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Preventing and Combating Terrorism: Contribution by ODIHR

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The purpose of this paper is to build upon the ‘food for thought’ paper presented by the ODIHR at the ASRC 2004 by expanding on certain areas that the ODIHR considers of particular importance in the development of its anti-terrorism programme 2005. It should, therefore, be read in conjunction with that paper (annexed for ease of reference) for a comprehensive view of the ODIHR’s work on the fight against terrorism.

The OSCE is in a unique position to take a genuinely multi-dimensional approach to the fight against terrorism. To that end the ODIHR can make an important contribution to developing a comprehensive, effective and durable security strategy to prevent and combat terrorism. The ODIHR has enhanced its capacity in the field of anti-terrorism to ensure that it is well positioned to provide the expertise and skills that are necessary to fulfill its mandated tasks and to push forward the work of the OSCE in a cross-dimensional approach to security in the fight against terrorism.

A part of that work is to identify key issues relating to human rights in the fight against terrorism and to open up debate on those issues.

The Right to Life in the Context of Counter-Terrorism Measures

*The right to life is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation*¹. It is a right that is relevant in a number of different ways in the context of counter-terrorism and which should not be interpreted narrowly. The OSCE Human Dimension Commitments currently only refer specifically to the right to life in the context of the death penalty but the complexity of issues around the protection of the right to life in the fight against terrorism merits closer consideration. The ODIHR believes that this is a subject that could usefully be explored through a focused follow up to the workshop on protecting human rights in the fight against terrorism held in Copenhagen in March 2004.

¹ HRC General Comment No 06: The Right to Life (art. 6) CCPR: 30/04/82

The right to life is contained in a number of international and regional human rights instruments, notably the International Covenant of Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms:

Article 6 International Covenant of Civil and Political Rights

- 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
- 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
- 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
- 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
- 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
- 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 2¹ – Right to life

1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a. *in defence of any person from unlawful violence;*
- b. *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- c. *in action lawfully taken for the purpose of quelling a riot or insurrection.*

Duty to Protect

Within the international framework of human rights obligations, States have a duty to protect their population by taking measures to prevent terrorist attacks.

According to Point 1 of the Council of Europe Guidelines on Human Rights and the Fight Against Terrorism 2002:

*'States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism **in accordance with** these guidelines.'*

This obligation requires States to enact and implement effective anti-terrorism legislation which allows for detection, prevention of and punishment for terrorist acts or attempts which threaten the life and physical integrity of individuals within their jurisdiction. In some specific circumstances, this obligation may extend beyond this basic duty to imply 'a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'². While this obligation forms the basis for a State's duty to act robustly in the fight against terrorism, it cannot be viewed as a justification for excessive measures which might be in breach of other obligations to protect human rights, including the right to life. All measures taken to protect the right to life of individuals from the threat of terrorism must be strictly proportionate to their goals and exercised in a non-discriminatory and non-arbitrary fashion. Any exceptions to the general prohibition on taking a person's life must be strictly interpreted³ and the use of force resulting in death can only be

² EctHR, *Osman v United Kingdom*, 28 Oct 1998.

³ EctHR, *McCann v United Kingdom*, 27 Sept 1995.

justified where such use of force was ‘absolutely necessary’ in the circumstances to effect an arrest or to prevent a terrorist act.

The Human Rights Committee has stressed that ‘States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.’⁴

The duty to prevent deaths caused by actions of the security forces.

The right to life implies a duty on States to ensure that State forces do not arbitrarily deprive the life of any person within the context of counter-terrorism. In the context of Article 2 of the ECHR, a number of principles regarding the framework required to ensure that counter-terrorism measures are legal, proportionate and do not lead to arbitrary killing were laid out in the case of *McCann v United Kingdom*⁵. In this case the European Court of Human Rights specified that the lawfulness of the use of force leading to a death must be assessed not only in the light of the circumstances of the shooting itself, but also taking into account the way in which an operation had been planned and controlled and what measures had been put into place ‘so as to minimise, to the greatest extent possible, recourse to lethal force.’⁶

While the use of force to detain or arrest a person or to protect the right to life of an individual may result in deprivation of life on some occasions without breaching human rights obligations, the powers of the State to prevent acts of terrorism must be strictly prescribed by law. They must also be set within an appropriate operational framework to ensure that any use of force in this context may only occur to the degree that is absolutely necessary and does not result in the arbitrary deprivation of life of suspects or others.

Even in the context of an armed prison uprising, the UN Human Rights Committee has found that the justification for the use of force to quell the uprising is not limitless and must be

⁴ HRC General Comment 06 Ibid.

⁵ Ibid.

⁶ ibid at para 194.

exercised with restraint. The mere fact of an uprising in a prison does not provide a justification for the elimination of convicted or suspected terrorists.⁷

States cannot allow their security forces to use force in an arbitrary manner which would amount to a breach of their human rights obligations. Excessive use of force in counter-terrorism operations is counter-productive in that it may lead to loss of life on the same scale as that which would have resulted from the terrorist attack itself. It also foments a climate of mistrust of the State authorities and a sense of injustice in communities that may be targeted in counter-terrorism operations.

The duty to inquire into deaths in the context of counter-terrorism

The obligation to protect the right to life extends to the duty to inquire into deaths that have occurred in the context of the fight against terrorism. An inquiry is required into deaths which have been caused by the use of force of the security forces, whether those deaths have occurred during a state of emergency and whether they are the deaths of terrorist suspects or of innocent bystanders. Without an adequate, full, independent and impartial inquiry into deaths which have occurred as a result of the use of force of the security forces, including the broader context of the planned operation surrounding the deaths, States cannot ensure that, in practice, the deprivation of life was not arbitrary and was lawful⁸. States will be in breach of their human rights obligations if they do not fully investigate the circumstances surrounding deaths caused by the security forces.

All deaths which occur within the context of terrorism or counter-terrorism should be the subject of judicial inquiry and/or inquest followed, where appropriate, by prosecution of those responsible for the killings in order for States to fulfil their obligation to protect the right to life.

The death penalty

The OSCE commitments⁹ recognise that the majority of Participating States have abolished the death penalty and that this issue should be kept under review. Even in cases where States have

⁷ Inter American Court of Human Rights, *Neira-Alegría v Peru*, 19 Jan 1995.

⁸ ECtHR *Jordan (Hugh) v UK*, 4 May 2001, ECtHR *McShane v UK*, 28 May 2002.

⁹ Inter alia, Vienna 1989 “Questions relating to security in Europe” para 24

not abolished the death penalty, however, the arbitrary use of the death penalty will amount to a breach of the right to life.

The death penalty may only be given in cases of the most serious crimes. Crimes defined as ‘terrorist offences’ vary in seriousness across the OSCE region. Those States which maintain the death penalty should exercise extreme caution when qualifying offences and acts which may give rise to the death penalty to ensure that the death penalty is only applicable for the most serious crimes and should not allow for the application of the death penalty for ‘terrorism’ in general as the term is not sufficiently clearly defined as to be certain that it would only apply to the most serious crimes.

In no circumstances may the death penalty be applied retrospectively where it would not have been applicable for the act in question at the time that the offence was committed.

The death penalty may only be applied after conviction for a crime following a fair trial. Trials of terrorist suspects must be in conformity with the right to a fair trial¹⁰. Application of the death penalty must be in accordance with the law. Pre-emptive killings that are not the result of an absolutely necessary use of force to effect an arrest or to protect the right to life of an individual, or killings conducted outside of the legal framework will automatically be in breach of State’s obligations to protect the right to life.

The Prohibition on Discrimination and Arbitrariness

The Council of Europe Guidelines on Human Rights and the Fight against Terrorism provide that:

‘all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate revision¹¹.’

Protection of the right to life is not only fundamental from a human rights perspective. Without the State’s respect for and duty to protect the right to life of individuals under their control,

¹⁰ ECtHR Ocalan v Turkey, 12 March 2003

¹¹ Principle II

there can be no security. The right to life is the basis of all security and should be taken very seriously in the context of the fight against terrorism.

Where communities feel that their right to life is not protected or is treated with contempt by State forces, a sense of powerlessness and alienation of certain sectors of the community is the consequence which provides the conditions that foment a climate where recruitment for terrorism is facilitated. In a joint statement by the special rapporteurs, representatives, experts and chairpersons of the working groups of the special procedures of the UN Commission on Human Rights, issued on 30 June 2003, the authors deplored the fact that:

*'under the pretext of combating terrorism, human rights defenders are threatened and vulnerable groups are targeted and discriminated against on the basis of origin and socio-economic status, in particular migrants, refugees and asylum-seekers, indigenous peoples and people fighting for their land rights or against the negative effects of economic globalisation policies.'*¹²

Where States fail to adequately protect and respect the right to life of those under their control in their fight against terrorism, they risk creating a state of insecurity which is akin to that created by terrorism itself. If the approach to counter-terrorism is conducted in an arbitrary or discriminatory fashion it risks exacerbating the problem and creating even more victims of terrorism.

Conferences and Meetings

The ODIHR is currently preparing a Supplementary Human Dimension Meeting on human rights and counter-terrorism scheduled for 14-15 July 2005 in Vienna. This meeting will focus on the three themes of freedom of religion, torture, and the role of civil society in the fight against terrorism. The meeting will have introducers from across the OSCE region and the ODIHR would encourage participating States to support the participation of expert representatives from their relevant authorities to enhance the level of discussion at this meeting.

¹² <http://www.unhchr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet>

Building upon the success of the 2004 Workshop on protecting human rights while countering terrorism, the ODIHR hopes to organise another workshop on this subject, possibly with a particular focus on the protection of the right to life in the fight against terrorism to allow for an in depth discussion of one of the key and extremely complex human rights issues in the context of counter-terrorism.

Technical assistance and support

The ODIHR's programme on legislative technical assistance focuses on supporting participating States' efforts to ratify and implement the 12 UN conventions and protocols and is carried out in close cooperation with the UN Office on Drugs and Crime and the OSCE ATU. The ODIHR is also available to assist on technical aspects of participating States' counter-terrorism legislation in order to enhance their abilities to effectively cooperate with other States in the fight against terrorism and to ensure their conformity with international obligations including international human rights law. The ODIHR is mandated to provide this assistance on request and would encourage participating States to take full advantage of the legal expertise that the ODIHR has to offer in this field.

In addition to technical assistance on ratification and implementation of the 12 UN conventions and protocols and assistance in drafting and amending counter-terrorism legislation, the ODIHR is also preparing training in the practical aspects of the application of international human rights standards in the fight against terrorism which is aimed at senior public officials and policy makers in OSCE participating States. This training is designed to raise awareness of the issues involved in order to enable public officials to act in conformity with international human rights standards in their daily work to ensure an effective strategy to counter-terrorism.

The ODIHR has raised concerns about the use of specific legislation in some participating States aimed at combating 'extremism'. Of particular concern is the lack of a clear legal definition of the term 'extremism' and the potential for such laws to be open to abuse by being used to suppress legitimate opposition. The ODIHR is building on the work started in 2004 with a roundtable on extremism in Kazakhstan which aimed to address the issue of "extremism" while promoting and ensuring the respect for human rights, and is advising States, on request, about non-legal measures that can be taken to combat extremism. The ODIHR

believes that violent extremism is best approached through standard existing criminal law mechanisms rather than through specific but vague legislation aimed at the notion of 'extremism' in general.

The ODIHR is expanding its capacity in order to continue its work of creating a database of legislation on counter-terrorism in participating States as part of the Legislation on Line tool¹³.

The ODIHR programme on anti-terrorism for 2005 is also aimed at assessing the adequacy of participating States' legislation with regard to the protection of victims in order to enable a needs assessment for the protection of victims rights in the OSCE region. This follows from the OSCE Permanent Council Decision 618 of 1 July 2004 on Solidarity with Victims of Terrorism. The ODIHR has been tasked to promote this Decision at relevant OSCE Events, and further to compile existing legislation relating to assistance to and compensation for the victims of terrorism, so as to promote best practices in this area.

Cooperation within the OSCE and with other international organizations

The cross-dimensional nature of the fight against terrorism naturally links the work of the ODIHR with other OSCE partners. Continuous good cooperation with the Action Against Terrorism Unit (ATU) of the Secretariat should be highlighted. The ODIHR also cooperates closely with the Conflict Prevention Center (CPC), the Office of the OSCE Co-ordinator of Economic and Environmental Activities (OCEEA), and the OSCE Field Missions. In addition, the ODIHR co-operates with the OSCE Centre for Research (CORE). The ODIHR is also a regular participant at the Informal Group of Friends of the Chair on Combating Terrorism in Vienna.

The role of the ODIHR in the fight against terrorism is intricately linked with the work of a number of other international organizations, notably the UN (in particular through the UN Office on Drugs and Crime, the Counter Terrorism Committee and the UN Office of the High Commissioner for Human Rights), the Council of Europe (in particular through the CODEXTER, the Directorate for Human Rights and the Directorate for Legal Affairs) and the

¹³ www.legislationonline.org

European Union. The ODIHR is currently building on contacts with these international organizations to ensure that its work is complementary to the work of those organizations.

In relation to technical legislative assistance, the ODIHR is ready to provide support for the work of the UNODC and the CTED through its legal expertise. The ODIHR is also exploring the possibilities of organising training in cooperation with other international organizations.

The ODIHR recently participated in a Council of Europe seminar on protecting human rights while fighting terrorism which looked at the implementation of the Council of Europe Guidelines on Human Rights and the Fight Against Terrorism¹⁴ aimed at identifying gaps in these guidelines and strengthening the existing guidelines. The ODIHR will monitor the development of the guidelines with a view to considering how the OSCE could support the guidelines or the eventual updated guidelines. The appropriate follow-up to this will depend on the outcome of deliberations at the Council of Europe.

Conclusions

The effective work of the ODIHR in anti-terrorism depends to a great extent on the willingness of participating States to make use of the expertise provided by the ODIHR in legislative technical assistance and to provide funding for the realisation of projects. The ODIHR has enhanced its capacity for providing technical legislative assistance and targeted training related to anti-terrorism. It stands ready to respond to requests from participating States for technical assistance and needs assessment and urges participating States to take full advantage of the ODIHR's expertise in this regard.

¹⁴ Of 11 July 2002 and 2 March 2005