

**Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance**

REFERENCE:  
AL USA 14/2020

11 June 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Working Group on Arbitrary Detention; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, pursuant to Human Rights Council resolutions 40/16, 42/22, 35/15, 34/18, 41/12 and 34/35.

In this connection, we offer the following comments expressing our concern about the statement made by the Attorney-General of the United States, William Barr, on 31 May 2020, in regard to the ongoing protests in the United States following the killing of George Floyd in Minneapolis on 25 May 2020. Mr. Barr set out a number of propositions of considerable legal import including that:

“To identify criminal organizers and instigators, and to coordinate federal resources with our state and local partners, federal law enforcement is using our existing network of 56 regional FBI Joint Terrorism Task Forces (JTTF).

The violence instigated and carried out by Antifa and other similar groups in connection with the rioting is domestic terrorism and will be treated accordingly.”<sup>1</sup>

We also note that on the same date the President of the United States, Mr. Donald J. Trump stated by tweet that: “The United States of America will be designating ANTIFA as a Terrorist Organization.”<sup>2</sup>

We respectfully address a number of the human rights challenges evidenced in the Attorney-General’s statement and advance our views that the human rights implications of this statement are considerable and not in compliance with the United States’

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<sup>1</sup> <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism>

<sup>2</sup> <https://twitter.com/realDonaldTrump/status/1267129644228247552>

international human rights obligations. While no legislative action has to date been taken by the United States government, we respectfully submit that the positions set out above are of considerable concern, including but not limited to the effects of the proposed designations on the policing and investigatory resources of the United States under the banner of ‘domestic terrorism’ regulation.

We remind your Excellency’s Government that counter-terrorism conventions should be used as the appropriate trigger for determining what conduct is to be proscribed as terrorism, in the absence of a comprehensive multilateral treaty on terrorism.<sup>3</sup> This includes but is not limited to the International Convention for the Suppression of the Financing of Terrorism. In addition, Security Council resolution 1566 (2004), as well as the report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, and the model definition of terrorism advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism provide clear guidance to States on appropriate conduct to be proscribed.<sup>4</sup> The definition of terrorism and terrorism activity must be confined to acts that are ‘genuinely’ terrorist in nature in accordance to the three cumulative elements identified by the Security Council in its resolution 1566 (2004), paragraph 3 supported and affirmed by the model definition of terrorism developed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism as best practice.<sup>5</sup> Those elements include:

- a) Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; and
- b) Irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act; and
- c) Such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.<sup>6</sup>

This cumulative approach functions as a safety threshold to ensure that it is only conduct of a terrorist nature that is identified as terrorist conduct.<sup>7</sup> In this regard, we caution against the use of counter-terrorism rhetoric and regulation directed at ill-defined

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<sup>3</sup> E/CN.4/2006/98 para. 32.

<sup>4</sup> A/59/565 (2004), para. 164 (d); See e.g. the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) of 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (1970); the International Convention on the Taking of Hostages (Hostages Convention) of 1979; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971; and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973; E/CN.4/2006/98 paras 25-50, 72

<sup>5</sup> A/HRC/16/51

<sup>6</sup> E/CN.4/2006/98, para 37.

<sup>7</sup> E/CN.4/2006/98, para.38.

organizations, and arising in the context of broad societal unrest and protests occasioned by the lethal use of force by police against an African American man in Minneapolis, Minnesota.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has highlighted the dangers of overly broad definitions of terrorism in domestic law and practice that fall short of international treaty obligations. She notes that to be “prescribed by law” a counter-terrorism prohibition must be framed in such a way that regulatory processes and substantive law are adequately accessible, so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct accordingly.<sup>8</sup>

We would like to bring to the attention of your Excellency’s Government that in her report to the General Assembly on the impact of counter-terrorism measures on civil society and human rights defenders, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism urged States to ensure that their counter-terrorism legislation is sufficiently precise to comply with the principle of legality, so as to prevent the possibility that it may be used to target civil society on political, racial, religious or other unjustified grounds.<sup>9</sup> We note that loose or inaccurate designation of individuals or groups as “terrorists” is frequently accompanied by exceptional measures under domestic law including due process exceptionality,<sup>10</sup> administrative measures (including but not limited to watchlisting or being placed on terrorism databases),<sup>11</sup> and the discriminatory application of police and security sector powers against particular groups including religious minorities, ethnic groups and persons of colour. In this regard, we would like to stress that detention can be considered arbitrary when based on vague or imprecise legislation, on discriminatory grounds, when it is imposed without a legal process or through one that is in clear violation international fair trial standards.<sup>12</sup> We recall that a failure to restrict counter-terrorism laws and related measures to the countering of conduct which is truly terrorist in nature also pose the risk that, where such laws and measures restrict the enjoyment of rights and freedoms, they will offend the principles of necessity and proportionality that govern the permissibility of any restriction on human rights.<sup>13</sup>

We note that the United States does not have a domestic legal basis that explicitly allows for the designation of domestic groups as terrorist organizations, and existing

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<sup>8</sup> E/CN.4/2006/98, para.46

<sup>9</sup> A/70/371, para. 46(c).

<sup>10</sup> A/HRC/37/52

<sup>11</sup> Noting significant human rights concerns that prevail if, for example, decisions are taken following secretive proceedings, in absentia or on the basis of vaguely defined criteria A/HRC/28/28, para. 50; and A/71/384.

<sup>12</sup> CCPR/C/GC/35, paras. 17 and 22.

<sup>13</sup> E/CN.4/2002/18, Annex, para. 4(b).

designation authority applies only to foreign organizations.<sup>14</sup> It appears that the proposed designation does not apply to a foreign terrorist organization. Moreover, existing regulation follows from a statutory power which is restricted to an exceptional threat stemming in “whole or in part” outside United States territory, which would not be satisfied in the case of a movement operating in whole within the United States.

We also take note of the Federal Bureau of Investigation’s definition of terrorism which identifies ‘domestic terrorism’ as ‘violent, criminal acts committed by individuals and/or groups to further ideological goals stemming from domestic influences, such as those of a political, religious, social, racial, or environmental nature.’<sup>15</sup> We point out that this definition reaches to property offences and lesser criminal damage, and means that this domestic standard is not aligned with agreed international treaties on terrorism and UN Security Council Resolution 1566, particularly in respect of the targeting of civilians.<sup>16</sup> It is of significant concern to us that the investigation of, and prioritization of resources towards, ‘domestic terrorism’ in the United States is premised on an operational standard that falls significantly below best international practice.

In this regard, we note that the principle of *nullum crimen sine lege* in article 15 of the ICCPR entails a positive duty of the State to precisely and unambiguously defines the punishable offence.<sup>17</sup> Moreover, any such criminalisation must be non-discriminatory and cannot extend to conduct that is protected under international law.

We are deeply concerned that the precedent of assigning terrorist status to any organization whose organizational structure, aims and composition is unclear, inappropriately broadens the definition of terrorism, undermines legal certainty and creates clear and present risks to the protection of human rights and fundamental

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<sup>14</sup> The Secretary of State designates a list of Foreign Terrorist Organizations (FTOs) United States Department of State, “Foreign Terrorist Organizations,” <https://www.state.gov/j/ct/rls/other/des/123085.htm>. While the Foreign Terrorist Organization list is the most prominent — another relevant lists include the “Terrorist Exclusion List” <https://www.state.gov/j/ct/rls/other/des/123086.htm>, the “Specially Designated Terrorists” (SDTs) list; and, the state-sponsors of terrorism list. We also note the existence of the Treasury Department’s listing of terrorists under Executive Order 13224, pursuant to the International Emergency Economic Powers Act. Listing under this order enables a block on the U.S. property and interests of foreign persons determined by the Secretary of State to have committed, or “pose a significant risk of committing,” acts of terrorism that threaten U.S. national security.

<sup>15</sup> FBI definition found at: <https://www.fbi.gov/investigate/terrorism>

<sup>16</sup> OP 3 of UNSCR 1566 (2004), “Recalls that 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, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature”.

<sup>17</sup> See e.g. Human Rights Committee, General Comment no. 29, para. 7. See also Inter-American Court of Human Rights, *Castillo-Petruzzi et al v Peru*, Judgment of 30 May 1999, Series C, No. 52, para. 121.

freedoms. We are profoundly concerned that the United States is creating a precedent in defining certain manifestation of protest as domestic terrorism and failing to distinguish between threats that are genuinely terrorist in nature and those which are not. We believe that it is the government's duty to demonstrate that there is objective reason to believe that acts that qualify as domestic terrorism under 18 USC Section 2331(5) have been committed, and we do not believe that any such process has been undertaken. The failure to address specific conduct and particular perpetrators in the public position articulated by the Attorney-General in our view weakens and undermines human rights protections as well as the global fight against terrorism more broadly.

We affirm that regular criminal law and fair criminal justice process should be applied to those who have transgressed criminal law. Designating any violent action as terrorism does not advance the common interests of States, nor does it address the fundamental and systematic inequalities and discrimination that have given rise to extensive protest in the United States in particular. We urge the United States government to uphold its constitutional and international law commitments to freedom of expression, freedom of peaceful assembly, liberty and security of a person, due process and the rule of law.

Article 19 of the ICCPR protects the right to freedom of expression. It protects all expressions of opinion capable of transmission to others, including political discourse, commentary on one's own, and on public affairs. It even protects expression that may be regarded as deeply offensive.<sup>18</sup> Any restriction to the right to freedom of expression must be provided by law, meet one of the exhaustively enumerated legitimate aims in Article 19 (3), and be necessary and proportionate to achieve their protective function. The requirement of legality entails that laws must be drafted with "sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."<sup>19</sup> The State has the burden of proof to demonstrate that these three requirements are met in respect of each individual whose rights are restricted.

Moreover, "the proper management of assemblies requires the protection and enjoyment of a broad range of rights by all the parties involved ... including the rights to: freedom of peaceful assembly, expression, association and belief; participation in the conduct of public affairs; bodily integrity, which includes the rights to security, to be free from cruel, inhuman or degrading treatment or punishment, and to life; dignity; privacy; and an effective remedy for all human rights violations".<sup>20</sup> Thus, even if some participants in an assembly are not peaceful and "as a result forfeit their right to peaceful assembly, they retain all other rights, subject to normal limitations".<sup>21</sup>

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<sup>18</sup> Human Rights Committee, General Comment no 34 (CCPR/C/GC/34), para. 11.

<sup>19</sup> *Id.* para. 25.

<sup>20</sup> Joint report of the Special Rapporteur on Freedom Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (A/HRC/31/66), para. 8:  
<https://undocs.org/A/HRC/31/66>

<sup>21</sup> *Id.* at para 9.

The misuse of terrorism rhetoric and regulation is not a solution for addressing structural discrimination, social inequity, and police violence. The United States should be a leader on countering terrorism through a rule of law and human rights based framework, not a violator of the fundamental rights that are necessary to address complex social, political and economic challenges. We reiterate that the proposed designations of ill-defined groups as domestic terrorist organizations would not be compatible with international human rights law binding on the United States, or with best practice in relation to counter-terrorism strategies.

We recall the fundamental importance of ensuring that every restriction imposed on rights is fully compatible with international human rights law. We call upon Your Excellency's government to recognize, both in law and practice, that counter-terrorism designation does not eviscerate freedom of expression and freedom of assembly as individual rights, and that they remain protected, subject only to those restrictions that are permitted under international human rights law.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information in details of how your Excellency's Government's purported designation of these groups comply with the United Nations 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, in particular with international human rights law.
3. Please provide further information of how the definition of terrorism in the statement by Attorney-General Barr is narrowly construed to guarantee that measures taken pursuant to it do not unduly interfere with human rights while complying with the principle of legality. Please also explain how the government's approach aligns with the model definitions developed by the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.
4. Please explain how Attorney-General's Statement (and any changes made to it since the date of this communication) is compatible with Your

Excellency's Government's obligations under articles 7, 11, 12, 19 and 20 UDHR, articles ICCPR 2, 15, 19 and 21.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Given the seriousness of the matter, we believe that it requires the most serious attention on the part Your Excellency's Government and would thus appreciate a response to this communication at your earliest convenience. For the same reason, we may publicly express our concern in the case. Any public expression of concern on our part will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question

Please accept, Excellency, the assurances of our highest consideration.

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

Leigh Toomey  
Vice-Chair of the Working Group on Arbitrary Detention

Agnes Callamard  
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David Kaye  
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## **Annex**

### **Reference to international human rights law**

In connection with the above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

In connection with the above alleged facts and concerns, we would like to refer your Excellency's Government to articles 7, 11, 12, 19 and 20 of the Universal Declaration on Human Rights and Articles 2, 15, 19 and 21 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States on 8<sup>th</sup> June 1992, which guarantees the principle of *nullem crimen sine lege*, and the rights to freedom of expression and freedom of association. In particular, we wish to remind your Excellency's Government that any restrictions to the exercise of these rights under articles 19 and 21 of the ICCPR must be provided by law and be necessary and proportionate to the aim pursued.

The scope of the right to freedom of expression is broad. Article 19(2) of the ICCPR "protects all forms of expression and the means of their dissemination", including political discourse, commentary on one's own and on public affairs, canvassing and discussion of human rights, such as boycott movements, see General Comment 34, para. 11. In order to be lawful, any restrictions imposed on the right to freedom of expression must be compatible with Article 19 (3) of the Covenant. This includes restrictions on discussion of government policies and political debate, reporting on human rights, and engaging in peaceful demonstrations. Pursue one of the legitimate aims exhaustively listed in the provision, be provided by law, and be necessary and proportionate. The State has the burden of proof to demonstrate that any restrictions to the right to freedom of expression is compatible with the Covenant.

We also remind that the right to freedom of association is an essential components of democracy as it empowers individuals to "express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable", as enunciated in the Human Rights Council Resolution 15/21.

We would also like to refer to Human Rights Council resolution 22/6, which urges States to ensure that measures to combat terrorism and preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights. (OP 10).

In this regard, we would like to bring to the attention of your Excellency's Government that the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism urged States to ensure that their counter-terrorism legislation is sufficiently precise to comply with the



principle of legality, so as to prevent the possibility that it may be used to target civil society on political or other unjustified grounds. (A/70/371, para 46(c)).

With respect to the use to counter terrorism and extremism justifications to restrict the legitimate exercise of freedom of expression, we would like to underline that any restriction on expression or information that a government seeks to justify on grounds of national security and counter terrorism must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest (CCPR/C/GC/34). We would like to stress that counter terrorism legislation with penal sanctions should not be misused against individuals peacefully exercising their rights to freedom of expression and freedom of peaceful association and assembly. These rights are protected under ICCPR and non-violent exercise of these rights is not a criminal offence. Counter terrorism legislation should not be used as an excuse to suppress peaceful minority groups and their members.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism would also like to bring to the attention of the Government paragraphs 74 to 78 of A/HRC/37/52 and her 2018 report to the Human Rights Council A/HRC/40/52, in particular paragraphs 36, as well as, paragraphs 75 (a) to (i).

With regard to definitions of terrorism under domestic law and their use to proscribe organisations under international law. We bring your Excellency's Government attention to the "principal of legal certainty" under international law (ICCPR article 15(1)) which requires that criminal laws are sufficiently precise so it is clear what types of behaviour and conduct constitute a criminal offence and what would be the consequence of committing such an offence. This principle recognizes that ill-defined and/or overly broad laws are open to arbitrary application and abuse. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has highlighted the dangers of overly broad definitions of terrorism in domestic law that fall short of international treaty obligations (A/73/361, para.34).

We recall and highlight the preamble to United Nations Security Council Resolution 1373, which affirms the need to combat terrorist acts "by all means, in accordance with the Charter of the United Nations".<sup>22</sup> As the Charter makes substantial references to human rights protection, this affirms the reference to the need to promote and respect human rights norms including when addressing terrorism domestically. The Security Council consistently includes language on the need for States to ensure that "any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law" in chapter VI and chapter VII resolutions addressing terrorism. The Council resolutions also incorporate language according to which "effective counter-terrorism measures and respect for [...] the rule of

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<sup>22</sup> [S/RES/1373](#).

law are complementary and mutually reinforcing” and that they are “an essential part of a successful counter-terrorism effort.”<sup>23</sup> We further note that General Assembly resolution 63/185, para. 18, and E/CN.4/2006/98, para. 49, equally affirm that the definition of terrorism and related offences must be “accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law”.

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<sup>23</sup> See Security Council resolutions [2129 \(2013\)](#), [2170 \(2014\)](#). See also [2178 \(2014\)](#) (“[T]he rule of law [is] complementary and mutually reinforcing with effective counter-terrorism measures, and [is] an essential part of a successful counter-terrorism effort . . . .”); [2395 \(2017\)](#) (“[T]he rule of law [is an] essential component[] of counterterrorism, and recognizing that effective counterterrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing . . . .”); and [2396 \(2017\)](#) (“[T]he rule of law [is] complementary and mutually reinforcing with effective counter-terrorism measures, and [is] an essential part of a successful counter-terrorism effort . . . .”).