



10th December 2018 Campaign

International Human Rights Day

« *The challenge of fundamental judicial safeguards in the fight against terrorism* »

- *The context of the campaign*

The terrorist threat is more present than ever in our societies and on all continents. States have the obligation to protect their citizen against such threat. However, the measures adopted to this end must comply with human rights. In recent years, the world has seen a proliferation of ultra-security measures: derogatory regimes regarding counterterrorism, states of emergency, strengthening of the role of intelligence services etc. While these measures are intended to protect citizens from human rights abuses by terrorist groups, more and more they constitute themselves a violation of human rights and the rule of law.

This approach is not only contrary to States' international obligations and commitments but also counterproductive. In fact, those violations of human rights and the rule of law contribute to creating a climate of impunity and call into question the effectiveness of counterterrorism.

- *A challenge to judicial safeguards surrounding detention*

Several human rights violations have been observed throughout the world in relation to counterterrorism particularly regarding legal safeguards relating to detention.

First, with regards to police custody of persons accused of terrorism, several States have integrated derogatory provisions in their domestic law. These provisions include the extension of the time limit for police custody. Indeed, several States have extended the length of detention without judicial authorization or without a review of the grounds for detention. Thus, persons accused of terrorism have been held in detention for long periods without being charged and without access to a judge. In addition, there is an increased use of incommunicado detention and/or by intelligence services, removing this detention from any judicial control.

Furthermore, judicial safeguards are not always enforced. Persons accused of terrorism are not necessarily informed of the reasons of their arrest and detention, cannot always inform their relatives and do not systematically have access to a lawyer and a doctor from the outset of their detention.

Similarly, the time limits for pre-trial detention have been extended in some countries and the control of detention limited in this context.

- *An increased risk of torture and other ill-treatment*

These measures are particularly problematic in that they increase the risk of torture and other forms of cruel, inhuman or degrading treatment or punishment. This is all the more worrying as it has been observed that there is a growing tendency from States to resort to interrogation methods that contravene the absolute prohibition of torture and other forms of ill-treatment, sometimes in a systematic and widespread manner. This trend has been accompanied by an increasing acceptance

of these methods by the public, mistakenly believing that they allow for a more efficient repression and prevention of terrorist acts.

- ***A vague and instrumentalised notion of terrorism***

It has been noted that States sometimes use very vague definitions of terrorism leaving them an important room for action. This calls into question the principle of legal certainty, thus creating a risk of arbitrariness. Moreover, this allowed various states to apply these provisions to other crimes or offences or even to legitimate activities such as the work of journalists, human rights defenders, minority groups, members of the political opposition or other individuals.

- ***Accepted limitations to human rights***

While limitations to the implementation of some human rights can be accepted in the context of counterterrorism, they must remain exceptional and comply with international law standards, namely that they must be prescribed by law, in pursuance of one or more specific legitimate purposes, necessary in a democratic society and proportionate. Moreover, the prohibition of torture is absolute and does not suffer from any exception as expressly provided for in international law¹. Thus, these limitations cannot contravene this right.

- ***Recommendations for the protection of human rights during detention in the context of counterterrorism***

Thus, the Working group on protecting human rights while countering terrorism has adopted several reference guides to assist States in the fight against terrorism while guaranteeing respect for human rights. Among these guides, the one on detention in the context of countering terrorism sets out 10 principles that States must respect. These principles are as follows:

- 1) No one shall be subject to unlawful or arbitrary deprivation of liberty in the implementation of counter-terrorism measures;
- 2) On arrest or detention on terrorism charges, persons must be informed of the reasons for arrest or detention, be promptly informed of any charges and of the person's rights and be informed of how to avail oneself of those rights, in a language, manner and format understood by the detained or arrested person. Competent authorities must record and communicate certain further information to the detained person and/or his or her legal counsel concerning the circumstances of the detention;
- 3) All persons deprived of liberty have the right to prompt and effective access to legal counsel;
- 4) Detention awaiting trial should be an exception and should be as short as possible;
- 5) Persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. Persons deprived of their liberty are entitled to the enjoyment of all human rights, subject to restrictions that are unavoidable in a closed environment. The modalities and conditions of detention must always be applied without discrimination and under the same conditions as for free persons. No one shall be subjected to torture or other forms of ill-treatment or punishment under any circumstances;
- 6) Any form of detention must be subject to effective oversight. A detained person must have access to independent complaints mechanisms. States have an obligation to undertake prompt, independent, thorough and impartial investigations into allegations of torture or ill-treatment and to institute criminal proceedings against the perpetrators of such acts. States should, and may be required by international obligations to, allow regular visits to places of detention by independent parties;

¹ Article 2, paragraph 2 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

- 7) Any form of detention must be subject to effective oversight and control by the judiciary. Any person arrested or detained for the alleged commission of a terrorist offence must be brought promptly before a judge or other officer authorised by law to exercise judicial power. All detained persons, whether the detention pertains to the alleged commission of a terrorist offence or for other reasons, must have the right to challenge in court the legality of their detention, including by way of habeas corpus;
- 8) Any form of administrative or 'preventive' detention for reasons of national security must be lawful and not arbitrary. All rights and guarantees applicable to detained persons must apply equally to such forms of detention. Immigration detention must be limited to such time as is reasonably necessary in the particular case, must be periodically reviewed, and must comply with all safeguards applicable to any other form of detention. Administrative detention should in principle not be used and, where used, must be restricted to exceptional circumstances. Other preventive measures, such as control orders, may amount to a deprivation of liberty;
- 9) Secret and incommunicado detention may never be used, including in the detention of terrorist suspects;
- 10) Persons unlawfully or arbitrarily deprived of their liberty shall have access to justice, including claiming remedies and reparation. Persons unlawfully or arbitrarily deprived of their liberty shall be immediately released and shall be entitled to reparation, including compensation, for the period of time unlawfully or arbitrarily detained. Detained persons whose rights have been violated whilst in detention shall be entitled to remedies and reparation. Information obtained through the use of torture or other forms of cruel, inhuman or degrading treatment shall be inadmissible as evidence.

- ***A return of the death penalty***

Finally, it is particularly worrying to note that counterterrorism enabled some countries to go back on the abolition of the death penalty. Several States have retained, extended or reinstate the death penalty for terrorism-related offences and not exclusively for « *the most serious crimes* » in accordance with article 6 paragraph 2 of the International Covenant on Civil and Political Rights. Yet, this practice is also a form of torture or other cruel, inhuman or degrading treatment or punishment.

- ***Final recommendations***

On the occasion of Human Rights Day 2018, the FIACAT and the ACATs call on all States to guarantee the respect for human rights while countering terrorism particularly the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment by ensuring inter alia, the respect of fundamental safeguards surrounding detention.

To go further:

- [Factsheet n°32 – Human Rights, Terrorism and Counter-terrorism;](#)
- [Counter-Terrorism Implementation Task Force, Basic Human Rights Reference Guide – Detention in the Context of Countering Terrorism ;](#)
- [Report of the Secretary-General, Protecting human rights and fundamental freedoms while countering terrorism, A/72/316, 2017;](#)
- [Report of the United Nations High Commissioner for Human Rights, Negative effects of terrorism on the enjoyment of all human rights and fundamental freedoms, A.HRC/34/30, 2017;](#)
- [Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/28/28, 2014;](#)
- [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, 2016;](#)
- [Council of Europe Convention on the Prevention of Terrorism, 2005;](#)
- [ACAT France, Humains n°05 – Démocratie : la tentation de la torture, 2018 \(only in French\);](#)
- [ACAT France, Rapport « Un monde tortionnaire » 2016 : que pensent les français de la torture \(only in French\).](#)