

**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 right to privacy; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

REFERENCE:  
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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 right to privacy; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 40/16, 42/22, 35/15, 37/2 and 34/19.

In this connection, we offer the following comments directed to the Counter Terrorism and Sentencing Bill, which is currently before Parliament. We raise concerns in relation to its compatibility with the United Kingdom's obligations under international human rights law and in relation to pertinent international standards of counter-terrorism regulation. In particular, we note that as currently drafted, the Bill could seriously impact the rights of individuals who are simply 'suspected' of terrorism rather than convicted of a terrorism-related offence as well as substantially enhance sentencing for a number of individuals convicted of a range of offences, and *inter alia* limit the capacity of a convicted person to obtain sentence review through process of parole. We are also concerned that the legislation is dispensed through Parliament during the COVID-19 pandemic, which does not permit in-depth public scrutiny of and engagement with the text. Compliance with human rights treaties and standards are complementary and mutually reinforcing goals with effective counter-terrorism measures.<sup>1</sup> We, therefore, encourage an ongoing review and reconsideration of certain key aspects of the Bill to ensure that it is in compliance with your Excellency's Government's international human rights obligations.

**Overview of international human rights law standards applicable**

We respectfully call your Excellency's Government's attention to the relevant provisions enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). In particular, we consider international human rights standards applicable under article 9 ICCPR and article 5 ECHR, which provide for the right to liberty and security; article 15 ICCPR and 7 ECHR, which protects the principle of legality; articles 19, 21 and 22 ICCPR and articles 10 and 11 ECHR, which guarantee the universally-recognized right to freedom of opinion and expression and freedom of peaceful assembly and association; article 18 ICCPR and 9

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<sup>1</sup> A/HRC/16/51 para. 8.

ECHR which protect the right to religion and belief; and article 14 ICCPR and article 6 ECHR, which protect the right to a fair trial and the presumption of innocence. We also refer to article 17 ICCPR and article 8 ECHR, which protect against arbitrary or unlawful interference with a person's privacy, reputation and home; and article 12 ICCPR, which protects freedom of movement. We also consider article 2 ICCPR and 1 ECHR, whereby the State is under a duty to adopt laws that give domestic legal effect to the rights and adopt laws as necessary to ensure that the domestic legal system is compatible with the Covenant.<sup>2</sup>

We further refer to the relevant provisions of the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2242 (2015), 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. These resolutions require that States must ensure that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of their obligations under international law.

### **Concerns relating to the compatibility of the Bill with international human rights law**

The Bill proposes fundamental changes to the current Terrorism Prevention and Investigation Measures (TPIM), currently under section 3 TPIM Act 2011. We note that the Counter-Terrorism and Sentencing Bill aims to amend the standard of proof for Terrorism Prevention and Investigation Measures (TPIMs). Under draft Clause 37 of the Bill, the Secretary of State will no longer be required to be "satisfied, on the balance of probabilities" that the individual was, or had been, involved in terrorism-related activity. It will suffice that the Secretary of State has "reasonable grounds for suspecting" that the individual was involved in terrorism-related activity. In practice, this means that TPIMs can be imposed on a broader range of individuals: those that might, but also might not be, engaged in acts of terrorism. We also note that under draft Clause 38 of the Bill, the two-year cap on TPIMs would be removed, so that they can be indefinitely renewed, without limiting such cases to the most serious cases of continuing terrorism-related activity, and without heightened judicial oversight. Further, the 14 restrictions currently in place under TPIMs would be broadened, and draft Clause 40 removes the limitations on the number of hours that the Secretary of State can require an individual to remain inside their home each day.

The proposed changes are significant departures from the current TPIM regime, which was enacted in 2011 to replace broad control orders that had been struck down by the Courts due to their overbroad nature and impact. We caution that the proposed new powers relating to TPIMs, in both lowering the burden of evidence and in expanding their scope and duration, do not seem to have been given a sufficient justification that would be rooted in and satisfy both the principle of necessity and of proportionality. The broad

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<sup>2</sup> See Leyla Şahin v. Turkey [GC], No. 44774/98 at para. 136, ECHR 2005.

scope of provisions contained in the Bill, give rise to a real concern about the lack of a robust and independent review mechanism.

In our experience, the mere possibility of increasing the number of individuals subjected to administrative measures by broadening the basis and capacity of designation through lowering of the burden of proof almost inevitably leads to an over-imposition of the measures. Indeed, it is important to bear in mind that by its very nature, intelligence information (on which the imposition of TPIMs is based) can be inaccurate. The increased use of intelligence as a primary basis to underpin extensive administrative regulation, including measures that lead to *de facto* deprivation of liberty for individuals, the greater the possibility of fundamental errors. Specifically, there is a greater chance that individuals who have no link to terrorism-related activity are caught, their actions and intentions misinterpreted or misunderstood. Further, the concept embedded in this legislation of potential or likely terrorism-related activity brings the Bill's application squarely into "pre" crime-based regulation, a matter that deeply concerns us for its detrimental effects on the rule of law and the proportionate approach to sanction. In this regard, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has noted a pattern of regulation whereby legislation introduced to combat terrorism restricts rights by according broad powers to the executive, to the exclusion of judicial oversight and control.<sup>3</sup> We caution that broadening of powers conferred to the executive by this Bill may contribute to the arbitrary use of those powers, thereby diminishing civil liberties in the process and potentially disproportionately impacting on certain communities. We take this opportunity to stress that effectively countering terrorism can only be done with the trust of all communities within a society. Grievances, actual or perceived injustice, as well as violations of human rights can not only render sweeping change attractive, but it also breaks the very fragile yet essential trust between communities affected by terrorism and the government.

In this respect, we note that if the Bill were adopted, it may have a very serious impact on a number of fundamental rights and freedoms. We are particularly concerned at the impact that the extension of the number of hours in a designated location (home) – up to twenty-four hours a day – can have on the right to liberty and security, protected under article 9 of the ICCPR and article 5 of the ECHR. We recall that restrictions on liberty can become deprivations of liberty, particularly where the periods under which an individual must remain at home are very long, and that deprivations of liberty can, according to the UN Human Rights Committee, include house arrest.<sup>4</sup> We also recall that with respect to the Control Orders regime under the Prevention of Terrorism Act 2005 in force at the time, the UN Human Rights Committee expressed concern that it involved "the imposition of a wide range of restrictions, including curfews of up to 16 hours, on individuals suspected of being "involved in terrorism", but who have not been charged with any criminal offence".<sup>5</sup> Article 9(1) of the ICCPR requires that deprivation of liberty

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<sup>3</sup> A/63/223, para. 13; See, also, report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/4/25, para. 32.

<sup>4</sup> See Human Rights Committee 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.4.

<sup>5</sup> CCPR/C/GBR/CO/6, para. 17.

must not be arbitrary, and must be carried out with respect for the rule of law. It is our clear position that the removal of clear limits to curfews poses a serious danger that their imposition, on their own or combined with other rights-restricting measures – could amount to an arbitrary deprivation of liberty.

Further, we note that Article 5 ECHR sets out an exhaustive list of cases where a person may be deprived of liberty by law, and does not permit terrorism-related, or security-related, deprivation of liberty. Such a risk is enhanced by the fact that the ‘evidence’ on which the Secretary of State’s decisions will be made are secret, which in turn prevents a proper application of the procedural safeguards inherent to any deprivation of liberty, as guaranteed both under article 9(4) ICCPR and article 5(4) ECHR.

We are also concerned that due to its impact and potentially infinite duration, the measures permitted under the Bill could, in some cases, be considered as penal sanctions against non-convicted individuals, against whom there is no requirement that they have engaged in ‘new’ or ‘continuing’ terrorism-related activity. The ‘information’ used as the basis for making these rights-limiting decisions could therefore potentially only be required at the initial point of decision-making. Further, no increased specific standards to enforce such additional penalties are envisaged. This raises very serious concerns concerning the protection right to a fair trial, particularly the right to be presumed innocent, set out in article 14(2) ICCPR and article 6(2) ECHR indicating that every person charged with a criminal offence is entitled to be presumed innocent until proven guilty according to law. This means that it is the prosecution who bears the burden of proof to show guilt beyond a reasonable doubt; that the accused person is entitled to the benefit of the doubt; and that an accused person must be treated in accordance with the presumption of innocence.<sup>6</sup>

The imposition of certain measures contained in the Bill, notably those contained in Clause 39 and 40 would, by obliging individuals to live in a certain place, or by further confining them to a home, could further seriously interfere with the privacy, reputation and liberty of individuals contravening article 17 ICCPR and article 12 UDHR, which protects against arbitrary or unlawful interference with a person’s privacy and home.

Interference with an individual’s right to privacy is only permissible if it is neither unlawful nor arbitrary.<sup>7</sup> We also note that the imposition of such measures could seriously encroach upon freedom of movement, freedom of association and assembly, the right to participate in religious and cultural life, the right to health, the right to work and the right to education, for example if curfews impede on working or school hours. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism conveys her concern at the restrictions that extensive home-based detention place on freedom to work. Freedom to work is guaranteed by international treaties<sup>8</sup> and can be limited by proportionate and non-discriminatory

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<sup>6</sup> Human Rights Committee, general comment No. 32, para. 30. <sup>[1]</sup><sub>SEP</sub>

<sup>7</sup> ICCPR art. 17(1); Human Rights Committee, general comment No. 16, para. 3.

<sup>8</sup> International Covenant on Economic, Social and Cultural Rights, art. 6.

measures. Unemployment compensation and social assistance are not substitutes for work. Disabling an individual's capacity to fully engage in society has significant effects on broader terrorism prevention goals, including integration and inclusion.<sup>9</sup> These rights and freedoms represent an essential condition for the free development of individuals, as recognized by international and regional human rights mechanisms, and are "essential to the realization of other human rights and form an integral and inseparable part of human dignity."<sup>10</sup> The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism again recalls the role that these rights play in preventing marginalization and polarization and ensuring that individuals have the opportunity to integrate fully into society.

We would also note the impact that these measures can have on the right to privacy and home or to honour and reputation. We remind your Excellency's Government that the Human Rights Council has found that the right to privacy is a human right that supports other human rights and forms the basis of any democratic society.<sup>11</sup> Countering terrorism does not give States a carte blanche, which automatically legitimates any interference with the right to privacy.<sup>12</sup> Limitations to the right to privacy or other dimensions of article 17 are subject to a permissible limitations test, which holds that restrictions that are not prescribed by law are "unlawful" in the meaning of article 17, and those that fall short of being necessary or do not serve a legitimate aim constitute "arbitrary" interference with the rights provided under article 17, as set forth by the Human Rights Committee in its general comment No. 27 (1999). We also recall that where the exercise of functions and powers relating to counter-terrorism legislation involves a restriction upon a human right that is capable of limitation, any such restriction should be to the least intrusive means possible and shall (a) be necessary in a democratic society to pursue a defined legitimate aim, as permitted by international law; and (b) be proportionate to the benefit obtained in achieving the legitimate aim in question.<sup>13</sup> The Special Rapporteur on the right to privacy has outlined the underlying principles of his draft legal instrument on government led surveillance and we note their relevance here.<sup>14</sup>

Our second series of concerns relate to the Bill's envisaged sentencing reforms. We note that Clauses 4-14 of the Bill provide for a "Serious Terrorism Sentence" applicable where either the terrorist offence or a combination of offences "was very likely to result in or contribute to (whether directly or indirectly) the deaths of at least two people" whether the risk of multiple deaths condition is met whether or not any death actually occurred, when for which there is a minimum 14-year custodial term as well as a licence period of a minimum 7 and maximum 25 year period. We also refer to this being the case whether the offender "was or ought to have been, aware of that likelihood". Similarly, we note that while the existence of a 'terrorist connection' already existed in the counter-terrorism regime<sup>15</sup> it was limited to a range of well-defined offences. Clause

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<sup>9</sup> Secretary-General's Plan of Action to Prevent Violent Extremism (A/70/674), paras. 3, 4, 9, 25 and 26.

<sup>10</sup> CESCR, General Comment 18, E/C.12/GC/186 (24 November 2005), par. 1

<sup>11</sup> A/HRC/13/37, para. 11.

<sup>12</sup> A/HRC/13/37, para. 13.

<sup>13</sup> A/HRC/16/51, para. 14, Practice 2 (3).

<sup>14</sup> A/HRC/34/60 and A/HRC/37/62 and Annex 7.

<sup>15</sup> Counter-Terrorism Act 2008

1 of the Bill proposes to extend that list to include “any other offence” punishable with a term of imprisonment of more than two years, which allows for an almost limitless application of the harsher sentencing.

We are concerned that such provisions leave too much leeway for assumptions and lack straightforwardness relating to links, causation, and presumptive knowledge, particularly in cases where the offences have not been fully completed. Relatedly, the term “terrorist connection” used in this context, but present throughout the Bill, in our view, lacks clarity and introduces broad discretion to those in charge of sentencing. We are also concerned with the uncertainty and lack of legal certainty that follows for judges in having to determine as a statutory threshold whether the serious terrorism offence was “... very likely to result in or contribute to (whether directly or indirectly)” multiple deaths, and whether the offender “...was, or ought to have been, aware of that likelihood”. Affirming causation and/or construction knowledge of incomplete criminal offences is a highly complex and challenging task. The formulation of this legislation will, in our view, make this task more challenging and bring a significant degree of legal uncertainty into sentencing practice, compounding rule of law challenges with the legislation. Such unclear provisions pose a fundamental challenge to the principles of legality and of certainty of the law, enshrined in article 15(1) ICCPR and article 7 ECHR and non-derogable even in times of emergency. This principle requires that criminal laws must be 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.<sup>16</sup>

We note, also, that the Bill proposes to introduce the use of polygraphs (Clauses 32-35). However, worryingly, the purpose of their introduction remains unspecified in the draft. It is a grave concern that the introduction of polygraphs in the context of this law would seem to be aimed at allowing the use of polygraph testing to be used in TPIM proceedings as a basis for securing them. Given the absence of reliability of information obtained through polygraph testing and the serious implications that this can have on due process and on the right to privacy, this is serious concern. We recall that statements made under polygraph examinations should very clearly be excluded from any criminal proceedings.<sup>17</sup> This should also be the case for any psychological assessment made as a result of polygraph examinations. It is our clear position that given the very serious consequences that the imposition of TPIMs can have on fundamental rights and freedoms, statements made under polygraph examinations should very clearly be excluded from any TPIM process and procedure. We recall that the use of polygraphs should never be made compulsory, and that individuals must always give their informed consent before their use.

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<sup>16</sup> A/70/371, para. 46(c)); A/73/361, para. 34.

<sup>17</sup> This is the general position under the Offender Management Act 2007.

Finally, we note with concern that clauses 27-31 propose to remove the Parole Board's power to direct early release of certain dangerous terrorist offences. The proposal would apply not only to persons who have been convicted of serious terrorism offences but to any terrorist offender determined to be dangerous by the sentencing court. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism underscores the importance and valuable role played by the Parole Board in the assessment of all offenders, and the value of this independent, expert and multi-faceted review process. Its function has been best practice for the United Kingdom and it has been identified as a model of use for other States. We recall the Mandela Rules, which stress that the treatment of prisoners should emphasize their continuing membership of the community not their exclusion from it.<sup>18</sup> The separation out of terrorism offences from all other categories of dangerous offence undermines the possibility of early release operating as an incentive to good and reintegration-focused behavior, as well as to incentivize positive behavior within the prison and it takes away a significant assessment point to independently assess risk. We are particularly concerned that the opportunity for early release has been entirely removed from child terrorist offenders, in contravention of the Convention on the Rights of the Child article 40 (1), which mandates that States 'take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'. We are also concerned that the requirement of mandatory minimum sentences for all adult offenders, however young they may be, and may disable Judges from taking properly into account "exceptional circumstances" including age in sentencing.<sup>19</sup>

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 assessment of the Bill.
2. Please explain how the Bill is compatible with your Excellency's Government's obligations under articles 2, 5, 14, 15, 17, 19, 20, 21 and 26 ICCPR and how it may remediate the aforementioned inconsistencies with international human rights standards enshrined in the Bill.
3. Please explain how the Bill is compatible with your Excellency's Government's obligations under article 40 of the Convention on the Rights of the Child and how you may remediate the aforementioned inconsistencies with international human rights standards enshrined in the Bill.
4. Please identify the positive measures and oversight provided by your Excellency's government on the excise of the powers now enumerated in the Bill.

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<sup>18</sup> The United Nations Minimum Standard Rules for the Treatment of Prisoners Rules 86-90

<sup>19</sup> Section 268B(2) Criminal Justice Act 2003 inserted by clause 4.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

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

Elina Steinerte  
Vice-Chair of the Working Group on Arbitrary Detention

Agnes Callamard  
Special Rapporteur on extrajudicial, summary or arbitrary executions

Joseph Cannataci  
Special Rapporteur on the right to privacy

Nils Melzer  
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment