

# JOINT CIVIL SOCIETY STATEMENT

## Counter-terrorism:

### **The EU and its Member States must respect and protect human rights and the rule of law**

**Brussels, 1<sup>st</sup> March 2016.** The 2015 terrorist attacks in Paris and elsewhere - and the assertion by States that there is an elevated terrorist threat in the European Union (EU) - have led to a new set of counter-terrorism measures at both EU and national levels. These terrorist attacks are heinous criminal acts which undermine human rights. International human rights law itself requires that states must take appropriate measures to prevent and respond to acts of terrorism, in order to ensure the security and safety of the people in their territories. The undersigned organisations recall that counter-terrorism measures must always comply with the rule of law and **human rights obligations under European Union and international law**. Effective counter-terrorism measures and the protection of human rights are not conflicting but are aimed at overlapping, **complementary and mutually reinforcing goals**. In practice, widespread violations of human rights while countering terrorism have proven to be counterproductive.

The undersigned organisations acknowledge that states are facing substantial threats to the security of their populations that require effective action. However, the extent of restrictions on human rights that result or could result from adopted or contemplated security measures is significant. Transparency, information and meaningful participation of civil society are crucial to avoid excessive or other arbitrary restrictions on human rights as a result of counter-terrorism laws and policies.

An overarching concern is the fast-track procedures used by EU institutions and EU Member States authorities to adopt counter-terrorism measures, for instance in the Draft Directive on Combating Terrorism. This reduces the space for meaningful civil society **participation and transparency**, foreseen in EU Stakeholder Consultation Guidelines, **and thus hinders accountability**, which is contrary to Article 11 of the Treaty of the European Union. Adoption of emergency measures also does not allow for proper or, indeed, any impact assessments, as foreseen by the EU Better Regulation Guidelines and Better Regulation tool 24. **The shrinking space for civil society** is a concerning reality not only outside the EU, but also within its own borders.

The undersigned organisations urge the EU and Member States to respect, protect and fulfil human rights and the rule of law:

***The right to be free from torture and cruel, inhuman or degrading treatment or punishment.*** All States must comply with the absolute prohibition of torture and ill-treatment and take effective measures to prevent any acts of torture or cruel, inhuman or degrading treatment or punishment. They must ensure that allegations of such treatment are effectively and independently investigated and the perpetrators brought to justice, and that victims have access to effective remedies and reparations, including rehabilitation. States must ensure that statements and other information obtained through torture and ill-treatment, including information obtained abroad, are not invoked as evidence in any proceedings, except against a person accused of torture.<sup>1</sup> This obligation includes a responsibility not to use or share torture-

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<sup>1</sup> See Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the [Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment](#), General Affairs Council of 18 April 2008.

tainted information obtained in other States and should also cover EU agencies with cooperation agreements with third countries, such as Europol. As a guarantee against ill-treatment within EU Member States, international fair trial rights should be respected, suspects arrested for terrorism offences should be notified of their rights effectively in accordance with international human rights law and Directive 2012/13/EU and access to a lawyer should be ensured in accordance with Directive 2013/48/EU. The important right of an arrested person to be brought promptly before a judicial authority upon arrest, as set out Article 5 European Convention on Human Rights (ECHR) and Article 9 International Covenant on Civil and Political Rights (ICCPR), that amongst other things is a safeguard against prohibited ill-treatment, should also be clearly enshrined in EU law.

***No return to face human rights violations.*** All removals and expulsions of persons must respect the principle of *non-refoulement*, meaning that nobody must be returned to a country where there are substantial grounds for believing that he/she would be in danger of being subjected to torture, ill-treatment or other serious violations of human rights.<sup>2</sup> This principle must hold true for people convicted of terrorism offences, or who are suspected of terrorism-related activity. Diplomatic assurances, which are typically not legally enforceable and are inherently unreliable, should not be considered as sufficient protection against torture, ill-treatment, unfair trial or arbitrary detention following removal.

***The right to liberty and security of the person.*** Any person arrested or deprived of their liberty, including by administrative detention, must have prompt access to judicial review of detention, and regular judicial review thereafter. All detainees at all times have the right to challenge the lawfulness of their detention through judicial proceedings. They have a right to prompt and regular access to a lawyer, and the right to inform their family of their detention. Deprivation of liberty is permissible only on the grounds envisaged by Article 5(1) ECHR. Where the authorities possess credible facts or information giving rise to a reasonable suspicion that a person has committed an offence, they may arrest that person on suspicion of committing an offence in accordance with Article 5(1)(c) ECHR and ensure all attendant guarantees, including the right to an adversarial hearing before a court enabling the suspect to contest the reasonableness of the suspicion and ensuring their access to materials necessary for challenging detention effectively. Proposals for administrative forms of detention based on suspicion against the person but which circumvent the protections of criminal procedure are in principle unlawful, at least in so far as the state concerned has not formally derogated from international human rights obligations, including Article 5 ECHR due to a state of emergency that threatens the life of the nation. Detention must even then be subject to strict criteria of necessity and proportionality, be subject to judicial review and allow for access to a lawyer. Whatever the basis for detention, solitary confinement must only be imposed in exceptional cases as a last resort, for as short a time as possible and subject to independent review, only pursuant to the authorisation by a competent authority and must never be prolonged. It can only be applied in conditions that ensure the detainees rights to health, due process and protection against ill-treatment will not be violated. Effective access to legal counsel and consular services should be ensured at all times.

***Right to fair trial.*** Individuals suspected of terrorism-related offences should be investigated, charged and tried before independent and impartial courts within the ordinary criminal justice system. Proceedings relating to terrorism offences sometimes involve evidence obtained from

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<sup>2</sup> See Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 33 of the 1951 Convention Relating to the Status of Refugees and article 33 of the 1951 Convention Relating to the Status of Refugees.

overseas operations, surveillance, intelligence and military agencies, which may be relied upon to demonstrate aspects of substantive offence definitions such as the individual's intention and their concrete participation in terrorist offences; they may also be subject to particular media scrutiny. Such proceedings must respect international law and standards on the right to a fair trial, as protected by Article 14 ICCPR, Article 6 ECHR and supported by EU Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, and further Directives adopted under Article 82(2) TFEU including on the presumption of innocence, safeguards for children and legal aid. These measures foresee no possibility of general derogation in times of emergency, and any limitations on the rights concerned must therefore be in accordance with the law, confined to what is necessary and proportionate to the legitimate aim pursued, subject to judicial oversight and must not undermine the overall fairness of the trial. Outside the context of criminal proceedings (e.g. asset freezing, security measures imposing restrictions on individuals or organisations), the right to be heard and rights of defence should also be fully respected, in particular by enabling the person concerned to comment effectively upon the evidence which serves as the basis for the decision against them.

***Definition of terrorism.*** International human rights bodies have repeatedly expressed their concern that the potentially vague and over-broad scope of the definitions of terrorism in domestic law in certain jurisdictions may contravene the principle of legality and could lead to violations of human rights. Similar concerns apply to the definition of terrorism under EU law. Member States and EU institutions should apply clear definitions of what constitutes a terrorist offence or ancillary offences of terrorism within national criminal law, to protect against arbitrary or discriminatory application. Such definitions should ensure that concrete individual participation in intended or actual acts of terrorism is required for the offence to be committed. "Receiving training for terrorism" should be confined to receiving such training wilfully. Moreover, it is essential that offences of "receiving training for terrorism" be subject to establishing specific intent of carrying out, or contributing to the commission of the principal offence as a result of the training. In the absence of such intent, there is a risk of criminalising conduct, which lacks a sufficient proximate causal link with the main criminal offence. It should be clear that these new criminal law provisions do not apply to conduct governed by international humanitarian law. States should give priority to fulfilling their existing international legal obligations to investigate and prosecute war crimes, crimes against humanity and other crimes under international law.

***The right to non-discrimination.*** Counter-terrorism policies have had a disproportionate impact on certain populations, including ethnic or religious minorities, including Muslims, people of African and Asian descent, migrants, or people perceived to be from these groups. Evidence shows the disproportionate effects on Muslim communities of the post 9/11 practices, such as racial profiling.<sup>3</sup> Evidence also shows that more recent European States' policies and practices have disproportionately targeted Muslims and people perceived to be Muslim. Ethnic profiling has been reported as on the rise in several EU member states. Intelligence services, police authorities and justice systems should be equipped to ensure fair and efficient policing and equal access to justice. Discrimination undermines social cohesion and society as a whole, and can reinforce radicalisation and violence. Equality and non-discrimination standards must be complemented by specific policy strategies by Member

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<sup>3</sup> From the European Network Against Racism (ENAR) Shadow reports, Open Society Foundations (OSF), Amnesty International and the European Union Agency for Fundamental Rights (FRA).

States to address all forms of racism, including anti-Semitism, Afrophobia and Islamophobia. We welcome [commitments made by the European Commission](#) at the European Commission Colloquium on fundamental rights in October 2015, but encourage concrete follow-up in terms of obligations for Member States.

***Freedom of expression and peaceful assembly.*** Freedom of expression is often curtailed in states proposals to counter radicalisation or counter-terrorism, for instance in measures criminalising glorification of or apology for terrorism. The proposed Directive on combating terrorism prohibits a person from *threatening* to commit certain acts or to aid, abet or incite someone to do so,<sup>4</sup> even without any direct link to specific terrorist offences or activities in some cases.<sup>5</sup> The Directive should include a provision on freedom of expression, as in the Council's 28 November 2008 Framework Decision on combating terrorism. Further, online surveillance and limits to freedom of expression should, in line with the primary law of the EU and international law, be provided in by law, be proportionate, necessary and subject to data protection law. It would for instance be important to ensure that such restrictions are targeted and subject to judicial pre-authorisation with a requirement for reasonable suspicion. Internet companies should not be pressured into censoring online content, for example by the threat of criminal sanctions, nor should they be forced to cooperate to undermine encryption, which would actually damage security online. Greater efforts should also be made to combat online hate speech targeting groups at risk of discrimination, with more scrutiny to ensure such efforts meet human rights criteria. Counter-terrorism measures restricting freedom of assembly should be foreseeable and transparent, limited to what is necessary and proportionate in pursuit of a legitimate aim, based on corroborated evidence, have time limits and be subject to independent or judicial review. Blanket bans on demonstrations and other peaceful assemblies should be avoided.

***The right to privacy.*** The proposed Directive on the long-term storage and use of Passenger Name Record (PNR) for the purpose of profiling individuals as possible serious criminals or terrorists raises serious human rights concerns. These concerns include an excessive data retention period, lack of evidence showing that these measures are effective (in fact, the collection of data on an indiscriminate and mass basis has not been shown as necessary for preventing terrorist attacks) and the high risk of discriminatory use of the data depending on the way algorithms or data analyses indicators are designed. The undersigned organisations are further concerned by indiscriminate mass surveillance practices carried-out by some Member States. In addition, PNR and other untargeted data mining and surveillances practices can lead to discriminatory behaviour and the prohibited processing of data revealing race, ethnic origin or religion through the use of proxies. Both in this context and in context of the wider demands from law enforcement agencies for Internet companies to arbitrarily infringe on human rights, special attention needs to be brought to the development and use of algorithms for crime-fighting purposes.

***Human rights of asylum seekers and migrants.*** Migration is not a crime. States must refrain from policies and rhetoric that associate asylum-seekers and migrants with the threat of terrorism, and must not use counter-terrorism and counter-radicalisation measures as an excuse for curbing commitments to migration and international protection. Additional “targeted” border checks, proposed in the context of the reform of Schengen, are problematic because they are based on travel and personal characteristics of individuals, and run the risk of ethnic profiling. Recent proposals to revise the mandate of EU border surveillance agency

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<sup>4</sup> Articles 3(2)(i), 8 to 13 and 16 of the draft Directive on combating terrorism.

<sup>5</sup> Article 15 of the draft Directive.

Frontex, and extend its competences, strengthen the security-oriented approach of European migration policy at the expense of migrants' human rights. These amendments must take into account the human rights obligations of Member States and the EU and should be accompanied by adequate safeguards for the respect of the human rights of EU citizens, migrants, asylum-seekers and refugees. Without safeguards, monitoring and training for the new EU border and coastal guards and frontline officers, risks of human rights violations are higher. Efforts should be made to restore ethnic and religious minorities' trust in law-enforcement authorities and promote community policing, using existing best practices such as through the hiring and training of policemen/women to engaging highly diverse communities in full respect of their cultural, religious and ethnic backgrounds. Effective policing relies on trust within communities.

***Freedom of movement.*** Criminalising travel for terrorism, as in the proposed Directive on Combating Terrorism, has a direct impact on freedom of movement. The right to leave a country, including one's own, should only be restricted for specific and legitimate reasons and by proportionate means and not on general assumptions. The right to re-enter your own country must never be restricted arbitrarily or disproportionately. Proposals which would have the effect of banning citizens from re-entering their countries should not be based on general assumptions. The potential withdrawal of an individual's ID or passport based on suspicion of radicalisation and without a judicial decision based on an explicit and reasonable set of criteria set out in the law is incompatible with the right to freedom of movement. The withdrawal of EU citizenship for persons convicted of terrorism-related offences could lead to statelessness and additional arbitrary penalties.

***Freedom of religion or belief.*** Article 18 of the ICCPR and Article 9 ECHR do not permit any limitation to freedom to hold any thought, conscience and religion or the freedom to have or to adopt a religion or belief of one's choice. Mosques should not be closed based on their alleged radical affiliation, without clear elements pointing to the establishment of responsibility for the commission of criminal acts of any of the individuals who owned or administered them. Proposals to separate 'radical' prisoners from the rest of detainees would seem difficult to implement without unjustifiably infringing on freedom of religion as definitions of "radical" are vague, and no Member State has formulated a reliable and non-discriminatory list of indicators of radicalisation. The proposal in the November 2015 Council conclusions to "develop risk assessment tools and tools to detect early signs of radicalisation in prisons" should ensure safeguards to prevent arbitrary profiling and protect freedom of religion and non-discrimination among prisoners. Prisons need more education and other programmes and resources to fully play their rehabilitation and reintegration role. For some offenders, alternative measures to detention should be explored as a way to reduce overcrowding in prisons, reduce repeat offender rates as well as prevent further radicalisation and encourage re-integration in society. The administration must organise meetings with former detainees who have managed their integration into society.

***Human rights education and social inclusion.*** The reaffirmation of "EU values" in the education systems fall short of addressing social exclusion and human rights violations, and therefore do not offer a real counter-narrative to radicalisation. Human rights and the rule of law are universal values, with their basis in the Universal Declaration of Human Rights, and are not exclusive to any one region or culture. Comprehensive human rights education programmes should be available in schools, including on digital rights, equality and non-discrimination, European history and minorities' contributions to Europe. Long-term social investment in education, housing, employment, health and social services are crucial to stop the massive disenfranchisement of sizeable parts of the population.

*Counter-terrorism and human rights in external affairs.* The EU should implement the Operational Human Rights Guidance for EU external cooperation actions addressing “Terrorism, Organised Crime and Cybersecurity: Integrating the Rights-Based Approach”. As committed to in the EU strategic framework on human rights and democracy, the EU should ensure that human rights and rule of law are fully respected in the implementation of its activities, projects and agreements and are at the centre of all EU agencies, EU programmes, legislation, policies and mechanisms. Cooperation with third countries requires a human rights risk assessment, and the setting-up of monitoring-protection-reporting mechanisms to ensure the full protection of human rights. Countering terrorism should go hand in hand with activities ensuring the full protection of human rights, including the rights of Human Rights Defenders and with concrete measures protecting the space for civil society in regard to counter-terrorism and security issues. Failure to take such measures has contributed to increases in radicalisation and impunity.

**Signed:**

European Network Against Racism (ENAR)

Amnesty International

International Federation of Human Rights (FIDH)

International Commission of Jurists (ICJ)

Open Society European Policy Institute

World Organisation Against Torture (OMCT)

Fair Trials

European Digital Rights (EDRi)

Forum of European Muslim Youth and Student Organisations (FEMYSO)

International Federation of Action by Christians for the Abolition of Torture (FIACAT)

International Rehabilitation Council for Torture Victims (IRCT)

Association for the Prevention of Torture (APT)

European Association for the Defense of Human Rights (AEDH)