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INPUT TO THE GLOBAL STUDY ON THE IMPACT OF COUNTER-TERRORISM MEASURES ON CIVIL SOCIETY AND CIVIC SPACE

SPECIAL RAPPORTEUR ON COUNTER-TERRORISM AND HUMAN RIGHTS

INTRODUCTION

The Geneva Academy of International Humanitarian Law and Human Rights is pleased to submit this input to the Special Rapporteur on Counter-Terrorism and Human Rights, with a view to informing the latter's Global Study on the Impact of Counter-Terrorism Measures on Civil Society and Civic Space.

The submission has been prepared in the framework of the Geneva Academy's **IHL Expert Pool**, a response mechanism that works to deliver technical assistance, capacity development and legal opinion on topical IHL issues for users within the human rights community of practice. Launched in 2022, this project works to strengthen the capacity of human rights mechanisms to incorporate IHL into their work in an efficacious and comprehensive manner, by organizing and facilitating the provision of expert advice.

The submission has been prepared and drafted by **Dr Michael Moncrieff** and **Dr Pavle Kilibarda** of the Faculty of Law of the University of Geneva, and members of the [Counter-Terror Project: A Legal Empirical Approach](#) funded by the Swiss National Science Foundation.

Dr Francesco Romani, Research Fellow at the Geneva Academy in charge of the IHL Expert Pool, has coordinated the submission for the Geneva Academy.

In the following pages, the authors will focus particularly on points 15 and 17 of the call for inputs. The issues highlighted here are also relevant to the broader role and position of civil society organizations [CSOs] considered by the Study as a whole. In this submission, attention is drawn to four issues that are less commonly considered in the context of counter-terrorism measures and relate to a lack of transparent, empirical decision-making and the over-extension and misuse of IHL in counter-terrorism operations.

1. DEFINING POLICIES: THE PROBLEM OF VAGUE COUNTER-TERRORISM GOALS

States have implemented numerous counter-terrorism measures, but their goals often remain vaguely defined. The absence of well-articulated goals generates analytical and argumentative barriers to adequate participation of academic researchers, human rights organizations, advocacy groups, and international organizations. Without knowledge of a measure's intended outcomes, it is difficult for CSOs and other stakeholders to operationalise and measure appropriate indicators of counter-terrorism impacts. The inability to assess a measure's intended effects may result in adopting ineffective or counterproductive policies that risk eroding institutional trust and legitimacy. Clear goals must be established to have a meaningful debate and develop effective counter-terrorism measures. Poorly articulated goals result in policies that are not merely unduly intrusive on individual rights, but also ineffective in achieving their broader purpose of combating terrorism.

The United Kingdom's 2019 criminal offence of entering or remaining in designated areas¹ is one example of such a policy. It was introduced to respond to individuals traveling to parts of Iraq and Syria controlled by terrorist groups. The UK's Independent Reviewer of Terrorism Legislation notes confusion regarding whether the power to designate such areas was intended to deter travel or to enable the prosecution of returnees when evidence of other offences is insufficient.² If CSOs and other stakeholders conclude that a particular goal is different from the policymakers' intended goal, they will seek inappropriate forms of evidence and produce false conclusions.

The failure to clearly articulate counter-terrorism goals may be caused by (a) confusion regarding what is to be achieved with a policy, particularly when responding to the urgency and complexity of terrorism and counter-terrorism. (b) Concerns may also exist that clear goals will demand greater accountability for policy failures, which could diminish public support and political approval of counter-terrorism efforts. Regardless of the causes, the lack of articulation of counter-terrorism goals is problematic for analytical assessment and open debate of counter-terrorism measures.

States should be encouraged to ensure a more transparent and inclusive process of formulating public policy on counter-terrorism and allow for a greater role of civil society, in line with the following: (a) Goals should be based on evidence and operationalised in a measurable manner. This would help ensure that goals are achievable and can be evaluated objectively. (b) States can engage with stakeholders and experts to develop policy goals based on the best available evidence and informed by various perspectives. This may include engagement with the public through consultations, workshops, and other forms of dialogue to solicit feedback to ensure that goals reflect the needs and concerns of civil society. (c) States should also aim to be more

¹ Terrorism Act 2000, ss 58B, 58C.

² Jonathan Hall, 'The Terrorism Acts in 2020. Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, and the Terrorism Prevention and Investigation Measures Act 2011' (Home Office 2022) 84.

transparent by clearly articulating their policy goals to the public. This could involve providing information about the reasons for measures, the evidence that supports them, and their expected outcomes.

2. ARTICULATING POLICY CAUSALITY: THE ABSENCE OF CIVIL SOCIETY PARTICIPATION IN THE EVALUATION AND OVERSIGHT OF COUNTER-TERRORISM

A significant impediment to understanding the impacts of counter-terrorism on civil society is the absence of its participation in the monitoring, evaluation, and oversight of counter-terrorism measures. Many States do not have established review mechanisms that report their findings to the public. The review mechanisms that do exist typically exclude the direct involvement of civil society. Aside from direct involvement, CSOs need to understand how measures are supposed to function to have open conversations about counter-terrorism impacts. Clearly defined policy goals are not enough: a step-by-step theory of how an intervention is supposed to reach its goals must be articulated according to a theory-of-change, causal or mechanistic model. An inclusive discussion of causal models – detailing the activities necessary to progress from one step to the next to reach the intended goals and the factors likely to support or interrupt the process³ – would allow more targeted input at each step in the causal process, allowing CSOs to enhance the effectiveness of measures while reducing their human rights impacts.

A false dichotomy between security needs and maintaining human rights is often raised in the context of counter-terrorism. Instead of focusing on the quantifiable results of specific counter-terrorism measures, steps in a causal model could be identified and evaluated for effectiveness and potential human rights impacts in light of the policy's intended goal. For example, a review of airport security in Israel identified that Israeli Arab passengers had their bags checked at a higher rate than Israeli Jewish individuals.⁴ Minor policy changes replaced this practice with less invasive methods, resulting in an equally effective but less harmful approach.⁵ Incremental adjustments informed by stepwise causal modeling could help identify minor modifications that would significantly improve counter-terrorism measures.

It is difficult to envisage adequate CSO engagement and oversight without proper knowledge of how measures work and what the policymakers seek to achieve. States may be hesitant to discuss how measures work for security or political reasons, at least concerning certain aspects or steps foreseen by a measure. Nevertheless, secrecy in policymaking and implementation may only be exceptionally tolerated in a democratic society. States might also be discouraged by the difficulty

³ See, Nick Cowen and Nancy Cartwright, 'Street-Level Theories of Change: Adapting the Medical Model of Evidence-Based Practice for Policing' [2019] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3324778>> accessed 16 February 2022.

⁴ Badi Hasisi and David Weisburd, 'Going beyond Ascribed Identities: The Importance of Procedural Justice in Airport Security Screening in Israel' (2011) 45 Law & Society Review 867.

⁵ Badi Hasisi, Simon Perry and Michael Wolfowicz, 'Counter-Terrorism Effectiveness and Human Rights in Israel' in Eran Shor and Stephen Hoadley (eds), *International Human Rights and Counter-Terrorism* (Springer Singapore 2019) <http://link.springer.com/10.1007/978-981-10-4181-5_22> accessed 16 February 2022.

in conceptualising causal models, although scholarship demonstrates that all policies ultimately rely on them.⁶

Accordingly, (a) States should provide opportunities for CSOs to offer feedback and input on the effectiveness of policies. Preferably, the establishment of ‘public justificatory deliberation mechanisms’⁷ that have the ‘capacity to meaningfully change or abort measures’ would greatly enhance transparency and oversight. (b) Ideally, and when feasible considering security concerns, the articulation of the causal theory of counter-terrorism measures should be made available to researchers. Such changes would increase transparency and help CSOs evaluate the impacts of counter-terrorism independently from formal review mechanisms. (c) Funding and support for organisations to participate in policy review, conduct research, and contribute their perspectives and expertise to the policymaking process, should also be prioritised.

3. OVERCLASSIFICATION OF SITUATIONS OF VIOLENCE INVOLVING ‘TERRORIST’ ARMED NON-STATE ACTORS [ANSA]

In addition to international human rights law [IHRL], IHL also applies to situations of violence amounting to an armed conflict. Although terrorism has not traditionally been regarded as an armed conflict phenomenon, the tendency since 9/11 has been to increasingly regard counter-terrorism operations through an armed conflict lens. The high-intensity violence projected by listed terrorist groups such as Al Qaeda or ISIS, coupled with their opaqueness and the difficulty in elucidating their structure and functioning, have made States and other relevant stakeholders more prone to ‘overclassify’ situations as armed conflicts when in truth they are more appropriately dealt with under the law enforcement paradigm.

Examples of likely over-classification may be found in different parts of the world and under various circumstances. (a) There is often a tendency both on the part of States and CSOs towards over-classification in situations where precise information on a group’s structure and functioning is unavailable. Boko Haram in Nigeria is typically regarded as a single group despite its fractious nature and the violent infighting between different factions that do not form a single chain of command. (b) In countries such as Burkina Faso, Nigeria, or Mali it may be difficult to attribute specific attacks to an identifiable group with any certainty. (c) Often, when a terrorist ANSA becomes inactive or dormant, relevant stakeholders continue to classify the situation as an armed conflict although no violence may have been projected for several years. This is the case with ‘core’ Al Qaeda in Afghanistan and ISIS in Libya. (d) Sometimes, a State will invoke counter-terrorism to explicitly or implicitly adopt a conduct of hostilities approach to lethal force, as did Egypt in its response to a bus bombing in 2018 when its security forces eliminated several dozen ‘militants’ in what appears to be a conduct of hostilities approach. Thus, over-classification typically occurs when the intensity and organisation requirements for a NIAC are ‘shored up’ in light of imperfect knowledge, reversing the presumption that no armed conflict exists and that the law enforcement paradigm governs the situation.

⁶ Nancy Cartwright and Jacob Stegenga, ‘A Theory of Evidence for Evidence-Based Policy’, *Evidence, Inference and Enquiry* (British Academy 2011) 297.

⁷ Mathias Vermeulen, Dan Deering and Sadhbh McCarthy, ‘Report on Legal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism’ (Centre for Irish and European Security 2015) D3.3.

The reasons for over-classification are multifaceted and are as related to the desire for greater freedom in dealing with real or alleged terrorists as they are to genuine difficulties in data collection and operational analysis. Unlike the more restrictive rules of IHRL, IHL allows the wilful killing of combatants/fighters in an armed conflict and is usually taken to permit conflict-related security detention. The extension of IHL rules to a situation where its application is at best uncertain represents a serious infringement upon basic human rights and freedoms, including the right to life and the right to liberty and security of person.

To address the matter of over-classification, several steps need to be taken, ranging from the symbolic to those more profoundly oriented towards closing the legal gaps and translating them into policy. (a) States, but also other stakeholders who engage them – including CSOs – must be reminded that domestic law and IHRL, and not IHL, form the basic framework for dealing with violent non-state actors, including ones listed as or considered terrorists by one or more governments or an international or regional organisation. If the existence of an armed conflict is in doubt, or if it is unclear whether IHL applies to a specific situation, the presumption must be in favour of law enforcement. (b) Armed conflicts involving ANSAs are usually non-international, requiring that a certain intensity of fighting and level of organisation of the ANSA be met. CSOs should help develop a more precise cartography of the criteria of conflict classification, especially in the context of counter-terrorism, following a principle-based approach.⁸ (c) Policymakers at all levels should be encouraged to strive for greater transparency regarding the conflict classification process, especially when applying lethal force under the conduct of hostilities paradigm against alleged terrorists. (d) Procedures or mechanisms for improved data collection and sharing between various stakeholders, including CSOs, should be created to ensure a more reliable, fact-based classification process.

4. INADEQUATE LAW AND POLICY GUIDANCE ON TARGETING

Post 9/11 counter-terrorism activities also demonstrate a much greater reliance on remote lethal operations against suspected terrorists and militants. Usually referred to as ‘targeted killings’, such operations typically involve the use of armed drones outside the targeting State’s own territory against targets who may or may not be situated in a populated area. Targeted killings are often justified as the only possibility of eliminating a dangerous threat to security in a situation where arrest and criminal prosecution are unavailable and vaunted as involving a minimal risk of civilian collateral damage. Extraterritorial targeted killings such as drone strikes are fundamentally incompatible with the requirements of the law enforcement paradigm, which limits the use of intentional lethal force to situations where it is strictly necessary to protect life from an imminent threat. However, the targeted killing of combatants/fighters is permissible under IHL and the conduct of hostilities paradigm if the principles of distinction, proportionality, and precautions in attack have been respected. The necessity and ‘window of opportunity’ arguments cannot themselves be invoked to justify applying the conduct of hostilities paradigm as this would amount to over-classification.

Assuming that a lethal operation takes place in the context of a non-international armed conflict, its targets are limited to fighters and military objectives within a geographically limited territory and against an identifiable belligerent. (a) However, a number of targeted killings have been conducted

⁸ Gloria Gaggioli and Pavle Kilibarda, ‘Counterterrorism and the risk of over-classification of situations of violence’ (2021) 103:916-917 *International Review of the Red Cross* 203-236.

against members of a group on the basis that it is 'affiliated' with another group involved in an armed conflict. Al Qaeda or ISIS 'affiliates' such as Al-Shabaab are still regularly targeted on the grounds that they form part of the same global terrorist network despite arguably having no meaningful structural or operational relationship with the 'core' group and functioning as separate groups. (b) Similarly, individuals linked to a terrorist group have been subjected to lethal targeting far away from the territory where IHL actually applies, such as when Al Qaeda cleric Anwar al-Awlaki was killed in a US drone strike in Yemen in 2011. (c) States have also insisted on the targetability under IHL of group members whose function does not involve direct participation in hostilities ('continuous combat function'). (d) Finally, irrelevant criteria – such as spending time or communicating with or sharing the same social milieu as a known militant – have been relied on for targeting decisions, notably in Afghanistan.

The practice of extraterritorial targeted killings poses a very serious risk of arbitrary deprivation of life and must be addressed with the utmost urgency. The over-extension of IHL-based targeting represents a serious encroachment upon individual rights and freedoms and a significant challenge to ensure oversight by civil society and human rights bodies. CSOs should therefore focus on the adequate translation of the rules and principles of IHRL and IHL in such a manner as to enable law-compliant and credible targeting decisions and full accountability for the use of lethal force. Authorities should be encouraged to render the targeting process more transparent and to be clear regarding the legal basis for the use of lethal force, both with CSOs and the general public.

CONCLUSION

We call on the Special Rapporteur and CSOs to consider the following points a priority in future activities: (a) the need for better articulation of the goals of counter-terrorism measures, allowing CSOs to measure and scrutinise counter-terrorism impacts; (b) the necessity of achieving greater transparency and a more prominent role for CSOs in the oversight of counter-terrorism policy and measures; (c) the tendency to over-classify situations of violence involving terrorist ANSAs as armed conflicts, diluting the standards of applicable HRL; and (d) the persistence of IHL-based targeted killings that gravely threatens respect for the right to life.

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