

# CROSS-BORDER CRIMINAL JUSTICE AND SECURITY: HUMAN RIGHTS CONCERNS IN THE OSCE REGION



# About the Working Group on Counter-Terrorism, Anti-Extremism and Human Rights

The Working Group on Counter-Terrorism, Anti-Extremism and Human Rights (the '**Counter Terrorism Working Group**') is part of the Civic Solidarity Platform ('**CSP**'), which brings together civil society organisations from across the Organisation for Security and Cooperation in Europe ('**OSCE**') region. It aims to:

- Monitor the human rights impact of counter-terrorism and anti-extremism initiatives across the OSCE region and raise the alarm when human rights threats emerge;
- Facilitate the exchange of experience and expertise between CSP members with respect to the human rights impact of counter-terrorism and anti-extremism initiatives;
- Advocate to ensure human rights standards are respected and promoted within policies and initiatives to counter terrorism and violent extremism.

The Counter Terrorism Working Group is co-ordinated by Fair Trials and the SOVA Center for Information and Analysis. It was officially launched in January 2018 following a roundtable organised by Fair Trials in November 2017 in Vienna (supported by the German Ministry of Foreign Affairs). This event informed the Vienna Declaration on Preventing Security Measures from Eclipsing Human Rights, adopted at the OSCE Parallel Civil Society Conference in December 2017.

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Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

**Fair Trials'** work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

**SOVA Center for Information and Analysis** is a Moscow-based Russian non-profit organisation founded in 2002. SOVA Center focuses on monitoring and analysis in the field of nationalism and racism, relations between religious organisations, the state and secular society in Russia, and on misuse of anti-extremism policies by the authorities.

Other founding civil society organisations of the Working Group include the Albanian Helsinki Committee, Article 19, DRA, Human Rights First, the Netherlands Helsinki Committee and the Serbian Helsinki Committee.

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## Introduction

The increasingly global nature of terrorism and violent extremism, resulting from the increased prevalence and sophistication of transnational networks and the ease of international travel, has rendered purely national responses to security threats anachronistic. The need for states to cooperate in the fight against terrorism and violent extremism is now arguably greater than ever before. States across the OSCE region have responded to this challenge by working more closely through both bilateral and multilateral means.

Countries across the world have an obligation to protect their citizens from the threat of terrorism and violent extremism, but they cannot not do this effectively unless, in doing so, they promote and protect human rights. As was highlighted by the Counter Terrorism Working Group's Contribution to the 2017 Vienna Declaration:

**“The protection of human rights is often seen as incompatible with national security, when in fact it provides an essential framework for sustainable security. In particular; human rights safeguards help to prevent abuse of Counter Terrorism [“CT”] and countering violent extremism and radicalisation leading to terrorism [“VERLT”] legislation. Furthermore, measures which do not comply with human rights standards can marginalise and discriminate against targeted communities and can foster distrust in public institutions, which may in turn result in alienation and VERLT. CT and VERLT strategies should therefore not only include human rights safeguards that prevent abuse of CT and VERLT legislation but take strengthening equal rights and a culture of human rights as basic building blocks.”<sup>2</sup>**

The OSCE supports cooperation among participating States in various ways, including by encouraging the exchange of information and expertise, for instance through meetings and trainings of relevant stakeholders, and by fostering co-ordination of security policies.

Although the OSCE does not have its own legal counter-terrorism framework, it actively encourages participating states to comply with international and regional counter-terrorism mechanisms.

Cross-border cooperation is no doubt an important aspect of counter-terrorism strategy, which has real benefits, but it can also have a serious adverse effect on human rights, not just for terror suspects, but also for members of the wider public. Although the protection of human rights is part of various counter-terrorism strategies including those of the United Nations ('UN') and the OSCE, experiences and examples from across the OSCE region make it clear that concern for human rights are often overlooked in favour of comity and efficiency.

Given that the OSCE does not itself provide states with formal legal mechanisms to govern cross-border cooperation, this paper does not discuss OSCE cross-border mechanisms in the sense that these mechanisms are created or governed by the OSCE. Instead, this paper identifies some of the different counter-terrorism and anti-extremism cooperation mechanisms that are in force at the regional and national level and that are used by different member states across the OSCE. These are mechanisms which civil society members of the Working Group believe to be having a negative effect on human rights. This paper does not intend to be exhaustive. Instead, it aims to highlight a few key examples to demonstrate the breadth of the challenge and the importance of keeping human rights at the forefront of discussions on cross-border cooperation in this area.

This paper focuses on formal types of collaboration, which are supported by laws and international agreements, but it is acknowledged that this represents only a partial picture. A significant amount of cross-border cooperation takes place through informal, bilateral mechanisms, which are hard for civil society organisations to detect.

2. Civic Solidarity Platform Working Group on Counter-Terrorism, Anti-Extremism and Human Rights, 'Contribution of the CSP WG on CT and HR to the Vienna Declaration', Vienna, 20-21 November 2017, available at: [https://www.fairtrials.org/wp-content/uploads/2017/12/CSP-WG-on-Counter-Terrorism-and-Human-Rights\\_Outcome-document.pdf](https://www.fairtrials.org/wp-content/uploads/2017/12/CSP-WG-on-Counter-Terrorism-and-Human-Rights_Outcome-document.pdf)



# **Overview of Counter-Terrorism Mechanisms in the OSCE Region**



The OSCE region spans three continents and over fifty participating states, the majority of which are member states of other regional organisations that have adopted their own counter-terrorism strategies and mechanisms.

In addition to their membership of the UN, which promotes collaboration through its Global Counter-Terrorism Strategy and through various other mechanisms within its architecture, OSCE participating states include member states of the European Union ('**EU**'), the Council of Europe, the Commonwealth of Independent States ('**CIS**'), the Collective Security Treaty Organisation ('**CSTO**') and the Shanghai Cooperation Organisation ('**SCO**'). Given that most OSCE participating states are members of more than one of these mechanisms, they participate in various overlapping regional and international cooperation frameworks.

To varying degrees, counter-terrorism instruments adopted by regional organisations reflect the main pillars of the UN Global Counter-Terrorism Strategy – 1) to address the conditions conducive to the spread of terrorism; 2) to prevent and combat terrorism; 3) to build the capacity of states to tackle terrorism; and 4) to ensure human rights and the rule of law.<sup>3</sup> However, it is clear that most of the emphasis has been on the second and third of these pillars.

The OSCE too plays an important role in facilitating cross-border cooperation. It does this primarily by helping participating states to fulfil their international obligations regarding counter-terrorism and anti-extremism. In particular, the OSCE's cross-dimensional and comprehensive approach to security provides the basis for activities that can tackle the root causes and conditions that foster terrorism. The current focus areas for the OSCE's activities include:<sup>4</sup>

1. Promoting the implementation of the international legal framework against terrorism and enhancing international legal co-operation in criminal matters related to terrorism;
2. Countering violent extremism and radicalization that lead to terrorism, following a multidimensional approach;
3. Preventing and suppressing the financing of terrorism;
4. Countering the use of the Internet for terrorist purposes;
5. Promoting dialogue and co-operation on counter-terrorism issues, in particular, through public-private partnerships between State authorities and the private sector (business community, industry), as well as civil society and the media;
6. Strengthening national efforts to implement United Nations Security Council resolution 1540 (2004) on non-proliferation of weapons of mass destruction;
7. Strengthening travel document security; and
8. Promoting and protecting human rights and fundamental freedoms in the context of counter-terrorism measures.

3. United Nations Office of Counterterrorism, 'UN Global Counter-Terrorism Strategy', available here: <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>

4. OSCE, Countering Terrorism, 'Strategic focus areas for OSCE counter-terrorism activities', available at: <https://www.osce.org/countering-terrorism>



# Extradition



**“In both regions [the EU and the CIS], it is therefore time to reform these systems of criminal cooperation so as to ensure compliance with their human rights and refugee law obligations under international law.”**



International Commission of Jurists

There is widespread recognition that the transfer of wanted persons to facilitate their prosecution or to enforce a sentence, is an essential aspect of cross-border counter-terrorism cooperation. Extraditions are crucial measures that facilitate justice and prevent impunity, but they can also have a devastating impact on human rights, especially if there are insufficient safeguards to prevent their misuse. In particular, effective laws and procedures to prevent unjustified extraditions are needed to ensure that states comply with their international obligation to prevent the *refoulement* of individuals at risk of torture. There has, however, been a trend across the OSCE region to prioritise efficiency over human rights, as evidenced by the adoption of regional extradition instruments that remove ‘traditional’ procedural safeguards.

## The European Arrest Warrant

In the EU, the European Arrest Warrant (“**EAW**”) establishes a fast-track system for the arrest and extradition (or ‘surrender’) of persons to stand trial or to serve a prison sentence. The EAW was enacted in 2002 in the wake of the 9/11 attacks amid concerns that existing extradition laws were too cumbersome to tackle serious cross-border crimes effectively.

The EAW is designed to be highly efficient, and it is based on the principle of ‘mutual recognition’, which means that in practice, there are very limited grounds on which the country receiving the EAW may refuse to extradite (or ‘surrender’) the person. The EAW system is founded on the assumption that a Member State can have complete faith that, once extradited, to any other Member State, a person’s human rights will be respected. It is now clear that this assumption was misplaced. EAWs have exposed the disparities between Member States regarding human rights protections. Surrendered individuals have, for example, been subject to ill-treatment in prison.

The EU has been alert to the challenges regarding the effective operation of the EAW, and it has responded by adopting a series of laws designed to improve respect for fair trial rights in the EU. However, these do not yet go far enough. For example, more robust safeguards are needed to prevent EAWs (designed to tackle serious crime and terrorism) being used to address minor crimes. In addition, there are signs that counter-terrorism laws are used in certain EU Member States disproportionately, and in ways that have serious implications for freedom of expression and freedom of association. These raise further questions about the human rights impact of EAWs, when they are used in the counter-terrorism context.

## Extraditions in the CIS Region

Unlike the EU, the CIS is not bound by a common set of regional human rights standards. However, this has not prevented its Member States from developing multilateral extradition frameworks with minimal safeguards for human rights.

The main regional legal framework governing extraditions between CIS States is the ‘Minsk’ Convention of 1993, under which States are obliged to extradite wanted persons for criminal offences for which the maximum prison sentence is one year or more.<sup>5</sup>



Like the EAW, the Convention contains very few grounds for states to refuse extradition, and it contains no explicit human rights bar to extradition. In 2002, for most CIS states, the new 'Chisinau' Convention largely replaced the Minsk Convention<sup>6</sup> (except for countries which refused ratification, such as Turkmenistan and Uzbekistan, with whom extradition is still governed by the Minsk Convention). The Chisinau Convention provided additional grounds for refusing extradition, including on the basis of asylum or risk of persecution on account of race, gender, religion or political opinion.<sup>7</sup> Although these additional grounds no doubt amount to a significant improvement, they fall short of recognising a broader human rights bar to extradition.

**“These men are at grave risk of torture in Uzbekistan and no amount of diplomatic assurances nor reliance on bilateral arrangements can alleviate Kazakhstan of its responsibility under international law”**



Human Rights Watch on the transfer of Uzbek Citizens

## 29 Uzbek Citizens

In 2011, Kazakhstan extradited 29 Uzbek citizens to Uzbekistan, in accordance with the Minsk Convention, despite the fact that the majority of the group had previously been recognised as refugees by the UNHCR. The Kazakh authorities did this having re-determined their status under a new law on refugees, adopting a policy of refusing refugee status to Uzbek and Chinese citizens in order to promote good relations with other SCO Member States. The UNHCR, whose expert took part in the extradition proceedings, decided to annul the refugee certificates previously issued to a number of people in the group, after which they were extradited. The individuals extradited to Uzbekistan were reportedly not even served with extradition papers. The UN Committee Against Torture held that the extradition amounted to a violation of non-refoulement.<sup>8</sup>

## Extraditions in the SCO Region

Russia and four Central Asian States are also parties to the Convention on the Shanghai Cooperation Organisation on Combating Terrorism, which provides a framework for bilateral and multilateral cooperation on a range of counter-terrorism measures, including extradition and information-sharing for terrorism offences. Much like the EU, the SCO's guiding principle on cooperation has been described to be that of 'mutual recognition'.<sup>9</sup> According to the International Federation for Human Rights, this means that in the context of counter-terrorism cooperation, SCO States are generally expected to recognise and respect each other's decisions regarding the designation of terrorist groups and the definition of criminal offences.<sup>10</sup> This concept is particularly troubling given that some SCO States, such as China and Uzbekistan, have been subject to severe criticism for using anti-terror laws for political purposes and against ethnic minorities. Furthermore, while the EU justifies 'mutual recognition' on the basis that its Member States

<sup>5</sup> Article 56, Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993)

<sup>6</sup> Council of Europe, 'INVESTIGATING AND PROSECUTING INTERNATIONAL CORRUPTION AND MONEY LAUNDERING CASES', (2016), p.66

<sup>7</sup> Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (2002 Chisinau Convention)

<sup>8</sup> Non-refoulement: No State shall transfer a person to a territory where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. United Nations Committee Against Torture, *Abdussamatov et al. v. Kazakhstan* (Communication no 444/2010)

<sup>9</sup> FIDH, 'Shanghai Cooperation Organisation: A Vehicle for Human Rights Violations', (June 2012), p.5

<sup>10</sup> *Ibid.*



are bound by the same regional human rights standards, there is no common human rights framework applicable amongst SCO states.

The SCO Convention is not an extradition treaty in itself, but a framework for cooperation on counterterrorism. It therefore makes no references to mandatory grounds for refusing extradition or human rights.<sup>11</sup> It does, however, allow states to exercise very broad extra-territorial jurisdiction in relation to terrorism offences, and to seek extradition in such cases.

The absence of adequate human rights protections in these regional legal frameworks has real implications for individuals, including those who face falsified accusations and the risk of torture, as evidenced by criticisms of intra-SCO extraditions by the European Court of Human Rights ('**ECtHR**'),<sup>12</sup> and UN Treaty Bodies. Despite this criticism, SCO countries not only continue extradition under the current treaties, but have also committed to "speed up" the already simplified extradition procedure, in relation to "foreign terrorists" under the Qingdao Declaration.<sup>13</sup>

11 Article 11, Shanghai Convention on Combating Terrorism, Separatism and Extremism (2001)

12 European Court of Human Rights, *Nizomkhon Dzhurayev v. Russia*, (App. No. 31890/11)

13 'Qingdao Declaration of the Council of Heads of State of the Shanghai Cooperation Organization,' The Shanghai Cooperation Organization, June 10, 2018, <http://eng.sectsc.org/load/454877/>

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# Expulsions



The ECtHR has defined 'expulsions' as '*with the exception of extradition, any measure compelling a foreign national's departure from the territory where he or she was lawfully resident*'.<sup>14</sup>

The ECtHR's definition of 'expulsions' thus includes various types of administrative removals, including deportations.

The use of expulsions as a counter-terrorism measure has reportedly soared in recent years.<sup>15</sup> The number of individuals deported from Italy for security reasons, for example, rose from less than 20 per year between 2007 and 2014, to over 90 in 2017 alone.<sup>16</sup>

Deportations from Italy can be carried out in cases where there is insufficient evidence to initiate criminal prosecutions, but there are supposedly well-founded reasons to believe that an individual is a threat to national security.<sup>17</sup> In a number of CIS countries (including Russia), expulsions on 'extremism' charges or even suspicions are a common practice. In effect, deportations and expulsions can amount to an alternative to criminal prosecution as a counter-terrorism measure.

There are signs that states are also willing to use expulsions as an alternative to extraditions, given that extradition procedures can be more complex, and subject to greater judicial scrutiny. The International Law Commission has commented that expulsions should not be used to 'circumvent' extradition proceedings,<sup>18</sup> but there have been several instances in recent years in which deportations have clearly been used to 'override' extradition decisions.

## Abdullah Buyuk

Abdullah Buyuk is a Turkish businessman with alleged ties with the Gulenist movement who was arrested in Bulgaria in 2016.<sup>19</sup> Buyuk's arrest and subsequent extradition proceedings were triggered by an INTERPOL 'Red Notice',<sup>20</sup> but the Bulgarian courts refused the extradition on the basis that he was subject to political persecution, and that he would be subject to serious human rights violations in Turkey.

This did not, however, prevent the Bulgarian authorities from deporting Buyuk, supposedly on the basis that he had no legal right to remain in Bulgaria. Buyuk had made an asylum claim in Bulgaria which had been rejected, but the reasons for the decision were not known, and the Bulgarian Prime Minister appeared to justify the decision to deport Buyuk as a way of controlling the number of refugees into the country.<sup>21</sup>

14 European Court of Human Rights Nolan and K. v. Russia, App. No. 2512/04, Judgment of 12 February 2009, para. 112

15 International Commission of Jurists, 'Transnational Injustices National Security Transfers and International Law', (2017) at p.81

16 Lorenzo Vidino and Francesco Marone, 'The Jihadist Threat in Italy: A Primer', Istituto per gli Studi di Politica Internazionale, (13 November 2017). Available at: [www.ispionline.it/it/pubblicazione/jihadist-threat-italy-primer-18541](http://www.ispionline.it/it/pubblicazione/jihadist-threat-italy-primer-18541)

17 Ibid.

18 International Law Commission, Draft Articles on the Expulsion of Aliens (2014), Article 12

19 Asya Mandzhukova, 'Guest Post: Outrage in Bulgaria over secretive transfer of Turkish citizen to Ankara' (19 August 2016). Available at: [www.fairtrials.org/node/883](http://www.fairtrials.org/node/883)

20 More information about INTERPOL Red Notices are given below

21 Asya Mandzhukova, 'Guest Post: Outrage in Bulgaria over secretive transfer of Turkish citizen to Ankara' (19 August 2016). Available at: [www.fairtrials.org/node/883](http://www.fairtrials.org/node/883)



# Extraordinary Rendition



**“There can be no doubt that in today’s world, intergovernmental cooperation is necessary for combating terrorism. But such cooperation must be effected in a manner that is consistent with the rule of law.”**



Open Society Justice Initiative

Extraordinary rendition can be defined as ‘the transfer - without legal process - of a detainee to the custody of a foreign government for purposes of detention and interrogation’.<sup>22</sup> The absence of legal safeguards and due process - ordinarily required by international law - mean that people subject to extraordinary rendition are often left vulnerable to numerous human rights violations, including torture and mistreatment.<sup>23</sup>

A report by the Open Society Foundations found that since the terrorist attacks on September 11th 2001, over 54 governments globally cooperated with the US Central Intelligence Agency (‘CIA’) in the extraordinary rendition or secret detention of at least 136 individuals.<sup>24</sup> Within its secret detention regime, the US regularly used torture and mistreatment against detainees, and actually went so far as to attempt to legally justify the use of torture against suspects in the now infamous ‘torture memos’.<sup>25</sup> It also rendered suspects into the custody of states where there was a grave possibility that torture would be used against them (the countries which most often receive transfers were reportedly Egypt, Syria and Morocco),<sup>26</sup> a clear violation of the principle of *non-refoulement*. Throughout the CIA’s rendition and secret detention program, there were several documented cases of extreme torture and death.<sup>27</sup>

## Khaled El-Masri

German national Khaled El-Masri was seized whilst on holiday in Macedonia in 2004 because he had been mistaken for an Al-Qaeda suspect with a similar name. He was held incommunicado with no access to lawyers, translators, consular personnel or contact with his family. He was then extraordinarily rendered to a secret CIA detention facility in Afghanistan. Eventually, the authorities realised they had the wrong man, and El-Masri was released after a 4-month ordeal. In 2012, the ECtHR held that Macedonia had violated El-Masri’s rights under the European Convention on Human Rights (‘ECHR’) and ordered Macedonia to pay €60,000 compensation. The Court held that Macedonia’s cooperation with US authorities and facilitation of El-Masri’s transfer into US custody meant that Macedonia should be held responsible for the torture and mistreatment to which El-Masri had been subjected.<sup>28</sup>

## Guantanamo Bay

**“On a human level, it is a place of misery and despair. And on a larger level, it is a monument to the death of the rule of law. It is here that for the first time in our history, we have “forever prisoners” men who have been imprisoned without charge, often without even credible evidence, and possibly left to die there.”**

**REPRIEVE**

Reprieve on Guantanamo Bay

22 Open Society Foundations ‘GLOBALIZING TORTURE CIA SECRET DETENTION AND EXTRAORDINARY RENDITION’, (2013) p.5

23 Amnesty International ‘“Rendition” and secret detention: A global system of human rights violations’, (January 2006)

24 Open Society Foundations ‘GLOBALIZING TORTURE CIA SECRET DETENTION AND EXTRAORDINARY RENDITION’, (2013) p.12

25 Memorandum from John Yoo, Deputy Assistant Att’y Gen. to William J. Haynes II, Gen. Counsel, Dep’t of Def., 1 (March 14, 2003).

26 International Bar Association ‘Extraordinary renditions’, (January 2009) p.57

27 See, for example, Open Society Justice Initiative, ‘GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION’ (2013) available at: <https://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>

28 European Court of Human Rights El-Masri v. the former Yugoslav Republic of Macedonia Application no. 39630/09, (13 December 2012)

In 2002, the US authorities opened the notorious Guantanamo Bay detention centre, where so-called 'enemy-combatants' are detained. Since it opened, citizens of 49 different countries have been held there,<sup>29</sup> and the very nature of the military detention facility means that detainees are transferred there without due process or recourse to the law.

Roughly 780 detainees have been held at Guantanamo since it opened, and the majority of them were never charged with a crime, despite some of them being held in detention for over a decade.<sup>30</sup> As of 2018, more detainees in Guantanamo Bay had died than had been convicted,<sup>31</sup> and of the 8 detainees who were convicted, 4 have had their convictions reversed.<sup>32</sup> At least 5 of these convictions were plea agreements in which detainees plead guilty in return for the possibility of being released.

There have also been concerns raised over the fate of those released from Guantanamo. In 2018, Senegal decided to deport two former Guantanamo detainees to Libya. The detainees had been resettled in Senegal after an agreement with the Obama administration in 2016, but just two years later they were reportedly deported to Libya where there are fears they have been imprisoned by militia and have effectively 'vanished' with no follow up or intervention from the USA.<sup>33</sup>

## Russia

In 2004, the USA deported 7 Guantanamo detainees to Russia to face criminal charges there. The detainees had all asked not to be returned to Russia for fear of torture and mistreatment, but after obtaining diplomatic assurances by the Russian authorities, they were all deported.

Although initially released because of a lack of evidence against them, over the course of the following years, the detainees were subject to continued harassment and threats from Russian authorities. Just three years after being released, two had been subject to torture and convicted on the basis of evidence obtained by torture, one had been tortured and was awaiting trial (and subsequently received a sentence of life imprisonment), and the other four had gone into hiding or fled abroad.<sup>34</sup>

Cross-border cooperation in the context of the so-called "war on terror" has facilitated numerous and significant human rights violations, some of which continue to this day. Currently, there are 40 detainees held in Guantanamo, all of whom have been detained there for over 10 years - the majority have never been convicted or even charged with a crime.<sup>35</sup>

<sup>29</sup> The New York Times, 'The Guantanamo Docket', available at: <https://www.nytimes.com/interactive/projects/guantanamo/detainees/by-country>

<sup>30</sup> Human Rights First 'Guantanamo By the Numbers', (2018) available at: <https://www.humanrightsfirst.org/resource/guantanamo-numbers>

<sup>31</sup> Reprieve '7 things you didn't know about Guantanamo Bay', (2017) available at: <https://reprieve.org.uk/update/7-facts-guantanamo-bay/>

<sup>32</sup> Human Rights First 'Dropped Charges, Overturned Convictions, and Delayed Trials in Guantanamo Military Commissions' (2018)

available at: <https://www.humanrightsfirst.org/resource/dropped-charges-overturned-convictions-and-delayed-trials-guantanamo-military-commissions>

<sup>33</sup> Charlie Savage, Declan Walsh and Dionne Searcey 'Deported to Libya, Ex-Gitmo Detainees Vanish. Will Others Meet a Similar Fate?'

The New York Times, (23 April 2018) available at: <https://www.nytimes.com/2018/04/23/us/politics/guantanamo-detainees-repatriation-libya.html>

<sup>34</sup> Human Rights Watch, 'The "Stamp of Guantanamo" The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States', 2007

<sup>35</sup> Human Rights First 'Guantanamo By the Numbers', (2018)



## Abductions in the CIS Region

**“Once they are returned,  
they vanish.”**



Refugee lawyer in Moscow speaking to  
Amnesty International in January 2016

In some of the CIS participating states, there have been numerous incidences of cross-border abductions of individuals by special services. In Russia, cases of abductions of Uzbek 36 and Tajik 37 citizens by officers of those states' special services, assisted by the Russian authorities, have been documented since the 2000s, and continue to be registered.<sup>38</sup>

### Mirsobir Khamidkariyev

Mirsobir Khamidkariyev, an Uzbek national living in Russia, had previously worked as a film producer in Uzbekistan. After producing a film about corruption, he was put on a wanted list on charges of alleged involvement in religious extremism and establishment of a banned extremist organization. In May 2014, following Khamidkariyev's application, a court in Moscow issued a decision according to which he should be granted refugee status; the decision entered into force. However, in June 2014, Khamidkariyev was abducted by unidentified men in a taxi. His lawyer sent inquiries to the relevant state agencies, asking them to stop the asylum seeker Khamidkariyev's involuntary removal from Russia. A month later, it turned out that Khamidkariyev was in prison in Tashkent facing extremism charges. The lawyer travelled to Tashkent and was allowed to attend the proceedings. He learned from Khamidkariyev that he had been abducted by officers of the Uzbek Ministry of National Security and put on a regular, Tashkent-bound flight, which would not have been possible without the involvement of the Russian Federal Security Service (FSB). Khamidkariyev was sentenced to 8 years in prison. The ECtHR found Russia in violation of Article 3 of the Convention and awarded 19,500 euros to Khamidkariyev. However, as of 2018, he was still held in prison supposedly suffering ill-treatment and torture.<sup>39</sup>

<sup>36</sup> ECtHR, *Iskandarov v. Russia* (App. no. 17185/05), Radio Free Europe/ Radio Liberty 'Documented: Five Cases Of Abduction,' November 14, 2012, available at <https://www.rferl.org/a/central-asia-russia-five-cases-of-abduction/24770771.html>

<sup>37</sup> European Parliament Policy Department of Directorate-General for External Policies of the Union 'Human Rights in Russia Year 2006: Briefing Paper,' 2006, available at [http://www.europarl.europa.eu/RegData/etudes/note/join/2006/348611/EXPO-DROI\\_NT\(2006\)348611\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2006/348611/EXPO-DROI_NT(2006)348611_EN.pdf)

<sup>38</sup> Amnesty International 'Fast-Track to Torture: Abductions and Forcible Returns from Russia to Uzbekistan,' 2016, available at <https://www.amnesty.ie/wp-content/uploads/2016/05/Fast-Track-to-Torture-Uzbekistan.pdf>

<sup>39</sup> 'Russian NGO Shadow Report on the Observance of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the Russian Federation for the period from 2012 to 2018,' p. 5, 35-39, available at [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/RUS/INT\\_CAT\\_CSS\\_RUS\\_31612\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/RUS/INT_CAT_CSS_RUS_31612_E.pdf)



The background features several overlapping, semi-transparent geometric shapes in various shades of blue. There are two dark blue rectangles at the top, a medium blue rectangle below them, and a large, light blue circle at the bottom. The text is centered over these shapes.

# Information-Sharing



Information-sharing is widely recognised as an essential aspect of counter-terrorism policies and strategies, as evidenced by the approach that states are being called on to take by the UN regarding the threat of Foreign Terrorist Fighters ('FTF's).

Information-sharing in the OSCE region takes place in various ways. It can be either formal or informal, and mechanisms for facilitating information-sharing exist at bilateral, regional, and international levels. These different mechanisms for cross-border information-sharing serve a wide range of purposes, but they can also raise a similar range of human rights issues. They can undermine the privacy of individuals, and insufficient human safeguards can lead to abuses of these mechanisms, resulting in unlawful detentions, unfair trials, and the risk of *refoulement*.

### 'Foreign Terrorist Fighters'

Foreign Terrorist Fighters have been increasingly identified as a major security concern by the international community, particularly in the context of the recent and ongoing conflicts in the Middle East, which are reported to have drawn tens of thousands of FTFs from over 100 countries.

In 2014, the United Nations Security Council ('UNSC') adopted Resolution 2178, which required states to introduce a variety of measures to combat the threat posed by FTFs. A key aspect of Resolution 2178 is information sharing. It calls on all states to collect and analyse travel data, and to share information about the movements of FTFs.

This resolution was bolstered by Resolution 2396 (2017), which requires member states to develop and implement systems to collect biometric data and to develop watchlists or databases of known and suspected terrorists, including FTFs.<sup>40</sup>

Whilst it is clear that states need to be equipped with the necessary powers to combat the phenomenon of "foreign terrorist fighters", concerns have been raised that the current approach is open to abuse. The former UN Special Rapporteur on counter-terrorism, Martin Scheinin, voiced serious concerns that UNSC Resolution 2178:

**"imposes upon all Member States far-reaching new legal obligations without any effort to define or limit the categories of persons who may be identified as 'terrorists' by an individual state. This approach carries a huge risk of abuse, as various states apply notoriously wide, vague or abusive definitions of terrorism, often with a clear political or oppressive motivation."**<sup>41</sup>

The vagueness and lack of defined scope of all three terms "foreign", "terrorist" and "fighters" leaves states with a broad discretion over which groups and activities are criminalised by this legislation.<sup>42</sup> The lack of transparency in many information-sharing mechanisms and the lack of clarity over whether due diligence is paid to the legitimacy of information shared within these mechanisms leaves them open to potential abuse.

### Intelligence Sharing

**"In many States, the use of information by intelligence services that may have been obtained by torture or ill-treatment in other countries is still not prohibited or has even been publicly condoned."**



UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

<sup>40</sup> Resolution 2396 (2017) adopted by the Security Council at its 8148th meeting, on 21 December 2017

<sup>41</sup> M. Scheinin, "Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters", Just Security, (2014) available at: [www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin](http://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin)

<sup>42</sup> OSCE Office for Democratic Institutions and Human Rights (ODIHR) 'Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework' (2018) Pgs. 22-23

The clandestine nature of intelligence operations and cooperation means there is only limited oversight or publicly available knowledge about the exchange of information across borders, especially where this cooperation is led by national intelligence agencies. Even where information-sharing mechanisms are based on publicly-known agreements, such as the SCO and the 'Five Eyes' alliance, little is known about how these arrangements operate in practice.<sup>43</sup> In the EU, a study by the Fundamental Rights agency has found that the majority of EU Member States do not have laws requiring international cooperation to be based on any rules, and where they exist, they are generally not disclosed to the public.<sup>44</sup>

Full transparency regarding intelligence activities is not always conducive to tackling the threat of terrorism and violent extremism, but it is clear that unregulated information-sharing mechanisms can have serious implications for privacy and data protection, and a detrimental impact on other human rights. They can facilitate unlawful detentions and unfair trials, and they can be used by states to 'delegate' serious human rights violations, for instance, by making use of information obtained through torture carried out by another country. This is of particular concern, given that the use of torture and inhuman and degrading treatment against terror suspects has become an endemic and normalised part of the so-called 'war on terror'. Far from being consigned to the battlefield, intelligence and information obtained by torture has been shared across borders, and it has become the basis of extradition, immigration and criminal proceedings in states across the OSCE region.<sup>45</sup>

## Mounir El Motassadeq<sup>46</sup>

In 2005, a Moroccan student residing in Germany, Mounir El Motassadeq, was convicted by the Hamburg Supreme Court of belonging to a terrorist group and assisting in the September 2001 terrorist attacks. El Motassadeq was convicted on the basis of statements from three individuals who were held in US custody in an undisclosed location after US authorities gave summaries of the interrogations of these individuals to German authorities. After the defence challenged the admissibility of these statements on the grounds that they may have been obtained by torture, German authorities asked for proof from US intelligence services on the circumstances in which the statements were obtained. The US intelligence services refused to provide any information on how the statements were obtained, and despite the prohibition on torture evidence in German law, El Motassadeq was convicted, largely on the basis of those statements.

## Information-Sharing: INTERPOL

INTERPOL is the world's largest policing organisation that brings together police forces of almost 200 countries, including all the OSCE's participating states. INTERPOL's main function is to facilitate cooperation between its Member States, including by hosting a system of 'notices' which are used by Member States to request various types of cooperation. These notices, which are readily accessible to national police forces via INTERPOL's databases, include the Red Notice, which is used to request the location and arrest of a wanted person with a view to extradition.

Red Notices are not international arrest warrants, and even though there is no international legal obligation on countries to act upon them,

<sup>43</sup> Privacy International, 'Secret Global Surveillance Networks: Intelligence Sharing between Governments and the Need for Safeguards' (April 2018)

<sup>44</sup> Fundamental Rights Agency, 'Surveillance by intelligence service: fundamental rights safeguards and remedies in the EU – Volume II: field perspectives and legal update', p.13

<sup>45</sup> See, for example, *A and Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; *United States of America v Ali Yasin Ahmed, Madhi Hashi, Mohamed Yusuf*, No. 12 Cr. 661, 2012 WL 6721134 (E.D.N.Y. Nov. 15, 2012); 18 U.S.C. § 2339B (2012) and *El Haski v Belgium*, App no. 649/08, (ECtHR, 25 September 2012), paras 88, 89. See also paras 92-99.

<sup>46</sup> OLG Hamburg, 4. Strafsenat, Urteil, 2 StE 4/02-5, (19 August 2005). For more information on the case, see Fair Trials and REDRESS, 'Tainted by Torture: Examining the use of torture evidence', May 2018, p. 33-34



their impact can still be devastating. Aside from triggering arrests and extradition proceedings in many cases, Red Notices can also damage personal reputations, job opportunities, and the freedom to travel.<sup>47</sup> In some countries, the existence of a Red Notice has been used as a basis for refusing asylum to individuals.<sup>48</sup>

Fair Trials has documented several instances in which OSCE participating states have misused INTERPOL alerts as a tool for exporting repression. Red Notices have been used to harass and intimidate political activists, journalists, human rights defenders, refugees, and other exiled people in need of international protection.

### Dogan Akhanli

Dogan Akhanli is a German writer of Turkish origin, who fled Turkey and was granted asylum in Germany in the 1990s. Dogan is renowned for his writings critical of Turkey's human rights record, and for advocating for the recognition of the Armenian genocide, a position strongly opposed by the Turkish state.

In August 2017, Akhanli was arrested whilst on holiday in Spain on the basis of an INTERPOL Red Notice issued at the request of the Turkish authorities. The Red Notice was supposedly based on terrorism charges. Akhanli was eventually able to avoid extradition to Turkey and was able to go back home after direct interventions from the German government. His arrest was publicly criticised by the German Chancellor, Angela Merkel.

"I am very glad that Spain has now released [Dogan Akhanli]... It is not right. We must not misuse international organisations like INTERPOL for such purposes"<sup>49</sup>

Angela Merkel,  
Chancellor of Germany

The main source of this challenge is the fact that many countries misuse their own criminal justice systems as well as international cooperation mechanisms for political purposes. In this context, it is clear that INTERPOL needs to implement robust procedures to review requests for international alerts to ensure compliance with their own rules, which prohibit the use of its systems for political purposes and/or in violation of international human rights standards.<sup>50</sup>

INTERPOL has begun to adopt reforms to improve its ability to prevent the abuse of its alerts. These include a new policy intended to protect refugees. These are significant improvements which must be implemented effectively, but further reform is also needed. Prominent political activists have continued to find themselves pursued by the countries they have fled through INTERPOL's databases.

### Muhiddin Kabiri

As the leader of the Islamic Renaissance Party of Tajikistan since 2006, Muhiddin Kabiri was a member of Tajikistan's parliament until the country's 2015 elections, when the government began a crackdown on political opposition in the country.<sup>51</sup> His party was banned, and Kabiri was convicted and sentenced after criminal proceedings were criticised by human rights activists as being politically motivated.<sup>52</sup> But only months after this judgment, Muhiddin's details were uploaded on to INTERPOL's list of wanted persons.

Kabiri's case raises questions about INTERPOL's ability to identify Red Notices that fail to comply with its rules on human rights and political motivation, even in high-profile cases. Kabiri's Red Notice was issued despite criticisms from international observers and human rights organisations regarding the crackdown on IRPT members by the Tajik government, and reports that he was claiming asylum in a European country.

47 Fair Trials, 'Dismantling the Tools of Oppression: Ending the Misuse of INTERPOL', (2018) Para. 22 p.13

48 Ibid. para 128 p.59

49 Reuters, 'Merkel attacks Turkey's 'misuse' of Interpol warrants' (20 August 2017), Available at: <https://www.reuters.com/article/us-eu-turkey-election/merkel-attacks-turkeys-misuse-of-interpol-warrants-idUSKCN1B00IP>

50 Fair Trials, 'Dismantling the Tools of Oppression: Ending the Misuse of INTERPOL', (2018), Executive Summary Paras I-II, p.4

51 Human Rights Watch, 'Tajikistan: Severe Crackdown on Political Opposition' (17 February 2016), Available at: <https://www.hrw.org/news/2016/02/17/tajikistan-severe-crackdown-political-opposition>

52 The Guardian, 'Tajikistan human rights fears as banned party's ex-leaders jailed for life' (2 June 2016) Available at: <https://www.theguardian.com/world/2016/jun/02/tajikistan-human-rights-fears-banned-irpt-party-leaders-jailed-life>

## Information-Sharing: Regional Cooperation

### Data Sharing in the CIS and SCO Region

Many states in the OSCE region also have access to regional mechanisms that facilitate the sharing of law enforcement data. CIS Member States, for example, have access to a regional database established by the CIS Agreement for Inter State Search of Wanted Persons ('CIS Agreement'). The CIS database is similar to INTERPOL's systems, in that it enables authorities to exchange information about wanted persons quickly.

Whereas INTERPOL has rules and procedures designed to prevent its systems from being misused, the CIS Agreement contains no express references to human rights and provides no avenues for redress for those who wish to challenge alerts. The abuse of the CIS database does not appear to be well-documented, but the failure to take into consideration human rights in the CIS Agreement and the lack of a complaints mechanism could make it susceptible to politically-motivated misuse.

### Alexander Lapshin

In 2017, the Israeli journalist Alexander Lapshin was arrested in Belarus and subsequently extradited to Azerbaijan, allegedly for visiting Nagorno-Karabakh without authorisation.<sup>53</sup> Although there were initial suggestions that the arrest had been triggered by an INTERPOL alert, subsequent reports implied that information regarding Lapshin had been shared between Belarus and Azerbaijan by different means.

Had Azerbaijan decided to use INTERPOL to seek his arrest, this is likely to have fallen foul of INTERPOL's rules given the clear political nature of the accusations.

While it is uncertain if Lapshin's arrest was caused by the CIS database, his case illustrates that states often have access to alternative means of sharing data, which they can potentially use to avoid INTERPOL's rules and procedures that are designed to prevent the dissemination of politically-motivated requests for cooperation.

The 5 OSCE participating states that are also members of the SCO also share information through the database of the SCO's Regional Anti-Terrorist Structure ('**RATS**'), which was established in 2004. This electronic database was designed to facilitate quick and easy dissemination of data that includes information on terrorist, separatist and extremist organisations (such as their structure, activities, sources of funding, and details about their members and others affiliated with the groups). In addition, the database can be used to share information about the status, dynamics and trends in the spread of terrorism, separatism and extremism, as well as counter-measures to these threats<sup>54</sup>

Member states of the CIS exchange intelligence regarding members of organisations that have been recognised as extremist or terrorist within the member states. In 1999, the heads of the CIS Member States in the Fight Against Terrorism.<sup>55</sup> As a result, in 2000, the Anti-Terrorism Centre of the CIS Member States ('**ATC CIS**') was established. Among other activities, ATC CIS maintains a database of information similar to that of the SCO,<sup>56</sup> but its data set is much larger. Information is also exchanged among CIS states through the CSTO. The CSTO (formerly the Collective Security Treaty (CST)) aims to strengthen relations on foreign policy, military, military-technical and security among member states. The CSTO has moved from a more traditional regional military cooperation organisation facing external or 'foreign' threats, into a security cooperation organisation that also looks at local and regional security threats,

52 Amnesty International, 'Azerbaijan: Extradited blogger should be released immediately by Azerbaijani authorities', 10 February 2017 available at:

<https://www.amnesty.org/download/Documents/EUR5556752017ENGLISH.pdf>

54 Tashkent 'Agreement on the Database of the Regional Anti-Terrorist Structure of the Shanghai Cooperation Organization,' 2004

55 Minsk 'Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism,' 1999, available at

<https://treaties.un.org/doc/db/terrorism/csi-english.pdf>

56 "On ATC CIS," The Antiterrorist Center of the CIS Member States. Accessed July 16, 2018, <http://www.cisatc.org/132>.



including terrorism.<sup>57</sup> Monitoring extremist and terrorist propaganda in the internet aimed at blocking relevant web resources is carried out by CSTO member states special services during their annual collective operation 'PROXI' on fighting cybercrime. In May 2018, heads of RATS SC, ATC CIS and the CSTO Secretariat signed a memorandum on cooperation including information exchange.<sup>58</sup>

## Data Sharing in the EU

The EU has a variety of mechanisms that facilitate data-sharing. In addition to a multitude of overlapping bilateral, and sub-regional agreements between EU Member States, formal cooperation takes place at the EU level, including through Eurojust (which facilitates the coordination of investigations and prosecutions between EU Member States) and Europol (which supports law enforcement authorities throughout the EU on crime fighting activities).

Europol's main focus is on terrorism and serious organised crime, and its responsibilities include collecting, storing, and exchanging information used for cross-border cooperation between EU Member States. Europol maintains its own 'Europol Information System', which includes information about wanted persons, to facilitate its work. In recent years the EU has been making efforts to enhance cross-border information exchange amongst the police authorities of its Member States. These have resulted in the adoption of instruments like the Prum decision, which enables access by police authorities to DNA and licence plate data held by their counterparts in other Member States.

Data-storing and data-sharing activities, including those of Europol are regulated by the EU's rules on data protection and are subject to the oversight of the European Data Protection Supervisor ('**EDPS**'), but there are questions about the extent to which EU mechanisms for facilitating the exchange of information comply with human rights, including in the following the ways:

- The EU's Passenger Name Record ('**PNR**') System, which collects and stores details of airline passengers for lengthy periods for counter-terrorism purposes has been subject to criticism for violating the right to privacy. The Court of Justice of the European ruled in 2017 that the EU's plans to enter into a PNR agreement with Canada amounted to a violation of EU law, because the plan proposed to keep personal data for longer than necessary for countering the threat of terrorism.
- Concerns have been raised about Europol's plans to enter into data-sharing agreements with several countries outside the EU, particularly in North Africa and the Middle East, including Egypt, Morocco, and Algeria.<sup>59</sup> This has been criticised for giving countries that exploit counter-terrorism laws to crush dissent, access to European law enforcement data and for having insufficient data protection safeguards to prevent the misuse of data by third countries.
- Although there are EU laws regulating the cross-border exchange of information for law enforcement purposes, these laws do not regulate the exchange of information between intelligence agencies.



# Sharing Laws, Policies, and 'Best Practices'



The OSCE's Consolidated Framework for the Fight Against Terrorism mentions the 'exchange of good practices' as part of cooperation in the fight against terrorism.<sup>60</sup> Furthermore, one of the six priorities of VERLT - the largest single area of work within the Action against Terrorism Unit - is 'Maintaining online repositories of relevant policies and National Action Plans for countering violent extremism'.<sup>61</sup>

Although the exchange of good practices that respect the rule of law and fundamental rights in the fight against terrorism is clearly desirable, in practice, many of the laws and policies that are exchanged between states can have a detrimental effect on human rights (and thus on sustainable security). This is particularly concerning in regions that lack a human rights oversight mechanism. There is a concern that 'best practices' may be regarded as practices which give the State unlimited powers to police terrorism and VERLT, rather than practices that are necessary and proportionate.

## Definition of Terrorism

**“The fact that there is no internationally agreed definition of the term “terrorist” or “terrorism” leaves significant space for diverse and far-reaching interpretations by national authorities, and increases the potential for abuse”**



OSCE Office for Democratic  
Institutions and Human Rights

There is no universally accepted definition of terrorism,<sup>62</sup> which has led to different approaches and applications of counter terrorism law at a national, regional and international level. Numerous international conventions do not define terrorism, but say that for the purposes of the convention, terrorism means any offence “within the scope of and as defined in” a range of other treaties and conventions, some of which are now over 40 years old. For example, the Council of Europe Convention on the Prevention of Terrorism lists 11 different bodies of law in its Appendix to refer to the definition of terrorism, 8 of which are from the 1970s and 1980s.<sup>63</sup>

Overbroad definitions of terrorism can have a detrimental impact on legitimate political expression, free speech and national self-determination movements.<sup>64</sup> The lack of shared international consensus has generally resulted in differences in the definition of terrorism occurring in regional cooperation mechanisms.

## The Shanghai Cooperation Organisation

The 2001 Shanghai Convention on Combating Terrorism, Separatism and Extremism<sup>65</sup> not only conflates terrorism and extremism with 'separatism', but it also specifically says that these terms should be interpreted broadly.<sup>66</sup> This seems to have been what has happened in practice: Whilst the Shanghai Convention specifically defines terrorism, extremism and separatism as acts related to violence, many States do not link these offences to violence in national legislation.

The UN Human Rights Committee has raised concerns over the broad definition of terrorist offences in the SCO region, and highlighted that the vagueness of

60 OSCE Consolidated Framework for the Fight Against Terrorism PC.DEC/1063, Para 13

61 Professor Peter R. Neumann 'Countering Violent Extremism and Radicalisation that Lead to Terrorism: Ideas, Recommendations, and Good Practices from the OSCE Region', (September 2017) p.35

62 European Parliament, Understanding definitions of terrorism, (2015) available at: [http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/571320/EPRS\\_ATA\(2015\)571320\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/571320/EPRS_ATA(2015)571320_EN.pdf)

63 Appendix to the Council of Europe Convention on the Prevention of Terrorism, (16 May 2005), ETS No. 196

64 See, for instance, The Organisation for Islamic Cooperation on concerns over the overbroad definition of terrorism in the European Parliament 'Understanding definitions of terrorism', (2015)

65 Shanghai Convention on Combating Terrorism, Separatism and Extremism, 15 June 2001

66 Article 1.2, Ibid.



offences has led to the misuse of legislation to restrict human rights across the region, including in Kazakhstan, Uzbekistan and Turkmenistan.<sup>68</sup> There have been a number of attempts to create a unified list of terrorist organizations in the framework of the different cooperation mechanisms operating in the region, but so far, none have succeeded.

Unlike 'traditional' treaties which generally stipulate that the treaty does not affect the obligations of parties to other international treaties,<sup>69</sup> the Shanghai Convention stipulates that States should avoid using the powers in the Convention against people "based upon exclusively political, philosophical, ideological, racial, ethnic, religious or any other similar considerations and that they should entail punishment proportionate to their gravity."<sup>70</sup> Therefore, whilst the Convention explicitly recognises that powers should not be used in a discriminatory way, it does not contain the same commitment to fundamental rights that would be usual in a treaty of this kind.

There have been many instances of SCO states using counter-terror legislation to crack down on political movements as well as long standing disputes with minority communities. In 2005, Kazakhstan used anti-extremism laws to 'liquidate' the Democratic Choice of Kazakhstan (DVK) Party.<sup>71</sup> The latest SCO Convention on Countering Extremism was signed in 2017, and expands the definition of extremism even further, defining it not just by extremist acts, but by an "ideology and practice".<sup>72</sup>

## Criminalisation of Terrorist Activities

Regional and international counter-terrorism treaties in force in the OSCE region include obligations to enact legislation and to prosecute individuals for internationally-recognised terrorism offences, as well as for other offences linked to terrorist activities, including training, and public provocation to commit a terrorist offence. For example, the UN Security Council Resolution 2178 (2014), which encourages states to criminalise offences linked to FTFs, has led to the adoption of many laws adopted both at the domestic and regional levels regarding the criminalisation of terrorist activities. However, concerns have been raised that these laws are applied in a discriminatory way against particular groups.

### Foreign Terrorist Fighters in Serbia

The first group of individuals to be tried as FTFs in Serbia were convicted in April 2018 after a lengthy trial, which lasted for 4 years, during which three of the defendants were kept in pre-trial detention for the whole period.

The lengthy sentence that these individuals received (69 years) can be contrasted with the relative leniency with which volunteer fighters who join the conflict in East Ukraine have been treated. For example, in the case of Radomir Pocuca, an individual who joined pro-Russian forces in East Ukraine was not charged with terrorism offences, but with the offence of participating in a conflict in another country. He was given a one-year suspended sentence.<sup>74</sup>

67 Article 1, Ibid.

68 International Commission of Jurists, 'Transnational Injustices National Security Transfers and International Law', (2017) at p.31

69 Ibid. at p.30

70 Article 3, Shanghai Convention on Combating Terrorism, Separatism and Extremism, 15 June 2001

71 Human Rights Watch, 'Eurasia: Uphold Human Rights in Combating Terrorism', (14 June 2006) available at: <https://www.hrw.org/news/2006/06/14/eurasia-uphold-human-rights-combating-terrorism>

72 Rashid Alimov, SCO Secretary-General, 2017 in an interview available here: <http://eng.sectsc.org/news/20170613/295928.html>

73 E.g. Council of Europe Convention on the Prevention of Terrorism, Arts 1, 5, 7, and 9

74 Izabela Kistic, 'Serbia's foreign fighters: how different destinations mean a different application of the law', (10 July 2018). Available at: <https://www.fairtrials.org/news/serbia%E2%80%99s-foreign-fighters-how-different-destinations-mean-different-application-law>



## Glorification of Terrorism

**“ [A] constrained and shrinking space for public and open debate, discussion and criticism poses a longer-term threat to the strength of civil society and the ability to ensure not only the right to freedom of expression, but the defence of a whole range of other fundamental human rights”**



Amnesty International

In the EU, law-makers enacted a Directive on combating terrorism in response to UN Security Council Resolution 2178, which requires Member States to criminalise various activities linked with terrorism.<sup>75</sup> Under the Directive, EU Member States are required to criminalise the distribution of messages that ‘glorify’ terrorist acts.<sup>76</sup> Although the Article also states that there must be intent to advocate or incite a terrorist offence from these messages, several human rights organisations have raised concerns that “such a low threshold is likely to lead to abuse”.<sup>77</sup> Whilst the internationally recognised right to freedom of expression may be restricted, restrictions must be necessary and proportionate.<sup>78</sup>

In Spain, the Criminal Code was amended in 2015 to broaden the scope of Article 578 to include the “glorification of terrorism”. Since then, artists, rappers, vegan activists and even puppeteers have fallen victim both to Spain’s broad definition of terrorism, and the crime of “glorifying” it.<sup>79</sup>

### Valtonyc

The Spanish rapper known as ‘Valtonyc’ faced criminal charges including the glorification of terrorism after posting his rap music online. His song referenced the Basque country in Spain and the longstanding struggle with terrorist nationalist groups there. He was sentenced to three and a half years in prison and fled to Belgium. Spain has issued an EAW against him (as well as reportedly an INTERPOL alert), and he is now facing extradition.

The case demonstrates not only how punitive ‘glorification’ offences can be, but also how international cooperation mechanisms allow states to extend these punitive laws to citizens across borders. As all Member States were required by EU law to have created this offence by September 2018, the dual criminality exception to the EAW will no longer be available to refuse extradition, no matter whether the offence is used more punitively or with fewer safeguards in other Member States.

Spain is not the only country that has enacted laws that are much broader than the Directive’s requirement to criminalise the glorification of terrorism where there is intent to incite terrorist acts. In 2014, France amended the Criminal Code to include the offence of ‘apology for terrorism’, and has since brought thousands of cases under the new law, many of them involving minors.<sup>80</sup> Many of these cases do not involve direct incitement to violence, and tend to involve ‘drunken interactions with the police or provocative – and sometimes obnoxious – statements in school courtyards or on social media.’<sup>81</sup> The UK’s proposed new Counter-Terrorism and Border Security Bill 2018 caused alarm amongst Civil Society

75 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

76 Ibid. Article 5

77 Human Rights Watch ‘EU Counterterrorism Directive Seriously Flawed’, (November 2016) available at <https://www.hrw.org/news/2006/06/14/eurasia-uphold-huma>

78 Cf. International Covenant on Civil and Political Rights (Article 19) and ECHR (Article 10)

79 Amnesty International ‘Tweet... If you dare: How Counterterrorism laws restrict freedom of expression in Spain’, (2018)

80 Amnesty International, ‘DANGEROUSLY DISPROPORTIONATE: THE EVER-EXPANDING NATIONAL SECURITY STATE IN EUROPE’ (2017)

81 Nadim Houry ‘France’s Creeping Terrorism Laws Restricting Free Speech’, Just Security, (30 May 2018) available at: <https://www.justsecurity.org/57118/frances-creeping-terrorism-laws-restricting-free-speech/>

Organisations, who raised concerns that it ‘criminalised thought’ and freedom of expression.<sup>82</sup>

Similar to the glorification laws in the EU, Turkey has a law against ‘propaganda’, enacted through an amendment to Article 7/2 of Law no. 3713 on the Fight against Terrorism in Turkey in 2013. The law states:

**“Any person who disseminates propaganda in favour of a terrorist organisation by justifying, praising or encouraging the use of methods constituting coercion, violence or threats shall be liable to a term of imprisonment of one to five years.”**

The amendment in 2013 was intended to narrow the definition of terrorist propaganda in order to bring Turkey’s legislation in line with EU requirements on Freedom of Expression. However, despite the amendment, since the failed coup attempt of 2016, the law has been used to imprison students, academics, journalists and anyone who has been critical of Erdogan’s regime.<sup>83</sup>

## Mesale Tolu

Turkey has also used these propaganda laws against foreign nationals who it perceives to be critical of the Government. German journalist, Mesale Tolu, was arrested in Turkey on charges of spreading terrorist propaganda and belonging to a terrorist organisation after working for left-leaning news outlets and allegedly having links to the Communist party. She spent 8 months in prison before being released and having a travel ban place on her. In August 2018, the travel ban was finally lifted, but her trial is expected to continue in absentia, and her husband remains imprisoned in Turkey on similar charges.

Under the Council of Europe Convention on the Prevention of Terrorism, States have an obligation to proactively seek jurisdiction over terrorist offences,<sup>84</sup> and this has enabled Turkey to expand its use of counter terror legislation outside of its borders. For example, Turkey recently arrested two British nationals as soon as they arrived in Turkey, because they had allegedly previously shared posts from their social media accounts that praised the Kurdistan Workers’ Party (PKK) and the Syrian Kurdish People’s Protection Units (YPG). Turkey has a history of abusing cross border cooperation mechanisms to try and pursue Government critics abroad under the guise of fighting terrorism.<sup>85</sup>

## Receiving Terrorist Training

**“‘One click’ criminalisation of viewing streamed content is not the answer to online radicalisation.”**



Open Rights Group

The EU Directive on Combating Terrorism addresses the issue of viewing terrorism-related content online. The Preamble to the Directive states that self-study, through the internet or otherwise, should be considered as receiving training for terrorism ‘when resulting from active conduct and done with the intent to commit or contribute to the commission of a terrorist offence’.<sup>86</sup> This intent can be inferred from ‘the type of materials and the frequency of reference’.<sup>87</sup>

82 Liberty ‘Liberty’s Second Reading Briefing on the Counter-Terrorism and Border Security Bill’, (2018) available at: <https://www.libertyhumanrights.org.uk/sites/default/files/Liberty%27s%20Second%20Reading%20Briefing%20%20on%20the%20Counter-Terrorism%20Bill%20FINAL.pdf>

83 See, for example, Zia Weise ‘How Did Things Get So Bad for Turkey’s Journalists?’ The Atlantic (2018); BBC News, ‘Turkey academics on trial for ‘terrorist propaganda’ (2016); Burcu Karakas ‘Turkish students charged with terrorist propaganda after peace rally’ Deutsche Welle, (2018)

84 Council of Europe Convention on the Prevention of Terrorism, CETS No.196 (2007), Article 14

85 Fair Trials, ‘Dismantling the Tools of Oppression: Ending the Misuse of INTERPOL’, (2018)



The Directive leaves the frequency of reference and type of materials (factors that indicate intent) to the discretion of Member States, meaning that information-seeking is left open to overly broad, but severe criminalisation. For example, the UK's proposed new Counter-Terrorism and Border Security Bill 2018 criminalises viewing online content three or more times with a potential 15-year prison sentence, and even goes so far as to criminalise someone who views content over someone else's shoulder.<sup>88</sup> The UN Special Rapporteur on the Right to Privacy has criticised the proposed law as straying towards 'thought crime', and remarked that the threshold of viewing content three times was 'arbitrary'.<sup>89</sup>

The proposed UK laws have been drafted despite the fact that similar legislation in France has twice been declared unconstitutional for unjustifiably restricting freedom of communication. In June 2016, France adopted a law criminalising the 'regular consultation' of online materials inciting terrorism without a legitimate reason, making it punishable by up to two years in prison and a €30,000 fine.<sup>90</sup> The legislation, and a later, amended version of it, were twice declared unconstitutional. The court 'underlined that merely looking at websites or holding a certain heinous ideology does not justify loss of liberty'.<sup>91</sup>

In both cases, concerns were raised that although there was a clause in the French legislation and the UK's proposed legislation that allows for 'legitimate purposes', it will actively discourage journalists and academics from doing their job. As UK NGO Liberty surmised 'It is a brave reporter or researcher who will be undeterred by the prospect of a 15-year prison sentence'.<sup>92</sup> Even before this proposed legislation in the UK, counter terror laws have been used against academic pursuit of knowledge:

## Rizwaan Sabir

In 2008, a Muslim student at the University of Nottingham, Rizwaan Sabir, was arrested on suspicion of terrorism and held in police custody for 7 days. Sabir had been researching terrorism for his master's degree and was arrested after downloading a manual from a US government website which contained information on al-Qaida. Sabir was eventually released without charge, but the arrest raised serious concerns over the police's use of counter terror laws against academic research and particularly against Muslim students.

## Anti-Extremism

**“[E]xtremism laws are being used to target organizations and individuals critical of the Government”**



UN Human Rights Committee,  
Concluding observations on Russia (2009)

In 2002, Russia adopted a law "On Combating Extremist Activity" (which has subsequently been amended numerous times). Since then, several CIS countries have adopted anti-extremism laws and policies that largely mirror them.<sup>93</sup> This sharing of laws and policies has resulted in a proliferation of repressive anti-extremism laws across the region.

86 Recital 11, Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism  
87 Ibid.

88 Liberty, Liberty's Second Reading Briefing on the Counter-Terrorism and Border Security Bill (2018), p. 6

89 Lizzie Dearden 'UK government straying towards 'thought crime' by criminalising viewing terrorist material, UN inspector says' The Independent, (June 2018) available at: <https://www.independent.co.uk/news/uk/politics/thought-crime-uk-un-terrorism-government-viewing-material-offence-law-a8423546.html>

90 Article 421-2-5-2 of the French Penal Code, available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070719&idArticle=LEGIARTI000032633496>

91 Human Rights Watch, 'French Legislators Rebuked for Seeking to Criminalize Online Browsing', (December 2017)

92 Liberty, 'Liberty's Second Reading Briefing on the Counter-Terrorism and Border Security Bill' (2018) at para.16

93 Alexander Verkhovsky, Criminal Law on Hate Crime, Incitement to Hatred and Hate Speech in OSCE Participating States (The Hague: SOVA Center, 2016), p. 66. Available at: <https://www.sova-center.ru/files/books/osce-laws-eng-16.pdf>

Russia's laws encompass a wide array of activities, ranging from terrorist activities to hate crimes and hate speech. The definition of extremism and designated extremist organisations is very broad. In 2012, the European Commission for Democracy through Law of the Council of Europe (Venice Commission) pointed out that an overly broad and unclear definition of extremism, as well as arbitrary application of the Russian law, gave rise to excessively severe restrictions on fundamental rights and freedoms, and violated the principles of legitimacy, necessity and proportionality. It recommended bringing the Russian legislation in line with the ECHR.<sup>94</sup> However, up to now, Russia has ignored these recommendations.

Among other activities, Russian law criminalises:

**“propaganda of the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion.”<sup>95</sup>**

Given that several religions regard their believers as exceptional or as 'chosen people', this law could be interpreted to apply to almost any religion, making religious groups that have fallen out of favour with the Government vulnerable to unjustified targeting. Once an organisation has been branded as 'extremist' or 'terrorist', the continued participation in its activities is criminalised. The definition used to designate organisations as extremist, and the low threshold required for proving participation in these organisations, can lead to severe human rights violations including arbitrary arrest and detention and restrictions on the right to freedom of expression, opinion and religion. The ban on “propaganda of exclusiveness or superiority” on the basis of religion has also been included in legislation in Belarus, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, and Turkmenistan.

## Jehovah's Witnesses

In April 2017, the Russian Supreme Court banned all Jehovah's Witness Organisations, declaring them to be 'extremist'. The ruling places Jehovah's Witnesses, a group that poses no obvious threat to public security, in the same category as ISIS, and affects more than 100,000 followers of the religion across Russia. There have since been widespread arrests, and hundreds of people have fled the country to seek asylum.<sup>96</sup> In July 2018, the EU's delegation to the OSCE released a statement condemning Russia's use of anti-extremist legislation to restrict freedom of expression, opinion and religious belief.<sup>97</sup>

Extremism is motivated by ideology, and this appears to have been the justification for the banning of books and other sources of 'dangerous' information in Russia. The distribution of such banned materials is also subject to prosecution. Similar trends can also be witnessed in Belarus, Kyrgyzstan, Kazakhstan, and Uzbekistan.<sup>98</sup>

**“Individuals, particularly lawyers, defending those facing extradition or charged with terrorism, separatism or extremism in SCO states, are subject to extreme pressure and state repression.”**

**fidh**  
International Federation  
for Human Rights

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<sup>94</sup> European Commission for Democracy through Law (Venice Commission), 'Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation,' 2012 para.77, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)016-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)016-e)

<sup>95</sup> The Federal Law 'On Combating Extremist Activity,' Article 1 para. 1 point 4

<sup>96</sup> Andrew Higgins, 'Jehovah's Witnesses, Fleeing Russia Crackdown, Seek Shelter in Finland', New York Times, July 2018

<sup>97</sup> OSCE Permanent Council N° 1191: EU Statement on the situation of Jehovah's Witnesses in Russia, July 2018

<sup>98</sup> Human Rights Watch, "'We Live in Constant Fear' Possession of Extremist Material in Kyrgyzstan', 2018; Human Rights Council Thirty-seventh session, Report of the Special Rapporteur on freedom of religion or belief on his mission to Uzbekistan, A/HRC/37/49/Add.2, (2018)

# Preventing the Financing of Terrorism

Preventing the financing of terrorism has become a key aspect cross-border counter-terrorism policies, especially following the adoption of the International Convention for the Suppression of the Financing of Terrorism in 1999, and the UN Security Council Resolution 1373 in 2001. These measures call on states, *inter alia*, to criminalise fundraising for terrorism purposes, and to develop regimes for freezing assets that could be used to support terrorist activities. States should take appropriate measures to prevent the financing of terrorism, but the perception that civil society organisations can act as conduits for the financing of terrorism has meant that counter-terrorism laws are being used to limit their activities.

## The Financial Action Task Force (FATF)

**“Despite the FATF’s global standard-setting role, there is no intergovernmental convention underpinning or regulating its activities. This makes it difficult to understand and influence the workings of the organisation and as a result the FATF remains highly non-transparent in its work.”**



Global NPO Coalition on FATF

The Financial Action Task Force ('FATF') is a body set up by various governments to tackle money laundering. Its main role is to set

international standards on measures and regulations to combat money laundering, which are laid out in its 'recommendations', and to promote their effective implementation. The FATF's mandate was expanded in the immediate aftermath the '9/11' terror attacks in 2001 to include counter-terrorism as one of its main objectives. Since then, the FATF has adopted various recommendations to counter the financing of terrorism.

The implementation of the FATF recommendations is actively encouraged as an internationally-recognised counter-terrorism measure. The UN Global Counter-Terrorism Strategy, for example, includes a commitment to encourage states to implement the recommendations, and the EU has passed legislation on terrorism financing that is binding across its Member States that gives effect to them.<sup>99</sup> The implications of failing to comply with the FATF recommendations can be extremely serious. While the FATF has no powers to enforce its recommendations on states, it promotes compliance through monitoring, and by labelling states as 'non-compliant' for failing or refusing to implement. 'Non-compliance' can affect trade, investment, and aid, so there is a strong incentive for states to implement the recommendations.<sup>100</sup>

There is little doubt that the FATF plays an important role in ensuring a coordinated response to terrorism financing, but its recommendations have also had the unintended effect of restricting civic space. The FATF's 'Recommendation 8', in particular, identifies non-profit organisations as 'particularly vulnerable' to the financing of terrorism, and it encourages states to adopt laws to ensure *inter alia* that terrorist organisations do not pose as legitimate entities and to prevent the exploitation of CSOs by terrorist groups to funnel funds.<sup>101</sup>

Recommendation 8 has been used in many countries to justify the introduction of restrictive regulations on CSOs, including in countries

<sup>99</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

<sup>100</sup> Ben Hayes, 'Counter-Terrorism, "Policy Laundering" and the FATF: Legalizing Surveillance, Regulating Civil Society', *International Journal for Not-for-Profit Law* Vol. 14, Issue 1-2, (April 2012)

<sup>101</sup> The Financial Action Task Force, *INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION*, 'The FATF Recommendations', (adopted by the FATF plenary in February 2012)



where civil society actors already have limited space in which to operate. Given that the primary purpose of Recommendation 8 is to prevent money-laundering, there are also concerns that it has endorsed laws that create a challenging environment for international non-governmental organisations, and CSOs that depend on foreign funding.

However, the FATF and its monitoring bodies have not always been sensitive to the impact of the recommendations on freedom of expression and assembly, and the pressure faced by CSOs carrying out vital work. For example, one of the FATF's monitoring bodies appeared to endorse Uzbekistan's regulatory regime in 2010, despite being perceived by the International Centre for Not-for-Profit Law as responsible for closing down most foreign or international CSOs in the country.<sup>102</sup>

In response to various criticisms, the FATF amended Recommendation 8 in 2016, recognising that not all CSOs are vulnerable to terrorism financing, and encouraging states to take a proportionate, risk-based approach.<sup>103</sup> This is a welcome improvement, but one that requires close monitoring to ensure that countries amend their CSO laws to reflect these changes. The amendment of Recommendation 8 is a clear example of how civil society can work with multilateral bodies in order to inform improved policies and practices that respect human rights and civil society itself.

<sup>102</sup> Ben Hayes, 'Counter-Terrorism, Policy Laundering and the FATF: Legalising Surveillance, Regulating Civil Society', Transnational Institute / Statewatch (February 2012)

<sup>103</sup> See 'Information on updates made to the FATF Recommendations' available at: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>