Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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Excellency,

1. I write in my capacity as the United Nations (UN) Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolution 31/3, in response the Call for submissions published by the House of Commons Public Bill Committee.

2. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism is an independent expert appointed by the UN Human Rights Council for a three-year term. As per my mandate, I have been invited to gather, request, receive and exchange information on alleged violations of human rights and fundamental freedoms while countering and preventing terrorism and violent extremism, and to report regularly and publicly to the Human Rights Council and General Assembly about *inter alia* identified good policies and practices, as well as existing and emerging challenges and present recommendations on ways and means to overcome them. The mandate offers advice and technical assistants as appropriate to governments to support the promotion and protection of human rights while they engage in countering terrorism.

3. I welcome the opportunity to submit my views on the Counter-Terrorism and Border Security Bill, which is currently passing through Parliament.

4. Terrorism poses a serious challenge to very tenets of the rule of law, the protection of human rights and their effective implementation. This is a reality well appreciated in the United Kingdom in particular. I recognize the need for an adequate legal and policy framework that enables authorities to efficiently prevent and counter terrorism and violent extremism. Consistent with the vision of the Global Counter-Terrorism Strategy, I maintain the view that effectively combatting terrorism and ensuring respect for human rights are not competing but complementary and mutually reinforcing goals.[1] Moreover, relevant provisions of Security Council resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180 require that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with States' obligations under international law, in particular international human rights law, refugee law, and international humanitarian law.

5. In this context, I express my concern that a series of provisions included in the draft Bill fall short of the United Kingdom's obligations under international human rights

[1] A/HRC/60/288.

law, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). While my analysis is not exhaustive, it addresses the following provisions: Clauses 1, 2, 3, 11, 12, 17, 18, 20 as well as parts of Schedules 2 and 3. As a result of my analysis, I recommend that the draft Bill is amended with due consideration to the human rights concerns outlined below. This approach will both strengthen the compatibility of the draft Bill with international law, as well as provide a substantial and strengthened basis to combat terrorism and address the conditions conducive to terrorism itself.

A. TERRORIST OFFENCES

Expression of support for proscribed organizations

6. **Clause 1** amends Section 12 of the Terrorism Act 2000 by criminalizing expressing "an opinion or belief that is supportive of a proscribed organization", to the extent such expression is "reckless" as to whether it will "encourage support" for the organization in question. The amendment expands the scope of Section 12 in that it removes the requirement that the expression "invite support" for the organization. The draft Bill does not clarify the criteria for expression to be considered "supportive", a shortcoming that has been highlighted by a number of stakeholders contributing to the debate, including the Joint Committee on Human Rights.[2] Furthermore, the draft Bill lowers the threshold for the requisite *mens rea* from intentionally or knowingly calling for support for a proscribed organization to being reckless as to the effects of the expression on those to whom it is directed, without setting clear criteria detailing what "encouraging support" implies and how such result is assessed or measured.

7. I would like to underscore that the right to freedom of expression extends "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."[3] While freedom of expression is a qualified right, all restrictions to the right must be interpreted narrowly. As clarified by the European Court of Human Rights, the necessity of any restrictions to the right to freedom of expression must be 'convincingly established'[4] pursuant to a 'pressing social need'[5]. Relevant measures must further be proportionate to the protected interest.[6]

8. I therefore urge that the provision be brought in compliance with the United Kingdom's obligations under Articles 19 and 20 ICCPR as well as Article 10 ECHR. In this respect, I recommend that the United Kingdom be guided by the standards spelled out in the *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* (Rabat Plan of Action)[7]. I would like to highlight the six-part threshold test proposed therein for

[2] Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para. 12 ff.
[3] See, for example, *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, § 49.
[4] *Observer and Guardian v United Kingdom,* no. 3585/88, 24 October 1991, § 59.
[5] *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, § 48.
[6] A/HRC/22/17/Add.4, para. 18.
[7] A/HRC/22/17/Add.4

expression considered as criminal offence[8], in particular incorporating the requirements of intent[9] and of "reasonable probability that the speech would succeed in inciting actual action (…) recognizing that such causation should be rather direct."[10]

9. I note that the United Kingdom is cognizant that the provision restricts Articles 8, 9 and 10 ECHR but argue that such restriction is justified.[11] I however join others in expressing concern that public interest speech as well as other legitimate activities, including those undertaken by civil society, human rights organizations, journalists and academics may be deemed as falling within the scope of the provision, "risking a 'chilling effect', not only on journalistic and academic freedoms, but also the inquisitive and the foolish mind"[12], as the Joint Committee warns.

10. I further highlight my concerns the draft raises with respect to the requirement that restrictions on human rights, including on the right to freedom of expression, be provided by a law that conforms to the need for legal certainty. In accordance with international human rights standards, such law must be "sufficiently accessible and foreseeable as to its effects, that is, formulated with sufficient precision to enable the individual to regulate his conduct" and "to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'[13] Furthermore, the law must indicate the scope of discretion it confers on implementing authorities "with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."[14]

11. I note that Clause 1, as it currently stands, may not comply with the requirement of foreseeability as established under international human rights law. I further stress in this respect that lowering the required *mens rea* to recklessness is particularly problematic in case of an offense criminalizing expression as it further reduces the foreseeability element for all stakeholders concerned by the provision.

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[8] A/HRC/22/17/Add.4, para. 29. The elements proposed in this regard are: 1) context, 2) speaker, 3) intent, 4) content and form, 5) extent of the speech act and 6) likelihood, including imminence.

[9] "Intent: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience." *Ibid*.

[10] "Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct." *Ibid*.

[11] "The objective of this new offence–to restrict the degree to which proscribed terrorist groups garner more support–is sufficiently important to justify the limitation of the fundamental rights under Articles 8, 9 and 10." Home Office, Memorandum on Counter-Terrorism Border and Security Bill - European Convention on Human Rights, June 2018, paras 12–14.

[12] Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para. 8.

[13] *Sunday Times v. United Kingdom (no. 1)*, no. 6538/74, 26 April 1979, § 49.

[14] See *Malone v. United Kingdom*, no. 8961/79, Series A no. 82, 2 August 1984, § 68; *Silver and Others v. the United Kingdom*, nos. 5947/72 et al., Series A no. 61, 25 March 1983.

12. I also join the Independent Reviewer of Terrorism Legislation and others[15] in noting that encouragement of terrorism is already criminalized in the Terrorism Act of 2006 and calls for a review of the necessity for introducing this additional provision.

Publication of images

13. **Clause 2** amends Section 12 of the Terrorism Act 2000 to criminalize "the publication by a person of an image (whether still or moving image) of an item of clothing or an article (such as a flag) in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation."[16] The clause covers any footage, including footage taken in private[17] as long it is "published". It is not required that the act is done in support of a proscribed organization nor that it call for or encourage such support.[18] The size of the audience reached is also immaterial as is the conduct posing any concrete risk of harm. The government argues the amendment is necessary to address images or videos posted online against the backdrop of an ISIS flag.[19] The Joint Committee on Human Rights however pointed out that wearing clothing or displaying an article in a public place where this is likely to arouse suspicion of membership of a proscribed group was already prohibited, together with encouraging terrorism and dissemination of terrorism publications, criminal offences under sections 1 and 2 of the Terrorism Act of 2006.[20]

14. I am concerned that Clause 2 runs the risk of criminalizing a broad range of legitimate behaviour, including reporting by journalists, civil society organizations or human rights activists as well as academic and other research activity.[21] I consider that the provision falls short of the requirements of the principle of legality under Article 15 ICCPR and Article 7 ECHR. I am particularly troubled by the intention to attach serious criminal consequences (including imprisonment) to conduct that merely raises "reasonable suspicion" without requiring that membership in or concrete support of proscribed organizations is actually established.[22]

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[15] Joint Committee on Human Rights Oral evidence: Legislative Scrutiny: Counter- Terrorism and Border Security Bill, HC 1208, Wednesday 20 June 2018, Q. 3. See also Written Evidence to the Joint Committee on Human Rights, Professor Emeritus Clive Walker, School of Law, University of Leeds, 15 June 2018.
[16] Counter Terrorism and Border Security Bill 2017-19, *Explanatory Notes*, paras. 31-33.
[17] Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para. 19.
[18] Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para. 22. See also, Article 19, Written Evidence to the House of Commons Public Bill Committee, para. 9ff.
[19] Explanatory Notes, para. 33.
[20] Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para.
[21] Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para. 26; Reporters Without Borders, Written Evidence to the Joint Committee on Human Rights; Article 19, Written Evidence to the House of Commons Public Bill Committee, para. 10.
[22] See also, Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para. 25.

Obtaining or viewing material over the Internet

15. **Clause 3** amends section 58(1)(a) of the Terrorism Act of 2000 to include viewing online material of a kind "likely to be useful to a person committing or preparing terrorist acts", if the person "knows, or has reason to believe, that the record contains or is likely to contain" terrorist material and such conduct occurs on three or more occasions. The Government argues that "the requirement to view the material on at least three occasions ensures that the new offence deals with a pattern of behaviour, rather than a deliberate but one off action (perhaps sparked by mere curiosity) or the unintended viewing of such material, for example by inadvertently clicking on the wrong internet link".[23] It is however not required that the person consults such material with the intention of committing a terrorist act nor is there any subsequent action needed for the conduct to be considered criminal.[24]

16. I would like to stress that the mere consultation of material that is "likely to be useful to a person committing or preparing terrorist acts" cannot be persuasively qualified as conduct implicating a sufficiently pressing social need requiring criminalization. The provision is criminalizing conduct that is far removed from any recognized offense and lacks a clear *actus reus*, an essential element of a criminal act. In particular, as the Government specifies, "the offence would be committed whether the defendant was in control of the computer or was viewing the material, for example, over the controller's shoulder." It is not clear under what circumstances would this result in the prosecution of someone who was merely present while the proscribed material was being viewed.

17. In this context, I further note the danger of employing simplistic "conveyor-belt" theories of radicalization to violence, including to terrorism. My mandate has previously cautioned against measures based on a distorted understanding of the process of radicalization to violence "as a fixed trajectory to violent extremism with identifiable markers along the way" and stressed that that "the path to radicalisation is individualised and non-linear, with a number of common 'push' and 'pull' factors but no single determining feature", an analysis which is supported by the available independent evidence.[25] As others have also underscored in the context of the current debate, there is "no clear production line from viewing extremism or even being 'radicalised' into becoming an active terrorist",[26] a view also asserted in other contexts by the United Kingdom Government.[27] The possible legal outcomes are even more worrisome considering the high penalties attached to conduct penalized under Clause 3.[28] It also carries a clear risk to the freedom to seek information, and may penalize journalism,

[23] *Explanatory Notes*, para. 37.
[24] Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para. 30.
[25] A/HRC/31/65, para. 15 (footnotes omitted).
[26] See, for example, Written Evidence to the Joint Committee on Human Rights, Professor Emeritus Clive Walker.
[27] Home Office, *Prevent Strategy* (Cm 8092, London, 2011) para.6.4.; *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm.9608, London, 2018) para.103.
[28] According to Clause 6 (and subject to its adoption), the offense could be punished by up to 15 years imprisonment.

academic and other research and the work of civil society and human rights advocates.[29] While the defence of reasonable excuse may mitigate some of the adverse effects of the law, the potential to chill free speech and the right to seek, receive and impart information remains undeniable, especially as those coming within the purview of the law may nonetheless be subjected to "the stress and uncertainty of a criminal trial".[30] As Liberty pointed out, "[i]t is a brave reporter or researcher who will be undeterred by the prospect of a 15 year prison sentence."[31]

18. I would like to reiterate that the implementation of the amendments contained in Clauses 1-3 risks setting off an alarming chilling effect on legitimate activities, including that of civil society organizations, journalists and academics and to unduly interfere with the right to freedom of expression, the freedom to seek, receive and impart information and ideas and the right to hold opinions without interference, as well as with interlinked political and public interest processes. The offenses are broadly defined, falling short of the principle of legality requiring a requisite level of legal certainty in case of criminalization of conduct as well as of the principles of necessity and proportionality.

19. I echo concerns expressed by other experts[32] at the increase of maximum sentences for a wide range of terrorism-related offenses, including in case of some of the above-mentioned provisions (Clause 3), and stress that such increase should be based on empirical evidence demonstrating that current sentences fail to provide the necessary deterrent effect and an increase in sentences would ameliorate this shortcoming, among others by reducing recidivism. The impact of such changes on the successful rehabilitation of offenders should also be duly considered, as should the disparate impact of such legislation on particular groups.

B. NOTIFICATION REQUIREMENTS AND DATA COLLECTION

20. **Clause 11** expands the existing notification regime set up under the Terrorism Act 2008[33] by requiring Registered Terrorist Offenders (RTOs) to provide additional personal information such as their cell phone numbers and email addresses as well as financial information such as bank accounts and credit cards and to provide notification whenever any of that information changes.[34] The notification regime applies

[29] See, for example, Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para. 30; Reporters Without Borders, Written Evidence to the Joint Committee on Human Rights, paras. 10-11; Article 19, Written Evidence to the House of Commons Public Bill Committee, para. 12.
[30] Reporters Without Borders, Written Evidence to the Joint Committee on Human Rights, para. 11.
[31] Liberty, Liberty's Second Reading Briefing on the Counter-Terrorism and Border Security Bill 2018, June 2018, para. 16.
[32] Written Evidence to the Joint Committee on Human Rights, Professor Emeritus Clive Walker, pp. 19-21; Article 19, Written Evidence to the House of Commons Public Bill Committee, paras. 17-19.
[33] Notification requirements under the Terrorism Act 2008 included only name, home address, date of birth, and national insurance number.
[34] Counter Terrorism and Border Security Bill 2017-19, *Explanatory Notes*, paras. 81-83.

automatically, for a period ranging from 10 to 30 years. The existing framework does not provide for the possibility of review. I note that the notification regime interferes with affected persons' right to privacy, family life and potentially other interlinked rights. For this reason, the measures' necessity and proportionality must be demonstrated. Family members may be significantly adversely affected by such measures given the co-dependency of financial resources and financial instruments for many and given the gender profiles of RTOs there may be a distinctly gendered effect produced by such registration requirements. Moreover, its automatic applicability casts doubt on the necessity of imposing such measures in each individual case, while the lack of a review further raises issues with respect to proportionality. I therefore recommend setting up robust safeguards that adequately address the risk of arbitrary interference involved by the intrusiveness of the measures.[35] In addition, I recommend the establishment of clear 'off-ramps' for such notification measures if an offender is socially integrated and rehabilitated and poses no further threat.

21. **Clause 12** confers broad authority to conduct warrant-based searches of RTOs' addresses or addresses where they may be found. This clause does not require that the RTO have breached or is believed to have breached any notification requirement. Having the possibility to employ such intrusive measures without any suspicion of wrongdoing, merely "for the purpose of assessing the risks posed by the person to whom the warrant relates"[36] raises serious concerns as to the necessity and proportionality of the measures. The broad authority may further sustain stigma for ex-offenders, posing barriers to successful re-integration, employment opportunities, and normal family life. Such outcomes are not conducive to the prevention of terrorism and may compound exclusion and ex-offender discrimination.

22. **Clause 17** and **Schedule 2** extend the period of time for which biometric data (fingerprints and DNA samples) can be retained by the Government. The changes sought by this clause would allow the government to retain, for a period of three years and without the consent of the Commissioner for the Retention and Use of Biometric Material (Biometric Commissioner), the biometric data of individuals who were arrested in connection with a terrorist offence, even if subsequently not charged or convicted of such.[37] The draft Bill also seeks to increase the national security determination extension for retention from two to five years.[38] At no point does the Government have an obligation to notify the subject of the national security determination. The Government has not provided evidence supporting the necessity of the newly proposed broad powers for public order or national security purposes or that the current retention period is insufficient. Furthermore, the removal of the oversight exercised by the Biometric

[35] See also, Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, para 49; Written Evidence to the Joint Committee on Human Rights, Professor Emeritus Clive Walker, pp. 23-25.
[36] Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19, paras 50-51.
[37] Counter Terrorism and Border Security Bill 2017-19, *Explanatory Notes*, para. 113.
[38] *Explanatory Notes*, para. 118.

Commissioner further raises the risk of arbitrary, including discriminatory,[39] use of the power, in violation of the United Kingdom's human rights obligations, including those relating to the right to privacy under Article 17 of the ICCPR and Article 8 ECHR.

C. PERSONS VULNERABLE TO BEING DRAWN INTO TERRORISM

23. **Clause 18** of the Bill amends Sections 36 and 38 of the Counter Terrorism and Security Act 2015, thereby extending the scope of the Prevent Strategy by authorizing local authorities, in addition to police, to refer individuals considered as vulnerable to being drawn into terrorism to so-called "Channel panels".

24. I note the calls by diverse stakeholders, including the Joint Committee on Human Rights, international human rights mechanisms, such as the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance[40] as well as civil society to conduct a comprehensive and independent audit of the Prevent strategy. Against this background, I recommend that the United Kingdom launch an independent review of the Prevent Strategy and that such review incorporates a comprehensive assessment of the Strategy's human rights impact.

D. BORDER SECURITY

25. **Clause 20** and **Schedule 3** of the Bill provide for stop and search as well as detention powers at ports and borders to determine whether an individual is or has been involved in "hostile activity for, on behalf of, or otherwise in the interests of, a State other than the United Kingdom".[41] The Bill provides for a broad definition of "hostile acts' as any act that threatens national security, the economic well-being of the United Kingdom, or is an act of serious crime. It does not provide for a definition of "national security" or "economic wellbeing" nor does it delineate the scope of acts that may be deemed as threats to these interests. While the government contends that the terms "take their ordinary meaning"[42], the lack of proper guidance raises issues regarding the level of foreseeability of the law, both for implementing authorities and individuals impacted by their implementation. The powers can be exercised without any cause or suspicion as to the respective person's involvement in hostile activity, thus further broadening the discretion conferred upon national authorities.

26. Any person subject to this power must provide any information or document requested by the officer under pain of committing an offense - the penalty for which can be imprisonment and/ or a fine[43] - and may have their personal belongings copied and retained, including belongings containing privileged information.[44] Access to a lawyer is

[39] Liberty, Liberty's Second Reading Briefing on the Counter-Terrorism and Border Security Bill 2018, June 2018, para. 28.
[40] https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23073&LangID=E
[41] Counter Terrorism and Border Security Bill 2017-19, *Explanatory Notes*, paras. 130-31.
[42] *Explanatory Notes*, para. 132.
[43] Counter Terrorism and Border Security Bill, Schedule 3, para. 3 (a-d).
[44] Schedule 3, para. 11. Such measures are however subject to the oversight of the Investigatory Powers Commissioner.

limited in case questioning lasts for under an hour[45] and even afterwards the person can only consult with the lawyer in the presence of a police officer.[46]

27. The exercise of these powers constitutes an interference with a series of rights, including the rights to privacy, freedom of expression, freedom of movement, the right to liberty and security of person and others. The discretion conferred upon authorities is very broadly defined with insufficient safeguards against abusive implementation and with limited oversight.[47] In this respect, I would like to warn, in particular, of the risk of such powers being applied in a discriminatory fashion on grounds including race, colour, language, religion, or national origin.

CONCLUSION

28. I stress the importance of bringing the draft Bill in line with the United Kingdom's obligations under international human law. I recommend that the Committee review the necessity of the offenses criminalized in Clauses 1-3 for efficiently addressing the terrorist threat. I further reiterate that any criminal offense must be precisely and narrowly defined, and the discretion conferred upon implementing authorities must be limited. In addition, I underscore the need to ensure that such provisions do not unduly interfere with human rights, including the right to freedom of expression, to seek, receive and impart information and ideas and the right to hold opinions without interference. Moreover, counter-terrorism powers must also be narrowly conceived and in line with the principles of necessity, proportionality and non-discrimination. I highlight that the legal framework must incorporate adequate and sufficient safeguards, including independent oversight. I therefore recommend that the draft Bill be amended with due consideration of the concerns outlined above.

Finally, I would like to inform that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: https://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx
Please accept the assurances of my highest consideration.

Yours sincerely,

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

[45] Schedule 3, para. 5.
[46] Schedule 3, para. 26.
[47] The Special Rapporteur notes the lack of inbuilt judicial oversight in this regard.