

13 April 2013

Dear Chairperson,

We, the undersigned groups, wish to send our compliments to the Chair and congratulate the African Commission on Human and Peoples' Rights for holding its 53<sup>rd</sup> Ordinary Session.

At this session, and in recognition of the African Commission's crucial role in the protection of human rights on the continent, we are calling on the Commission to better ensure that States engaged in fighting terrorism fully comply with their human rights obligations, including complying with their legal responsibilities towards victims of terrorism and victims of counterterrorism-related human rights violations.

Eight years have passed since 2005 when, at its 37<sup>th</sup> Ordinary Session, the African Commission adopted a resolution that set forth several important measures to ensure that African States fully comply with their human rights obligations as they simultaneously fulfill their responsibilities to protect the people within their borders from terrorism. Since that time, while the African Union and individual States have established a robust anti-terrorism regime, including the Convention on the Prevention and Combating of Terrorism and its 2004 Protocol, the mechanisms that the 2005 resolution envisaged to ensure that States do not violate human rights in the fight against terrorism have never been fully implemented. This unbalanced approach exists at a time when the number of civilians harmed by terrorists and counterterrorism operations are on the rise, and the techniques and tactics that violent extremists and counterterrorism forces are using, some of which are new—such as suicide bombings and unmanned aerial vehicles (“drones”)—are proliferating and raise important legal and policy issues. Moreover, the civilian victims of this violence, whether by the militants or States, often go unnoticed and have found little relief from their governments, the parties responsible, or the African Union.

For these reasons, which are elaborated on below, we believe the Commission should:

1. Update itself on the situation of human rights and terrorism on the continent, including a consideration of legal responsibilities that States have towards victims of terrorism and victims of counterterrorism-related human rights violations;
2. Regularly engage with the African Union Peace and Security Council (PSC) and update the PSC on the situation of human rights and terrorism and emphasize to the PSC that Member States must fully comply with their human rights obligations in the fight against terrorism;
3. Ensure that the special procedures and mechanisms of the African Commission look at the protection of human rights in the context of measures aimed at preventing and combating terrorism (as committed to in the Commission's 2005 resolution);
4. Ensure that the special procedures and mechanisms of the African Commission coordinate their efforts to promote a coherent approach in their

- work on human rights and terrorism (as committed to in the Commission's 2005 resolution);
5. Organize a meeting of experts on the protection of human rights and the rule of law within the framework of the fight against terrorism in Africa (as committed to in the Commission's 2005 resolution); and
  6. Consider developing for AU Member States Draft guidelines and principles on the protection of human rights in the fight against terrorism in Africa.

We believe that the Commission has both the authority and the responsibility to conduct these activities in the light of its past activities and the AU Protocol on the Establishment of the Peace and Security Council ("PSC Protocol"), which under Article 19, obligates the Commission to "bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council." Those objectives include, under Article 3, co-ordinating and harmonizing continental efforts in the prevention and combating of international terrorism and protecting human rights and fundamental freedoms and respecting the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.

### **State-Related Counterterrorism Abuses**

The fight against terrorism does not take primacy over respecting the fundamental rights of individuals. This is recognized not only by the Commission's 2005 resolution but also in the Convention on the Prevention and Combating of Terrorism. Thus, counterterrorism operations must respect the right to life, the prohibition of arbitrary arrests and detention, the right to a fair hearing, the prohibition of torture and other cruel, inhuman and degrading treatment and punishment, the right to seek asylum, the principle of *non-refoulement*, and many more human rights. Domestic anti-terrorism laws must also conform to human rights standards and cannot, for example, codify arbitrary or indefinite detention, or infringe on freedom of speech or assembly in ways that are incompatible with human rights law. Additionally, when States do commit human rights violations, they must effectively and adequately investigate the allegations, seek to hold the perpetrators accountable, and provide reparations to the victims.

In addition to being unlawful, counterterrorism-related human rights violations have numerous drawbacks. Human rights violations demonstrate a State's willingness to violate the rule of law, which is essential for stable government. Violent extremists can also use human rights violations as a recruitment tool and can, no matter how wrongly, use them to claim a justification for the violence of terrorism. In addition, counterterrorism-related abuses often indiscriminately target entire communities and, as a result, erode community trust in government. This extinguishes opportunities for authorities to enter into dialogues with the same communities that can be instrumental in reducing extremist violence.

Given the situation of counterterrorism-related human rights violations on the continent, it will be important that any work that the special procedures and mechanisms of the Commission undertake on this issue seek to understand not only the type of abuses taking place, but also new factors that require attention. These include, but are not limited to:

**Counterterrorism security forces:** Too often, and in violation of the African Charter and international treaty obligations, State security forces commit human rights violations while conducting counterterrorism operations. The perpetrators are often not held accountable and the victims do not have access to an effective remedy and reparations. In Mali, the fighting in the north brought with it reports of soldiers committing extrajudicial killings. In Nigeria, Amnesty International reported security forces killing people at close range “who were clearly no threat to life.” In Somalia, the UN sanctioned “Monitoring Group” reported that in 2012 in “areas controlled by the TFG [Transitional Federal Government] and affiliated groups, arbitrary executions and indiscriminate retaliation are commonplace, and due process is routinely denied to those accused of working with Al-Shabaab.” In late 2012, Kenyan security forces in Garissa, Eastleigh, and Mombasa conducted counterterrorism operations through the use of excessive force and indiscriminate attacks against Muslim and Somali communities. These forces beat people and there were reports of disappearances and fears of extrajudicial killings. In 2012, Ethiopia labeled as terrorists and extremists non-violent Ethiopian Muslims who protested what they considered to be unconstitutional government interference in Muslim affairs. In some cases, security authorities beat and arbitrarily detained the protestors.

**Renditions and violations of the principle of non-refoulement:** When States transfer a terrorism suspect to another country the sending State must do so in accordance with the law and allow the suspect to challenge the transfer. Under the principle of non-refoulement, the sending State must also permit the suspect to raise any concerns he or she may have about being subjected to torture or other abuses upon transfer. Despite these rules, however, some African States have unlawfully rendered suspects to foreign countries, including, in some instances, in the face of a real risk of the suspects being tortured after transfer. This was the case when Kenya unlawfully rendered to Uganda suspects of the Kampala World Cup bombings in 2010. Kenya arbitrarily detained and denied the suspects their procedural rights for extradition; subjected them to harsh treatment and denied them access to counsel; and rendered suspects to Uganda where many of them alleged abuse.

**Anti-terrorism domestic legislation:** The Convention on the Prevention and Combating of Terrorism requires States to implement anti-terrorism legislation, but it also states that States must do so in compliance with their human rights obligations. Some of the domestic laws, however, provide definitions of terrorism that are too vague to meet international human rights standards. In other cases, domestic anti-terrorism laws permit arbitrary detention, limit due process, and place restrictions on fundamental freedoms such as the right to assemble. Ethiopia, Gambia, Egypt, Kenya, Mauritius, Sudan, Tanzania, Tunisia, Uganda, and Zambia are all countries that have come under criticism for their anti-terrorism laws by human rights groups.

**Weaponized and surveillance “drones”:** Unmanned Aerial Vehicles, commonly known as “drones,” embody technology that allow States to more easily locate individuals and carry out targeted killings. In some cases, this equipment is given by foreign government to African governments. In other cases, foreign governments, such as the United States, covertly operate the flights. Covert drone programs, and in some cases manned aerial surveillance programs, have reportedly been based out of Burkina Faso, Djibouti, Ethiopia, Kenya, Niger, Seychelles, Somalia, and Uganda. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the

UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism have raised concerns as to whether the United States' drone program follows the strict rules that international law places on when a State can use lethal force. Foreign governments have responsibilities to use drones in accordance with international law, and African States must also ensure that any foreign governments operating drones within their borders also abide by these limits. Generally speaking, the limits on the use of force are as follows: Outside of a situation of armed conflict, a State must resort to the use of force only when other means remain ineffective or without any promise of achieving the intended result. If force is used, States must exercise restraint, act in proportion to the seriousness of the offence and the legitimate objective to be achieved; States must also minimize damage and injury, and respect and preserve human life. In a situation of armed conflict, drone killings must abide by the laws of war, meaning that they must target only legitimate military objectives; any harm to civilians or civilian objects must be proportionate to the military objective achieved; and the State must take the precautionary measures to minimize damage to civilians and civilian objects.

***Intergovernmental counterterrorism arrangements:*** Governments are increasingly cooperating with each other in countering terrorism, something that is promoted in the Convention on the Prevention and Combating of Terrorism and its 2004 Protocol. In doing so, however, intergovernmental intelligence sharing arrangements and joint operations, including criminal investigations, must be conducted such that States are not complicit in, or aiding and abetting, another State's human rights violations. For example, States should not seek to receive intelligence from another State when it is reasonable to believe that the intelligence was obtained through torture or other illegal means. Similarly, States must not transfer a suspect to another State for interrogation or investigation when there is a real risk that the suspect will be tortured; not allow the agents of a foreign State to commit human rights abuses within its territory and jurisdiction; and not provide any form of assistance to another State that could be reasonably assumed to contribute to a human rights violation.

***Public access to national security-related information:*** The fight against terrorism has provided an impetus for many governments to enhance their secrecy regimes and increase secret surveillance. Within this context, States are placing excessive restrictions on the ability of individual victims, as well as the public at large, to access information held by public authorities. States in very specific circumstances are permitted to keep some national security related information from the public. However, the restrictions are excessive because individuals and the public have a right to government-held information, a right that may override governmental interests especially when the information is needed to monitor, expose, and discourage illegal actions (including human rights violations), corruption, other significant wrongdoing, and serious threats to public safety or health. To help better define the right to information regarding national security matters, civil society, in consultation with the Commission's Special Rapporteur on Access to Information and Freedom of Expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression, and others, are developing Principles on National Security and the Right to Information. These are principles that the African Commission should support in its efforts to ensure that States' counterterrorism policies and laws are in full compliance with their human rights obligations.

***Private military and security companies:*** Private military and security companies have gained prominent roles in the fight against terrorism in some countries. At the same time, the UN Working Group on the use of mercenaries as a means of violating human rights and the exercise of the right of peoples to self-determination has noted that the types of military functions that these contractors take part in “pose particular risks to human rights because they involve the potential for the use of force against civilians and the citizenry. These risks are further exacerbated by the environments in which the companies typically operate: conflict and post-conflict situations and places in which the rule of law is weak.” In Somalia, for example, the UN sanctioned “Monitoring Group” received reports of a trainee at a private security company being subjected to extra-judicial punishment that resulted in his death. Private military and security companies have also taken a role in maritime security in the fight against piracy, which at times has been linked to the fight against terrorism. The United States has also reportedly used private companies to conduct aerial reconnaissance missions over various African States. Given these and other examples, it is essential that States regulate the use of these contractors to ensure they are not permitted to violate human rights and, when they do, they are held accountable.

### **Spreading Militancy, the Duty to Protect, and the Rights of Victims**

Al-Qaeda in the Maghreb (AQIM), Ansar Dine, Al Shabaab, Boko Haram, and the Lord’s Resistance Army are some of the more notable extremist groups that have left civilians dead from Mali to Somalia. In many cases, these and other groups build up their ranks by forcibly recruiting children, enticing people through false promises, and in many cases preying on those who desperately seek quick financial gains.

The results have been devastating. In Nigeria, Human Rights Watch reported that since 2009, “hundreds of attacks by suspected Boko Haram members have left more than 1,500 people dead, according to media reports,” and that in the first nine months of 2012 alone, “more than 815 people died in some 275 suspected attacks by the group – more than in all of 2010 and 2011 combined.” In Mali, where militants fought for control of the north, and where Ansar Dine destroyed shrines in Timbuktu (a World Heritage site), the UNHCR reported in 2013 that the crisis “triggered the internal displacement of an estimated 204,000 while more than 200,000 Malians have found refuge in neighbouring Mauritania, Niger and Burkina Faso.” Across the border in Niger, in January AQIM claimed responsibility for taking over 100 hostages at a gas plant. In Somalia, the UN Monitoring Group documented a variety of Al-Shabaab related abuses, including unlawful killings. It reported, “Civilians have borne the brunt of the impact of the on-going conflict in Somalia, with all major parties guilty of either indiscriminate attacks or disproportionate use of force. Al-Shabaab has been the worst offender: in areas under the group’s control, civilians are routinely arrested, beaten or executed on charges of being ‘spies.’” In Kenya, where the government believes Al-Shabaab fighters are crossing over from Somalia, there were reports that in 2012 there had been over 30 attacks involving grenades or explosive devices resulting in at least 76 people dead and around 220 people injured. Uganda suffered one of the most deadly terrorist attacks in the region in 2010 when Al Shabaab took responsibility for sending two suicide bombers to kill over 70 spectators watching the final match of the Soccer World Cup in Kampala. There are numerous other incidents of violent extremism not mentioned in this letter.

Although terrorists are the ones primarily responsible for the harm they cause, there are several human rights responsibilities that fall squarely on States due to this violence. Each one is worth the consideration of the Commission and its relevant special mechanisms and procedures:

***Duty to Protect:*** A State must fulfill its responsibility to protect those within its territory or jurisdiction from the human rights abuses that result from terrorist attacks, such as deprivations of life that are caused by, for example, grenade attacks, and restrictions of liberty that are caused by, for example, kidnappings. As part of the duty to protect, and as part of the State's requirement to provide an "effective remedy," States may also be required to conduct investigations and hold perpetrators accountable. When a State fails in its duty to protect, the State is in violation of its human rights obligations and must therefore pay reparations to the victims. This may include, as appropriate, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. In some cases, a failure to protect may be caused by corruption, such as police freeing a suspect in return for a bribe who then launches an attack on civilians. In other cases, the government may fail to protect individuals because poor intra-governmental intelligence sharing allowed the planning of an attack to go unnoticed. In other cases, a government may simply refuse to send police to prevent an attack or fail to investigate an attack after it occurred.

***Victims Rights':*** In addition to the duty to protect and to provide compensation where necessary, States must fulfill their obligation to provide victims of terrorist attacks with sufficient care and consideration so to ensure that those victims are able to enjoy the rights of the African Charter and other international treaties. For example, as set out in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, individuals, in their efforts to seek justice, must have non-discriminatory access to judicial bodies, judicial services, lawyers, and legal services. Similarly, a State may need to ensure that people who suffered from physical disabilities due to a terrorist attack can access public buildings or have access to appropriate healthcare. States must also respect the rights of non-governmental organizations to form groups that promote the interests of terrorism victims. In this context of victim rights, it is also important to mention the 2012 report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which urged States to "voluntarily accept a binding international obligation to provide reparation to the victims of all acts of terrorism occurring on their territory in which a natural person has been killed or has suffered serious physical or psychological harm irrespective of the nationality of the perpetrator or the victim." The Special Rapporteur, Ben Emmerson, took this position because he saw this as a way to fill a "protection gap" that exists in cases of terrorism where the State was not at fault but a human rights abuse occurred.

## **Conclusion**

Since 2005, when the Commission issued its resolution on human rights and terrorism, there has been an increase in human suffering caused by extremist violence on the continent. In response, the continent has seen the establishment of national and regional anti-terrorism mechanisms, and an increase, often made possible through foreign assistance, in the capabilities of African States to conduct counterterrorism operations. Unfortunately, this has been accompanied by regular reports of States

committing human rights abuses but with no correspondingly strong emphasis on human rights by the African Commission, the PSC, or other regional African bodies.

For all these reasons, we strongly encourage the Commission to update itself on the situation of human rights and terrorism on the continent, including a consideration of State responsibilities towards victims of terrorism and victims of counterterrorism-related human rights violations; to regularly engage with the PSC by means of updating the PSC on the situation of human rights and terrorism and emphasizing the need for Member States to fully comply with their human rights obligations in the fight against terrorism; and to fully implement the Commission's 2005 resolution.

Sincerely,

Access to Justice (A2J)

[African Policing Civilian Oversight Forum \(APCOF\)](#)

[Center for the Study of Violence and Reconciliation \(CSVR\)](#)

[Citizenship Rights in Africa Initiative \(CRAI\)](#)

[Civil Society Prison Reform Initiative \(CSPRI\)](#)

[Commonwealth Human Rights Initiative \(CHRI\) Africa Office](#)

[East Africa Law Society \(EALS\)](#)

[International Federation for Human Rights \(FIDH\)](#)

[The Kenyan Section of the International Commission of Jurists \(ICJ-Kenya\)](#)

[Muslims for Human Rights \(MUHURI\)](#)

[Network of National Human Rights Institutions in West Africa \(NNHRIWA\)](#)

[Open Society Justice Initiative \(OSJI\)](#)

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