaries has expressed concern over the potential for governments to selectively apply the “FTF” label to foreign fighters. See UN Office of the High Commissioner for Human Rights (OHCHR), Annual Report of the

For example, fighters from the United States, United Kingdom, Canada, and Australia, among other countries, have traveled to northern Syria to join the Kurdish People's Protection Units (YPG) forces fighting ISIS. The international coalition against ISIS, which includes these four countries, backs the YPG. Yet the YPG is affiliated with the Kurdistan Workers Party (PKK), a Kurdish militant group that these and other countries list as a terrorist organization.<sup>11</sup>

A similar quandary may arise when prosecuting foreign fighters who traveled to Yemen. In July 2015, international media reported that members of Al-Qaeda in the Arabian Peninsula (AQAP) were fighting alongside the Saudi-led coalition seeking to defeat Ansar Allah, rebels known as the Houthis, in southern Yemen.<sup>12</sup>

Thirteen months later, regional media reported allegations by the United Arab Emirates, part of the Saudi-led coalition, that AQAP operatives in southern Yemen were colluding with the country's former president, Ali Abdullah Saleh, who is supporting the Houthis.<sup>13</sup>

Furthermore, not all foreign fighters are engaged in acts that would violate the international laws of armed conflict. The International Committee of the Red Cross has warned of the "potentially adverse effects" on the laws of war of conflating armed conflict with terrorism, including on the status of non-state armed groups that opposing state forces may erroneously designate as terrorists.<sup>14</sup>

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Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/70/330, <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>, paras. 55 and 56.

<sup>11</sup> See, e.g., Henry Tuck, Tanya Silverman, Candace Smalley, "Shooting in the Right Direction: Anti-ISIS fighters in Syria and Iraq," Institute for Strategic Dialogue, <http://www.strategicdialogue.org/wp-content/uploads/2016/08/ISD-Report-Shooting-in-the-right-direction-Anti-ISIS-Fighters.pdf>; and Lauren Williams, "Awkward contradictions in Australian foreign-fighter laws," Lowy Interpreter, March 25, 2015, <http://www.loyyinterpreter.org/post/2015/03/25/Awkward-contradictions-in-Australian-foreign-fighter-laws.aspx>.

<sup>12</sup> Maria Abi-Habib and Mohammed Al-Kibsi, "Al Qaeda Fights on Same Side as Saudi-Backed Militias in Yemen," *Wall Street Journal*, July 16, 2015, <http://www.wsj.com/articles/al-qaeda-fights-on-same-side-as-saudi-backed-militias-in-yemen-1437087067>.

<sup>13</sup> "Saleh ties to Al Qaida revealed after arrests," *Gulf News*, August 4, 2016, <http://gulfnews.com/news/gulf/yemen/saleh-ties-to-al-qaeda-revealed-after-arrests-1.1873699>.

<sup>14</sup> International Committee of the Red Cross (ICRC), *The applicability of International Humanitarian Law to Terrorism and Counterterrorism*, October 1, 2015, <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>.

There is no universally accepted definition of terrorism. Definitions put forward in various international treaties generally center on the use of violence for political or ideological ends. In Resolution 1566, adopted unanimously in 2004, the Security Council described terrorism as:

Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.<sup>15</sup>

The former UN special rapporteur on human rights and counterterrorism, Martin Scheinin, included these elements in his proposed model definition of conduct that is “genuinely of a terrorist nature.”<sup>16</sup>

Since enactment of Resolution 2178, armed extremist groups such as ISIS, Al-Qaeda, and their followers have killed thousands of civilians—the majority of them Muslims—in heinous attacks from Paris to Bamako, Brussels to Baghdad, Dhaka to Quetta, Istanbul to the skies above Sinai, and beyond. Confronted with this transnational threat, the UN and its member states have a responsibility to respond. Indeed, governments have an obligation under international law to protect everyone within their jurisdiction.<sup>17</sup>

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<sup>15</sup> UN Security Council Resolution 1566 (2004), S/RES/1566 (2004), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WG%20SRES%201566.pdf>, para. 3.

<sup>16</sup> UN Human Rights Council, Report of the UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, (16th Session, 2010), A/HRC/15/51 (2010), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>.

<sup>17</sup> This obligation stems from states’ primary duty to protect the right to life, which is protected under international human rights treaties. See, e.g., the International Covenant on Civil and Political Rights (“ICCPR”), adopted December 16, 1966, G.A. res. 2200A (XXI), entered into force March 23, 1979, <http://www2.ohchr.org/english/law/ccpr.htm>, art. 6. Some regional human rights bodies have extended that duty to include protection from acts of terrorism. See, e.g., 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://www.un.org/en/sc/ctc/specialmeetings/2011/docs/coe/coe-rights\\_guidelines\\_en.pdf](http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/coe/coe-rights_guidelines_en.pdf). 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>, para. 107.

But as the UN General Assembly itself recognized in its Global Counterterrorism Strategy of 2006 and has repeatedly reaffirmed—and as Resolution 2178 itself states—security and human rights are complementary goals. Indeed, the General Assembly notes that abuses of human rights and lack of rule of law are among the conditions “conducive to the spread of terrorism.”<sup>18</sup>

“FTF” measures mark a second major round of problematic counterterrorism laws and regulations that governments around the world have enacted since the attacks of September 11, 2001, largely as a result of binding UN Security Council mandates. At least 150 countries have enacted counterterrorism measures since the attacks of September 11.<sup>19</sup> Governments have used these measures to jail journalists and political activists, to target religious or ethnic groups, and to quash peaceful protests and other forms of non-violent dissent.<sup>20</sup> Rather than learning from those errors, Resolution 2178 encourages excessive responses all over again.

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<sup>18</sup> UN General Assembly, Global Counter-Terrorism Strategy,” Resolution 60/288, adopted September 8, 2006, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/No5/504/88/PDF/No550488.pdf?OpenElement>, Pillars I, V. The General Assembly most recently reaffirmed the strategy on its biannual review of July 1, 2016; see United National General Assembly, Resolution A/70/L.55, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/70/L.55](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/L.55).

<sup>19</sup> For an analysis of relevant Security Council resolutions and ensuing laws from 2001 to 2012, see Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide Since September 11*, June 29, 2012, <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11>.

<sup>20</sup> See, e.g., “Ethiopian Forces Kill ‘Up to 100’ Protesters,” Human Rights Watch dispatch, August 13, 2016, <https://www.hrw.org/news/2016/08/13/ethiopian-forces-kill-100-protesters>; and “Kenya: Ensure Due Process on ‘Terrorism List,’” April 12, 2015 <https://www.hrw.org/news/2015/04/12/kenya-ensure-due-process-terrorism-list>.

## IV. National ‘Foreign Terrorist Fighter’ Measures

At least 47 governments around the world have enacted one or more “FTF” laws or regulations since 2013, according to the author’s research. At least two-thirds of these countries enacted “FTF” measures in response to or in anticipation of the passage of Resolution 2178 in September 2014. Following is a provisional list of these countries:

Algeria, Austria, Australia, Bahrain, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Cameroon, Canada, Chad, China, Denmark, Egypt, France, Germany, Indonesia, Ireland, Israel, Italy, Jordan, Kazakhstan, Kenya, Kosovo, Libya, Macedonia, Malaysia, Morocco, the Netherlands, New Zealand, Norway, Pakistan, Portugal, Poland, Russia, Saudi Arabia, Serbia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Uganda, the United Arab Emirates, the United Kingdom, the United States, and Uzbekistan.

### Sweeping Powers

Common themes in “FTF” laws and regulations include expansion of police powers of search and seizure, in some cases without judicial authorization; gag orders and other restrictions on speech; constraints on religious observance and protests; sweeping travel bans; banishment measures including revocation of citizenship, in some cases without a criminal conviction or adequate legal safeguards; and unfettered collection of individuals’ metadata such as phone call logs and Internet activity. Other provisions authorize prolonged detention before charge or trial, or the use of special courts, secret witnesses, and secret evidence. Harsh punishments include lengthy prison terms and, in some countries, the death penalty.

These measures represent a broad and dangerous expansion of government powers at the expense of internationally protected human rights including freedom of expression, association, peaceful assembly, and movement, as well as freedom from religious or ethnic discrimination, and from torture and other inhuman or degrading treatment. They also threaten the rights to a fair trial and other due process guarantees, to privacy, and in

some cases, to the right to life. These rights are protected by the Universal Declaration of Human Rights, as well as an array of international and regional treaties.<sup>21</sup>

Governments may “derogate”—that is, restrict—certain human rights during genuine emergencies that “threaten the life of the nation.” However, such measures must be of a “temporary and exceptional nature,” limited “to the extent strictly required by the exigencies of the situation.”<sup>22</sup> The restrictions must be prescribed by law and must not discriminate on the ground of race, color, sex, language, religion, or social origin. Certain rights including the rights to life, to freedom from torture, inhuman or degrading treatment, the principles of legality and equality before the law, and freedom of thought, conscience, and religion, are non-derogable.<sup>23</sup> Taken as a whole, “FTF” measures flout those restrictions and risk creating a perpetual state of emergency in leading democracies and brutal autocracies alike.

## Definitions of “Terrorism”

A number of countries have enacted counterterrorism laws that contain overly broad definitions or could easily criminalize non-violent activities. Countries with one or more overbroad definitions run the gamut from democracies to autocracies, including Brazil, Canada, China, Egypt, France, Israel, Saudi Arabia, and Tunisia.

The rights to freedom of expression, association and assembly are upheld through a number of international human rights instruments.<sup>24</sup> In addition to facilitating disproportionate restrictions on these rights, overbroad or vague definitions run counter to the basic principle in international human rights law that laws should be precisely drafted

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<sup>21</sup> These rights are protected in full or in part under treaties including the ICCPR; the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed November 4, 1950, entered into force September 3, 1953, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf); African Commission on Human and Peoples’ Rights, “African Charter on Human and Peoples’ Rights,” entered into effect January 25, 2005, <http://www.achpr.org/instruments/achpr/>; and Inter-American Commission on Human Rights, “American Convention on Human Rights,” adopted November 22, 1969, <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm>.

<sup>22</sup> UN Human Rights Committee, General Comment No. 29, art. 4 of the ICCPR, §§ 2, 3, 4, 6, 7.

<sup>23</sup> ICCPR, art. 4(2).

<sup>24</sup> These include the Universal Declaration of Human Rights, adopted December 10, 1948, G.A. Res. 217A, entered into force December 16, 1948, <http://www.un.org/en/universal-declaration-human-rights/>; the ICCPR, arts. 19, 21, 22; the ECHR, arts. 10, 11; the African Charter on Human and Peoples’ Rights, arts. 9–11; and the American Convention on Human Rights, arts. 13, 14, 16.

and understandable, both as a safeguard against their arbitrary use and so that people know what actions would constitute a crime.<sup>25</sup>

China's counterterrorism law of January 1, 2016, includes as terrorism a broad term that can mean to "propagate" but also to "advocate," potentially creating a new tool to stifle thought or speech.<sup>26</sup> The law's list of "terrorist activities" includes "compelling others to wear or bear clothes or symbols that advocate terrorism in a public place," a potential new tool in China's well-documented campaign to stifle the religious and cultural beliefs of its Uyghur Muslims and Tibetan Buddhists.<sup>27</sup>

Saudi Arabia's 2014 counterterrorism law and related royal decrees consider "contact or correspondence with any groups, currents [of thought], or individuals hostile to the kingdom" to be terrorist acts, along with "attending conferences, seminars, or meetings inside or outside [the kingdom] targeting the security of society, or sowing discord in society."<sup>28</sup>

Some definitions of terrorism in democracies are also dangerously open-ended. Canada's counterterrorism law of 2015 creates a criminal offense of knowingly "advocating or promoting the commission of terrorism offences in general," without defining the term "terrorism offences in general."<sup>29</sup>

Under international law, speech that incites violence may be punished as a criminal offense. However, several of these measures contain no requirement of intent to spark an

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<sup>25</sup> The European Court of Justice has repeatedly affirmed the principle of legal certainty. See, e.g., Judgement of the Court (Fourth Chamber) of February 16, 2012 in the joined cases of C-72/10 and C-77/10, Court of Justice of the European Union, <http://online.liebertpub.com/doi/pdf/10.1089/glre.2012.16514>, § 74.

<sup>26</sup> Zunyou Zhou, "China's Comprehensive Counter-Terrorism Law," *Diplomat*, January 23, 2016, <http://thediplomat.com/2016/01/chinas-comprehensive-counter-terrorism-law/>.

<sup>27</sup> Counter-Terrorism Law of the People's Republic of China, December 2015, [http://news.xinhuanet.com/politics/2015-12/27/c\\_128571798.htm](http://news.xinhuanet.com/politics/2015-12/27/c_128571798.htm), art. 3. See also Joint Letter from Human Rights Watch to Secretary Kerry and Secretary Lew, June 5, 2016, <https://www.hrw.org/news/2016/06/05/joint-letter-secretary-kerry-and-secretary-lew>.

<sup>28</sup> "Saudi Arabia: New Terrorism Regulations Assault Rights," Human Rights Watch new release, March 20, 2014, <https://www.hrw.org/news/2014/03/20/saudi-arabia-new-terrorism-regulations-assault-rights>.

<sup>29</sup> Canada's Anti-Terrorism Act, S.C. 2015, C. 20, entered into force June 18, 2015, [http://laws-lois.justice.gc.ca/eng/annual/statutes/2015\\_20/](http://laws-lois.justice.gc.ca/eng/annual/statutes/2015_20/). See also Letter from Human Rights Watch, "Letter to the Senate of Canada Re: Bill C-51, the Anti-Terrorism Act, 2015," June 2, 2015, <https://www.hrw.org/news/2015/06/02/letter-senate-canada-re-bill-c-51-anti-terrorism-act-2015>.

act of terrorism but rather, as in Canada’s case, a “recklessness as to whether any of those offences *may* [emphasis added] be committed” as a result.<sup>30</sup>

Counterterrorism amendments made in 2015 to Spain’s Criminal Code and Criminal Procedures Code increase vaguely worded offenses that could be used to stifle free expression.<sup>31</sup> The potential for abuse was underscored in February 2016 when a Spanish court charged two puppeteers with “glorifying terrorism” for staging a show at a Madrid carnival that included scenes of violence and, at one point, of a puppet holding a sign that referenced Al-Qaeda and the Basque militant group ETA. The puppeteers were jailed for four days and barred from leaving the country pending trial; they faced three years in prison if convicted.<sup>32</sup> In June, a judge dismissed the charges, saying the banner did not glorify terrorism, but was instead a critique of religious and state authority, including “the police practice of fabricating evidence.”<sup>33</sup>

France’s counterterrorism law of 2014 has allowed the courts to fast-track cases of “glorifying” or other acts of “*apologie*”—defense of—terrorism, resulting in numerous jail sentences for people who drunkenly insulted police officers or made other comments that, while offensive to many, fell well short of incitement or support for terrorism.<sup>34</sup>

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<sup>30</sup> Ibid.

<sup>31</sup> Rights International Spain, “Shadow Report for Sixth Periodic Review of Spain by the Human Rights Committee (‘Shadow Report’), <http://rightsinternationalspain.org/en/publicaciones/8/submissions-to-international-organizations>, pp. 26–27; “Two legal reform projects undermine the rights of assembly and expression in Spain’—UN experts,” OHCHR news release, February 23, 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597>.

<sup>32</sup> “Spanish judge frees puppeteers jailed for glorifying terrorism,” *Guardian*, February 10, 2016, <https://www.theguardian.com/world/2016/feb/10/spanish-judge-frees-puppeteers-raul-garcia-alfonso-lazaro-basque-eta>; “Free Speech: the muzzle grows tighter,” *Economist*, June 4, 2016, <http://www.economist.com/news/international/21699906-freedom-speech-retreat-muzzle-grows-tighter>.

<sup>33</sup> “Judge closes case against puppeteers because they did not support terrorism” (“El juez archiva la causa contra los titiriteros porque no apoyaron el terrorismo”), EFE, June 28, 2016, <http://www.efe.com/efe/espana/politica/el-juez-archiva-la-causa-contra-los-titiriteros-porque-no-apoyaron-terrorismo/10002-2970402#>.

<sup>34</sup> “France faces ‘litmus test’ for freedom of expression as dozens arrested in wake of attacks,” Amnesty International, January 16, 2015, <https://www.amnesty.org/en/latest/news/2015/01/france-faces-litmus-test-freedom-expression-dozens-arrested-wake-attacks/>; “French dissenters jailed after crackdown on speech that glorifies terrorism,” *Guardian*, January 30, 2015, <https://www.theguardian.com/world/2015/jan/30/french-jailed-crackdown-speech-glorifies-terrorism>.

The list of offenses in Israel’s counterterrorism law of July 2016, which is applicable domestically, includes expressing support for a listed terrorist group—such as waving the group’s flag, or singing its anthem.<sup>35</sup>

## Travel Bans and ID Confiscation

A mainstay of “FTF” and other counterterrorism laws are travel bans, often achieved through suspension or revocation of passports and national identity cards from people suspected of intending to travel abroad to join or train with groups the government considers to be foreign terrorist organizations. Some of these travel restrictions are so broad as to be arbitrary and disproportionate.

International law grants everyone the right to leave any country, including their own.<sup>36</sup>

Countries that have enacted travel bans include Austria, Australia, Azerbaijan, Belgium, Denmark, Egypt, France, Israel, Italy, Malaysia, the Netherlands, New Zealand, Tajikistan, Tunisia, and the United Kingdom.

France allows the interior minister to revoke citizens’ passports and bar them from foreign travel for up to six months, renewable for up to two years, if the minister has “serious reasons to believe” they are planning to go abroad with the aim of “participating in terrorist activities,” or if authorities suspect they are traveling to a place where terrorist groups operate and in conditions conducive to their posing a threat to public safety upon their return to France.<sup>37</sup>

The law also empowers authorities to expel or ban entry of foreigners, including citizens of other European Union countries, from French territory.<sup>38</sup>

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<sup>35</sup> Israel’s Combatting Terrorism Law, 5776-2016, Sefer Hahukim (official gazette), [http://fs.knesset.gov.il//20/law/20\\_lsr\\_343902.pdf](http://fs.knesset.gov.il//20/law/20_lsr_343902.pdf), § 24; Marissa Newman and Raoul Wootliff, “Knesset passes into law sweeping antiterror reforms,” *Times of Israel*, June 15, 2016, <http://www.timesofisrael.com/knesset-passes-into-law-sweeping-anti-terror-reforms/>.

<sup>36</sup> UDHR, art. 13; ICCPR, art. 12.

<sup>37</sup> France’s Strengthening Provisions on the Fight Against Terrorism, Law No. 2014-1353 of November 13, 2014 (Loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029754374&categorieLien=id>, art. 1.

<sup>38</sup> *Ibid.*, art. 2.

Germany in 2014 empowered the authorities to revoke passports of suspected “FTFs” and in 2015 extended the ban to include identity cards that could be used to travel to conflict areas such as Syria through third countries.<sup>39</sup> The authorities can replace suspended documents with three-year identity cards marked “Not valid for travel outside Germany.” Critics have dubbed the substitute identification cards the “Terrorism ID card.”<sup>40</sup>

Tunisia and Egypt have enacted sweeping foreign travel bans on males under ages 35 and 40, respectively.<sup>41</sup> Egypt has also targeted opposition figures, academics, and civil society members, such as six women en route to a German non-governmental organization for training on ways to stop violence against women.<sup>42</sup>

Australia’s Foreign Fighters Law of 2014 criminalizes travel to a “declared area where terrorist organizations engage in hostile activity” unless individuals can prove they will be or were there for “a sole legitimate purpose,” placing the burden on would-be or returning travelers to prove their innocence.<sup>43</sup>

Tajikistan in April 2015 announced it was barring nationals under age 35 from performing the Hajj.<sup>44</sup> In addition to arbitrarily restricting freedom of movement, this ban constitutes an arbitrary and disproportionate restriction on freedom of religion.

## Citizenship Revocation

A growing number of laws with “FTF” provisions, including those of Austria, Australia, Bahrain, Belgium, Canada, the Netherlands, and the United Kingdom, allow or have

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<sup>39</sup> “Germany: New Anti-Terrorism Legislation Entered into Force,” US Library of Congress, Global Legal Monitor, July 10, 2015, <http://statewatch.org/news/2015/jul/germany-implementation-of-uncsc-2178.pdf>.

<sup>40</sup> “Bundestag tightened anti-terror laws” (“Bundestag verschärft Anti-Terror-Gesetze”), *Deutsche Welle*, April 23, 2015, <http://www.dw.com/de/bundestag-versch%C3%A4rft-anti-terror-gesetze/a-18405381>.

<sup>41</sup> “Tunisia: Arbitrary Travel Restrictions,” Human Rights Watch news release, July 10, 2015, <https://www.hrw.org/news/2015/07/10/tunisia-arbitrary-travel-restrictions>.

<sup>42</sup> “Egypt: Scores Barred from Traveling,” Human Rights Watch news release, November 1, 2015, <https://www.hrw.org/news/2015/11/01/egypt-scores-barred-traveling>.

<sup>43</sup> See “Australia: Proposed Counterterror Laws Threaten Freedoms,” Human Rights Watch news release, October 15, 2014, <https://www.hrw.org/news/2014/10/15/australia-proposed-counterterror-laws-threaten-freedoms>; and Human rights Watch Letter to Australian Parliamentary Joint Committee on Intelligence and Security Re: Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill, October 3, 2014, <https://www.hrw.org/news/2014/10/03/letter-australian-parliamentary-joint-committee-intelligence-and-security-re-counter>.

<sup>44</sup> “Tajikistan Bans Hajj Pilgrimage for Citizens Younger Than 35,” *Radio Free Europe*, April 14, 2015, <http://www.rferl.org/content/tajikisyanm-bans-hajj-pilgirmage-for-citizensyounger-than-35/26955080.html>.

allowed the authorities to revoke citizenship of nationals convicted of terrorism-related offenses, or in some cases even if they are not charged with a crime.

The Universal Declaration of Human Rights affirms that everyone has a right to a nationality, and that no one shall be arbitrarily deprived of his or her nationality.<sup>45</sup> The 1961 Convention on the Reduction of Statelessness restricts the situations in which a person may be lawfully deprived of nationality if such deprivation results in statelessness.<sup>46</sup> The International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrarily banning people from returning to their country.<sup>47</sup>

In an effort to ensure that anyone targeted is not left stateless, most countries' "FTF" measures strip citizenship only from dual nationals. In a troubling exception, the United Kingdom in 2014 and 2015 enacted laws that together permit the authorities to strip British citizenship from naturalized citizens even if this may lead to statelessness.<sup>48</sup>

The United Kingdom's counterterrorism law of 2015 also allows the government to ban returns of citizens and residents suspected of terrorism-related travel if they refuse to participate in a deradicalization program. During that time their travel documents are to be cancelled and their names placed on no-fly lists.<sup>49</sup> Such so-called "exclusion orders" could effectively leave UK citizens stateless during that period.

Under July 2014 amendments to its Citizenship Law, Bahrain's criminal courts—which have a documented record of unfair convictions and use of confessions extracted through torture—can strip nationals of citizenship on terrorism charges even if they do not have a second nationality. Some 300 people have lost citizenship largely because of the measure,

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<sup>45</sup> UDHR, art. 15.

<sup>46</sup> OHCHR, Convention on the Reduction of Statelessness, 1961, <http://www.unhcr.org/protection/statelessness/3bbb286d8/convention-reduction-statelessness.html>.

<sup>47</sup> ICCPR, art. 12.

<sup>48</sup> "Deprivation of British citizenship and withdrawal of passport facilities," UK Parliament briefing paper SNo6820, January 30, 2015, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SNo6820>.

<sup>49</sup> "Human Rights Watch Concerns and Recommendations on the United Kingdom," submission to the UN Human Rights Committee in advance of its pre-sessional review of the United Kingdom, June 22, 2015, <https://www.hrw.org/news/2015/06/22/human-rights-watch-concerns-and-recommendations-united-kingdom>.

the majority of them civil society activists, journalists and religious figures, according to Bahraini and international human rights organizations.<sup>50</sup>

Even citizenship revocations that apply exclusively to dual nationals may rest on shaky international legal ground. Conferring an extra sanction—banishment—that cannot be conferred on citizens with a single nationality, even if they are convicted of an identical crime, may constitute unequal application of the law. Such revocations may also result in discrimination based on race or ethnicity, unfair hearings, and harm to family life—a critical consideration in revoking citizenship of children or of their parents.

Australia’s Allegiance Act of 2015 allows the immigration minister to strip Australian citizenship from dual nationals as young as 14 if they are believed to have engaged in serious terrorism offenses.<sup>51</sup> If the dual nationals committed the alleged terrorist acts overseas, or are overseas at the time the alleged acts come to the authorities’ attention, the minister can strip them of citizenship on mere suspicion even if they have not been convicted of any crime.<sup>52</sup>

The law may be applied retroactively to dual nationals convicted of serious terrorism offenses within the preceding 10 years. This amounts to application of a penalty that did not exist at the time the crime was committed. Such retroactive application penalty is prohibited under the ICCPR, to which Australia is a party.<sup>53</sup>

Similarly, a law enacted in May 2016 in the Netherlands allows the authorities to strip dual citizens as young as 16 of Dutch nationality if they determine that the suspects have joined or fought abroad with a terrorist group and pose an “immediate threat” to national

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<sup>50</sup> See, e.g., Bahrain Institute for Rights and Democracy, “Stop Revoking Citizenships—BIRD Publishes Full Documentation,” February 10, 2016, <http://birdbh.org/2016/02/revoked-citizenship/>.

<sup>51</sup> Australian Citizenship Amendment (Allegiance to Australia Act) Bill 2015, enacted December 3, 2015, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bid=r5507](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r5507), §§ 33AA, 35, 35A.

<sup>52</sup> “Australia: Don’t Revoke Citizenship Without Safeguards,” Human Rights Watch news release, December 13, 2015 <https://www.hrw.org/news/2015/12/13/australia-dont-revoke-citizenship-without-safeguards>.

<sup>53</sup> Ibid. The ICCPR states that: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.” ICCPR, art. 15(1).

security.<sup>54</sup> No criminal conviction is required. Those whose Dutch citizenship is revoked have only four weeks to appeal.<sup>55</sup>

In one of the few attempted reforms worldwide of potentially abusive measures spawned by Resolution 2178, Canada may repeal a measure implemented in 2015 that allows the government to revoke the citizenship of dual nationals convicted of serious national security crimes, including terrorism.<sup>56</sup>

The absence of judicial process for revoking citizenship in certain cases, particularly for individuals never convicted of a crime, erodes due-process rights recognized under international law, including the presumption of innocence, the right to a fair trial, and the right to appeal.

Belgium's counterterrorism law of 2015 only allows citizenship revocation from naturalized dual nationals who have been convicted of serious terrorism related offenses, upon the authorization of a judge.<sup>57</sup> However, given the substantially higher rates of dual nationality among Belgian citizens of North African heritage, there is a risk that the measure will create a tier of second class citizens based on their ethnicity and religion.

Stripping the citizenship of dual nationals also may result in effective statelessness. Dual nationals could be indefinitely detained in immigration centers if their second home-country cannot confirm their citizenship, or refuses to accept them. International law holds that everyone, including non-citizens, must be protected from arbitrary indefinite detention.<sup>58</sup> Dual nationals also may face a risk of torture or ill-treatment upon forcible

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<sup>54</sup> "Lower House Revocation of Jihadists' Dutch Citizenship (Tweede Kamer voor intrekking Nederlanderschap jihadist)," Kingdom of The Netherlands news release, May 24, 2015, <https://www.rijksoverheid.nl/onderwerpen/terrorisme-en-nationale-veiligheid/nieuws/2016/05/24/tweede-kamer-voor-intrekking-nederlanderschap-jihadist>.

<sup>55</sup> Hanne Cokelaere, "The Netherlands to Strip Dual Citizens of Nationality if they Join ISIL," *Politico*, May 25, 2016, <http://www.politico.eu/article/netherlands-to-strip-dual-citizens-of-nationality-if-they-join-isil/>.

<sup>56</sup> An Act to amend the Citizenship Act and to make consequential amendments to other Acts, S.C. 2014, C. 22, Government of Canada, [http://lois-laws.justice.gc.ca/eng/AnnualStatutes/2014\\_22/page-1.html](http://lois-laws.justice.gc.ca/eng/AnnualStatutes/2014_22/page-1.html), § 8. The citizenship-stripping provision did not become active until June 2015. "Bill to Change Canadian Citizenship Act Passes House of Commons, With Senate Approval Pending," Canada Immigration Newsletter, July 5, 2016, <http://www.cicnews.com/2016/07/bill-change-canadian-citizenshipact-passes-house-commons-senate-approval-pending-078363.html>.

<sup>57</sup> Belgium's Law to Strengthen the Fight against Terrorism (Loi visant à renforcer la lutte contre le terrorisme), No. 9385 of 2015, <http://www.lachambre.be/FLWB/PDF/54/1198/54K1198001.pdf>.

<sup>58</sup> See, e.g., *Conka v. Belgium* (2002), European Court of Human Rights, Judgment of February 5, 2002, 51564/99, <http://www.refworld.org/docid/3e71fd44.html>.

return to a second home country. International law prohibits forcibly returning people to countries where they face such harm.<sup>59</sup>

The effectiveness of stripping citizenship as a means of confronting a transnational terrorist threat is questionable. Banishment risks transferring control of terrorism suspects to governments that may not prosecute them. Moreover, terrorists who learn or suspect they are *non grata* may simply commit attacks elsewhere, including on foreign-based facilities of the country that revoked their citizenship.

## Expanded Security and Intelligence Powers

Countries including Belgium, Canada, China, France, Israel, Pakistan, Poland, Russia, and Tunisia have expanded police and intelligence powers to hunt down alleged terrorists including “FTFs.” Several provisions allow the security and intelligence services to engage in activities that could violate the rights to privacy, freedom of expression, association, and assembly, among others, with virtually no effective oversight.

Poland’s counterterrorism law of 2016 allows surveillance of foreigners for up to three months without a warrant. It also provides potentially overbroad latitude to security force snipers to “shoot to kill.”<sup>60</sup> United Nations principles on the use of firearms by law enforcement personnel restrict the use of force to the minimal amount necessary to keep order, and allow the use of lethal force only when there is an imminent threat to life.<sup>61</sup>

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<sup>59</sup> The ICCPR, for example, provides in Article 7 that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The HR Committee has interpreted the Convention’s torture prohibition to include the nonrefoulement obligation, writing that, “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”: HR Committee, General Comment No. 20, art. 7, (forty-fourth session, 1991), <http://hrlibrary.umn.edu/gencomm/hrcom20.htm>. The Convention against Torture expressly prohibits the transfer of a person to a country where he or she would be at risk of torture, see the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Adopted December 10, 1984, G.A. Res. 39/46, entered into force June 26, 1987, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>, art. 3.

<sup>60</sup> “Poland’s New Anti-Terror Law,” *Inside-Poland.com*, June 23, 2016, <http://inside-poland.com/t/polands-new-anti-terror-law-gives-authorities-right-to-expel-foreigners-access-personal-data-hold-suspects-for-14-days-without-charge-shoot-to-kill-and-more/>.

<sup>61</sup> United Nations Human Rights Office of the High Commissioner, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted August 27 to September 7, 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>.

The July 2016 version of France’s emergency law, renewed for the fourth time since the Paris attacks of the preceding November, empowers the police to raid homes and other premises, to search luggage and vehicles, and to seize data from computers and mobile phones, all without prior approval from a judge.<sup>62</sup>

Canada’s counterterrorism law of 2015 allows the Canadian Security Intelligence Service (CSIS) to disrupt activities including protests if it deems them unlawful, and even to violate the country’s Charter of Rights and Freedoms so long as it obtains a warrant in a secret hearing. The law allows unfettered sharing of individuals’ personal information among 17 Canadian government agencies.<sup>63</sup>

## Preventive Detention and Control Orders

In tandem with measures banning suspected “FTFs” from travel abroad, many governments have imposed preventive detention or “control” measures on terrorism suspects that severely restrict their movements at home. Governments including Australia, Canada, France, Libya, and the United Kingdom have enacted or enhanced such measures. Pakistan in 2016 allowed its 90-day, pre-charge detention regime, enacted in 2014, to lapse.

Prevention detention and control measures limit people’s liberty on the suspicion that they may intend to commit a criminal act in the future. This is in marked contrast to pre-charge or pre-trial detentions, or post-conviction sentences, which apply to people who are suspected or found guilty of committing a criminal offense in the past.

International human rights law limits preventive detention to exceptional, narrowly defined circumstances.<sup>64</sup> Control orders typically include curfews, extensive home confinement, forced domestic relocation, and restrictions on where targeted people can pray, whom they can visit, what websites they can access, and even what over-the-counter substances they

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<sup>62</sup> France: Prolonged Emergency State Threatens Rights,” Human Rights Watch news release, July 22, 2016, <https://www.hrw.org/news/2016/07/22/france-prolonged-emergency-state-threatens-rights>.

<sup>63</sup> “Canada: Senate Should Reject Counterterrorism Bill,” Human Rights Watch news release, June 2, 2015, <https://www.hrw.org/news/2015/06/02/canada-senate-should-reject-counterterrorism-bill>.

<sup>64</sup> The HR Committee has stated that preventive detention in cases of a public security threat must, among other provisions, not be arbitrary, that information must be provided on the reasons for detention, and that court control of the detention must be available. See, HR Committee, General Comment No. 8, art. 9 (16th session, 1982), HRI/GEN/1/Rev.1 at 8 (1994), <http://hrlibrary.umn.edu/gencomm/hrcom8.htm>, para. 4.

can consume—measures that can violate the rights to freedom of movement, religion, association and expression, as well as the rights to privacy and family life.

Australia’s “FTF” law of 2014 extends through 2025 the practice of pre-charge detention of up to 48 hours, in extreme secrecy, if police believe the detention is “reasonably necessary” to prevent an imminent terrorist act. All contact with lawyers and visitors may be monitored by police exercising the preventive detention order. If the police obtain special permission from a judge, they can bar the detainee from contacting a lawyer.<sup>65</sup>

The law also extends control orders to up to one year, with an option of renewal, to anyone who, according to the government, has participated in terrorist training or engaged in hostile activity in a foreign country, or who has been convicted of a terrorism offense in Australia or abroad. Restrictions may be imposed on the basis of a low standard of proof—a “balance of probabilities” rather than “beyond reasonable doubt”—and on the basis of secret evidence.<sup>66</sup>

Canada’s 2015 counterterrorism law authorizes the police to hold suspects for up to seven days without charge if the authorities suspect they “may” carry out a terrorist act in the future and that such detention is “likely” to prevent it.<sup>67</sup>

The law requires provincial court judges to consider imposing curfews and other control for up to one year on such suspects.<sup>68</sup>

The United Kingdom’s 2015 counterterrorism law reintroduced compulsory, internal relocation of up to 200 miles (322 kilometers) from home for suspected terrorists who are not convicted of any crime.<sup>69</sup>

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<sup>65</sup> See, “Australia: Proposed Counterterror Laws Threaten Freedoms,” Human Rights Watch news release, <https://www.hrw.org/news/2014/10/15/australia-proposed-counterterror-laws-threaten-freedoms>; and Letter to Australian Parliamentary Joint Committee on Intelligence and Security Re: Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill (2014), <https://www.hrw.org/news/2014/10/03/letter-australian-parliamentary-joint-committee-intelligence-and-security-re-counter>.

<sup>66</sup> Ibid.

<sup>67</sup> “Canada: Senate Should Reject Counterterrorism Bill,” Human Rights Watch news release, <https://www.hrw.org/news/2015/06/02/canada-senate-should-reject-counterterrorism-bill>.

<sup>68</sup> Ibid.

<sup>69</sup> “Human Rights Watch Concerns and Recommendations on the United Kingdom,” submission to the UN Human Rights Committee in advance of its pre-sessional review of the United Kingdom, <https://www.hrw.org/news/2015/06/22/human-rights-watch-concerns-and-recommendations-united-kingdom>.

France's state of emergency extended until January 2017 the powers of local authorities to place suspects under house arrest without prior judicial authorization, often without detailing the security threat they are believed to represent.<sup>70</sup> Human Rights Watch and Amnesty International have extensively documented abuses under the measure.<sup>71</sup> Most of those placed under house arrest have been Muslims, but the French authorities also have detained unionists and climate activists.<sup>72</sup>

The renewed emergency law also changes the French security code to triple the maximum duration of house arrest, from one month to three, for people suspected of returning from an area abroad where terrorist groups are operating and posing a security threat upon return to France—but whom the authorities have insufficient evidence to charge.

## Lengthy Pre-Charge and Pre-Trial Detention

Another trend in “FTF” laws is the authorization of extensive pre-charge or pre-trial detention to periods that clearly exceed international guidelines. In some cases, this detention includes periods in which the detainee is denied access to family members, counsel, or both.

Countries with excessive pre-charge or pre-trial detention periods include Chad, Egypt, France, Malaysia, Poland, Saudi Arabia, Spain, Tunisia, and Turkey. International standards require “prompt” judicial review of detention.<sup>73</sup>

The UN Human Rights Committee (HR Committee), which oversees states' compliance with the ICCPR, has elaborated that pre-charge custody without judicial review should not exceed 48 hours, saying longer periods “unnecessarily increase the risk of ill-treatment.”

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<sup>70</sup> France: Prolonged Emergency State Threatens Rights,” Human Rights Watch news release, <https://www.hrw.org/news/2016/07/22/france-prolonged-emergency-state-threatens-rights>.

<sup>71</sup> “France: Abuses Under State of Emergency,” Human Rights Watch news release, February 3, 2016, <https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>; Amnesty International, *Upturned Lives: The Disproportionate Impact of France's State of Emergency*, February 4, 2016, <https://www.amnesty.org/en/documents/eur21/3364/2016/en/>.

<sup>72</sup> “France's state of emergency used to ban activists from labour law protests,” *Radio France Internationale*, May 16, 2016, <http://en.rfi.fr/france/20160516-frances-state-emergency-used-ban-activists-labour-law-protests>; “Paris climate activists put under house arrest using emergency laws,” *Guardian*, November 27, 2015, <https://www.theguardian.com/environment/2015/nov/27/paris-climate-activists-put-under-house-arrest-using-emergency-laws>.

<sup>73</sup> ICCPR, art. 9(3).

The HR Committee stated that any further delay must remain exceptional and be justified by the circumstances.<sup>74</sup>

The UN special rapporteur on torture has also warned that “torture is most frequently practiced during incommunicado detention.”<sup>75</sup> These laws also facilitate violations of the internationally protected rights to liberty and fair trials.<sup>76</sup>

Malaysia’s 2015 Prevention of Terrorism Act allows the police to detain suspects without charge for 21 days, which a 38-day extension. The defendant is not permitted to be represented by counsel during this period, except when providing testimony.

The law grants a board appointed by Malaysia’s king the authority to impose detention without trial for up to two years, with indefinite, two-year extensions, for suspects including those suspected of links to foreign terrorists.<sup>77</sup>

Saudi Arabia’s 2014 counterterrorism law allows for incommunicado detention of terrorism suspects for 60 to 90 days, restricts a suspect’s right to access to a lawyer, and permits one year of pre-trial detention, with unlimited extension upon court order.<sup>78</sup>

Chad’s counterterrorism law allows pre-charge police detention for up to 30 days, renewable twice upon approval by a public prosecutor.<sup>79</sup> Poland’s counterterrorism law of June 2016 allows the police to detain terrorism suspects for 14 days without charge.<sup>80</sup> Spain in 2015 reduced incommunicado, pre-charge confinement for terrorism suspects from 13 days to 10 days for adults and children as young as 16—periods that remain

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<sup>74</sup> HR Committee, General Comment No. 35, art. 9, “Liberty and Security of person,” 2014, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC35-Article9LibertyandSecurityofperson.aspx>.

<sup>75</sup> OHCHR, “Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment,” E/CN.4/2003/68 (2012), <http://www.ohchr.org/Documents/Issues/SRTorture/A-HRC-19-61.pdf>, para. 26.

<sup>76</sup> ICCPR, arts. 9, 14. The HR Committee has also said that detainees should have access to a lawyer from the outset of detention. See Concluding Observations on Georgia, CCPR/3/79, Add. 74, April 9, 1997, para. 28.

<sup>77</sup> “Malaysia: Scrap Repressive Counterterrorism Bill,” Human Rights Watch news release, April 5, 2015, <https://www.hrw.org/news/2015/04/05/malaysia-scrap-repressive-counterterrorism-bill>.

<sup>78</sup> “Saudi Arabia: Terrorism Law Tramples on Rights,” Human Rights Watch news release, February 6, 2014, <https://www.hrw.org/news/2014/02/06/saudi-arabia-terrorism-law-tramples-rights>.

<sup>79</sup> Chad Law No. 34/2015 Repression of Acts of Terrorism, July 30, 2015, art. 4. Copy on file with Human Rights Watch.

<sup>80</sup> “Poland’s New Anti-Terror Law,” *Inside-Poland.com*, <http://inside-poland.com/t/polands-new-anti-terror-law-gives-authorities-right-to-expel-foreigners-access-personal-data-hold-suspects-for-14-days-without-charge-shoot-to-kill-and-more/>.

excessive.<sup>81</sup> Turkey’s emergency powers, enacted in July 2016, lengthen pre-charge police detention for terrorism suspects from 4 to 30 days.

France’s July 2016 emergency law amends French legal codes to increase the maximum period of pretrial detention for children as young as 16 from one year to two, and from two years to three, depending on the offense.<sup>82</sup> International law limits the detention of children to “a measure of last resort and for the shortest appropriate period of time,” and requires criminal charges to be adjudicated “without delay.”<sup>83</sup> France since 2016 has allowed pre-charge police detention—*garde à vue*—of terrorism suspects for up to six days upon authorization from a special judge.<sup>84</sup>

## Special Courts, Secret Evidence

Another mainstay of the new counterterrorism laws with “FTF” provisions are proceedings, often by special courts and administrative boards, that flout international due-process standards. Countries that have enacted or increased use of such measures include Canada, Egypt, Israel, Pakistan, Saudi Arabia, and Tunisia.

The ICCPR states that everyone charged with a criminal offense has the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law. A judge is entitled to order a hearing closed only under specific conditions including instances “where publicity would prejudice the interests of justice.” The ICCPR also provides that the accused has the right to examine, or to have examined, the witnesses against them.<sup>85</sup> Targeted people should also have the opportunity to be represented by a lawyer of their choice, before a court of law.<sup>86</sup>

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<sup>81</sup> Spain’s Law of Criminal Procedure, as modified by Law 13/2015 of October 5, 2015, [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2015-10725](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-10725), arts. 509, 527.

<sup>82</sup> “France: Prolonged Emergency State Threatens Rights,” Human Rights Watch news release, <https://www.hrw.org/news/2016/07/22/france-prolonged-emergency-state-threatens-rights>.

<sup>83</sup> UN Commission on Human Rights, “Convention on the Rights of the Child,” Resolution 44/25 of November 20, 1989, entered into force September 2, 1990, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, arts. 37, 40.

<sup>84</sup> France’s Code of Criminal Procedure (Code de procédure pénale), Law No. 2006-64, as amended by Article 17 of the Law on the fight against terrorism and various provisions relating to security and border controls (Loi n. 2006-64 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000454124>, art. 706-88(1).

<sup>85</sup> ICCPR, art. 14.

<sup>86</sup> See, e.g., HR Committee, General Comment No. 29, art. 4, <http://hrlibrary.umn.edu/gencomm/hrc29.html>, § 3.

Counterterrorism measures enacted in Pakistan in 2014 and in Tunisia in 2015 allowed for specialized courts to hold closed hearings with secret witnesses, without detailing the criteria that must be met before any portion of a trial or testimony is closed.<sup>87</sup> Saudi Arabia’s law allows the kingdom’s terrorism tribunal to bar the defendant or the defendant’s lawyer from proceedings.<sup>88</sup>

Pakistan’s host of secret-court provisions lapsed in 2016. But in the meantime—in 2015—it approved yet another law establishing military courts to hear civilian terrorism-related cases. As the International Commission of Jurists noted in condemning the law, precedents from around the world have shown that military courts tend to see their role as enforcing state security rather than impartially determining the guilt of the accused, and military courts in Pakistan have a proven record of being neither independent nor fair.<sup>89</sup>

## Tougher Penalties, Including Death

Several recent laws prescribe tougher penalties, including the death sentence, for terrorism-related offenses than do ordinary criminal laws for the same underlying acts. In countries including Chad, Egypt, Pakistan, and Saudi Arabia, these penalties include the death penalty.

Serious crimes should allow serious penalties. Combined with overly broad definitions of terrorism and trials that fail to meet international due-process standards, however, tougher penalties could result in lengthy imprisonment or executions of peaceful dissidents and others who have no connection to terrorism.

International law discourages the use of the death penalty and limits its use to the most serious crimes, such as those resulting in death or serious bodily harm.<sup>90</sup> In 2008 the UN General Assembly adopted a moratorium on the death penalty, noting that “any

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<sup>87</sup> The Protection of Pakistan (Amendment), Ordinance No. 1 of 2014 (“PoPA”), January 22, 2014, [http://www.na.gov.pk/uploads/documents/1391322775\\_795.pdf](http://www.na.gov.pk/uploads/documents/1391322775_795.pdf), § 5; Human Rights Watch, An Analysis of Tunisia’s Draft Counterterrorism Law, July 7, 2014, <https://www.hrw.org/news/2014/07/07/analysis-tunisia-draft-counterterrorism-law>.

<sup>88</sup> “Saudi Arabia: Terrorism Law Tramples on Rights,” Human Rights Watch news release, <https://www.hrw.org/news/2014/02/06/saudi-arabia-terrorism-law-tramples-rights>.

<sup>89</sup> “Pakistan: ICJ denounces law permitting military trials of civilians,” International Commission of Jurists, January 6, 2015, <https://www.icj.org/pakistan-icj-denounces-law-permitting-military-trials-of-civilians/>.

<sup>90</sup> ICCPR, art. 6(2).

miscarriage or failure of justice in [its] implementation...is irreversible and irreparable.”<sup>91</sup> Several human rights groups including Human Rights Watch oppose the death penalty in all circumstances as an inherently cruel punishment.

Pakistan in December 2014 lifted a six-year, de facto moratorium on the death penalty for terrorism cases in response to a deadly attack that month by the Pakistani Taliban (TTP) that killed 141 people, most of them children. Three months later the country restored the death penalty for all capital offenses.<sup>92</sup> As of July 31, 2016, the country had hanged 424 people since lifting the moratorium, of whom fewer than 10 percent had been convicted on terrorism-related charges, according to the non-governmental Human Rights Commission of Pakistan.<sup>93</sup>

In January 2016, Saudi Arabia, a country with one of the most overbroad definitions of terrorism and terrorist acts, carried out a mass execution of 47 men convicted of terrorism-related crimes.<sup>94</sup>

Chad’s counterterrorism law of July 2015 ended a 12-year, de facto moratorium on the death penalty for terrorist acts that result in death, and also added the death penalty for recruitment for terrorist groups, and for acts that “endanger physical integrity”—a notably vague term—or damage the environment.<sup>95</sup>

In August 2015, Chad executed 10 men it had convicted the previous day, in secret proceedings, for deadly attacks two months earlier claimed by Boko Haram.<sup>96</sup> The secrecy and speed of the proceedings prompted an outcry from UN human rights experts.<sup>97</sup>

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<sup>91</sup> UN General Assembly, “Moratorium on the use of the death penalty,” A/RES/62/149, adopted February 26, 2008, <http://www.refworld.org/docid/47c814e32.html>.

<sup>92</sup> Madiha Batool, “Pakistan and the Death Penalty,” *The Diplomat*, April 21, 2016, <http://thediplomat.com/2016/04/pakistan-and-the-death-penalty/>.

<sup>93</sup> Human Rights Commission of Pakistan, “Who Has Been Executed,” <http://hrqp-web.org/hrqpweb/who-has-been-executed/>.

<sup>94</sup> “Saudi Arabia: Over 100 Executions Since January 1,” Human Rights Watch news release, July 27, 2016, <https://www.hrw.org/news/2016/07/27/saudi-arabia-over-100-executions-january-1>.

<sup>95</sup> Chad Law No. 34/2015 Repression of Acts of Terrorism, arts. 14, 22, 24, 26.

<sup>96</sup> “Chad executes 10 Boko Haram fighters over deadly attacks,” *BBC News*, August 29, 2015, <http://www.bbc.com/news/world-africa-34100484>.

<sup>97</sup> See, e.g., “UN Human Rights Office Deeply Regrets Resumption of Executions in Chad,” UN News Centre, September 1, 2015, <http://www.un.org/apps/news/story.asp?NewsID=51772#.WHhHu7Yrlbo>; and “Chad: UN human rights expert alarmed by the executions of 10 people following a swift trial,” OHCHR news release, September 7, 2015, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16388&LangID=E>.

Egypt's 2015 counterterrorism law carries the death penalty not only for committing certain terrorist acts but also for attempting to commit them.<sup>98</sup> The country has sentenced hundreds of alleged Islamists to death in mass trials that appear to violate due process standards.

## Emergency Laws

“FTF” measures have coincided with and in some cases are included in a recent spate of emergency laws enacted in the name of countering terror. These laws vastly increase powers to search, detain, and monitor individuals, to shut establishments such as meeting houses and places of worship, and to ban public gatherings, infringing on basic rights including freedom of movement, expression, and assembly, and the rights to due process and privacy.

Countries that have enacted emergency laws or declared states of emergency since 2014 include Egypt, Ethiopia, France, Hungary, Malaysia, Mali, Tunisia, and Turkey.

While international law allows restrictions to such rights on grounds of national security, as noted above they must be limited to the extent “strictly required by the exigencies of the situation.” Such measures must not discriminate on the basis of race, color, sex, language, religion or social origin.<sup>99</sup>

Tunisia and France have repeatedly renewed sweeping states of emergency that they declared in 2015 following a series of deadly mass attacks in each country. Among other measures, the respective laws expand each country's powers of police search and detention (detailed elsewhere in this paper) and allow local authorities to ban gatherings. Human Rights Watch has documented excessive use of force against protesters in Tunisia and abusive searches and house arrests of Muslims in France under these states of emergency.<sup>100</sup>

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<sup>98</sup> “Egypt: Counterterrorism Law Erodes Basic Rights,” Human Rights Watch, August 19, 2015, <https://www.hrw.org/news/2015/08/19/egypt-counterterrorism-law-erodes-basic-rights>.

<sup>99</sup> See, e.g., HR Committee, General Comment No. 29, Article 4, <http://hrlibrary.umn.edu/gencomm/hrc29.html>.

<sup>100</sup> See, e.g., “Tunisia: Crackdown on Peaceful Protests,” Human Rights Watch news releases, September 10, 2015, <https://www.hrw.org/news/2015/09/10/tunisia-crackdown-peaceful-protests>; and “France: Abuses Under State of Emergency,” <https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>.

In response to a coup attempt in July 2016, Turkish President Recep Tayyip Erdoğan declared a three-month state of emergency until January 2017 to squash what he described as the “terrorist organization” behind the failed putsch.<sup>101</sup> Erdoğan then used his sweeping emergency powers to detain more than 40,000 people.<sup>102</sup> Allegations quickly emerged of torture and other inhuman treatment in custody.<sup>103</sup>

Egypt has retained a counterterrorism state of emergency it imposed on North Sinai in 2014 that it has used to unlawfully carry out thousands of mass evictions and home demolitions, as well as arbitrary detention of citizens.<sup>104</sup>

Hungary’s emergency law of June 2016, described as a means to respond to a “terror threat situation,” allows the executive to indefinitely deploy military troops to secure infrastructure and institutions, freeze assets of individuals and organizations, ban public gatherings, and restrict movement inside the country.”<sup>105</sup>

Malaysia’s National Security Council Act of August 2016, which authorities justified as a counterterrorism measure, grants a council headed by the prime minister to declare regions—including the entire country—as security areas to protect “any interest of Malaysia.” The law allows the authorities to conduct arrests, searches, and seizures without warrants. Each such declaration lasts for six months, renewable indefinitely.<sup>106</sup>

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<sup>101</sup> “Erdogan declares three-month state of emergency in Turkey to hunt coup ‘terrorists,’” *Agence France-Presse*, July 21, 2016, <http://www.scmp.com/news/world/europe/article/1992664/erdogan-declares-three-month-state-emergency-turkey-hunt-coup>.

<sup>102</sup> Human Rights Watch, *A Blank Check: Turkey’s Post-Coup Suspension of Safeguards Against Torture*, October 24, 2016, <https://www.hrw.org/report/2016/10/24/blank-check/turkeys-post-coup-suspension-safeguards-against-torture>.

<sup>103</sup> “Turkey: Independent monitors must be allowed to access detainees amid torture allegations,” Amnesty International, July 24, 2016, [https://www.amnesty.org/en/latest/news/2016/07/turkey-independent-monitors-must-be-allowed-to-access-detainees-amid-torture-allegations/?utm\\_source=rss&utm\\_medium=rss](https://www.amnesty.org/en/latest/news/2016/07/turkey-independent-monitors-must-be-allowed-to-access-detainees-amid-torture-allegations/?utm_source=rss&utm_medium=rss).

<sup>104</sup> “Parliament approves state of emergency extension for North Sinai,” *Daily News Egypt*, July 19, 2016, <http://www.dailynewsegypt.com/2016/07/19/parliament-approves-state-emergency-extension-north-sinai/>; Human Rights Watch, *Look for Another Homeland: Forced Evictions in Egypt’s Rafah*, September 22, 2015, <https://www.hrw.org/report/2015/09/22/look-another-homeland/forced-evictions-egypts-rafah>. The right to housing is guaranteed under international treaties including the ICCPR, art. 17, and the African Charter on Human and Peoples’ Rights, <http://www.achpr.org/instruments/achpr/>, arts. 14, 16, and 18(1).

<sup>105</sup> “Disquiet as Hungary’s parliament votes for new anti-terror powers,” *Deutsche Welle*, June 8, 2016, <http://www.dw.com/en/disquiet-as-hungarys-parliament-votes-for-new-anti-terror-powers/a-19313126>; “Hungary: Constitutional changes would grant the Executive sweeping counter-terrorism powers,” Amnesty International public statement, May 10, 2016, <https://www.amnesty.org/en/documents/eur27/4011/2016/en/>.

<sup>106</sup> “Malaysia’s controversial National Security Council Act kicks in,” *Channel News Asia*, August 1, 2016, <http://www.channelnewsasia.com/news/asiapacific/malaysia-s-controversial/3003680.html>; “Malaysia: New Law Gives Government Sweeping

## Restrictions on Humanitarian Aid

Resolution 2178 does not explicitly advise governments to carve out humanitarian aid exemptions when criminalizing foreign travel, raising the prospect that they may curb life-saving activities by medical staff and other emergency workers—assistance that is protected under international law.

A report released in 2015 by the Harvard Law School Program on International Law and Armed Conflict found that only 4 of 25 countries it studied have made such exclusions: Australia, Canada, New Zealand and the United States, and that even these countries' exclusionary language was inadequate.<sup>107</sup>

Even as it grants humanitarian exemptions, the United States risks hindering emergency aid work through an amendment to its visa waiver program that it implemented in January 2016. The 30-year-old waiver program allows citizens of 38 countries to travel to the United States without first obtaining a visa. The amendment requires anyone from those 38 countries to obtain a visa to enter the United States if they have visited Iraq, Syria, Iran or Sudan or other “countries of concern” in the preceding five years. It also changes the regulations to require visas for dual nationals who are citizens of one of the 38 countries as well as of Iraq, Syria, Iran, or Sudan, even if they have not visited any of those four listed countries within five years. These measures could jeopardize the ability of aid workers to travel between the United States and humanitarian crisis zones, as well as their ability to brief US and UN agencies on these crises.<sup>108</sup>

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Powers,” Human Rights Watch news release, August 2, 2016, <https://www.hrw.org/news/2016/08/02/malaysia-new-law-gives-government-sweeping-powers>.

<sup>107</sup> Jessica Burniske and Dustin A. Lewis, with Naz K. Modirzadeh, *Suppressing Foreign Terrorist Fighters and Supporting Principled Humanitarian Action: A Provisional Framework for Analyzing State Practice*, Harvard Law School Program on International Law and Armed Conflict, October 2015, <https://pilac.law.harvard.edu/briefing-report-suppressing-ftfs-and-supporting-pha>, pp. 31–33.

<sup>108</sup> Ehab Zahriyeh, “NGOs warn changes to visa waiver program will affect aid efforts,” *Al Jazeera*, December 30, 2015, <http://america.aljazeera.com/articles/2015/12/30/changes-to-visa-waiver-program-could-impact-ngos1.html>.

## V. Recommendations

Attacks by armed extremist groups, their ranks often bolstered by legions of foreign fighters, are emerging as one of the greatest challenges to human rights and the rule of law in modern times. While governments have a duty to protect their citizens, enacting laws and regulations that subvert core rights and freedoms is both unlawful and counterproductive.

Measures that arbitrarily target Muslims or other groups based on their religion, race or ethnicity; that disproportionately restrict the right to peacefully express views through action or speech; that impose prolonged detention without charge or the death penalty following sham trials, can alienate targeted communities at a time when governments should unite societies against extremist armed threats. They fuel the recruitment narrative of groups such as ISIS or Al-Qaeda and make it easier for other governments to justify abuses in the name of security.

The Security Council should promptly adopt a resolution requiring that all definitions of “terrorism” and “terrorist” that member states use to implement mandates such as Resolution 2178 are fully consistent with international human rights law, refugee law, and humanitarian law. These definitions should, for example, exclude acts that lack the elements of criminal intent to cause death, serious bodily injury, or the taking of hostages in order to create a state of panic and provoke a government or third-party response.

Regional bodies such as the European Union and the African Union that issue directives to implement such counterterrorism measures should follow suit.

UN member states should press the UN Security Council and regional bodies for such changes. They also should promptly repeal or revise their own overly broad or vague “FTF” measures. When facing extraordinary threats that warrant declaration of an emergency, they should limit the scope and duration of emergency powers to what is truly necessary to address the crisis. They should press other countries, including their counterterrorism partners, to do the same.

Absent such reforms, leading democracies risk joining some of the world's harshest autocracies in making draconian emergency measures the norm.

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