

OHCHR Briefer

The Use of Administrative Measures in Counter-Terrorism:



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I. Overview

Terrorism remains a substantial threat to international peace and security. However, how States respond to it matters just as much. The report by the United Nations High Commissioner for Human Rights takes a deep dive into the rising use of administrative measures - such as administrative detention, movement restrictions, travel bans, terrorist listing, and deprivation of nationality - as tools to counter terrorism. While these measures may be aimed at enhancing security, they raise serious questions about their adherence to the rule of law and their impact on human rights. The ways in which administrative measures are designed and applied also raise questions regarding their efficiency in meeting their stated objectives.

II. Key Findings

1. Shift to Preventive Action

The report underscores the growing trend among States to employ administrative measures such as detention without trial, travel restrictions, and deprivation of nationality as tools used to counter terrorism, outside the confines of the criminal justice process. This trend appears to be growing in tandem with steps to boost criminal law to regulate conduct prior to commission of any terrorism offences. In this regard, the report notes the increased sanctioning of preparatory and material support actions, extending beyond the traditional inchoate offenses such as attempt and solicitation of terrorism. This shift from a post-crime to a pre-crime approach contributes to criminal law being increasingly asked to evaluate future possibilities rather than to evaluate likelihoods that an act has occurred.

2. Human Rights Concerns

a. Limited Safeguards and Oversight

Research indicates that administrative measures used in counter terrorism often lack the robust legal and procedural safeguards that are necessary to prevent their arbitrary or discriminatory application. This is problematic from a human rights perspective especially with respect to administrative measures, although ostensibly preventive in nature, closely resemble criminal sanctions, because of their severe restrictions on rights and punitive nature. In this regard, the application of administrative measures that mirror criminal sanctions can lead to the creation of a “parallel justice system”, in which individuals are subjected to criminal-like restrictions on their rights without the procedural safeguards typically required in criminal cases, such as the presumption of innocence, the right to a fair trial, and the requirement of proof beyond a reasonable doubt.

For example, the use of secret evidence and a low evidentiary threshold to justify various forms of administrative control over individuals not formally charged with terrorism-related offences, undermine the principle of equality before the law, the right to an effective defense, and the individuals’ ability to challenge the measures imposed on them. The absence of fair trial and due process rights, typically safeguarded in criminal proceedings, raises serious issues about the legality and legitimacy of such administrative measures.

b. Stigmatization and Impact on Civic Space

The application of administrative measures has far-reaching effects beyond individual cases. Measures such as deprivation of nationality, control orders, and extended surveillance not only affect the targeted individuals’ freedom of movement, privacy, and family life but also carry social stigma, branding these individuals as threats to society. This stigmatization can have profound social and economic consequences, further marginalizing already vulnerable groups. Furthermore, counter-terrorism justifications for administrative measures have been employed in various contexts to unduly restrict the freedoms of expression, peaceful assembly, and association, shrinking civic space and targeting human rights defenders, dissidents, and minority groups.



3. Recurrent Practices

Examples from various States illustrate diverse applications of administrative measures, often with minimal procedural safeguards and judicial oversight. These include:

- The use of secret evidence, State-appointed advocates and a low evidentiary threshold in counter terrorism administrative proceedings to impose a variety of control measures;
- Imposition of travel bans with counter terrorism justifications, sometimes without prior notifications, with limited opportunity to challenge such decisions before an independent judicial body and a lack of effective remedy;
- Terrorist listing of individuals and entities generating consequent administrative actions such as asset freezes, in procedures that often lack sufficient safeguards;
- The targeting of a wide range of civil society actors and those belonging to minority groups through terrorist sanctions and listing regimes;
- Extended administrative detention, including post-sentence preventive detention, without or with limited judicial oversight;
- Use of nationality deprivation as a counter-terrorism measure, in proceedings that lack transparency and at times carried out in absentia, especially in the context of addressing the threat posed by “foreign fighters”;
- Expansion of law enforcement surveillance powers with limited safeguards and ineffective judicial oversight, posing significant risks to privacy rights and targeting especially minority and marginalized groups.

IV. Key recommendations to States:

- Establish clear, precise legal basis and definitions for imposing administrative measures;
- Ensure that counter-terrorism-related administrative measures are subject to sufficient procedural safeguards and judicial review, and refrain from resorting to administrative measures to circumvent the application of legal protections used in criminal justice;
- Adopt specific measures to ensure that counter-terrorism efforts do not target, stigmatize, or disproportionately impact marginalized groups, including by undertaking prior human rights assessments.
- Ensure that terrorist listing is not used to unlawfully suppress the legitimate exercise of human rights, and take measures to remove individuals and entities that are erroneously or unlawfully included in such lists;
- Ensure that deprivation of nationality is not employed as a general policy to prevent or to counter terrorism. If used, it should be reserved for the most exceptional circumstances, not be applied arbitrarily, and be subject to stringent safeguards, and should never lead to statelessness.

III. Conclusion

The report concludes that while administrative measures may play a role in counter terrorism, the punitive nature, severe impact on human rights, and lack of necessary safeguards make certain measures particularly concerning from a human rights perspective. There are also concerns about the efficiency of administrative measures in meeting their stated objectives. To prevent their misuse, it is crucial for States to ensure that any administrative measures that resemble criminal sanctions are subject to rigorous procedural guarantees, transparency, and independent judicial oversight, tantamount to those applicable to criminal measures. This would help ensure that such measures are applied fairly, lawfully, and in a manner that respects international human rights standards.

