Persecuting Human Rights Defenders in the Name of Counterterrorism

In the last ten years, governments around the world have increasingly enacted laws aimed at criminalizing support of terrorist organizations. While these laws play an important role in combatting the financing and other material support of terrorist organizations, some states have adopted vague and sweeping laws that are susceptible to arbitrary or discriminatory application. Such laws have subsequently been used in frivolous prosecutions aimed at silencing journalists, lawyers, and other human rights defenders. This article will examine the genesis of these statutes, legal issues raised by the misapplication of these laws and best practices for implementing counterterrorism laws in a manner consistent with international law. Statutes restricting expression, association, and assembly are particularly susceptible to abuse as means to silence human rights defenders raising legitimate concerns about their governments’ human rights records.

I. Background

In the wake of terrorist attacks in the United States and the United Kingdom, both countries advocated for U.N. resolutions encouraging governments to criminalize the material support of terrorist organizations. In response to these pleas, the Security Council quickly and unanimously passed Resolution 1373 making it illegal to finance, plan or incite terrorist acts.\(^2\) The resolution called upon all member states to review and revise their national laws to ensure implementation

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\(^1\) This article was prepared by the Justice Defenders program of the American Bar Association Center for Human Rights. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association. This analysis is not intended as legal advice in any case. The Justice Defenders program provides *pro bono* assistance to human rights defenders who are the subject of harassment due to their advocacy efforts. The program is currently conducting an in-depth study of counterterrorism laws in Sub-Saharan Africa, on which we welcome comment or any information of past or ongoing cases. For further information about the program, please contact justicedefenders@americanbar.org or visit [http://www.americanbar.org/groups/human_rights/justice_defenders.html](http://www.americanbar.org/groups/human_rights/justice_defenders.html).

of international counterterrorism treaties. It provided that all states "should also ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that the seriousness of such acts is duly reflected in sentences served." In addition to setting out the obligation of States, the Security Council established a Counter-Terrorism Committee (CTC) to implement the resolution and monitor states’ compliance. The resolution does not define terrorism nor does it refer to human rights.

II. The Adoption of Vague and Sweeping Counterterrorism Statutes

Many repressive governments have pointed to the U.N. resolutions as justification for their own use of counterterrorism laws to harass human rights advocates. For example, when the U.N. Human Rights Committee questioned Ethiopia’s prosecution of journalists for reporting on conflicts in that country, government officials argued that Ethiopia’s counterterrorism law did not have a chilling effect upon freedom of expression because it was no different from the United Kingdom’s counterterrorism laws, which are viewed as compliant with the U.N. resolutions. Several other countries in the region have also searched, detained or charged lawyers and civil society leaders on the basis of what appear to be spurious counterterrorism accusations.

The U.N. Special Rapporteur on Freedom of Expression and Opinion has stated that “many Governments use anti-terrorism and national security legislation to restrict, partially or totally, freedom of opinion and expression and the right of access to information.” Echoing this concern, the U.N. High Commissioner for Human Rights noted that, while States have an obligation to protect individuals from terrorist acts, many counterterrorism measures “have been used to stifle the voices of human rights defenders, journalists, minorities, indigenous groups and civil society.” The U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has argued that restrictions on the right to association enacted for counterterrorism purposes should include safeguards to ensure that such restrictions are not used to infringe upon the rights of human rights defenders.

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3 SC Resolution 1373, ¶ 5
4 Id. at ¶¶ 6 - 7.
9 Id. at 43.
III. Attempts to Reform the System: CTC Best Practices

Recognizing the potential for the abuse of counterterrorism laws, the Security Council and the CTC took steps to ensure that States were meeting their human rights obligations while implementing counter-terrorism measures, acknowledging that important security concerns cannot override fundamental human rights. The Security Council adopted a resolution to remind State Parties that “they must ensure that any measures 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.”

The following year, the Security Council further strengthened the CTC’s role in ensuring respect for fundamental human rights when it passed Resolution 1624, which established that the CTC has a role in evaluating States’ human rights obligations.

IV. Establishing the Standard: Restricting Expression under International Law

Article 19 of the International Covenant on Civil and Political Rights guarantees the right to freedom of expression and only permits certain restrictions on this right. Any restrictions must serve a legitimate government interest and be narrowly tailored to address that interest.

With regards to the enforcement of counterterrorism laws that restrict the right to freedom of expression, the U.N. Special Rapporteur on freedom of expression has made clear that this right should generally only be the subject of restrictions when acts of expression rise to the level of inciting violence. To support such a claim, the State must prove that the statements were public, made with the intent to incite violence, and spoken in a context where there is a risk that they could, in fact, cause violence. First, any prohibition of incitement should be for “public provocation” only. This leaves non-public incitement to be dealt with under other concepts of liability such as conspiracy or aiding and abetting offenses. Second, the perpetrator must have the intent to incite a terrorist action. The speaker must have both the subjective intent to communicate the message and the intent that the message will incite terrorist activity. This

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15 Id.
17 Id.

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subjective intent requirement “eliminates many possible objections concerning freedom of expression and the value of intellectual discourse concerning unpopular ideas.”

Third, there must be an actual risk that such incitement will lead to a terrorist attack. The potential for the speech to cause violence must be sufficiently clear that the speaker is on notice of the danger. The “subjective intent requirement ensures that no innocent speaker risks being punished for unpredictable reactions by members of an audience.”

Finally, legislative or executive bodies cannot have the power to declare any particular declaration as incitement. This is a responsibility that must be reserved for an independent judicial body. In addition, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism emphasizes that the offense of incitement to terrorism “must be limited to conduct that is truly terrorist in nature; . . . must be prescribed by law in precise language, including by avoiding reference to vague terms such as ‘glorifying’ or ‘promoting’ terrorism; and should preserve the application of legal defenses.”

V. Vagueness: An Example

Many counterterrorism law do not include clearly defined terms and offenses. Article 14 of the ICCPR ensures the principle of legality, which requires states to precisely define all crimes so that the application of the laws and consequences of violations are reasonably foreseeable. Such specificity ensures that peaceful actions by associations such as labor, minority, or human rights groups are not subject to improper criminal penalties.

The definition of the offense must avoid general language that is ambiguous and fails to identify common characteristics, such as “material support for terrorism.” The term “material support” alone can mean material in the physical sense or material in a legal sense. Without any further explanation, this definition is too vague as it could include legitimate activities. In order to satisfy the principle of legality, “a list of factual examples identifying common


18 UNODC Report at ¶ 45.
19 Special Rapporteur, UNGA Report at ¶ 28.
20 UNODC Report at ¶ 46.
21 Id. at ¶ 45.
22 Id.
23 Best Practices at ¶ 31. Here, the Special Rapporteur specifically noted that this methodology should be applied to the Convention on the Prevention of Terrorism.
24 UNODC Report at ¶ 19.
25 Id. at ¶ 30; Best Practices at ¶ 26.
26 UNODC Report at ¶ 30.
27 Id.
characteristics of the prohibited conduct” should be included.\textsuperscript{29} For instance, a law prohibiting material support should include a list of actions that would qualify as such conduct.\textsuperscript{30}

IV. Conclusion

Almost all States have struggled with developing a balance between counterterrorism laws and civil liberties, a fight which remains important today. However, states using counterterrorism laws as a pretext to silence, discredit or punish human rights defenders are violating international law. Despite numerous attempts by international and regional bodies to counter increased prosecutions of civil society under these laws, many cases of harassment still continue. These laws provide immense powers to the State and if these powers are not effectively counterbalanced by measures like the best practices suggested above, then the potential for continued violations of human rights will only grow.

\textsuperscript{29} UNODC Report at ¶ 30.
\textsuperscript{30} \textit{Id.}