



General Assembly

Distr.
GENERAL

A/HRC/10/NGO/6
23 February 2009

ENGLISH ONLY

HUMAN RIGHTS COUNCIL
Tenth session
Agenda item 3

PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

**Written statement* submitted by Human Rights Advocates Inc. (HRA),
a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is
circulated in accordance with Economic and Social Council resolution 1996/31.

[11 February 2009]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Counter-terrorism and Human Rights

1. Human Rights Advocates submits this statement to address the issue of countering terrorism while ensuring that all persons suspected of committing terrorist acts are treated according to international human rights and humanitarian law. The label “terrorist” does not remove suspects from the sphere of protections of international law.

International Human Rights Law Obligations

2. States have a duty and a right under international human rights law to protect individuals within their jurisdiction from terrorist attacks, stemming from the duty to ensure respect for the right to life and security under the International Covenant on Civil and Political Rights (ICCPR).

3. With the passing of General Assembly resolution 60/288 in 2006, member states agreed to combat the spread of terrorism while ensuring that such measures comply with international human rights law.¹ As noted by the Security Council in resolution 1456, states have an obligation to combat terrorism, but they also are obliged to adopt measures in accordance with international law. In 2006, the UN Secretary-General emphasized that “effective counter-terrorism measures and the protection of human rights (are) not conflicting goals.”²

4. No universal, comprehensive and precise definition of “terrorism” currently exists. Security Council resolution 1566 defines terrorist acts as being committed with both 1) the intention of causing death or serious bodily injury, or the taking of hostages AND 2) for the purpose of provoking terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organization to do or abstain from doing any act. Without both intent requirements, domestic legislation may define terrorist conduct and organizations too broadly. For example, in the United States, domestic legislation makes it illegal to materially support terrorist activities. Under this definition, “the payment of a ransom to have a family member released by a terrorist organization” could be considered material support of terrorist activities, and illegal.³ In Great Britain, anti-terrorism legislation was recently used to freeze Icelandic assets in the UK after the collapse of Iceland’s banking system in which many Britons had a stake. A universal definition will prevent lawful actions and organizations from mistakenly falling under the umbrella of “terrorism.” Simultaneously, a criminal action does not automatically amount to a terrorist action.⁴ Nor should counter-terrorism measures be used to suppress political opposition. Reports in 2008 noted that the

¹ Office of the United Nations High Commissioner for Human Rights, “*Human Rights, Terrorism and Counter-terrorism*,” Fact Sheet No. 32, p. 20. Available at <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

² *Id.* at 21.

³ Scheinin, Martin, “*Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Addendum: Mission to the United States of America.*” A/HRC/6/17/Add.3, 22 November 2007.

⁴ Scheinin, Martin. “*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*” 28 December 2005. E/CN.4/2006/98.

Ethiopian government has used counter-terrorism activities to suppress non-violent opposition and arbitrarily detain peaceful government critics.⁵

5. Until a universal definition of terrorism is drafted, state counter-terrorism actions should be guided by obligations pursuant to international human rights law which exist during times of peace and armed conflict. Terrorist activity does not give states the right to curtail all human rights in order to strengthen counter-terrorism measures. International human rights law provides very specific instances in which certain human rights may be restrained. Article 4 of the ICCPR allows states to derogate from certain obligations under the Covenant only when the life of the nation is at stake. Other rights, like the prohibition on torture, are prohibited at all times, regardless of the circumstances.

6. Torture is now a norm of *jus cogen*, and, thus, is not permissible under any circumstances. The Convention Against Torture and Cruel, Inhuman and Degrading Treatment has been ratified by 146 parties, and signed by 10.⁶ Additionally, Article 7 of the ICCPR and Article 5 of the Universal Declaration of Human Rights prohibit torture.

7. The use of torture in the United States' "War on Terror" is now well documented, but the United States is not the only state to have tortured alleged terrorists. In Tunisia, despite the government's assurances that international human rights obligations are being followed, detainees suspected of terrorism-related offenses continue to report being tortured.⁷ In Russia, two of seven former Guantanamo Bay detainees released by the United States to Russia in 2004 were tortured and imprisoned, despite diplomatic assurances against torture.⁸ One of the detainees is dying from liver problems, yet continues to be denied an independent medical examination and treatment.⁹ In the Sudan, men, women and children disappeared following attacks on the Sudanese capital in May of 2008.¹⁰ Many were subjected to torture.¹¹ In Mexico, three men accused of a September 15th terrorist attack in Morelia disappeared for nearly 2 weeks. When they resurfaced, family members and defense counsel reported that the men had been tortured until they accepted responsibility for the attack.¹²

8. Since September 11, 2001, the practice by states of accepting diplomatic assurances that terrorist suspects will not be tortured in countries where they face the risk of abuse has resulted in numerous cases of torture.¹³ Reports of torture surround the transfer of terrorist

⁵ Human Rights Watch. "Ethiopia: Charge or Free Ethnic Oromo Terrorism Suspects." Available at: <http://www.hrw.org/en/news/2008/11/26/ethiopia-charge-or-free-ethnic-oromo-terrorism-suspects>.

⁶ Office of the United Nations High Commissioner for Human Rights, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment. Available at: <http://www2.ohchr.org/english/bodies/ratification/9.htm>.

⁷ Amnesty International, "Tunisia: Torture, Illegal Detention and Unfair Trials." Available at <http://www.amnesty.org/en/library/info/MDE30/005/2008/en>.

⁸ Human Rights Watch. "The Stamp of Guantanamo." Available at <http://www.hrw.org/en/reports/2007/03/28/stamp-guantanamo>.

⁹ Human Rights Watch. "Russia: Ex-Guantanamo Detainees Seriously Ill in Jail." Available at: <http://www.hrw.org/en/news/2008/12/02/russia-ex-guantanamo-detainee-seriously-ill-jail>.

¹⁰ Human Rights Watch. "Crackdown in Khartoum: Mass Arrests, Torture, and Disappearances since the May 10 Attack." Available at <http://www.hrw.org/en/reports/2008/06/16/crackdown-khartoum>.

¹¹ *Id.*

¹² Center Prodh. "Morelia. The Case of the Grenade Attack." Available at: http://centroprodh.org.mx/english/index2.php?option=com_content&do_pdf=1&id=75.

¹³ Human Rights Watch. "Cases Involving Diplomatic Assurances Against Torture." Available at: <http://www.hrw.org/en/reports/2008/12/15/cases-involving-diplomatic-assurances-against-torture-0>.

detainees to Syria, Jordan, Afghanistan, Poland, China, Egypt, Turkey, Uzbekistan and Pakistan. HRA cautions states that the *jus cogen* status of torture prohibits states from transferring individuals to countries where they will be tortured. States relying upon diplomatic assurances against torture must carefully monitor the treatment of detainees after transfer. Diplomatic assurances should not be considered a presumptive guarantee against torture.

International Humanitarian Law

9. The Geneva Conventions and their Additional Protocols were designed to regulate conflicts and to make a distinction between civilians and combatants.¹⁴ All persons involved in armed conflicts, whether international or non-international in scope, are protected by the Geneva Conventions and their two Additional Protocols.¹⁵ While there is no definition of “armed conflict” in the Geneva Conventions, it is commonly understood to require the use of military forces, weaponry and material.¹⁶ A terrorist allegation does not remove a detainee, whether considered a member of the armed forces, an illegal fighter or a civilian, from outside the protections of the Geneva Conventions. Terrorist suspects are covered by either the Third or Fourth Geneva Conventions, which focus on the treatment of prisoners of war, and the protection of civilian persons in time of war, including illegal fighters.

10. Under Additional Protocol I, members of national liberation movements can be considered a party to the Geneva Conventions. As such, national liberation movements must comply with virtually identical requirements as armed forces, including prohibitions against terrorist actions. In return, their members are afforded the same protections of POW’s. There are 164 parties and 4 signatories to Additional Protocol I. While the United States signed the treaty in 1977, it has refused to ratify the Additional Protocol, arguing that it was in the “service of terror.”¹⁷ By not having ratified Additional Protocol I, the United States argued that the Taliban fighters were not entitled to POW status because they were a militia, rather than the armed forces of Afghanistan.¹⁸

11. States who remove terrorist suspects from the protections of the Geneva Conventions are subject to war crimes.¹⁹ According to both the Third and Fourth Geneva Conventions, detainees must always be treated humanely. Additionally, the Third Geneva Convention states that physical or mental torture may never be inflicted on prisoners of war

¹⁴ International Committee of the Red Cross: “*International Humanitarian Law: Your questions answered.*”

P. 7 Available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/\\$File/ICRC_002_0703.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/$File/ICRC_002_0703.PDF!Open).

¹⁵ Non-international armed conflicts are governed by Common Article 3 of the Geneva Conventions and Additional Protocol II to the Geneva Conventions. GASSER, HANS-PETER. “*Acts of terror, “terrorism” and international humanitarian law.*” IRRC September 2002 Vol. 84 No 847, p. 560.

¹⁶ Koufa, Kalliopi K., “*Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism.*” E/CN.4/Sub.2/2004/40.

¹⁷ *Id.* at 564. See also, Douglas J. Feith, “Law in the service of terror: The strange case of the Additional Protocol”, *The National Interest*, No. 1, Fall 1985. During the “war on terror” Feith was Under Secretary of Defense for Policy in the Bush Administration.

¹⁸ U.S. Department of Justice. Office of Legal Counsel. “*Memorandum for Alberto R. Gonzales Counsel to the President: Re: Stats of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949.*” February 7, 2002.

¹⁹ Third Convention, Article 120. and Fourth Geneva Convention, Article 147.

to gain information. They may not be threatened, insulted or treated disadvantageously for refusing to give information.

12. The Geneva Conventions refer to combatants as either lawful or unlawful.²⁰ Lawful combatants are entitled to participate in hostilities and military operations. They are given Prisoner of War status.²¹ Unlawful combatants do not have the right to directly participate in hostilities and are not entitled to prisoner of war status.²² The term “enemy combatant” is not within the Geneva Conventions. This is a term of convenience coined by the United States in its “War on Terror.”²³

Recommendations

Human Rights Advocates recommends that:

13. States be reminded that international human rights law applies at all times and terrorism does not provide an exception to core obligations. The only exceptions to international human rights obligations are provided for within individual treaties and covenants, while other norms remain non-derogable.

14. The Human Rights Council promote the adoption of a universal, comprehensive and precise definition of “terrorism” to help ensure that all international human rights obligations are upheld by counter-terrorism measures. HRA encourages the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to continue working on the development of a universal definition, while in the meantime recommending that states adopt the double intent requirements of Security Council Resolution 1566 in domestic legislation.

15. The term “armed conflict” within the Geneva Conventions be defined so that the debate about what actions trigger the protections of the Geneva Conventions for detainees can be eradicated.

16. All remaining states ratify Additional Protocol I to the Geneva Conventions in recognition of its usefulness in prohibiting terrorism by including national liberation movements under the rules of war.

17. States recognize that there are only two types of combatants within the Geneva Conventions, “lawful combatants” and “unlawful combatants.” In particular, the United States should continue to be urged to stop its use of the phrase “enemy combatant” so that all detainees of armed conflict are protected by the Geneva Conventions.

²⁰ Peter Jan Honigsberg, “Chasing ‘Enemy Combatants’ And Circumventing International Law: A license for sanctioned abuse” *UCLA Journal of International Law and Foreign Affairs*, Vol. 12, No. 1, Spring 2007, p. 5.

²¹ Knut Dörmann, The Legal Situation of “Unlawful/Unprivileged Combatants”, 85 INT’L REV. OF THE RED CROSS 45 (2003). See also *supra* note 20.

²² *Id.* at 46. See also *supra* note 20.

²³ See *supra* note 20.