

# Memorandum to the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on Threats to the Right of Access to Counsel in the Context of Counter-Terrorism\*

## I. Introduction

This memorandum, by Yale Law School's Allard K. Lowenstein International Human Rights Clinic, was prepared for Ms. Fionnula Ní Aoláin, United Nations (UN) Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Special Rapporteur's mandate enables her "[t]o gather, request, receive and exchange information and communications from and with all relevant sources . . . on alleged violations of human rights and fundamental freedoms while countering terrorism."<sup>1</sup>

This memorandum addresses the right of access to counsel, which is currently under significant threat in the context of measures taken by States to counter terrorism. States invoke counter-terrorism to deny or undermine access to counsel in a wide range of contexts, from regular criminal and civil proceedings to states of emergency and situations of armed conflict. This memorandum maps a spectrum of violations of the right of access to counsel across these contexts to convey the importance of this right as well as the magnitude of the threats it faces.

UN human rights instruments guarantee the right of access to counsel. Article 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR) protects the right of anyone facing a criminal charge "to communicate with counsel of his own choosing."<sup>2</sup> The UN Human Rights Committee (HRC) has interpreted this right to include prompt access to counsel, private and confidential attorney-client meetings and communications, and freedom of attorneys from "restrictions, influence, pressure or undue interference from any quarter."<sup>3</sup> Article 14 is derogable, meaning that a State may formally and temporarily suspend the provision in exceptional circumstances, but these circumstances must truly be exceptional.<sup>4</sup> The HRC has also asserted that "[t]he guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights."<sup>5</sup> The right of access to counsel is also protected by UN principles and guidelines, namely principles 15 and 18(3) of the UN Body of Principles for

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<sup>1</sup> Human Rights Council Res. 15/15, ¶ 2(b), U.N. Doc. A/HRC/RES/15/15 (Oct. 7, 2010).

<sup>2</sup> International Covenant on Civil and Political Rights art. 14(3)(b), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>3</sup> Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, ¶ 34, U.N. Doc. CCPR/C/GC/32 (2007) [hereinafter HRC Comment 32].

<sup>4</sup> Even the eruption of armed conflict is not in itself sufficient to justify derogation from the right of access to counsel, as indicated by both the HRC and foundational treaties of international humanitarian law. *See* Human Rights Committee, *General Comment No. 29, States of Emergency (article 4)*, ¶ 3, U.N. Doc.

CCPR/C/21/Rev.1/Add.11 (2011) ("The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.") [hereinafter HRC Comment 29]; Geneva Convention Relative to the Treatment of Prisoners of War arts. 99(3), 105(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 72(1), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

<sup>5</sup> HRC Comment 29, *supra* note 4, ¶ 6.

the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>6</sup> principles 7 and 8 of the UN Basic Principles on the Role of Lawyers,<sup>7</sup> and principle 7 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.<sup>8</sup> Not all of these principles carry equal weight,<sup>9</sup> but their combined strength supports the fundamental nature of the right of access to counsel and clarifies that the right exists in the contexts of both detention and trial.

Regional human rights instruments similarly provide for the right of access to counsel.<sup>10</sup> There is regional variation, however, on the issue of derogability. In the Inter-American Human Rights System, due process guarantees, including the right of access to counsel, have indirectly acquired the status of non-derogable rights because they are deemed necessary to protect expressly non-derogable rights, such as the right to be free from cruel, inhuman or degrading treatment or punishment (CIDT).<sup>11</sup> In the European Human Rights System, on the other hand, the right of access to counsel is derogable in certain circumstances. The European Court of Human Rights applies a two-part test to determine whether circumstances merit derogation. First, a State must show “compelling reasons” for derogation, which the Court has defined as “the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity.”<sup>12</sup> The Court emphasizes that this is a “stringent” criterion requiring exceptional circumstances.<sup>13</sup> Second, the Court evaluates the “impact of the restriction on the overall fairness of the proceedings,” examining the ultimate prejudice caused to the accused’s right to a fair trial.<sup>14</sup> In the African Human Rights System, unlike the Inter-American Human Rights System and the European Human Rights System, no formal derogation process exists for any right. The African Commission on Human and Peoples’ Rights moreover has emphasized that “no circumstances whatsoever,” including states of emergency and armed conflict, may be invoked to justify restrictions of the

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<sup>6</sup> Adopted by GA Res. 43/173 (Dec. 9, 1988) [hereinafter Detention Principles].

<sup>7</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (Aug. 27–Sep. 7, 1990) [hereinafter Basic Principles].

<sup>8</sup> Adopted by G.A. Res. 67/187 (Dec. 20, 2012).

<sup>9</sup> The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, for example, is invoked more often than the others.

<sup>10</sup> Organization of African Unity, African (Banjul) Charter on Human and People’s Rights art. 7.1(c), OAU Doc. CAB/LEG/67/3 rev. 5 (1982) [hereinafter Banjul Charter]; Organization of American States, American Convention on Human Rights art. 8(2)(d), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3)(c), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

<sup>11</sup> Inter-Am. Comm’n H.R., *Report on Terrorism and Human Rights*, ¶ 261(c)(ii), OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (Oct. 22, 2000) [hereinafter IACHR Report]; see also *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9 (Oct. 6, 1987).

<sup>12</sup> *Case of Ibrahim and Others v. United Kingdom*, nos. 50541/08, 50571/08, 50573/08 & 40351/09, ¶ 259, HUDOC (Sep. 13, 2016), <http://hudoc.echr.coe.int/eng?i=001-166680> [hereinafter Ibrahim].

<sup>13</sup> *Id.* ¶ 258. Article 15 of the European Convention on Human Rights allows derogation from State obligations under the Convention “[i]n time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the State’s] other obligations under international law.” European Convention, *supra* note 10, at art. 15. In adjudicating the application of a member of the outlawed Irish Republican Army detained by the Government of Ireland for five months without charge or trial, the European Court of Human Rights interpreted this provision to require “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.” *Lawless v. Ireland*, 1961 Y.B. Eur. Cony. on H.R. 438, ¶ 28 (Eur. Ct. H.R.).

<sup>14</sup> Ibrahim, *supra* note 12, ¶ 257.

right to a fair trial.<sup>15</sup> Ultimately, the variation between these systems suggests that there is not yet an international consensus on the degree to which States are able to derogate from the right of access to counsel in the name of counter-terrorism.

The question of States' ability to limit the right of access to counsel in the name of counter-terrorism is a pressing one that extends beyond instances of formal derogation. States are increasingly enacting counter-terrorism legislation, imposing regulations, and declaring states of emergency that deny or undermine the right of access to counsel.<sup>16</sup> Some States are invoking these measures for unjustifiable ends—such as the targeting of marginalized groups and the suppression of political dissent—and in unjustifiable circumstances, that is, ones that do not demonstrably constitute terrorism.<sup>17</sup>

Note that while there is no globally agreed-upon definition of terrorism, the UN Security Council has described terrorism as

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[.]<sup>18</sup>

Additionally, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism established that

“Terrorist offences” should be confined to instances where the following three conditions cumulatively meet: (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.<sup>19</sup>

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<sup>15</sup> Afr. Comm'n H.R., Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, principle R (2003) [hereinafter ACHR Principles].

<sup>16</sup> Leandro Despouy (Special Rapporteur on the Independence of Judges and Lawyers), *Fourth Report on the Independence of Judges and Lawyers*, ¶¶ 10, 24, 26, U.N. Doc. A/63/271 (Aug. 12, 2008) [hereinafter Despouy].

<sup>17</sup> See Stella Margariti, *Defining International Terrorism to Protect Human Rights in the Context of Counter-terrorism*, 29 SECURITY & HUM. RTS. 173 (2018).

<sup>18</sup> S.C. Res. 1566, ¶ 3 (Oct. 8, 2004).

<sup>19</sup> See, e.g., Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *First Report on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 50, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005) [hereinafter Scheinin First Report].

UN bodies such as the UN Counter-Terrorism Implementation Taskforce,<sup>20</sup> the Working Group on Arbitrary Detention,<sup>21</sup> and the UN Office on Drugs and Crime,<sup>22</sup> as well as outside experts,<sup>23</sup> have reasserted the right of access to counsel in the face of restrictions based on counter-terrorism rationales.<sup>24</sup> The UN General Assembly also has urged States to comply with international human rights law while countering terrorism, including by providing judicial guarantees to those facing charges of terrorism.<sup>25</sup>

This memorandum examines threats to the right of access to counsel in the context of counter-terrorism by canvassing examples in which States have invoked counter-terrorism to deny or undermine the right in criminal and administrative proceedings as well as military detention. The geographical diversity of the examples illustrates that this is an issue of global concern, and the variety of practices underscore the many ways in which the right of access to counsel can be denied and undermined. All of the examples, however, illustrate how deeply counter-terrorism justifications have become embedded in States' legal frameworks, and how seriously that undermines basic judicial protections.

To map a range of practices that weaken the right of access to counsel, Part II focuses on detention practices that delay or completely deny access to counsel; Part III details how States abridge the right by threatening lawyers with legal and professional sanctions as well as violence, threats, and harassment; and Part IV describes how restrictions on private and confidential attorney-client communications, access to evidence, and choosing one's counsel practically undermine the right of access to counsel. Part V, the conclusion, notes the implications of the right of access to counsel for the enjoyment of other rights, such as the right to a fair trial, and raises concerns about the right of access to counsel that have emerged in the context of the Covid-19 pandemic.

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<sup>20</sup> CTITF WORKING GROUP ON PROTECTING HUMAN RIGHTS WHILE COUNTERING TERRORISM, BASIC HUMAN RIGHTS REFERENCE GUIDE: DETENTION IN THE CONTEXT OF COUNTERING TERRORISM, UNITED NATIONS COUNTER-TERRORISM IMPLEMENTATION TASK FORCE (Oct. 2014) (“All persons deprived of liberty have the right to prompt and effective access to legal counsel.”) [hereinafter CTITF DETENTION]; CTITF WORKING GROUP ON PROTECTING HUMAN RIGHTS WHILE COUNTERING TERRORISM, BASIC HUMAN RIGHTS REFERENCE GUIDE: RIGHT TO A FAIR TRIAL AND DUE PROCESS IN THE CONTEXT OF COUNTERING TERRORISM, UNITED NATIONS COUNTER-TERRORISM IMPLEMENTATION TASK FORCE (Oct. 2014) (“All persons have the right to representation by competent and independent legal counsel of their choosing, or to self-representation. The right to representation by legal counsel applies to all stages of a criminal process, including the pre-trial phase. Any restrictions on the right to communicate privately and confidentially with legal counsel must be for legitimate purposes, must be proportional, and may never undermine the overall right to a fair hearing.”).

<sup>21</sup> Report of the Working Group on Arbitrary Detention, *Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 54(g), U.N. Doc. A/HRC/10/21 (Feb. 16, 2009) (“[T]he persons accused of having engaged in terrorist activities shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel and representation.”).

<sup>22</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON CRIMINAL JUSTICE RESPONSES TO TERRORISM, CRIMINAL JUSTICE HANDBOOK SERIES (2009) (“The arrested/detained person must have access to legal counsel and must be able to communicate with counsel in full confidentiality”).

<sup>23</sup> See, e.g., ARTICLE 19, Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Nov. 1996) (“Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law. These include, but are not limited to, the following rights: . . . (d) the right to prompt access to counsel of choice”).

<sup>24</sup> See Despouy, *supra* note 16.

<sup>25</sup> G.A. Res. 74/147, Terrorism and Human Rights, ¶¶ 9-11 (Jan. 16, 2020).

Parts II, III, and IV—the substance of this memorandum—are not separate, nor are they equally weighted; rather, they represent a continuum of formal and informal strategies that States use to restrict access to counsel in ways that often overlap and compound one another. Intimidating lawyers, for example, is an informal tactic States use to make lawyers less available or willing to represent those accused of terrorism, and it is often combined with more formal legislative and regulatory restrictions on the right of access to counsel. The division of the memorandum into Parts is not meant to suggest that a State’s behavior can always be neatly sorted into one or another of these categories. Instead, it is intended to enumerate common threats to the right of access to counsel, recognizing that the tactics any given State adopts to restrict access to counsel in the name of counter-terrorism are variable, fluid, and complex.

## **II. Detention with delayed or no access to counsel**

This section of the memorandum discusses a continuum of State detention practices that undermine the right of access to counsel. These practices range from limited incommunicado detention authorized by domestic legislation to secret detention outside the protection of the law.

States may violate their obligation to respect the right of access to counsel by unduly delaying or completely denying a detained person’s access to a lawyer. The degree to which access to counsel may be lawfully delayed in counter-terrorism contexts varies regionally. The UN Basic Principles on the Role of Lawyers provide that access to counsel may be delayed for no more than 48 hours after the time of arrest or detention.<sup>26</sup> In the Inter-American System, the right of access to counsel in both criminal and administrative proceedings attaches at the moment a person is accused of an illegal act, an investigation into the person is ordered, or the person’s rights would be infringed by an authority’s order or action.<sup>27</sup> The African Commission on Human and Peoples’ Rights has cited “the moment of arrest or detention” as the trigger for States’ obligation to provide access to a lawyer,<sup>28</sup> and has said that even in states of war and national emergency the right of access to counsel may not be delayed.<sup>29</sup> The European Court of Human Rights and the Council of Europe do not permit “undue delay” of access to counsel, which is measured against the particular experiences of an accused or detained person rather than a defined period of time.<sup>30</sup> States often use the language of counter-terrorism or emergency to justify pushing the boundaries of these international and regional guidelines, engaging in detention practices that range from limited incommunicado detention to secret detention.

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<sup>26</sup> Basic Principles, *supra* note 7, principle 7.

<sup>27</sup> *Barreiro Leiva vs. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 206, ¶ 62 (Nov. 17, 2009); *Vélez Loor vs. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 132 (Nov. 23, 2010).

<sup>28</sup> Afr. Comm’n H.R., Principles and Guidelines on Human and Peoples’ Rights While Countering Terrorism in Africa, pt. 3(B)(iii) (2015).

<sup>29</sup> ACHR Principles, *supra* note 15, principle R; *see also, e.g.*, *Comm.74/92*, Commission Nationale des Droits de l’Homme et des Libertés v. Chad (1995), ¶ 21 (finding that Chad could not use the fact of civil war as an excuse for violating or permitting violations of the Banjul Charter).

<sup>30</sup> Eur. Consult. Ass., Directive 2013/48/EU of the European Parliament and of the Council, Doc. No. OJ L 294 (2013). However, the European Court of Human Rights has found that detention without appearance before a judge for four days and six hours falls outside the constraints as to time permitted by article 5 of the European Convention, even considering the special features of counter-terrorism investigations. *See Brogan and Others v. United Kingdom* 145-B Eur. Ct. H.R. (ser. A) (1988).

Incommunicado detention is the practice of refusing a detained person contact with the world outside the place of detention or incarceration.<sup>31</sup> As discussed below, States may use very short periods of incommunicado detention without violating human rights law, provided that the restriction on communication serves a specific purpose such as protecting the integrity of a criminal investigation. Secret detention is that in which the detainee is held incommunicado and both the location and the fact of the detention are concealed and unacknowledged by the State, whose objective it is to place the detainee outside the protection of the law.<sup>32</sup> Secret detention is never justified, and its use is prohibited by international law.

State practice often contains various elements along the continuum of incommunicado detention practices. Factors to consider include the duration of the detention, whether holding a person incommunicado demonstrably serves a specified and limited set of purposes and is specifically authorized by national legislation, whether the detainee is promptly brought before a judicial authority after detention, and whether the purpose of the incommunicado detention is to keep the person outside the protection of the law.<sup>33</sup>

#### A. Incommunicado detention authorized by domestic legislation

Many States provide for some form of incommunicado detention in their domestic counter-terrorism legislation. There is some debate as to whether detention is still incommunicado when limited access to a State-assigned “duty” lawyer is afforded but all other outside contact is prohibited.<sup>34</sup> This memorandum considers such cases to constitute incommunicado detention for two reasons. First, the right of access to counsel as defined in the ICCPR and the regional human rights treaties explicitly includes the right to consult with counsel of one’s own choosing.<sup>35</sup> Second, State counter-terrorism legislation itself often characterizes detention where a person may only consult a State-assigned lawyer as “incommunicado.”<sup>36</sup>

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<sup>31</sup> UNITED NATIONS & INT’L BAR ASS’N, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS, AND LAWYERS 352 (2002).

<sup>32</sup> Human Rights Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin*, ¶¶ 24, 28, UN Doc A/HRC/13/42 (May 20, 2010) [hereinafter *Joint Study on Secret Detention in the Context of Countering Terrorism*].

<sup>33</sup> ASSOCIATION FOR THE PREVENTION OF TORTURE, INCOMMUNICADO, UNACKNOWLEDGED, AND SECRET DETENTION UNDER INTERNATIONAL LAW 8-9 (Mar. 2, 2006), [https://www.apt.ch/content/files\\_res/secret\\_detention\\_ap1-1.pdf](https://www.apt.ch/content/files_res/secret_detention_ap1-1.pdf) [hereinafter INCOMMUNICADO].

<sup>34</sup> *Id.* at 2 (citing NIGEL RODLEY, TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 334 (2d ed., Oxford Univ. Press 1999)).

<sup>35</sup> ICCPR, *supra* note 2, at art. 14(3)(b); Banjul Charter, *supra* note 10, at art. 7.1(c); American Convention, *supra* note 10, at art. 8(2)(d); European Convention, *supra* note 10, at art. 6(3)(c).

<sup>36</sup> *See, e.g.*, LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM] art. 520 bis (Spain).

Though its use is discouraged by both international humanitarian and human rights law,<sup>37</sup> States may attempt in counter-terrorism legislation to justify using incommunicado detention for very limited periods of time and for specific purposes, such as preventing a detainee from directing co-conspirators to destroy evidence or to carry out a terrorist act.<sup>38</sup> The UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment allows the “competent authority” to delay notifying a detainee’s family and other “appropriate persons” about the arrest and imprisonment for a “reasonable period where exceptional needs of the investigation so require.”<sup>39</sup> However, if prolonged for more than “a matter of days,” preventing a detained person from communicating with the outside world, particularly with family members and legal counsel, violates international law.<sup>40</sup>

Two State examples illustrate how the spectrum of incommunicado detention regimes under the guise of counter-terrorism undermines the right of access to counsel and threatens members of marginalized groups. First, Spain offers an example of a State with a longstanding incommunicado detention regime that is set out in detailed legislation and subject to judicial oversight. Second, Nigeria provides an example of a State that formally created an incommunicado detention regime much more recently, with fewer procedural safeguards. The Nigeria case study also highlights how the ever-expanding realm of counter-terrorism has come to apply familiar problematic measures to nontraditional victims—in this instance, young children. An analysis of on-the-ground practice in both States demonstrates that neither adequately protects the right of access to counsel, undermining the possibility that incommunicado detention is ever compatible with human rights, no matter how carefully it is delimited.<sup>41</sup>

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<sup>37</sup> See, e.g., Third Geneva Convention, *supra* note 4, art. 48, 70, 122; Fourth Geneva Convention, *supra* note 4, art. 25, 26, 41, 78, 79, 106, 107, 116, 128, 136; Human Rights Committee, *General Comment 20, Article 7 (Forty-fourth session, 1992)*, ¶ 11 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (July 29, 1994) [hereinafter HRC Comment 20; CTITF DETENTION, *supra* note 20, principle 9.

<sup>38</sup> INCOMMUNICADO, *supra* note 33, at 9.

<sup>39</sup> Detention Principles, *supra* note 6, principles 16(1), 16(4).

<sup>40</sup> *Id.*, principle 15; see also Human Rights Committee, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (June 30, 1982) (explaining that in criminal cases, delays in bringing an arrested or detained person before a judicial officer must not exceed a few days). In *Teran Jijon v. Ecuador*, the Human Rights Committee found that keeping the victim “incommunicado for five days without being brought before a judge and without having access to counsel . . . entails a violation of article 9, paragraph 3 [of the ICCPR].” Human Rights Committee, Communication 277/1988, *Teran Jijon v. Ecuador*, U.N. Doc CCPR/C/44/D/277/1988 (Apr. 8, 1992). The Committee has also found that incommunicado detention of fifteen days constitutes a violation of a State’s obligation under article 10 of the ICCPR to treat all persons deprived of their liberty “humanely, with humanity and respect for the inherent dignity of the human person.” Communication 147/1983, *Arzuaga Gilboa v. Uruguay*, U.N. Doc CCPR/C/OP/2 (Nov. 1, 1985). However, shorter periods may also constitute a violation. *Id.*

<sup>41</sup> It has been noted that incommunicado detention may itself constitute cruel, inhuman, or degrading treatment or punishment. See, e.g., *Joint Study on Secret Detention in the Context of Countering Terrorism*, *supra* note 32, (citing UN Comm’n on Human Rights Res. 2005/39, UN Doc E/CN.4/RES/2005/39, ¶ 9 (Apr. 19, 2005) [hereinafter Res. 2005/39]; *Avdo and Esmā Palić vs. The Republika Srpska*, Decision on Admissibility and Merits, Human Rights Chamber for Bosn. & Herz., No. CH/99/3196, ¶74 (Jan. 11, 2001)).

Spain's counter-terrorism model has included legal provisions for incommunicado detention since 1983.<sup>42</sup> Though the Spanish Constitution protects the right to legal assistance during police and judicial proceedings, it also gives Parliament the power to define the terms under which such assistance will be afforded.<sup>43</sup> Parliament has relied upon this power to craft "organic laws" that modify the criminal code in exigent circumstances; the most notable modification expressly provides for incommunicado detention if requested by the arresting authority and approved by a judge.<sup>44</sup> Under the most recent iteration of the incommunicado regime, detained persons may be denied the right to choose their own attorneys.<sup>45</sup> Even if detained persons are appointed a lawyer by the State, they may not be permitted to consult with him or her in private.<sup>46</sup> Furthermore, the judge may prohibit all communication with anyone besides State-appointed counsel and medical officials.<sup>47</sup> As a general rule, the incommunicado detention may last only up to five days.<sup>48</sup> But when a person is suspected of "membership or relationship with armed groups or terrorist or rebellious individuals," the incommunicado detention may be extended for an additional five days.<sup>49</sup>

Spain's incommunicado detention regime has been condemned for decades by civil society groups<sup>50</sup> and regional and international human rights bodies, especially the European Committee on the Prevention of Torture (CPT).<sup>51</sup> The European Court of Human Rights has found in multiple cases that Spain's failure to effectively investigate petitioners' allegations of ill-treatment in incommunicado detention constitutes a procedural violation of article 3 of the European Convention on Human Rights.<sup>52</sup> The Court has emphasized that the State responsibility to

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<sup>42</sup> Ley Orgánica por la que se Desarrolla el Artículo 17.3 de la Constitución en Materia de Asistencia Letrada al Detenido y al Preso y Modificación de los Artículos 520 y 527 de la Ley de Enjuiciamiento Criminal (B.O.E. 1983, 310).

<sup>43</sup> Constitución Española [C.E.], art. 17(3) provides that every person arrested shall be guaranteed the assistance of a lawyer during police and judicial proceedings, *under the terms to be laid down by the law*. Article 24 provides that all persons have a right to defense, to assistance by a lawyer, and to be informed of the charges against them. Even though the Spanish Constitution allows Parliament some discretion in laying down the terms under which the right to counsel is guaranteed, it is not evident that the incommunicado detention regime is compatible with other constitutional provisions. For example, Ari D. MacKinnon argues that the regime is unconstitutional because the due process protections of articles 17(3) and 24 (which include right to counsel) are not listed in article 55 among the constitutional provisions which may be derogated during states of emergency or in connection with investigations of terrorist activities. Ari D. MacKinnon, Note, *Counterterrorism Checks and Balances: The Spanish and American Examples*, 82 N.Y.U. L. REV. 602 (2007).

<sup>44</sup> L.E. CRIM art. 520 bis (2) (Spain).

<sup>45</sup> *Id.* at art. 527(1)(a).

<sup>46</sup> *Id.* at art. 527(1)(c).

<sup>47</sup> *Id.* at art. 527(1)(b).

<sup>48</sup> *Id.* at art. 509(2).

<sup>49</sup> *Id.*

<sup>50</sup> AMNESTY INT'L, BRIEFING FOR THE COMMITTEE ON ENFORCED DISAPPEARANCES ON SPAIN (2013)

[https://www.ohchr.org/Documents/HRBodies/CED/Session5/AI\\_Spain\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/CED/Session5/AI_Spain_en.pdf).

<sup>51</sup> The Committee for the Prevention of Torture has recommended that the Spanish government strengthen legal safeguards for those held under the incommunicado detention regime since its first visit to Spain in 1991. *See* REPORT TO THE SPANISH GOVERNMENT ON THE VISIT TO SPAIN CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT) FROM 1 TO 12 APRIL 1991 (1996).

<sup>52</sup> *See* Martínez Sala and Others v. Spain, No. 58438/00 (2004), <http://hudoc.echr.coe.int/eng?i=001-67287>; San Argimiro Isasa v. Spain, No. 2507/07 (2010), <http://hudoc.echr.coe.int/eng?i=001-100676>; Beristain Ukar v. Spain,

effectively investigate allegations of ill-treatment is especially important in cases of incommunicado detention, where detainees are particularly vulnerable.<sup>53</sup> In a pair of cases before the Court in 2014, the petitioners, Beatriz Etxebarria Caballero and Oihan Unai Ataun Rojo, were arrested for suspected membership in the Euskadi Ta Askatasuna (ETA)<sup>54</sup> and SEGI,<sup>55</sup> respectively. They were held incommunicado under then-existing provisions of the Code of Criminal Procedure that prohibited them from communicating with a lawyer of their choosing.<sup>56</sup> Both petitioners alleged in their complaints that they were subjected to cruel treatment while in detention and that Spanish authorities failed to investigate when they complained. In the *Etxebarria* and *Ataun* cases, the Court went a step further than in its previous decisions and not only found article 3 violations, but also agreed with the CPT's recommendation that Spain abolish its incommunicado detention regime altogether, as it risks abuses and human rights violations by its very nature.<sup>57</sup>

After the *Etxebarria* and *Ataun* decisions, Spain modified rather than abolished its incommunicado detention regime, promulgating the Ley Orgánica 13/2015 as an “expansion of protections” for criminal defendants. The current legislation limits the grounds on which incommunicado detention may be imposed to (1) the urgent need to prevent serious consequences which may place the life, liberty, or physical integrity of a person in danger, or (2) the urgent need for immediate action by the investigative judge in order to prevent serious harm to criminal procedure.<sup>58</sup> Whereas the former law automatically removed incommunicado detainees' right to choose and privately consult with counsel, the modified law gives judges the authority to determine which restrictions to apply to each detainee, requiring a reasoned justification for applying each restriction.<sup>59</sup> Even so, the CPT reported after its 2016 visit to Spain that despite the modifications, the right of access to counsel remained “virtually unchanged,” because a judge could still choose to impose the full range of restrictions on detainees' rights.<sup>60</sup>

Spain presents the case of a State that has tried to legitimize the use of an incommunicado detention regime as a response to the threat of terrorism through detailed legislation and provisions for judicial oversight. However, even in the best of circumstances, the regime does not guarantee the right to consult in private with counsel of one's choice or to notify family members about the fact and location of detention. Additionally, it is clear that even with careful legal delimitations, the potential for torture and ill-treatment cast doubts on the compatibility of incommunicado detention with human rights.

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No. 40351/05 (2011), <http://hudoc.echr.coe.int/eng?i=001-103771>; *Otamendi Egiguren v. Spain*, No. 47303/08 (2012), <http://hudoc.echr.coe.int/eng?i=001-113820>.

<sup>53</sup> *Otamendi Egiguren v. Spain*, *supra* note 52, ¶ 41.

<sup>54</sup> The Euskadi Ta Askatasuna (ETA) is a Basque separatist organization whose campaign for independence from Spain includes mounting terrorist attacks.

<sup>55</sup> SEGI was a left-wing revolutionary youth organization affiliated with the ETA.

<sup>56</sup> L.E. CRIM. art. 527 (amended in 2015 by the Ley Orgánica 13/2015).

<sup>57</sup> *Etxebarria Caballero v. Spain*, ¶ 32 (2014), <http://hudoc.echr.coe.int/eng?i=001-146771>; *Ataun Rojo v. Spain*, ¶ 27 (2014), <http://hudoc.echr.coe.int/eng?i=001-146772>.

<sup>58</sup> L.E. CRIM. art. 509 (as amended in 2015 by the Ley Orgánica 13/2015).

<sup>59</sup> *Id.*

<sup>60</sup> REPORT TO THE SPANISH GOVERNMENT ON THE VISIT TO SPAIN CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT) FROM 27 SEPTEMBER TO 10 OCTOBER 2016, ¶ 33 (2017).

Compared to that of Spain, Nigeria's legal regime to combat terrorism is relatively new. The Nigerian Terrorism Prevention Act (TPA) was adopted in 2011 after a decade of international pressure to join the global fight against terrorism following the 9/11 attacks and the United Nations Security Council's passage of Resolution 1373, which called upon States to criminalize and take measures to prevent terrorism. Initially, sharp conflicts between Nigerian lawmakers of differing religious and ethnic backgrounds stalled the approval of a national anti-terrorism bill.<sup>61</sup> However, a dangerous increase in Boko Haram activity in 2010 spurred the passage of the TPA.<sup>62</sup> The legislation was drafted relatively quickly; one Nigerian jurist described it as "hurriedly packaged and passed."<sup>63</sup> The result was an overbroad and imprecise law which was amended within two years, and the 2013 amended version remains in effect. The amendments did little to strengthen accountability for the military and police forces, however, whose poor track record on human rights long predates counterinsurgency efforts against Boko Haram.<sup>64</sup> The discussion below examines the shortcomings of the incommunicado detention provisions in the TPA as well as a troubling example of how the legal framework is flouted in practice.

The TPA prohibits a range of terrorism offenses, including perpetrating terrorist attacks, arranging terrorist meetings, and providing material support for terrorism.<sup>65</sup> When enacted in 2011, Section 28(1) of the Act provided for a form of incommunicado detention in which a person arrested under "reasonable suspicion" of committing a terrorist offense could be detained without access to "any person other than his Medical Doctor and legal counsel of the detaining agency" for up to 24 hours.<sup>66</sup> Another provision stipulated that as soon as such detention was ordered, a person "shall be informed that he may, if he so wishes, be examined by a medical officer."<sup>67</sup> However, the TPA did not provide that the detainee must be informed of his right to consult with legal counsel from the detaining agency. More generally, the TPA's incommunicado detention provision failed to comply with regional and international human rights principles in that it did not require that a detainee be brought immediately before a judicial authority, that the incommunicado measures be ordered by a judicial authority, or that a detainee be allowed to notify a person of their choice of the fact and location of their detention.<sup>68</sup>

In the 2013 TPA amendments, the Nigerian legislature made several significant changes to Section 28(1). Notably, it permitted access to counsel of a person's choice by changing the phrase "any person other than his Medical Doctor and legal counsel of the detaining agency" to "any person other than a medical officer of the relevant law enforcement or security agency or his counsel."<sup>69</sup> Nonetheless, other changes weakened the right of access to counsel or left deficiencies in the law

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<sup>61</sup> Alaba Ajileye, *Legal Framework for the Prevention of Terrorism in Nigeria 2-5* (Conference Paper, Annual Law Week of the Nigeria Bar Association, Lokoja Branch 2015).

<sup>62</sup> Uchuekwu Wilson Nwosu, *Anti-Terrorism Legislation and Human Rights: An Appraisal of the Nigerian Terrorism (Prevention) Act, 2011*, 5 INT'L J. PEACE & CONFLICT STUD. 77 (2018); *id.* at 5.

<sup>63</sup> Ajileye, *supra* note 61, at 6.

<sup>64</sup> Adotei Akwei, Amnesty International USA, Statement on the Impact of US Counter Terrorism Efforts in Africa on Human Rights Before House Oversight and Reform National Security Subcommittee (Dec. 17, 2019).

<sup>65</sup> Terrorism Prevention Act, §§ 1(1)-(2) (Nig.).

<sup>66</sup> Terrorism Prevention Act, § 28(1) (2011) (amended 2013) (Nig.).

<sup>67</sup> *Id.* § 28(3).

<sup>68</sup> See AMNESTY INT'L, NIGERIA: PROVISIONS OF THE 'PREVENTION OF TERRORISM BILL 2009' ARE INCOMPATIBLE WITH NIGERIA'S HUMAN RIGHTS OBLIGATIONS (May 27, 2010) for a critical analysis of an early draft of the TPA bill. Many of the human rights concerns articulated remain unaddressed in both the 2011 and 2013 legislation.

<sup>69</sup> Terrorism Prevention Act, § 28(1)(a) (2013) (Nig.).

intact. The 2013 TPA amendments lengthened the period of permissible incommunicado detention from 24 to 48 hours. They also added a subsection explicitly prohibiting access to “any phone or communication gadget.”<sup>70</sup> Under the 2013 amendments, the TPA still does not provide that an independent judicial officer must order any incommunicado detention; this authority is given instead to “the relevant law enforcement or security officer.”<sup>71</sup> Finally, as is particularly relevant to this case study, neither the original nor the amended TPA sets an age limit for persons who may be detained, whether incommunicado or otherwise.

While Nigeria is party to several international human rights treaties, only treaties with implementing domestic legislation have the force of law under the Nigerian Constitution.<sup>72</sup> Among the human rights treaties that have been domesticated are the African Charter on Human and Peoples’ Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.<sup>73</sup>

In responding to the threat posed by Boko Haram, Nigeria’s detention practices fall far short of both its domestic and international legal obligations. For example, in Borno State, the epicenter of the Boko Haram insurgency, thousands of people suspected of Boko Haram affiliation have been arbitrarily detained at Giwa military barracks.<sup>74</sup> In May 2016, Amnesty International reported that 149 people had died while in detention at Giwa.<sup>75</sup> Among the dead were eleven children under the age of six, including four babies. Interviews with former detainees revealed horrific conditions of detention, including overcrowded cells, rampant disease, and lack of food and medical care. Further documentation of the atrocities at Giwa made clear that detainees were spending months to years imprisoned without access to any lawyer, much less one of their choice.<sup>76</sup> Despite calls from civil society and the United Nations to stop these detention practices and to shut down the facility,<sup>77</sup> Nigerian forces continue to detain suspected Boko Haram affiliates at Giwa. Though more recent reports indicate that food supply and sanitary conditions have improved marginally,<sup>78</sup> others show that detainees continue to suffer from overcrowding and physical abuse by soldiers.<sup>79</sup>

Children arrested and detained at Giwa on suspicion of terrorist affiliation, some as young as five years old, are held incommunicado with no access to counsel. A 2019 Human Rights Watch report

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<sup>70</sup> *Id.* § 28(1)(b).

<sup>71</sup> *Id.* § 28(1).

<sup>72</sup> CONSTITUTION OF NIGERIA (1999), art. 12.

<sup>73</sup> Amnesty Int’l, Nigeria: Still No Accountability for Human Rights Violations, Amnesty International Submission for the UN Universal Periodic Review, 31<sup>st</sup> Session of the UPR Working Group, November 2018 at 6.

<sup>74</sup> AMNESTY INT’L, IF YOU SEE IT, YOU WILL CRY: LIFE AND DEATH IN GIWA BARRACKS (May 10, 2016), <https://www.amnestyusa.org/reports/if-you-see-it-you-will-cry-life-and-death-in-giwa-barracks/> [hereinafter GIWA BARRACKS]. Giwa barracks is the largest military detention facility (of which Amnesty International) in Borno State.

<sup>75</sup> *Id.* at 6.

<sup>76</sup> HUMAN RIGHTS WATCH, “THEY DIDN’T KNOW IF I WAS ALIVE OR DEAD”: MILITARY DETENTION OF CHILDREN FOR SUSPECTED BOKO HARAM INVOLVEMENT (Sept. 10, 2019), <https://www.hrw.org/report/2019/09/10/they-didnt-know-if-i-was-alive-or-dead/military-detention-children-suspected-boko> [hereinafter MILITARY DETENTION OF CHILDREN].

<sup>77</sup> See U.N. Secretary-General, *Report on Children and Armed Conflict in Nigeria*, ¶ 92, UN Doc. S/2017/304, Apr. 10, 2017 [hereinafter SG Report on Nigeria]; GIWA BARRACKS, *supra* note 74.

<sup>78</sup> See U.S. STATE DEP’T., NIGERIA 2019 HUMAN RIGHTS REPORT (2019) [hereinafter NIGERIA 2019 REPORT].

<sup>79</sup> See AMNESTY INT’L, ‘THEY BETRAYED US’: WOMEN WHO SURVIVED BOKO HARAM RAPED, STARVED, AND DETAINED IN NIGERIA (2018), <https://www.amnesty.org/en/documents/afr44/8415/2018/en> [hereinafter THEY BETRAYED US].

revealed through interviews that children were routinely imprisoned without ever being brought before a judge and were harshly interrogated, sometimes at gunpoint, without the presence or assistance of legal counsel.<sup>80</sup> None of the children interviewed were ever given an opportunity to contact their family members;<sup>81</sup> in the event that families were arrested together, they were separated during detention.<sup>82</sup>

Though nominal protections exist under the TPA, incommunicado detention at Giwa and similar facilities<sup>83</sup> clearly violates the TPA's 48-hour limitation and provision for access to counsel of choice. The Act's lack of built-in safeguards, such as a requirement that arrested persons be brought before a judge, invites the abuse of its provisions. In particular, the lack of clarity regarding who has authority to decide that a suspect should be detained incommunicado opens the door for abuses like the ones at Giwa, where detainees are seized by military forces and immediately imprisoned with no independent oversight.

The incommunicado detention of children in particular violates a host of international legal principles. The Convention on the Rights of the Child, which Nigeria has ratified and domesticated through implementing legislation, stipulates that "the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."<sup>84</sup> The Convention further requires that "any child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance" as well as to challenge the legality of his or her detention.<sup>85</sup> In addition to Nigeria's treaty obligations, detaining children incommunicado flouts soft law principles such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty<sup>86</sup> and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").<sup>87</sup> The violation of these principles, which are meant to provide a safeguard against inhumane treatment and to empower children to challenge their detention in court, allows the State to continue egregious detention practices unchecked.

Nigeria presents a case where uncertainty and a lack of accountability mechanisms in counter-terrorism legislation open the door for the military's violations of detained persons' rights. The

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<sup>80</sup> MILITARY DETENTION OF CHILDREN, *supra* note 76.

<sup>81</sup> *Id.*

<sup>82</sup> GIWA BARRACKS, *supra* note 74.

<sup>83</sup> Other facilities where similar abuses have been documented include Maiduguri Maximum Security Prison, Bama Prison, and the Aguata camp in Eastern Nigeria. See NIGERIA 2019 REPORT, *supra* note 78; THEY BETRAYED US, *supra* note 79; SG Report on Nigeria, *supra* note 77, ¶ 39.

<sup>84</sup> Convention on the Rights of the Child art. 37(b), Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>85</sup> *Id.* at art. 37(d).

<sup>86</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, UN Doc. A/RES/45/113, Dec. 14, 1990, Rule 18(a) (providing that "juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications").

<sup>87</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), UN Doc A/RES/40/33, Nov. 29, 1985, Rule 7.1 (providing that procedural safeguards—including the presumption of innocence, the right to be notified of the charges against a person, the right to counsel, and the right to the presence of a parent or guardian—should be guaranteed at all stages of proceedings); *id.* at Rules 15.1 and 15.2 (elaborating upon these guarantees); *id.* at Rules 10.1 and 10.2 (providing for the immediate notification of parents and guardians upon the apprehension of a juvenile and clarifying that a judge or other competent officer must, without delay, consider the issue of release).

prolonged incommunicado detention of people suspected of terrorist offenses, including young children, illustrates the severe extent to which the right of access to counsel has been eroded in the context of counter-terrorism.<sup>88</sup>

## B. Secret Detention

While short periods of incommunicado detention may be authorized in a State’s domestic legislation without violating regional and international law, secret detention is extralegal by definition and is never justified.<sup>89</sup> Because the goal of secret detention is to place detained persons outside the protection of the law, every case of secret detention amounts to an enforced disappearance.<sup>90</sup> This section of the memorandum addresses the longstanding practice of States using secret detention to silence opposition. It also describes the post-9/11 practice of extraordinary rendition, which has effectively created a global system of secret detention where right of access to counsel is completely denied.

### 1. *Secret detention as a tool for silencing opposition*

The Special Rapporteur has already written extensively on the many human rights—including the right of access to counsel—that secret detention violates. A 2010 Joint Study prepared by the Special Rapporteur, along with the Special Rapporteur on Torture, the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances, concluded that secret detention is “irreconcilably in violation of international human rights law, including during states of emergency and armed conflict.”<sup>91</sup> The Joint Study provided a historical overview of State use of secret detention, describing the widespread pattern of enforced disappearances in Latin America from the 1960s to 1980s and secret detentions throughout Africa, the Middle East, Asia, and Europe. It also noted that secret detention is a tool that States use to silence opposition.<sup>92</sup> Rather than duplicating the legal analysis that the Special Rapporteur has

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<sup>88</sup> Other States with documented instances of children detained incommunicado include Iraq and Somalia, where children (mostly boys) suspected of affiliation with ISIS and Al-Shahab, respectively, are held with no access to a lawyer before being summarily tried as adults in military courts. HUMAN RIGHTS WATCH, “EVERYONE MUST CONFESS”: ABUSES AGAINST CHILDREN SUSPECTED OF ISIS AFFILIATION IN IRAQ (Mar. 6, 2019), <https://www.hrw.org/report/2019/03/06/everyone-must-confess/abuses-against-children-suspected-isis-affiliation-iraq>; HUMAN RIGHTS WATCH, “IT’S LIKE WE’RE ALWAYS IN A PRISON”: ABUSES AGAINST BOYS ACCUSED OF NATIONAL SECURITY OFFENSES IN SOMALIA (Feb. 21, 2018), <https://www.hrw.org/report/2018/02/21/its-were-always-prison/abuses-against-boys-accused-national-security-offenses>.

<sup>89</sup> International Convention for the Protection of All Persons from Enforced Disappearance art. 17(1), Dec. 20, 2006, 2716 U.N.T.S. 3 [hereinafter ICPPED]. See also CTITF DETENTION, *supra* note 20, principle 9. The *Joint Study on Secret Detention in the Context of Countering Terrorism* found that “[s]ecret detention is irreconcilable with international human rights law and international humanitarian law. It amounts to a manifold human rights violation that cannot be justified under any circumstances, including during states of emergency.” *Joint Study on Secret Detention in the Context of Countering Terrorism*, *supra* note 32, ¶ 17.

<sup>90</sup> ICPPED, *supra* note 89, at art. 2 (defining enforced disappearance as “The arrest, detention, abduction, or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”).

<sup>91</sup> *Joint Study on Secret Detention in the Context of Countering Terrorism*, *supra* note 32, at 2.

<sup>92</sup> *Id.* ¶ 289.

already undertaken, the discussion below simply notes examples of two States, Nigeria and Turkey, that have recently used secret detention in the name of counter-terrorism to muzzle dissent.

In Nigeria, journalists who have criticized public officials have been arrested and held without access to legal counsel or family members at undisclosed locations.<sup>93</sup> In 2016, for example, a journalist named Jones Abiri was arrested after his newspaper, the *Weekly Source*, published a controversial article. Though he was accused of membership in a Niger Delta militant group, he was never formally charged and was held incommunicado for two years. He was released on bail in 2018, but was then re-arrested and charged in May 2019 with terrorist offenses.<sup>94</sup> The Committee to Protect Journalists, which has repeatedly documented Nigeria's abuse of counter-terrorism and cybercrime legislation to oppress journalists,<sup>95</sup> has called upon authorities to release Abiri and other journalists charged with similar crimes.<sup>96</sup> Other civil society and government reports confirm that Nigerian journalists and activists are routinely arrested and detained for months without charges, and are often tortured while in police custody.<sup>97</sup>

In 2016, the Turkish government declared a state of emergency after a failed coup d'état.<sup>98</sup> Since then, family members of over two dozen people have alleged that State authorities disappeared their loved ones, detaining them in secret locations on suspicion of involvement in the attempted coup.<sup>99</sup> Under the state of emergency, the right of detainees to meet with lawyers was restricted and other safeguards against torture and ill-treatment were removed.<sup>100</sup> Although the state of emergency formally ended in July of 2018, many of the extraordinary powers granted to the president and the police under the state of emergency have been preserved through subsequently enacted counter-terrorism legislation. Interviews with lawyers, family members, and (in some cases) formerly detained persons themselves have revealed that agents of the Turkish government abducted numerous men and detained them secretly for months before transferring

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<sup>93</sup> See, e.g., Press Release, Human Rights Watch, Nigeria: Journalists, Activists Detained, Allege Torture (Aug. 21, 2018), <https://www.hrw.org/news/2018/08/21/nigeria-journalists-activists-detained-allege-torture> [hereinafter HRW Press Release]. See also NIGERIA 2019 REPORT, *supra* note 78, sec. 1(b) (on enforced disappearance).

<sup>94</sup> *Id.*; Nigeria Charges Weekly Source Editor Jones Abiri under Cybercrimes, Terrorism Acts, COMM. TO PROTECT JOURNALISTS (May 22, 2019), <https://cpj.org/2019/05/nigeria-charges-jones-abiri-weekly-source-terrorism>.

<sup>95</sup> See, e.g., Jailed Nigerian Journalist Agba Jalingo to Face Cybercrime Charge in Court, COMM. TO PROTECT JOURNALISTS (Feb. 12, 2020), <https://cpj.org/2020/02/jailed-nigerian-journalist-agba-jalingo-to-face-te>; Nigerian Journalist Fejiro Oliver Charged with Cybercrime for Corruption Report, COMM. TO PROTECT JOURNALISTS (Feb. 13, 2020), <https://cpj.org/2020/02/nigerian-journalist-fejiro-oliver-charged-with-cyb>; Peter Nkanga, *How Nigeria's Cybercrime Law Is Being Used to Try to Muzzle the Press*, COMM. TO PROTECT JOURNALISTS (Sept. 21, 2016), <https://cpj.org/2016/09/how-nigerias-cybercrime-law-is-being-used-to-try-t>.

<sup>96</sup> CPJ Calls for Charges to be Dropped Against Nigerian Journalist Jones Abiri, COMM. TO PROTECT JOURNALISTS (June 27, 2019), <https://cpj.org/2019/06/cpj-calls-for-charges-to-be-dropped-against-nigeri>; Nigerian Journalist Held Under Cybercrime Act for COVID-19 Coverage, COMM. TO PROTECT JOURNALISTS (June 10, 2020), <https://cpj.org/2020/06/nigerian-journalist-held-under-cybercrime-act-for-covid-19-coverage>.

<sup>97</sup> HRW Press Release, *supra* note 93; see also NIGERIA 2019 REPORT, *supra* note 78, sec. 1(b) (on enforced disappearance).

<sup>98</sup> See, INT'L COMM'N OF JURISTS, JUSTICE SUSPENDED: ACCESS TO JUSTICE AND THE STATE OF EMERGENCY IN TURKEY (2018).

<sup>99</sup> HUMAN RIGHTS WATCH, IN CUSTODY: POLICE TORTURE AND ABDUCTIONS IN TURKEY (Oct. 12, 2017), <https://www.hrw.org/report/2017/10/12/custody/police-torture-and-abductions-turkey>.

<sup>100</sup> *Id.*

them to official police custody.<sup>101</sup> To date, Turkey has not investigated any of the allegations that detainees were tortured while in secret detention.<sup>102</sup>

## 2. *Extraordinary rendition*

In the wake of the 9/11 attacks on the United States, the U.S. Central Intelligence Agency (CIA) began a regime of “extraordinary rendition,” which created a global system of secret detention.<sup>103</sup> Extraordinary rendition is the practice of transferring an individual into the custody of a foreign government without any legal process, for the purpose of detaining and interrogating the individual outside the reach of the law.<sup>104</sup> The CIA’s regime involved kidnapping suspects and transferring them on secret flights to undisclosed locations around the world known as “black sites,” where they were detained incommunicado, interrogated, and tortured.<sup>105</sup> The United States and other transferring countries tried to shield themselves from responsibility for violating the principle of non-refoulement by seeking “diplomatic assurances” that detainees transferred to the foreign jurisdiction would be treated humanely.<sup>106</sup> These assurances were usually included in the Memoranda of Understanding that governed the transfers between States.<sup>107</sup> However, diplomatic assurances were not effective safeguards against torture. A 2013 investigation by the U.S. Senate Intelligence Committee confirmed that prisoners at CIA “black sites” were subjected to “enhanced interrogation techniques” that included sleep deprivation and waterboarding.<sup>108</sup>

Although spearheaded by the United States, the extraordinary rendition regime relied upon the complicity of the dozens of other States that hosted “black sites,” allowed rendition flights to land and refuel in their territory, and themselves secretly rendered detainees to foreign jurisdictions.<sup>109</sup> U.S. courts have declined to rule on cases concerning extraordinary rendition,<sup>110</sup> which has allowed the United States to avoid legal responsibility for violating international law. The lack of State accountability for participation in extraordinary rendition legitimizes a counter-terrorism regime that denies detained persons a host of due process rights—including the right of access to counsel—both at the pre-transfer stage and during their detention.

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<sup>101</sup> *Id.*

<sup>102</sup> *Turkey: Enforced Disappearances, Torture*, HUMAN RIGHTS WATCH (Apr. 29, 2020), <https://www.hrw.org/news/2020/04/29/turkey-enforced-disappearances-torture>.

<sup>103</sup> OPEN SOCIETY JUSTICE INITIATIVE, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 5* (2013) [hereinafter *GLOBALIZING TORTURE*].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> AMNESTY INT’L, ‘DIPLOMATIC ASSURANCES’ – NO PROTECTION AGAINST TORTURE OR ILL-TREATMENT 1 (Dec. 2005), <https://www.amnesty.org/download/Documents/80000/act400212005en.pdf> [hereinafter *DIPLOMATIC ASSURANCES*]; *GLOBALIZING TORTURE*, *supra* note 103, at 7.

<sup>107</sup> *DIPLOMATIC ASSURANCES*, *supra* note 106.

<sup>108</sup> S. Rep. No. 113-288, at xii (2013).

<sup>109</sup> In 2013, The Rendition Project used flight data to reveal that at least 54 States were complicit in the extraordinary rendition regime. See Ian Cobain & James Ball, *New Light Shed on US Government’s Extraordinary Rendition Programme*, *GUARDIAN* (May 22, 2013), <https://www.theguardian.com/world/2013/may/22/us-extraordinary-rendition-programme>. However, because the regime is still highly classified, there remains a dearth of information about its full extent.

<sup>110</sup> See *Mohamad v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (upholding the dismissal of an action against participants in the extraordinary rendition program pursuant to the state secrets privilege).

In summary, State practices purporting to combat terrorism often delay or deny the right of access to counsel for persons detained on suspicion of terrorist offenses. These practices range from authorizing limited periods of incommunicado detention to perpetrating enforced disappearances with secret detention. The delay or denial of detainees' right to consult with lawyers of their choosing undermines a key source of accountability for States and weakens protection for detainees against torture and other rights violations. As States have enacted more legislation that broadens the scope of behavior constituting terrorist offenses, abuse of extraordinary powers to silence critics of State objectives, such as journalists and human rights defenders, has become widespread.

### **III. Intimidation of Lawyers**

Another abridgement of the right to counsel takes the form of State intimidation and sanction of lawyers who represent persons accused of terrorism. In particular, many governments conflate legal representatives with their clients, resulting in their detention, prosecution, or other punishment for the same terrorism or extremism offenses of which their clients are accused. These tactics severely undermine the right of access to counsel by preventing legal professionals from performing their jobs to the best of their ability, or from continuing to represent their clients at all. The damaging effects of State interference are often compounded by other limitations on the right to counsel addressed in other sections of this memorandum. Even where lawyers are granted unabridged access to their clients, the many obstacles described in this section may prevent them from providing full representation as guaranteed by regional and international human rights instruments and, often, domestic law.

Such interference also conflicts with soft law principles that elaborate on the right of access to counsel and the overarching right to a fair trial under international law. The most prominent are the UN Basic Principles on the Role of Lawyers<sup>111</sup> which set forth obligations related to the role of lawyers as a component of the right to a fair trial. These principles have been widely accepted and are regularly cited by regional courts,<sup>112</sup> as well as international and nongovernmental actors, in assessing whether the right of access to counsel is being protected in various jurisdictions.

The Principles do not include any clause explicitly suggesting derogability in emergency contexts. Several recent interpretations of the Principles confirm their application in the context of counter-terrorism. The UN Special Rapporteur on the independence of judges and lawyers, for example, has applied the Principles when analyzing State practice in an emergency context.<sup>113</sup> In addition, the International Commission of Jurists drew heavily on the UN Basic Principles on the Role of Lawyers in its Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in

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<sup>111</sup> Basic Principles, *supra* note 7.

<sup>112</sup> *See, e.g.*, Valle Jaramillo et al. v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 89 (Nov. 27, 2008); Kyprianou v. Cyprus, 2005-XIII Eur. Ct. H.R. 47, ¶ 58.

<sup>113</sup> *See generally* Despouy, *supra* note 16 (confirming that the following are elements of “human rights law is applicable in all circumstances, including both declared and undeclared states of emergency,” including under counter-terrorism regimes: the right to the assistance of legal counsel under principles 5 and 7, the right to legal assistance before a trial under principle 1, and the right to communicate confidentially with one’s lawyers under principle 8).

Times of Crisis.<sup>114</sup> Otherwise known as the Geneva Declaration, this document sets out standards for the protection of judges and lawyers in emergency contexts, including *inter alia* that of counter-terrorism and counter-extremism.<sup>115</sup> These standards echo many of those enshrined in the UN Basic Principles on the Role of Lawyers, confirming their importance in emergency contexts.

Together, these soft law instruments help delineate protections for lawyers in the counter-terrorism context. These include principles that are particularly relevant to the intimidation and sanction of lawyers: the freedom from discrimination with respect to entry into or continued practice in the legal profession,<sup>116</sup> the State responsibility to protect against intimidation, harassment, threats, or other improper interference with a lawyer's professional duties,<sup>117</sup> the right of lawyers not to be identified with their clients or their clients' causes,<sup>118</sup> the right of lawyers to appear before a court unless they have been lawfully disqualified,<sup>119</sup> and the right of lawyers to civil and penal immunity for statements made when acting in their professional capacity.<sup>120</sup>

Despite these principles' widespread acceptance by intergovernmental and nongovernmental actors, many States have routinely violated them in practice, particularly in the context of alleged terrorism, states of emergency, and military detention.

This section examines ways in which States undermine the right of access to counsel by targeting lawyers. These incursions on the right are grouped into three main categories: legal sanctions, professional sanctions, and personal attacks including violence, threats, and harassment.

While the following subsections provide a range of illustrative examples, they focus in particular on two States—Egypt and Tajikistan—to showcase how acts of intimidation and harassment can compound each other within a legal system. Egypt is notable because of extensively documented threats, harassment, and legal sanctioning of lawyers by its prosecution system for terrorism and extremism offenses. Tajikistan is notable because its government has formally taken administrative control of the legal profession and quashed lawyers' independence, in addition to using legal sanctions to incapacitate lawyers defending the government's political opponents. In 2015, the Tajikistani legislature removed control of the licensing process for lawyers from the national bar association and brought it under the control of the Ministry of Justice.<sup>121</sup> This change and subsequent alterations to the licensing process together severely shrank the pool of legal professionals in Tajikistan.<sup>122</sup> Nevertheless, it is important to note that many other States have engaged in similar violations of the right to counsel, and that the offenses described in this Part do

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<sup>114</sup> INT'L COMM'N OF JURISTS, LEGAL COMMENTARY TO THE ICJ GENEVA DECLARATION: UPHOLDING THE RULE OF LAW AND THE ROLE OF JUDGES AND LAWYERS IN TIMES OF CRISIS (2011) [hereinafter ICJ GENEVA DECLARATION].

<sup>115</sup> *Id.* at xi.

<sup>116</sup> Basic Principles, *supra* note 7, principle 10; ICJ GENEVA DECLARATION, *supra* note 114, at xvii (principles 5, 7).

<sup>117</sup> Basic Principles, *supra* note 7, principles 16-17; ICJ GENEVA DECLARATION, *supra* note 114, at xvii (principle 7).

<sup>118</sup> Basic Principles, *supra* note 7, principle 18; ICJ GENEVA DECLARATION, *supra* note 114, at xvii (principle 7).

<sup>119</sup> Basic Principles, *supra* note 7, principle 19.

<sup>120</sup> *Id.*, principle 20; ICJ GENEVA DECLARATION, *supra* note 114, at xvii (principle 7).

<sup>121</sup> *Tajikistani Lawyers Harassed, Intimidated and Imprisoned*, AMNESTY INT'L (May 24, 2017), <https://www.amnesty.org/en/latest/news/2017/05/tajikistani-lawyers-harassed-intimidated-and-imprisoned> [hereinafter *Tajikistani Lawyers Harassed*].

<sup>122</sup> *Id.*

not exhaust all of the potential ways that States exert undue influence on the legal profession to the detriment of human rights and the rule of law.

### C. Legal sanctions

Lawyers who represent persons accused of terrorism or extremism are regularly subjected to legal sanctions meant to intimidate them and prevent them from formally or functionally representing their clients. Such sanctions may include arrest, detention, citation, or prosecution. They also include any other action a State may take to prevent a lawyer from effectively and safely performing their job of advocating for their client.

In particular, lawyers who represent those accused of terrorism or extremism are themselves often prosecuted for terrorism or extremism in violation of principles 16 (freedom from prosecution or other sanction for professional activities) and 18 (the right of lawyers not to be identified with their clients or their clients' causes) of the UN Basic Principles on the Role of Lawyers.<sup>123</sup> The criminalization of lawyers appears to be a growing problem and is part of a larger trend of using counter-terrorism or “emergency” laws to prosecute and thus limit the effectiveness of human rights defenders (HRDs). In 2016, for example, the Special Rapporteur on the situation of human rights defenders criticized Ethiopia’s prosecution of HRDs under a counter-terrorism law for their attendance at a human rights workshop the previous year.<sup>124</sup> In another example, the President of the Bahrain Centre for Human Rights, Abdulhadi Al-Khawaja, was prosecuted in Bahrain in 2011 for terrorism offenses under a new “emergency” law for participation in a political protest.<sup>125</sup> He was sentenced to life imprisonment.<sup>126</sup> In many countries, HRDs are regularly prosecuted under counter-terrorism or other emergency laws for any sign of political organizing, which governments portray as anti-government action in subsequent proceedings.<sup>127</sup> Lawyers who belong to the category of human rights defenders are similarly targeted.

Where the State targets lawyers defending those accused of terrorism or extremism, it jeopardizes the right to a fair trial for the lawyers and their clients, undermines the rule of law, and may have the effect of suppressing social movements. For example, lawyers in Turkey have reported reluctance to represent members of the Gülen movement, a social movement headed by US-based cleric Fethullah Gülen. The Turkish government refers to it as the Fethullahist Terror Organization (FETÖ) and has designated it a terrorist organization. The government alleges that the Gülen movement is responsible for the attempted military coup. Turkish lawyers report that they fear prosecution and general public antipathy if they were to represent its members, which limits the

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<sup>123</sup> Basic Principles, *supra* note 7.

<sup>124</sup> Michel Forst (Special Rapporteur on the Situation of Human Rights Defenders), *Report to the Human Rights Council*, U.N. Doc. A/HRC/31/55/Add.1 (Jan. 19, 2016) [hereinafter Forst].

<sup>125</sup> FRONT LINE DEFENDERS, SET THEM FREE 10 (June 2019).

<sup>126</sup> *Id.*

<sup>127</sup> *See, e.g., id.*; Forst, *supra* note 124; *UN Experts Urge Egypt to End Crackdown on Protestors and Human Rights Defenders*, OHCHR (Oct. 28, 2019),

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25217&LangID=E> (criticizing the government of Egypt for using “counter-terrorism legislation to target people expressing dissent and seeking to promote and protect human rights”); *see also* AMNESTY INT’L, HUMAN RIGHTS DEFENDERS UNDER THREAT: A SHRINKING SPACE FOR CIVIL SOCIETY 13-14 (2017) (listing and explaining recent examples of governments using counter-terrorism laws to prosecute HRDs).

ability of members of the Gülen movement to access counsel.<sup>128</sup> In this and other cases, limitations targeting lawyers are functionally similar to outright violations of the rights of the accused to access counsel discussed in other sections of this memorandum.

Egypt provides another particularly salient example. The Egyptian government operates an exceptional system of Emergency State Security Courts, where the similarly exceptional Supreme State Security Prosecution (SSSP) prosecutes those charged with terrorism or extremism.<sup>129</sup> The accused are often non-violent government critics, including many journalists and activists.<sup>130</sup> The SSSP has at times prosecuted lawyers representing clients in the Emergency State Security Courts in retaliation for this work. Amnesty International has documented the recent arrests and detention of at least nine lawyers for their defense of clients facing prosecution by the SSSP, in addition to the arrests and detention of many more for political activities.<sup>131</sup>

One such lawyer, Ezzat Ghoniem, was subjected to enforced disappearance before being charged with membership in a terrorist organization.<sup>132</sup> The State forcibly disappeared him directly after he attempted to provide legal assistance to a woman being prosecuted by the SSSP, effectively preventing him from providing further representation in her particularly contentious case.<sup>133</sup> Ghoniem was one of two representatives recruited for her case who was subsequently arrested and prosecuted by the SSSP; another two were threatened with arrest and prosecution for considering representing her.<sup>134</sup> The systematic arrest and prosecution of lawyers willing to represent people being prosecuted by the SSSP ultimately resulted in the accused woman being denied her right of access to counsel, as she was unable to retain a legal representative despite having a theoretical right to do so.

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<sup>128</sup> HUMAN RIGHTS WATCH, *LAWYERS ON TRIAL: ABUSIVE PROSECUTIONS AND EROSION OF FAIR TRIAL RIGHTS IN TURKEY* (Apr. 10, 2019), <https://www.hrw.org/report/2019/04/10/lawyers-trial/abusive-prosecutions-and-erosion-fair-trial-rights-turkey> [hereinafter *LAWYERS ON TRIAL*].

<sup>129</sup> For a thorough assessment of the Egypt's laws on counter-terrorism and the SSSP, see Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *Letter dated Feb. 28, 2020 from Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, Agnes Callamard (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Clement Nyaletsossi Voule (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), Michel Forst (Special Rapporteur on the Situation of Human Rights Defenders) addressed to the Government of Egypt*, U.N. Doc. OL EGY 4/2020 (Feb. 28, 2020).

<sup>130</sup> *Egypt: Intensifying Crackdown Under Counterterrorism Guise*, HUMAN RIGHTS WATCH (July 15, 2018), <https://www.hrw.org/news/2018/07/15/egypt-intensifying-crackdown-under-counterterrorism-guise>.

<sup>131</sup> AMNESTY INT'L, *PERMANENT STATE OF EXCEPTION: ABUSES BY THE SUPREME STATE SECURITY PROSECUTION 49* (Nov. 2019), <https://www.amnesty.org/en/documents/mde12/1399/2019/en> [hereinafter *PERMANENT STATE OF EXCEPTION*].

<sup>132</sup> *Id.* at 49-50.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 50.

The government of Tajikistan has acted similarly. Like Egypt and many other States, it has weaponized the language and weight of national security to stifle dissent among its population.<sup>135</sup> In particular, the government has engaged in a sustained campaign of prosecuting its political opponents for a range of charges, including extremism. This is made possible by its Law on Combatting Terrorism of 1999 and its Law on the Fight Against Extremism of 2003, which both include vague language that the Tajikistani government has exploited in order to incorporate its opponents into these exceptional categories for detention and punishment.<sup>136</sup> As part of this campaign, the State has regularly targeted the defendants' lawyers in order to deprive them of representation. While extremism charges figure prominently in its prosecution of lawyers, the State invokes a range of offenses including fraud, divulging state secrets, arousing hostility, forgery, bribery, and corruption.<sup>137</sup> Once tried, lawyers often receive drastic sentences; in the most extreme case that has been publicly documented, one lawyer was sentenced to 28 years in prison.<sup>138</sup>

In that case, Buzurgmehr Yorov, one of Tajikistan's most prominent human rights lawyers, was denied a wide range of basic procedural rights in three trials alleging fraud, forgery, arousing hostility, extremism, contempt of court, insulting public officials, and publicly insulting the President.<sup>139</sup> In 2015, Yorov took on several central members of the Islamic Renaissance Party of Tajikistan as clients, shortly after they had clashed with the government in an armed raid.<sup>140</sup> He spoke out about abuse that his clients had faced in jail, and two days later was arrested without a warrant and detained without charge for twelve days.<sup>141</sup> The government actively intimidated lawyers who were considering representing Yorov in order to deprive him of representation, and then prevented him from meeting with lawyers who finally agreed to take him on as a client.<sup>142</sup> Yorov's defense team was prevented from accessing all of the prosecution's materials and from presenting its entire argument in court.<sup>143</sup> In 2019, the UN Working Group on Arbitrary Detention issued an opinion finding these failures to be in violation of international law, identifying violations of the ICCPR and the Universal Declaration of Human Rights as well as several freestanding peremptory norms.<sup>144</sup> This included a violation of article 14(3)(d) of the ICCPR,

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<sup>135</sup> AMNESTY INT'L, IN THE LINE OF DUTY: HARASSMENT, PROSECUTION, AND IMPRISONMENT OF LAWYERS IN TAJIKISTAN 6-8 (2017), <https://www.amnesty.org/en/documents/eur60/6266/2017/en> [hereinafter IN THE LINE OF DUTY].

<sup>136</sup> COUNTER EXTREMISM PROJECT, TAJIKISTAN: EXTREMISM AND COUNTER-EXTREMISM 5 (2019), <https://www.counterextremism.com/countries/tajikistan>; see also, e.g., *Tajikistan: Journalist Held on Baseless Charges*, HUMAN RIGHTS WATCH (Feb. 21, 2020), <https://www.hrw.org/news/2020/02/21/tajikistan-journalist-held-baseless-charges>. Similarly, the executive issued a decree in 2006 on the "Unified Concept of the Republic of Tajikistan on the Fight Against Terrorism and Extremism" that failed to define both terrorism and extremism. COUNTER EXTREMISM PROJECT, *supra* note 136, at 5.

<sup>137</sup> See, e.g., *Tajikistan: Arrest of Lawyer is a Threat to the Independence of the Profession*, INT'L COMM'N OF JURISTS (Mar. 7, 2014), <https://www.icj.org/tajikistan-arrest-of-lawyer-is-a-threat-to-the-independence-of-the-profession>; IN THE LINE OF DUTY, *supra* note 135, at 13-15.

<sup>138</sup> Working Group on Arbitrary Detention, Opinion No. 17/2019 concerning Mr. Buzurgmehr Yorov (Tajikistan), U.N. Doc. A/HRC/WGAD/2019/17, at 4 (May 24, 2019).

<sup>139</sup> *Id.* at 3-4.

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 2-4.

<sup>142</sup> *Id.* at 6.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 16 (holding that "The deprivation of liberty of Buzurgmehr Yorov, being in contravention of articles 2, 3, 7, 9, 10, 11, 12, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 2 (1), 9 (1), (2), (3) and (4),

which provides for the right of access to counsel, and violations of various rights enumerating the aspects of a fair trial across both instruments.

Yorov's trials demonstrate the cyclical nature of violations of the right of access to counsel through targeted sanction of lawyers. The government detained and prosecuted Yorov in order to deprive his client of representation. In the process, it also denied Yorov access to representation through similar tactics of intimidation and threats made credible by the carefully constructed atmosphere of hostility toward lawyers in Tajikistan. In all jurisdictions where governments use these tactics, incursions on the right of access to counsel compound each other, as lawyers recognize the danger they would face if placed in similarly restrictive custody, and are thereby deterred from providing representation. As such, the Special Rapporteur on the independence of judges and lawyers explained that detention and prosecution of lawyers for terrorism crimes associated with their clients "may create a chilling climate in which lawyers may eventually refuse to represent clients connected to politically sensitive issues out of fear of becoming the target of judicial harassment or criminal charges, thus severely compromising the universal right to legal representation."<sup>145</sup> This chilling effect is exacerbated by other efforts to drastically shrink the availability and independence of lawyers, which are further detailed below.

#### D. Professional sanctions

In addition to legal sanctions, many States restrict access to counsel by imposing professional sanctions to prevent lawyers from bearing the official qualifications required to represent clients, particularly those accused of terrorism or extremism. This category includes tactics of periodic or complete disbarment, State control of the legal profession in general and accreditation in particular, State-enforced closure of professional organizations, and other punishments including fines or a limited scope of authorization to perform legal work.

In particular, these restrictions implicate the prohibition of discrimination under principle 10; arbitrary administrative, economic, or other sanctions under principle 16; and undue disqualification of a lawyer under principle 19 of the UN Basic Principles on the Role of Lawyers. In addition to these broader principles, the UN Basic Principles on the Role of Lawyers also include principles that apply specifically to the management and independence of professional legal associations. These include lawyers' right to form and join self-governing and independent professional associations under principle 24, cooperation between professional associations and governments in furtherance of access to counsel for the public under principle 25, the professional association's responsibility to establish codes of conduct for lawyers in accordance with national law under principle 26, and the lawyer's right to fair disciplinary proceedings based in those codes of conduct before an independent committee or court under principles 28 and 29.<sup>146</sup>

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14 (1), (2), (3) (b), (d), (e) and (g) and (5), 15, 19, 21, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary").

<sup>145</sup> Gabriela Knaul (Special Rapporteur on the Independence of Judges and Lawyers), *Letter dated Mar. 15, 2013 from Gabriela Knaul (Special Rapporteur on the Independence of Judges and Lawyers), Working Group on Arbitrary Detention, Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), and Margaret Sekaggya (Special Rapporteur on the Situation of Human Rights Defenders) to the Government of Turkey*, 4, U.N. Doc. TUR 1/2013 (Mar. 15, 2013).

<sup>146</sup> Basic Principles, *supra* note 7.

The prototypical manifestation of this type of restriction on the right of access to counsel occurs when States disbar lawyers due to the nature of their work. China provides a significant example. Over the last decade, the Chinese government has used disbarment as a weapon to silence human rights lawyers who were representing people accused of national security breaches.<sup>147</sup> The government has used disbarment as just one tactic in a campaign against human rights lawyers that also includes prosecution and enforced disappearance in order to incapacitate the legal profession.<sup>148</sup> In some cases, lawyers were seemingly disbarred because of the clients that they had recently taken on.<sup>149</sup> Huang Qi, a human rights activist, was charged with “leaking state secrets” in connection with his work investigating human rights violations by the Chinese government.<sup>150</sup> Over the course of his pre-trial imprisonment, Huang and his family hired two lawyers, who were both promptly disbarred.<sup>151</sup> Huang’s subsequent lawyer appears to have been subject to State intimidation, as the State prosecuted Huang in secret proceedings<sup>152</sup> and ordered his lawyer not to share any information about them, including with Huang’s family.<sup>153</sup> Huang ultimately received a sentence of twelve years in prison for a charge he claims is baseless.<sup>154</sup>

In this example, the Chinese government directed local “bureaus of justice,” the name for Chinese professional lawyers’ associations, to disbar its targets.<sup>155</sup> Some States have gone so far as to assume direct control of accreditation and administrative punishments.<sup>156</sup> In this way, the State holds complete control over who is allowed to be a practicing lawyer. This has significant repercussions for the general public, as it also allows the State to influence who is able to find and hire a lawyer within the remaining group of licensees.

The government of Tajikistan has done exactly that. As noted above, in November 2015, the legislature amended the statutory licensing requirements for lawyers to move jurisdiction over the process from the Tajikistani bar association to the State.<sup>157</sup> With an absolute grip on access to the legal profession, the government over time was able to cut the number of licensed lawyers in the

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<sup>147</sup> Yaqiu Wang, *Trials in China Kept Secret by Silencing Lawyers*, HUMAN RIGHTS WATCH (Jan. 22, 2019), <https://www.hrw.org/news/2019/01/22/trials-china-kept-secret-silencing-lawyers>.

<sup>148</sup> *China: Free Rights Lawyers, Reinstate Law Licenses*, HUMAN RIGHTS WATCH (July 5, 2018), <https://www.hrw.org/news/2018/07/05/china-free-rights-lawyers-reinstate-law-licenses>.

<sup>149</sup> Wang, *supra* note 147.

<sup>150</sup> *Id.*; *China: Harsh Sentence for Rights Activist*, HUMAN RIGHTS WATCH (July 29, 2019), <https://www.hrw.org/news/2019/07/29/china-harsh-sentence-rights-activist>.

<sup>151</sup> Wang, *supra* note 147.

<sup>152</sup> Huang’s secret trial was one component of a larger trend of secret prosecutions of human rights defenders in China. See Lucy Hornby, *China Sends Warning to Lawyers with Secret Trials*, FINANCIAL TIMES (May 1, 2017), <https://www.ft.com/content/9fc3a8b4-2bf3-11e7-9ec8-168383da43b7>.

<sup>153</sup> Wang, *supra* note 147.

<sup>154</sup> *China: Harsh Sentence for Rights Activist*, *supra* note 150.

<sup>155</sup> See, e.g., Christian Shepherd, *China Rights Lawyer Says Legal License Revoked After Criticizing President Xi Jinping*, REUTERS (Jan. 15, 2018), <https://www.reuters.com/article/us-china-rights/china-rights-lawyer-says-legal-license-revoked-after-criticizing-president-xi-jinping-idUSKBN1F5067>; *China: Release Human Rights Lawyers*, HUMAN RIGHTS WATCH (Feb. 15, 2018), <https://www.hrw.org/news/2018/02/15/china-release-human-rights-lawyers>.

<sup>156</sup> The Special Rapporteur on the independence of judges and lawyers has expressed significant concerns about such exceptional control. Diego García-Sayán (Special Rapporteur on the Independence of Judges and Lawyers), *Report to the General Assembly on Bar Associations*, ¶ 60, 108-12, U.N. Doc. A/73/365 (Sept. 5, 2018).

<sup>157</sup> *Tajikistani Lawyers Harassed*, *supra* note 121.

country by almost half—from 1,500 in 2015 to 800 in 2019.<sup>158</sup> Even fewer lawyers are currently practicing; just 30% of those who were practicing before the change in law were still practicing two years later.<sup>159</sup> The government accomplished this in part by politicizing the questions in the examination portion of the accreditation process, which it required all licensed lawyers to retake after it took control.<sup>160</sup>

Ultimately, the existence of fewer practicing lawyers means that fewer members of the Tajikistani public are able to find adequate legal representation. As demonstrated above, this manipulation of the legal profession is just one part of the government’s strategy of suppressing dissent by removing legal protections for dissidents. The impact of these violations varies across Tajikistan—rural areas are more severely harmed, as they contain some small villages and towns without a single licensed lawyer.<sup>161</sup> The devastating impact on the right of access to counsel is evident. In the context of the targeted extremism trials described above, this depletion of the legal workforce has made it easier for the government to prevent its political opponents from retaining counsel. It thus factors into the State’s broader practice of using counter-terrorism and anti-extremism laws to incapacitate its political opponents through the legal regime that has been in place since the enactment of the Law on Combatting Terrorism of 1999 and Law on the Fight Against Extremism of 2003.

Finally, States may also obstruct the broad operation of legal organizations to prevent lawyers on staff from performing their work. While not technically a sanction, this form of obstruction also prevents lawyers from operating under their earned professional qualifications, in this instance their employment by a reputable legal organization. This is especially pertinent in the counter-terrorism context, as States at times have used states of emergency as a justification to shutter legal organizations. In July 2016, for example, Turkey used a state of emergency decree to close multiple legal organizations, including several human rights-focused organizations that it accused of association with the Gülen movement.<sup>162</sup> This was just one part of the Turkish government’s greater campaign to limit the right of access to counsel for its political opposition since 2016.<sup>163</sup>

As each of these examples illustrate, professional sanctions tend to constitute one component of a greater regime of limitations on the right of access to counsel, especially in the context of counter-terrorism. They primarily serve to reduce the overall availability of lawyers in a community, and thus the likelihood that an accused person may be able to find and retain a lawyer. However, they

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<sup>158</sup> INT’L BAR ASS’N HUMAN RIGHTS INST. & INT’L COMM’N OF JURISTS, JOINT SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE IN VIEW OF THE COMMITTEE’S EXAMINATION OF TAJIKISTAN’S THIRD PERIODIC REPORT UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 3 (2019) [hereinafter JOINT SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE].

<sup>159</sup> David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report on his Mission to Tajikistan*, ¶ 53, U.N. Doc. A/HRC/35/22/Add.2 (Oct. 13, 2017).

<sup>160</sup> *Id.* Sri Lanka provides a similar example of a State with complete control over legal accreditation, a process that has similarly been highly politicized at various points as political control of the government shifted. Mónica Pinto (Special Rapporteur on the Independence of Judges and Lawyers), *Report of the Special Rapporteur on the Independence of Judges and Lawyers on her Mission to Sri Lanka*, ¶ 12, U.N. Doc. A/HRC/35/31/Add.1 (Mar. 23, 2017).

<sup>161</sup> JOINT SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE, *supra* note 158.

<sup>162</sup> LAWYERS ON TRIAL, *supra* note 128.

<sup>163</sup> *Id.*

may also target specific lawyers because of the nature of their work and thus reduce the availability of lawyers for a certain type of law, including, importantly, for terrorism or extremism charges.

#### E. Violence, threats, and harassment

The preceding two sections discuss legal and administrative tactics that States use to limit lawyers' abilities to do their jobs and thus also to limit their clients' access to counsel. In addition, States may act extralegally, using violence, threats, and harassment to intimidate lawyers and deter them from representing the State's targets. This category of limitation on the right of access to counsel includes both physical violence and verbal and/or sexual harassment targeting the lawyer, as well as any threats of official sanction, violence, or other punishment toward the lawyer or someone they know.

The UN Basic Principles on the Role of Lawyers detail the State's responsibility to protect lawyers and facilitate rather than obstruct their work. Most notably, principle 16 emphasizes that States should "ensure that lawyers ... are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference" and that they are not threatened with arbitrary sanctions. In addition to the Basic Principles, the Special Rapporteur on the situation of human rights defenders has recognized that States' obligations toward HRDs, including human rights lawyers, include the obligation to protect them from violations committed by non-state actors.<sup>164</sup> Thus, States cannot allow non-state actors to harm, threaten, or harass lawyers even where such actions may be in line with the State's interests.

Violence against lawyers is common, particularly in emergency contexts where the rule of law is absent or where the State takes extreme measures to maintain its power. The late twentieth century in Colombia, for example, saw a pattern of violence and death threats against lawyers, many of whom represented leftist guerrillas whom the Colombian government regarded as a threat to its national security.<sup>165</sup> Human rights organizations documented many murders of these lawyers during this time period, some at the hands of the Colombian army and police forces.<sup>166</sup> The government treated representation of its adversaries—including some human rights organizations—as a political crime, not only detaining and prosecuting alleged offenders but at times torturing, disappearing, and murdering them as well.<sup>167</sup>

These violations were enabled by two executive decrees issued in 1988 and 1990, both adopted as permanent laws in 1991.<sup>168</sup> The former, which subsequently became known as the Statute for the Defense of Democracy or the Anti-Terrorism Statute, criminalized acts of terrorism as acts that "provoke a state of anxiety or terror to the public or a section of it, through acts that endanger the life, physical integrity or liberty of persons or buildings or means of communication,

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<sup>164</sup> Margaret Sekaggya (Special Rapporteur on the Situation of Human Rights Defenders), *Report to the General Assembly*, ¶ 8, U.N. Doc. A/65/223 (Aug. 4, 2010).

<sup>165</sup> INT'L COMM'N OF JURISTS, JUSTICIA PARA LA JUSTICIA: VIOLENCIA CONTRA JUECES Y ABOGADOS EN COLOMBIA, 1979-1991, ch. 3 (1992) [hereinafter JUSTICIA PARA LA JUSTICIA]; Param Cumaraswamy (Special Rapporteur on the Independence of Judges and Lawyers), *Report on the Mission of the Special Rapporteur to Colombia*, ¶¶ 110-18, U.N. Doc. E/CN.4/1998/39/Add.2 (Mar. 30, 1998).

<sup>166</sup> JUSTICIA PARA LA JUSTICIA, *supra* note 165, at 70.

<sup>167</sup> *Id.* at 69.

<sup>168</sup> *Id.* at 12.

transportation, processing or fluid handling or drivers using means capable of causing havoc.”<sup>169</sup> The statute thus broadly criminalized politically-motivated activities along with activities fitting the internationally accepted definitions of terrorism provided above.<sup>170</sup> It also broadly expanded military power by permitting the military to search and make arrests without warrants, to arrest anyone suspected of terrorist activities, and to hold them without charge for ten days.<sup>171</sup> In all, the Anti-Terrorism Statute led to further abuses of State power in the interest of repression of dissidents, as well as acts of violence linked to the army and police committed against judicial officials of the exceptional court system for crimes against the state.<sup>172</sup> The Colombian Supreme Court later struck down these provisions as unconstitutional.<sup>173</sup>

Violence against lawyers and other HRDs in Colombia not only served to incapacitate advocates who were already licensed, but also functioned to discourage others from joining the legal field.<sup>174</sup> Violence against lawyers perpetrated by the government compounded violence committed by criminal organizations, with the result that lawyering became an evidently dangerous profession.<sup>175</sup> The government did little to prosecute the aggressors; instead, “[i]mpunity [was] the general rule.”<sup>176</sup> The government thus sent a message to the legal workforce that certain types of work would likely lead to violence, from which advocates would not be protected. The ultimate goal of such a strategy was to decrease access to counsel for opponents of the government in need of representation, which the Colombian government accomplished effectively over the course of the 1980s.

Short of committing actual physical violence, some States employ threats and various forms of harassment, including sexual harassment, to intimidate lawyers representing clients accused of terrorism or extremism. In particular, female lawyers and lawyers who are members of lesbian, gay, bisexual, and transgender (LGBT+) communities face specific challenges of this nature, as they endure targeted sexual harassment and violence, as well as gender-based discrimination within the courtroom.<sup>177</sup>

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<sup>169</sup> Luz E. Nagle, *Colombia*, in *COMPARATIVE COUNTER-TERRORISM LAW* 130 (Kent Roach ed., 2015); Decreto 181, enero 27, 1988, Diario Oficial [D.O.] No. 38.191 (Colom.).

<sup>170</sup> Luz E. Nagle, *Global Terrorism in Our Own Backyard: Colombia’s Legal War Against Illegal Armed Groups*, 15 *TRANSNAT’L L. & CONTEMP. PROBS.* 6, 31 (2005).

<sup>171</sup> Nagle, *supra* note 169, at 139. The International Commission of Jurists expressed concern about the potential of these laws for use to erode individual due process and security rights just after their enactment. JUSTICIA PARA LA JUSTICIA, *supra* note 165, at 12 (“What has been a constant with these kinds of measures . . . are abuses against individual freedom and guarantees of due process of individuals not involved in drug trafficking or guerrilla activities, such as members of popular organizations, opposition activists or simply common citizens. Far from defending justice, these measures strengthen the role of civilian and military security organisms, granting them wide discretionary powers to collect evidence. Such powers in the hands of intelligence organisms, frequently . . . result in torture, forced disappearances and extrajudicial assassination.”).

<sup>172</sup> Nagle, *supra* note 170, at 31.

<sup>173</sup> *Id.* Note, however, that the Supreme Court did exclusively uphold the section of the law establishing jurisdiction for “Public Order Courts” to replace its previously challenged military trials. Nagle, *supra* note 169, at 139.

<sup>174</sup> See Mónica Pinto (Special Rapporteur on the Independence of Judges and Lawyers), *Report to the General Assembly*, ¶ 69, UN Doc. A/71/348 (Aug. 22, 2016).

<sup>175</sup> JUSTICIA PARA LA JUSTICIA, *supra* note 165, at 68.

<sup>176</sup> *Id.* at 93.

<sup>177</sup> See Michel Forst (Special Rapporteur on the Situation of Human Rights Defenders), *Situation of Women Human Rights Defenders*, U.N. Doc. A/HRC/40/60 (Jan. 10, 2019); see also, e.g., *PERMANENT STATE OF EXCEPTION*, *supra* note 131, at 53.

Egypt's Supreme State Security Prosecution (SSSP) again provides an instructive example. The SSSP tolerates a prevalent culture of threats and harassment toward defense lawyers, perpetrated both by prosecutors and by police officers involved in their cases.<sup>178</sup> Lawyers interviewed by Amnesty International reported that police officers made threats toward them about various topics, including prosecution of the targeted lawyer, social media surveillance, and preventing access to clients.<sup>179</sup> In addition, prosecutors sexually harassed many female lawyers, leading at least one of those interviewed to refrain from taking cases being prosecuted by the SSSP unless "absolutely necessary."<sup>180</sup> Thus, the programmatic usage of threats and harassment created an environment hostile enough to intimidate some lawyers out of working on SSSP cases. As shown above, this is just one small part of the Egyptian government's campaign to limit access to counsel for those accused of terrorism or extremism by the SSSP. It plays a significant role within this system, in particular in preventing female lawyers from taking on and effectively representing these individuals as clients. The overall effect is, again, a decrease in the number of lawyers working on counter-terrorism and extremism cases, and thus a decrease in the availability and accessibility of counsel for the accused.

Finally, it is important to note that these tactics may also be effectively used against acquaintances of a targeted lawyer. This strategy undermines the right to be free from arbitrary or unlawful interference with one's family under article 17 of the ICCPR.<sup>181</sup> For example, in the case from Tajikistan highlighted above, the State filed charges against Buzurgmehr Yorov's brother and sister as part of a campaign to intimidate and punish him.<sup>182</sup> Ultimately, both siblings fled the country to safety as Yorov faced an unfair trial.<sup>183</sup> This form of violation can similarly deter lawyers who are considering taking on terrorism or extremism cases.

In all, many governments have found that pressuring lawyers through legal, professional, and hostile extralegal pathways is an effective way to undermine the right of access to counsel for those lawyers' existing or potential clients. While these measures acutely violate the rights of the lawyers who are directly impacted, they are also an important component of many States' greater counter-terrorism regimes, contributing to systemic violations of the right of access to counsel for those accused of terrorism and extremism. These violations are multiplied as States expand the scope of these offenses under their domestic law, in many cases to target marginalized groups or political dissidents in situations that do not meet the abovementioned definition of terrorism.<sup>184</sup> Targeting the lawyers of those accused of terrorism and extremism, whether they are accused in good or bad faith, allows States to both undermine and escape accountability for their violations of the right of access to counsel in punishing their targets.

#### **IV. Undermining of access to counsel**

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<sup>178</sup> PERMANENT STATE OF EXCEPTION, *supra* note 131, at 53-54.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 53.

<sup>181</sup> ICCPR, *supra* note 2, at art. 17.

<sup>182</sup> *The Systematic Repression of Lawyers in Central Asia and Eastern Europe*, FREEDOM HOUSE (Sept. 12, 2018), <https://freedomhouse.org/article/systematic-repression-lawyers-central-asia-and-eastern-europe>.

<sup>183</sup> *Id.*

<sup>184</sup> *See* S.C. Res. 1566, ¶ 3 (Oct. 8, 2004); Scheinin First Report, *supra* note 19, ¶ 50.

In addition to intimidation and harassment of lawyers, States deploy a variety of laws, regulations, and policies to further undermine the right of access to counsel in instances purportedly implicating national security. Even when a person detained for terrorism or extremism-related offenses is able to meet with or speak to legal counsel, States may constrain the scope of that access to counsel and the ability to challenge accusations or offer a meaningful defense. By providing some limited access to counsel, States may claim to be upholding their obligations under international law to guarantee the right to counsel, while asserting that exigent circumstances justify restrictions or limitations that functionally undermine the right.

The right of access to counsel, however, is about more than just prompt access to legal representation. Rather, the right encompasses various components without which the right would be significantly impaired. The following Part discusses three such components of the right of access to counsel at particular risk in the context of terrorism and extremism: (a) the right to confidential communications and consultations, (b) the right to access documents and evidence, and (c) the right to choose one's counsel. By limiting these components of the right of access to counsel, States undermine the right and its capacity to safeguard against torture and guarantee fair trials.

#### F. Violations of the right to confidential communications and consultations

The right of access to counsel includes the right to confidential communications and consultations. However, States regularly violate this right by monitoring and recording private attorney-client meetings and surveilling privileged communications over telephone and email. These violations not only undermine safeguards for the right to a fair trial and freedom from torture, but also damage attorney-client trust, subvert the adversarial process, and pressure lawyers to alter or abandon their intended advocacy strategies. The following sections address the right to confidential communication under international law and provide examples of State violations of this right.

##### 1. *Right to confidential communication under international law*

Under international human rights law and standards, the right of access to counsel encompasses the right to communicate and consult with legal counsel in full confidentiality, without interception or censorship. Article 14 of the ICCPR guarantees that any person charged with a criminal offense shall “have adequate time and facilities for the preparation of his defence.”<sup>185</sup> Implicit in article 14 is the right to confidential communication, as the Human Rights Committee has affirmed.<sup>186</sup> The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also provides that “[a] detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel”<sup>187</sup> and provides for “[t]he right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship

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<sup>185</sup> ICCPR, *supra* note 2, at art. 14(3)(b).

<sup>186</sup> HRC Comment 32, *supra* note 3, ¶ 34 (“Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.”).

<sup>187</sup> Detention Principles, *supra* note 6, principle 18(2).

and in full confidentiality, with his legal counsel.”<sup>188</sup> Only in the most exceptional circumstances may a State restrict or otherwise suspend this right, and such a restriction or suspension must be specified by law and “considered *indispensable* by a judicial or other authority in order to maintain security and good order.”<sup>189</sup> Protections for the right to confidential communication and consultation with legal counsel are also enshrined in the UN Basic Principles on the Role of Lawyers, which stipulate that communications and consultations with legal counsel should occur “without delay, interception or censorship and in full confidentiality,”<sup>190</sup> and States should “recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.”<sup>191</sup> The Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems also clarify that States should provide effective legal aid for persons suspected of or charged with a criminal offence at all stages of the criminal justice process and that effective legal aid includes confidentiality of communications.<sup>192</sup> Significantly, the right to confidential communication attaches at accusation or arrest and extends throughout the course of legal proceedings.

At international law, one codified measure to protect confidential communication is the general prohibition on law enforcement officials from listening to or recording conversations between detained or imprisoned persons and their legal counsel. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “[i]nterviews between a detained or imprisoned person and his legal counsel may be within sight, *but not within the hearing*, of a law enforcement official.”<sup>193</sup> The Basic Principles on the Role of Lawyers repeats the prohibition on officials listening to interviews in the criminal justice context.

## 2. *State violations of the right to confidential communication*

States frequently violate the right to confidential communication for persons suspected of terrorism, extremism, or other national security offenses. Law enforcement officials, military personnel, and members of State intelligence services are often responsible for such violations. In some cases, State actors devise policy to encourage or to permit monitoring of attorney-client communications, whereas in other cases, the State fails to implement adequate safeguards to prevent the interception of confidential information during regular surveillance processes. In instances implicating national security, States are more likely to violate the right to confidential communication and therefore undermine the right of access to counsel more broadly. Moreover,

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<sup>188</sup> *Id.*, principle 18(3).

<sup>189</sup> *Id.*, principle 18(3) (emphasis added).

<sup>190</sup> Basic Principles, *supra* note 7, principle 8. Included under special safeguards in criminal justice matters, Principle 8 states, “All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.” *Id.*

<sup>191</sup> *Id.*, principle 22.

<sup>192</sup> [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems]. Principle 7 provides, “States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.” ¶¶ 27-28. Guideline 3 further recommends that States introduce measures “[t]o ensure that persons meet with a lawyer or a legal aid provider promptly after their arrest in full confidentiality; and that the confidentiality of further communications is guaranteed . . . .” ¶ 43.

<sup>193</sup> Detention Principles, *supra* note 6, principle 18(4) (emphasis added).

the imprecise definition of terrorism and its broad and shifting scope allows States to claim a wide array of information as relevant to national security and justify extensive intelligence gathering operations. The surveillance technology available to the State in the counter-terrorism space may also be varied and under-regulated, making violations of confidential communication easy, low-cost, and without consequence domestically.

The most obvious examples of State violations of the right to confidential communication involve the deliberate monitoring or surveilling of attorney-client communications. These violations vary in kind in the context of persons arrested or detained for alleged terrorism or other national security offenses. First, States may have policies or regulations allowing their agents to be physically present and within hearing range of in-person meetings and consultations, allowing officials to listen to the conversations in real time. Second, State agents may monitor or record in-person meetings by deploying—and often concealing—listening devices. Lawyers representing a Guantánamo Bay detainee, for example, discovered a hidden microphone in the room where they regularly met with their client.<sup>194</sup> Moreover, in the United States, the Attorney General may impose special administrative measures (SAMs) on persons detained for national security or terrorism offenses, and these measures may permit monitoring of attorney-client consultations, including through audio and visual recording.<sup>195</sup>

Turkey also provides a salient example of infringement on the right to confidential communication. In response to a failed military coup in July 2016, President Erdoğan announced a nation-wide state of emergency “in order to remove swiftly all the elements of the terrorist organization involved in the coup attempt.”<sup>196</sup> Under the state of emergency, Turkish authorities issued several decrees widening the scope of terrorism laws and leading to the investigation and arrests of thousands of civilians and military personnel for terrorist offenses.<sup>197</sup> The largest group facing terrorism charges are members of FETÖ. The second largest group facing terrorism charges are members of the Kurdistan Workers’ Party (PKK). Others charged with terrorism offences are linked to outlawed leftist groups.

While the state of emergency was initially imposed for three months and later extended multiple times before expiring in July 2018, many of the measures in the decrees became permanent through legislative incorporation. A 2019 report by Human Rights Watch documented the erosion of the right to legal defense for individuals charged with terrorism offenses. The restrictive measures include conditioning meetings between lawyers and clients on the presence of public officials and the recording of the conversations in full.<sup>198</sup> While the measures are theoretically discretionary, lawyers have reported widespread implementation, especially for FETÖ detainees, with one

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<sup>194</sup> Charlie Savage, *Guantánamo Lawyers Challenge Government’s Explanation for Hidden Microphone*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/us/politics/guantanamo-hidden-microphone.html>.

<sup>195</sup> ALLARD K. LOWENSTEIN INT’L HUMAN RIGHTS CLINIC AT YALE LAW SCH. & THE CTR. FOR CONSTITUTIONAL RIGHTS, THE DARKEST CORNER: SPECIAL ADMINISTRATIVE MEASURES AND EXTREME ISOLATION IN THE FEDERAL BUREAU OF PRISONS 16-17 (2017), [https://law.yale.edu/sites/default/files/area/center/schell/document/sams\\_report.final.pdf](https://law.yale.edu/sites/default/files/area/center/schell/document/sams_report.final.pdf) [hereinafter LOWENSTEIN & CCR]

<sup>196</sup> *Turkey Declares ‘State of Emergency’ after Failed Coup*, AL JAZEERA (July 21, 2016), <https://www.aljazeera.com/news/2016/07/erdogan-declares-state-emergency-turkey-160720203646218.html>.

<sup>197</sup> LAWYERS ON TRIAL, *supra* note 128.

<sup>198</sup> *Id.* at 16 n.24.

lawyer commenting, “There is no privileged communication when a meeting between lawyer and client takes place in the presence of a prison guard and the whole meeting is recorded on camera.”<sup>199</sup>

The third, and perhaps the most concerning, form of deliberate violations of the right to confidential communication involves remote surveillance by State intelligence agencies. Some States mobilize their intelligence agencies to deliberately intercept, monitor, and collect confidential attorney-client communication, conveyed through telecommunication systems such as telephones or email. Internal documents from U.K. intelligence agencies, for example, reveal regular surveillance of legally privileged communications between lawyers and their clients in cases implicating national security.<sup>200</sup> While States may intentionally work to capture these communications, a related violation involves failure to provide adequate measures to safeguard confidential communications during otherwise untargeted or regular mass surveillance procedures. The U.S. professional bar association, for example, questioned the adequacy of the policies used by the National Security Agency to protect attorney-client privilege, following a leak that the Australian Signals Directorate shared privileged information between an American law firm and its foreign government client.<sup>201</sup> Whether government surveillance is active or passive, lawyers representing clients accused of terrorism offenses have expressed concern about the impacts of mass surveillance on attorney-client trust and attorneys’ ability to effectively represent their clients.<sup>202</sup> The Special Rapporteur on privacy has repeatedly emphasized the importance of safeguarding privacy in the national security context, including the oversight of intelligence activities and the exchange of personal information across borders.<sup>203</sup>

Fourth, States also violate the right to confidential communication broadly when they fail to provide adequate opportunities, time, and facilities for persons to consult with attorneys privately and freely. Challenging physical conditions in facilities housing prisoners and detainees charged with national security offenses inhibit meaningful access to counsel.<sup>204</sup>

#### G. Limitations on access to evidence and proceedings

The pervasive use of secret evidence also undermines the right of access to counsel, as individuals and their counsel cannot access information that is relevant to the individual’s defense. Secret evidence here refers to evidence, whether classified or unclassified, that is not disclosed to the affected person or their counsel. The following section discusses situations where secret evidence

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<sup>199</sup> *Id.* at 16-17.

<sup>200</sup> Owen Boscott, *UK Intelligence Agencies Spying on Lawyers in Sensitive Security Cases*, GUARDIAN (Nov. 7, 2014), <https://www.theguardian.com/world/2014/nov/06/intelligence-agencies-lawyer-client-abdel-hakim-belhaj-mi5-mi6-gchq>.

<sup>201</sup> James Risen & Laura Poitras, *Spying by N.S.A. Ally Entangled U.S. Law Firm*, N.Y. TIMES (Feb. 15, 2014), <https://www.nytimes.com/2014/02/16/us/eavesdropping-ensnared-american-law-firm.html>.

<sup>202</sup> HUMAN RIGHTS WATCH, WITH LIBERTY TO MONITOR ALL: HOW LARGE-SCALE US SURVEILLANCE IS HARMING JOURNALISM, LAW AND AMERICAN DEMOCRACY 49-65 (2014), <https://www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and>.

<sup>203</sup> Joseph Cannataci (Special Rapporteur on Privacy), *Report of the Special Rapporteur on the Right to Privacy*, ¶¶ 26-49, U.N. Doc. A/HRC/40/63 (Feb. 27, 2019).

<sup>204</sup> LOWENSTEIN & CCR, *supra* note 195, at 24-25.

is used by States against individuals in terrorism and extremism proceedings, across military, criminal, and civil contexts.

1. *Prohibited use of secret evidence and secret proceedings under international law*

International law and standards provide imprisoned or detained persons with the right to access evidence against them, and this right is strongest for those charged with criminal offenses. Article 14 of the ICCPR guarantees adequate facilities for the preparation of a defense and the Human Rights Committee has clarified that this includes access to documents and other evidence, including “all materials that the prosecution plans to offer in court against the accused or that are exculpatory.”<sup>205</sup> According to the Committee, the right to access evidence is an important element of the guarantee of a fair trial and allows for procedural equality for both parties in an adversarial process.<sup>206</sup> Importantly, the Committee has noted that for criminal charges, “the fundamental requirements of fair trial must be respected during a state of emergency,” finding “no justification for derogation from these guarantees during other emergency situations.”<sup>207</sup>

2. *Use of secret evidence in proceedings against persons accused of security-related offenses*

States frequently use secret evidence in proceedings against persons suspected of terrorism or extremism. The use of secret evidence is pervasive in courts and tribunals—whether military or civilian—and extends to different contexts including criminal trials, removal and control proceedings, refugee and asylum determinations, and administrative detention.<sup>208</sup> While States have generally recognized that due process protections include the right to confront an accuser and to be presented with the evidence against a person, domestic legislatures and courts have often concluded that situations implicating national security may justify withholding critical information. Withholding information undercuts the accused person’s ability to challenge both the evidence itself as well as any resulting judgments or orders based on the evidence.<sup>209</sup> States often allege that disclosure of such evidence would reveal information that is highly sensitive, pertains to a highly sensitive source, or pertains to someone other than the affected person.<sup>210</sup> However, reports of State practice renders these justification dubious.

One concern is that States use the rationale of secret evidence as pretext for arbitrary detention, effectively insulating themselves from scrutiny and accountability. Israel, for example, has been repeatedly criticized for its use of administrative detention of Palestinians on the basis of secret

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<sup>205</sup> HRC Comment 32, *supra* note 3, ¶ 33.

<sup>206</sup> *Id.* ¶ 32.

<sup>207</sup> HRC Comment 29, *supra* note 4.

<sup>208</sup> See OXFORD PRO BONO PUBLICO, THE USE OF SECRET EVIDENCE IN JUDICIAL PROCEEDINGS: A COMPARATIVE STUDY (2011).

<sup>209</sup> See David Cole & Stephen I. Vladeck, *Comparative Advantages: Secret Evidence and ‘Cleared Counsel’ in the United States, the United Kingdom and Canada*, in SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW 173 (David Cole, Federico Fabbrini & Arianna Vidaschi eds., 2013).

<sup>210</sup> *Id.* at 176 (referring to the process whereby the U.S. government may refuse to disclose evidence to lawyers representing Guantánamo detainees who have also obtained prerequisite security clearances).

evidence made unavailable to the detainee and their lawyer.<sup>211</sup> The Israeli government relies on a combination of domestic laws and laws applied to the occupied territories to issue detention orders that can be renewed indefinitely.<sup>212</sup> Lawyers representing administrative detainees in Israeli military and civilian courts receive little to no information about the grounds for the orders, as the prosecutor alone has access to all evidence, including witnesses.<sup>213</sup> With no information about the basis for detention and no ability to cross-examine the prosecutor or any primary witnesses, detainees are unable to present a meaningful defense at the initial judicial review process or on appeal. Moreover, the bases for detention themselves are often impossibly vague, such as “being a threat to the security of the area,” while the security reasons are broad enough to include actions like participation in peaceful demonstrations or carrying a Palestinian flag.<sup>214</sup>

As of October 2019, Israeli authorities held 4,731 Palestinians in custody for security offenses, including 460 in administrative detention based on secret evidence without charge or trial.<sup>215</sup> According to a local human rights organization, Palestinian detainees have spent up to eight consecutive years and up to twelve cumulative years in administrative detention without charge or trial.<sup>216</sup> The relevant authorities often issue administrative detention orders for Palestinians following unsuccessful attempts by the Israeli government to bring criminal charges against them.<sup>217</sup> According to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, “Israel’s practice of holding individuals on secret evidence is in clear violation of both international humanitarian law and international human rights law and far oversteps the use of ‘internment’ as envisioned by the Fourth Geneva Convention.”<sup>218</sup>

The use of secret evidence is not limited to imprisonment and detention, as courts, tribunals, and administrative bodies also rely on secret evidence in issuing control orders, overseeing removal proceedings, and adjudicating denaturalization actions. There are fewer procedural safeguards in civil and administrative proceedings compared to criminal prosecutions, and individuals suspected of terrorism or considered a threat to national security are particularly vulnerable. The use of secret evidence—and in some cases secret proceedings where the affected person and/or their legal

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<sup>211</sup> See, e.g., Michael Lynk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), *Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶¶ 19-22, U.N. Doc. A/71/554 (Oct. 19, 2016); Comm. Against Torture, *Concluding Observations on the Fifth Periodic Report of Israel*, ¶ 22, U.N. Doc. CAT/C/ISR/CO/5 (June 3, 2016).

<sup>212</sup> Israel relies on (1) the Emergency Powers Law (Detentions) (1979), permitting the Minister of Defense to order detention for up to six months with the authority to indefinitely renew the order under a declared state of emergency; (2) Military Order 165, authorizing military commanders to detain individuals for up to six months with authority to indefinitely renew, if they have “reasonable grounds to presume that the security of the area or public security require detention”; and (3) the Incarceration of Unlawful Combatants Law (2002), providing for indefinite administrative detention of foreign nationals. The State applies these laws to Israel, the West Bank, and the Gaza Strip, respectively. While the Emergency Law only applies during a state of emergency, the Knesset has declared such a state since the founding of the State of Israel in 1948.

<sup>213</sup> ADDAMEER PRISONER SUPPORT AND HUMAN RIGHTS ASS’N, ADMINISTRATIVE DETENTION IN THE OCCUPIED PALESTINIAN TERRITORY: A LEGAL ANALYSIS REPORT 33-34 (4th ed. 2016).

<sup>214</sup> *Id.* at 11, 32.

<sup>215</sup> HUMAN RIGHTS WATCH, BORN WITHOUT CIVIL RIGHTS: ISRAEL’S USE OF DRACONIAN MILITARY ORDERS TO REPRESS PALESTINIANS IN THE WEST BANK 12 (2020) (citing figures provided by the Israeli Prison Services).

<sup>216</sup> ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS’N, *supra* note 213, at 31.

<sup>217</sup> Lynk, *supra* note 211, ¶ 20.

<sup>218</sup> *Id.* ¶ 21.

representatives have limited access—render it nearly impossible to contest allegations or offer any meaningful defense.

The expanded use of closed-material procedures (CMPs) in the United Kingdom is an example of undermining the right of access to counsel by limiting the ability to prepare an adequate defense. CMPs allow the government to present secret evidence in a closed hearing to the court, which can consider that evidence in determining the substantive issues in the case. Established in 1997 with the Special Immigration Appeals Commission, CMPs were originally designed for deportation cases related to national security and were only used three times prior to 9/11 against individuals suspected of terrorism-related activity.<sup>219</sup> However, the Justice and Security Act of 2013 expanded the application of CMPs to civil proceedings. The Act provides a broad definition of “sensitive information,” including any information held by or obtained from an intelligence service. Moreover, secretaries of state may certify additional information they consider contrary to the public interest to disclose. Judgments made based on CMPs are neither published nor made publicly available.

Lawyers representing clients in cases involving CMPs have identified tremendous difficulties in doing their work. Among these challenges are “how to represent your client effectively when you simply do not have access to much of the evidence that underpins the government’s case; . . . the fear that adopting a certain line of questioning might result in negative consequences in the secret part of the hearing; challenges in maintaining the trust of their clients; . . . and challenges in effectively appealing a case if part of the judgment is closed.”<sup>220</sup> The U.K. government has attempted to mitigate concerns stemming from the use of secret evidence and CMPs by designating and providing special advocates, lawyers with security clearance appointed to represent the interests of affected persons. While special advocates can review the secret evidence, they are prohibited from discussing any part of the evidence with the affected persons and their legal counsel. Moreover, their ability to effectively represent the interests of the individuals is severely limited, and many special advocates have publicly denounced CMPs as “inherently unfair” concluding that “they do not ‘work effectively’ nor do they deliver real procedural fairness.”<sup>221</sup>

Nonetheless, since 2013, courts and tribunals have increasingly adopted CMPs in contexts like immigration decisions, deportation and citizenship revocation, terrorism prevention and investigation measures, and security vetting decisions, particularly in response to perceived threats of terrorism and extremism.<sup>222</sup> While the U.K. offers a longstanding example, other countries that have adopted procedures similar to CMPs include Canada, New Zealand, and Australia.<sup>223</sup>

#### H. Denial of access to counsel of one’s choice

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<sup>219</sup> AMNESTY INT’L, *LEFT IN THE DARK: THE USE OF SECRET EVIDENCE IN THE UNITED KINGDOM* 8 (2012).

<sup>220</sup> *Id.* at 5 (summarizing interviews from barristers and solicitors who have acted in cases involving CMPs).

<sup>221</sup> Special Advocates, *Justice and Security Green Paper: Response to Consultation from Special Advocates*, 16 December 2011, para 15.

<sup>222</sup> Angus McCulough & Shaheen Rahman, *Disclosure in Closed Material Proceedings: What Has to Be Revealed?*, 24 JUD. REV. 223, 225 (2019).

<sup>223</sup> See David Jenkin, *The Handling and Disclosure of Sensitive Intelligence: Closed Material Procedures and Constitutional Changes in the ‘Five Eyes’ Nations*, in ROUTLEDGE HANDBOOK OF LAW AND TERRORISM 266 (Genevieve Lennon & Clive Walker eds., 2015); Cole & Vladeck, *supra* note 209.

As this memorandum notes in the section on incommunicado detention, the right of access to counsel includes the right to counsel of one's choosing. The right to choose counsel may be limited in certain circumstances, such as those in which a person facing a criminal charge cannot afford representation. This section discusses a different issue, however, examining cases in which the State specifically limits representation of persons accused of terrorism or extremism offenses to a list of pre-approved counsel.

1. *Access to counsel of one's choice under international law*

The right to choose one's legal representation is a fundamental right of the accused. International law guarantees persons accused of criminal offenses access to counsel of their choice at all stages of criminal proceedings, including during investigations and pretrial proceedings. Article 14 of the ICCPR and principle 1 of the Basic Principles on the Role of Lawyers provides for this right.<sup>224</sup> The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also provides: "If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay."<sup>225</sup> The right to choose one's lawyer is fundamentally linked to the right to present a defense and is one of the most important safeguards against torture and abuses in detention.

2. *States undermining the right to counsel of one's choice*

The right of access of counsel is undermined when States restrict a person's choice of legal representation. Sometimes States restrict the pool of lawyers available for representation in national security cases based on their level of clearance, such as special advocates for CMPs in the United Kingdom. However, these lists of approved counsel may function in practice to prevent independent lawyers from representing clients and vitiate the right of access to counsel for persons suspected of national security offenses. The danger is especially salient when States are not clear or transparent about the approval process for the generated lists and the determinative criteria, and do not provide lawyers who are not on these lists with meaningful recourse to challenge their exclusion. Some States may also exclude lawyers based on imputed political or social views.

Iran is such a case. While Iran's Code of Criminal Procedure guarantees the right of an accused person to a lawyer upon arrest, amendments to the code in 2015 tempered this guarantee. A note to article 48 restricts individuals accused of national security offenses from choosing their own legal representation during the investigation stage. Instead, accused persons must choose a lawyer from a list of names pre-approved by the Head of the Judiciary. The list of lawyers approved to represent people accused of national security offenses is very short. Of the more than 20,000 members of the bar association of Tehran, the judiciary has only approved 20 lawyers, none of

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<sup>224</sup> ICCPR, *supra* note 2, at art. 14 (3)(b); Basic Principles, *supra* note 7, principle 1 ("All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.").

<sup>225</sup> Detention Principles, *supra* note 6, principle 17(2).

whom are women or human rights lawyers.<sup>226</sup> Judges also occasionally refuse to accept accused persons' lawyers of choice during the trial phase.<sup>227</sup>

The Special Rapporteur on the situation of human rights in Iran has repeated concern that article 48 not only “undermines the independence of the legal profession, but also . . . is a serious impediment to due process and the right to a fair trial.”<sup>228</sup> Iranian human rights advocates have similarly expressed outrage, with one lawyer questioning, “‘How can a lawyer handpicked and approved by the security establishment defend a suspect accused of political crimes?’ . . . ‘On one side, you have a person accused of political and security crimes, and on the other side there are representatives of the Islamic Revolutionary Guard Corps and the Intelligence Ministry who show up in Revolutionary Courts run by their own people. On top of all that, you want to force suspects to hire one of your own state lawyers? Well, that’s not fair.’”<sup>229</sup>

### III. Conclusion

This memorandum has examined the range of restrictions on the right of access to counsel that States have employed in the name of counter-terrorism, including incommunicado detention and secret detention in contexts like Spain and Nigeria, targeting lawyers in Egypt and Tajikistan, and chipping away at components of the right of access to counsel in Turkey, the United States, Israel, the United Kingdom, and Iran. From all of these angles and across the globe, the right of access to counsel is under attack. For States to respect, protect, and fulfill the right of access to counsel, they must limit their use of incommunicado detention and abolish secret detention; they must refrain from sanctioning, threatening, and harming lawyers; and they must facilitate confidential communications with lawyers who are well-informed and freely chosen.

While the right of access to counsel must be respected, protected, and fulfilled as a right in its own sake, it also merits attention because of its broad implications for other rights. To deny the right of access to counsel is to deny a fundamental element of the overall right to a fair trial<sup>230</sup> and to undermine a detainee’s ability to exercise non-derogable rights within the right to a fair trial, such as habeas corpus.<sup>231</sup> The right of access to counsel is also considered a safeguard against torture and cruel, inhuman or degrading treatment or punishment as well as arbitrary detention.<sup>232</sup>

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<sup>226</sup> Tara Sepehri Far, *Want to Choose Your Lawyer? Good Luck in Iran*, HUMAN RIGHTS WATCH (June 5, 2018), <https://www.hrw.org/news/2018/06/05/want-choose-your-lawyer-good-luck-iran>.

<sup>227</sup> *Id.*

<sup>228</sup> Asma Jahangir (Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran), *Situation of Human Rights in the Islamic Republic of Iran*, ¶ 48, U.N. Doc. A/HRC/43/61 (Jan. 28, 2020); see also Asma Jahangir (Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran), *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran*, ¶ 45, U.N. Doc. A/HRC/34/65 (Mar. 17, 2017).

<sup>229</sup> *Iranian Lawyers: Judiciary’s Mandatory List of Approved Counsel Sets “Dangerous Precedent”*, CTR. HUMAN RIGHTS IRAN (Mar. 14, 2018), <https://iranhumanrights.org/2018/03/iranian-lawyers-judiciarys-mandatory-list-of-approved-counsel-sets-dangerous-precedent>.

<sup>230</sup> HRC Comment 32, *supra* note 3, ¶ 32; IACHR Report, *supra* note 11, ¶ 261(c)(ii); ACHR Principles, *supra* note 15, principle A(2)(f); *Salduz v. Turkey*, 2008-V Eur. Ct. H. R. 59, ¶ 51.

<sup>231</sup> CTITF DETENTION, *supra* note 20, ¶ 26.

<sup>232</sup> See P. Koojimans (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, in

Counter-terrorism trials often include lower procedural and evidentiary standards, which not only increase the complexity and the stakes of a trial but also encourage the extraction of confessions through torture, and thus make access to counsel all the more necessary in this context.<sup>233</sup> Although this memorandum has focused on the right of access to counsel itself, the implications of this right for other human rights makes it even more crucial that the right not be denied or undermined in the name of counter-terrorism.

Additional obstacles to access to counsel, beyond those mapped in this memorandum, have arisen in the context of the Covid-19 pandemic. In-person meetings may be barred by quarantines and other emergency measures, which do not designate lawyers as essential workers. If an in-person meeting does take place, the health of the client, the lawyer, and all others in the vicinity is at risk. If a meeting is held remotely, the government will have opportunity to infringe on the privacy of attorney-client communications. Compounded challenges to the right of access to counsel should be anticipated due to these overlapping contexts of counter-terrorism and Covid-19.

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*Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 284, U.N. Doc. E/CN.4/1992/17 (Dec. 27, 1991) (“Torture most often takes place during incommunicado detention, when the detainee is refused access to legal counsel”); *see also* HRC Comment 20, *supra* note 37, ¶ 11; Subcomm. on the Prevention of Torture, *Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives*, ¶ 62, U.N. Doc. CAT/OP/MDV/1 (Feb. 26, 2009); IACHR Report, *supra* note 11, ¶ 261(c)(ii); ASIA PACIFIC FORUM OF NATIONAL HUMAN RIGHTS INSTITUTIONS, ASSOCIATION FOR THE PREVENTION OF TORTURE, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, PREVENTING TORTURE: AN OPERATIONAL GUIDE FOR NATIONAL HUMAN RIGHTS INSTITUTIONS (May 2010); WORKING GROUP ON ARBITRARY DETENTION, FACT SHEET NO. 26, <https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>. The UN General Assembly and the UN Commission on Human Rights have both affirmed that “detention in secret places” can “facilitate the perpetration of torture and other cruel, inhuman, and degrading treatment or punishment” and that it can “in itself constitute a form of such treatment.” G.A. Res. 60/148, ¶ 11 (Dec. 16, 2005); Res. 2005/39, *supra* note 41. In addition, the longstanding general recommendations of the UN Special Rapporteur on Torture have declared that “the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.” Theo Van Boven, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, ¶ 22, UN Doc. A/59/324 (Sept. 1, 2004).

<sup>233</sup> *See* Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *Fourth Report on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 27, U.N. Doc. A/63/223 (Dec. 28, 2005).