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Counter-terrorism and social rights: The assessment of adverse effects of counter-terrorism on social rights of families of terror suspects and convicts in Indonesia

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Content

Marek Linha graduated from the University of Oslo in 2014. His master thesis titled "*Counter-terrorism and social rights: The assessment of adverse effects of counter-terrorism on social rights of families of terror suspects and convicts in Indonesia*" investigates how the enforcement of counter-terrorism measures in Indonesia has led to serious interference with social rights of families of terror suspects and convicts, potentially amounting to violations of international human rights law. It received the grade A.

The NCHR Indonesia programme assisted Marek with realizing an internship at a research institute in Indonesia, as well as conducting a field trip, making it possible for him to collect important data. He is currently working as an advisor at the Norwegian Organization for Asylum Seekers (NOAS).

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1 Introduction

The present thesis investigates claims that enforcement of counter-terrorism measures in Indonesia has led to serious interference with social rights of families of terror suspects and convicts, potentially amounting to violations of international human rights law.[1] It may appear surprising that such claims have been raised in Indonesia, a country where, not least due to its large and vocal Muslim population, the demand for sensitivity from counter-terrorism is relatively high.[2] Since it is difficult to presume bias in Indonesian counter-terrorism law or in its application, such claims represent a puzzle calling for a closer examination.

The aim of the thesis is to answer whether counter-terrorism enforcement in Indonesia has led to interference with social rights of families of terror suspects and convicts. In doing so, the thesis does not aim to conclusively determine whether Indonesia has breached its obligations but, instead, it seeks to elaborate on how violations of social rights potentially arising in this context may be determined and avoided. The legal framework employed in the thesis is mostly derived from the International Covenant on Economic Social and Cultural Rights (ICESCR),[3] as elaborated upon by the respective treaty body, the Committee on Economic, Social and Cultural Rights (CESCR).[4] The thesis relies on information about experiences of families of terror suspects and convicts in Indonesia gained from independent research institutes and non-governmental organisations that have come into contact with such families.

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[1] Among others, the Center for Human Rights Studies of the Islamic University of Indonesia has published a number of such accounts in Indonesian language, along with commentary, in a series of articles entitled 'Suara Khadijah' in their magazine 'ISRA' (editions 14-29) published by the Center between 2011 and 2012.

[2] See: Ramraj (2012) pp. 299-300.

[3] Full citation of treaties is contained in the bibliography.

[4] Established in 1987, the Committee is the body of independent experts that monitors implementation of the Covenant by its States parties. The Committee has developed 'jurisprudence' through its General Comments and State-specific concluding observations. See further: Langford and King (2008).

The main finding of the thesis is that enforcement of counter-terrorism measures in Indonesia has led to serious interference with social rights of families of terror suspects and convicts both directly and indirectly. Social rights of the families have been directly affected by counter-terrorism enforcement in situations involving enforced eviction, seizure of legal identity documents, and damage or loss of property. Indirect effects include socio-economic discrimination, exclusion of children from schools; denial of access to social assistance programmes; and threats to privacy and security.

The thesis consists of four main sections. The first, introductory section contains a literature review, introduces the reader into the Indonesian context, and discusses why counter-terrorism policy must take social rights into account. The second section lays out the methodology and highlights the inherent limitations. It also sets out the normative framework and addresses key conceptual and empirical issues. The third section is divided into two larger subsections. The first subsection applies the normative framework to a selection of specific cases, examining direct effects of counter-terrorism enforcement on social rights. The second subsection examines the indirect impact, focusing on serious, adverse effects of social stigmatization. The fourth, concluding section summarizes the main findings.

1.1 Counter-terrorism and human rights in a global perspective

It is now widely recognised that States' domestic counter-terrorism policies must be developed in conformity with international human rights law. In the immediate aftermath of the events of September 11, 2001, the UN Security Council, acting under Chapter VII of the UN Charter, called on States to "take the necessary steps to prevent the commission of terrorist acts".[5] This resolution failed to highlight the importance of conformity of such steps with human rights,[6] thus attracting severe criticism.[7] The Council has addressed this

[5] UNSC Res 1373 (2001) para. 2(b).

[6] The resolution expressly required the conformity with "the relevant provisions of national and international law, including international standards of human rights" in paragraph 3(f), which concerned measures related to refugee status determination. In addition, an indirect reference to human rights was provided in the

omission in later resolutions. In 2003, the Council requested that States "ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".[8] This position has been reiterated by the Council on numerous occasions,[9] including in a resolution adopted in 2010, in which the Council further recalled that, "effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort".[10]

Academics and legal professionals,[11] regional organisations,[12] as well as international courts[13] have all explored the relationship between human rights and counter-terrorism in great detail, focusing mostly on civil and political rights. Much focus has been placed on

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preamble, which reaffirmed the need to combat the terrorist threat by all means "in accordance with the Charter of the United Nations".

[7] As critically remarked by Robert Goldman, "This omission may have given currency to the notion that the price of winning the global struggle against terrorism might require sacrificing fundamental rights and freedoms", see: Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (2005) para. 6. For an overview of early critical reactions and their impact see: Byrnes (2008) 133-134.

[8] UNSC Res 1456 (2003) para. 6. Note the use of the weak term 'should'. Cf. UNGA Res 57/219 (2002) para. 1 ("States must ensure").

[9] In UNSC Res 1624 (2005) the strong term 'must' is used in an operative paragraph for the first time (see para. 4); however, in UNSC Res 1787 (2007) and UNSC Res 1805 (2008) the weak term 'should' reappears in the preambles.

[10] UNSC Res 1963 (2010) para. 10.

[11] See, e.g., Scheinin (2014); Salinas de Frías, Samuel, and White (2012); Ramraj, Hor, Roach and Williams (2012); Doswald-Beck (2011); International Commission of Jurists (2009); Duffy (2005); Walter, Vöneky, Röben and Schorkopf (2004); Benedek and Yotopoulos-Marangopoulos (2004).

[12] See, e.g., Organization for Security and Co-operation in Europe (2008); Council of Europe (2005); Inter-American Commission on Human Rights (2002).

[13] International case-law on human rights and counter-terrorism is vast. Especially relevant to the present thesis are a number of judgements by the European Court of Human Rights (ECtHR) referring to counter-terrorism measures that raised socio-economic issues under Article 8 of the European Convention on Human Rights (private and family life and home) and Article 1 of Protocol No. 1 (peaceful enjoyment of possessions), see: *Akdivar and Others v. Turkey*, ECtHR (1996) and *Doğan and Others v. Turkey*, ECtHR (2004). Social rights were also considered relevant by the International Court of Justice (ICJ) in its assessment of the legality of a security barrier erected by Israel in the Occupied Palestinian Territory, see: *Construction of a Wall*, ICJ (2004) para. 134.

practical challenges, such as the dilemma of protecting intelligence sources while respecting the right to a fair trial; responding to incitement of terrorist acts while respecting the right to freedom of expression; or engaging in surveillance operations while adhering to the right to, and respect for, private life. Proving that such challenges are not insurmountable, there is now a considerable amount of literature offering practical guidance for policy makers and others engaged in addressing the terrorist threat.

Attention to the protection and promotion of social rights while countering terrorism has been rather limited despite the fact that social rights also comprise binding international human rights law. Unfortunately, the framework of social rights has been rarely employed to systematically assess counter-terrorism policies. This lack of attention represents a critical gap, as the potential negative impact of counter-terrorism measures on the enjoyment of social rights can be serious.

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has identified a number of social rights at risk. These include the right to work; protection and assistance accorded to the family and to children and young persons; the right to an adequate standard of living, including adequate food and housing; the right to health; and the right to education.[14] As a result of similar concerns, an expert seminar was held in 2008 in the context of the work of the UN Working Group on Protecting Human Rights while Countering Terrorism. The participants of the seminar noted, among other things, that special impact of counter-terrorism measures on the social rights of women and children has often been disregarded.[15] Drawing on these discussions, the UN High Commissioner for Human Rights has highlighted that counter-terrorism measures can increase poverty and poverty related discrimination where women and children have been deprived of the source of their livelihoods as a result of measures

[14] UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2007) para. 33.

[15] UN Counter-Terrorism Implementation Task Force Working Group (2008) para. 27.

taken against husbands and fathers.[16] Similarly, the Special Rapporteur has described gendered effects, including on female family members who bear the burden of anxiety, harassment, social exclusion and economic hardship.[17]

1.2 Counter-terrorism in Indonesian context

Since the fall of Suharto's authoritarian rule in 1998, Indonesia has undergone a remarkable transition towards democracy and the rule of law. Serious challenges remain however, including endemic corruption and insufficient accountability in the police and the justice system.[18] The new democratic regime has been particularly tested by militant Islamic groups that have carried out several terror attacks, including the 2002 Bali nightclub bombing, the 2003 Marriott Hotel bombing, the 2004 Australian Embassy bombing, the 2005 Bali Bombings, and the 2009 simultaneous bombings of Marriott Hotel and the Ritz Carlton Hotel. More recently, the attacks seem to have shifted from Western targets to the Indonesian police.[19] In addition, the Government has been tested by self-determination movements, including the Free Aceh Movement and the Free Papua Organization. Although leading Indonesian politicians have previously described certain acts by members of these organisations as terrorist,[20] the Government has in fact refrained from applying anti-terror legislation in these cases.[21]

Just six days after the 2002 Bali bombing, the Government issued an anti-terrorism regulation, which was confirmed by the legislature in 2003 with no revision.[22] The law

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[16] UN High Commissioner for Human Rights (2009) para. 34.

[17] UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2009) para. 30.

[18] Horowitz (2013) 207-260.

[19] The Jakarta Post, Sangadji (2013).

[20] Human Rights Watch (2003) 16-17.

[21] According to Sidney Jones, the inconsistency has become untenable, see: Jones (2013). It should be noted that there is nothing inherent in the anti-terror legislation that would prevent its application to these movements. Instead, the restraint has been based on prosecutorial discretion.

[22] For a detailed overview of the legislation, see Ramraj (2012).

defines terrorism broadly as the intentional use of "violence or the threat of violence to create a widespread atmosphere of fear in public or to create mass casualties, by forcibly taking freedom, life or property of others or to cause damage or destruction to vital strategic installations or the environment or public facilities or international facilities".[23] Depending on the degree of involvement in preparation or perpetration of such attack, the sentence may vary from just a few years in prison to life imprisonment or death. The law also penalises "providing or lending money or goods or other assets to any perpetrator of criminal acts of terrorism; harbouring any perpetrator of any criminal act of terrorism; or hiding any information on any criminal act of terrorism", subjecting offenders to lower sentences. [24]

The Indonesian counter-terrorism police unit, Special Detachment 88, has played an important role in the anti-terror efforts. With considerable funding, equipment and training from foreign donors, including the United States and Australia, the Detachment has since 2002 reportedly arrested some 900 offenders and shot-dead around 90 suspects. [25] According to the Indonesian Counter-Terrorism Coordination Agency (BNPT), at least 121 terrorism-related investigations were brought before the courts in the past two years, resulting in at least 83 convictions. [26] In light of its sustained efforts, Indonesia is increasingly viewed as a leader in counter-terrorism issues in regional and multilateral fora.[27] However, the Detachment has also been criticised for human rights violations, in particular related to the right to life, including by the Indonesian national human rights institution Komnas HAM.[28]

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[23] Ibid. 292.

[24] Ibid.

[25] The Jakarta Post, Nazeer (2014).

[26] Quoted in a news story published online by the UNODC (2014).

[27] United States – Indonesia Society (2011) 3.

[28] See, e.g., the report submitted to the Human Rights Committee: Komnas HAM (2013) paras. 7-10.

Social rights of families of terror suspects and convicts have so far attracted little Government attention. As illustrated further below, counter-terrorism can result in socio-economic deprivation of such families. However, there are signs of slow improvement, at least in regard to families of convicted terrorists. Those convicted under the terrorism law have the right to early release after serving a third of the sentence.[29] So far, about 200 convicts have been released,[30] but there have also been at least 25 cases of recidivism.[31] This has prompted the BNPT to introduce a new 'deradicalisation blue print'. Although details of the program have so far not been publicised, the BNPT has announced that the program would involve not only the convicts but also their families and provide skills and personality development training to ensure smooth transition into society.[32] According to the Coordinating Minister for People's Welfare, the program would also address links between terrorism and poverty.[33] However, the utility of addressing poverty while countering terrorism has not gone unchallenged.[34]

1.3 Why must counter-terrorism take social rights into account?

This section presents two main arguments in support of the relevance and importance of social rights in the context of counter-terrorism. The first argument is practical: by negatively affecting the enjoyment of social rights of families of terror suspects and convicts, counter-terrorism measures can undermine the overall effectiveness of anti-terror efforts. The second argument is legal: social rights impose real legal obligations on States; counter-terrorism measures, just like any other State measures, must comply with these obligations, both under international and domestic law. Subsections below discuss both arguments, addressing contested issues as well as potential objections.

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[29] Ramraj (2012) 302.

[30] Ibid, 303.

[31] Noor Huda Ismail quoted in: The Jakarta Post, Perdani and Witular (2013).

[32] Ibid.

[33] Quoted in: The Jakarta Post, no author, (2012).

[34] Ramraj (2012) 308.

1.3.1 Argument from effectiveness

As indicated above, the argument that failure to comply with social rights can undermine anti-terror efforts has not gone unchallenged. Since most terrorists belong to the middle class, the counter-argument goes; the focus on social rights is misplaced and should probably be directed towards the improvement of civil rights instead. The present section argues that, upon closer examination, such conclusions appear to be premature.

In a recent collection of studies on root causes of terrorism, Tore Bjørgo concludes that "there is only a weak and indirect relationship between poverty and terrorism".[35] This conclusion echoes several previous studies. For example, based on statistical analysis of general economic situation in several countries and data on individual poverty status of terrorists, an often cited study finds that "participation in terrorism and political violence is apparently unrelated, or even positively related, to individuals' income and education" and that "terrorists are more likely to spring from countries that lack civil rights".[36] Other studies similarly find that terrorists around the world tend to belong to the middle class,[37] including in Southeast Asia.[38]

These studies pay little attention to the conceptualization of poverty. There is a qualitative difference between poverty conceptualised as a general phenomenon affecting similarly various segments of the population, and poverty conceptualised as targeted economic deprivation affecting specific individuals or groups. Although motivational effects are

[35] Bjørgo (2005) 256.

[36] Krueger and Malečková (2003) 142.

[37] See, e.g., Sageman (2004) 73-80; Pape (2006) 214-215.

[38] Singapore Ministry of Home Affairs (2003) 15.

likely to be stronger in the latter type of cases[39] a cross-country analysis of general statistical data will, by design, fail to reflect this.[40]

Another limitation of these studies concerns the reliance on the objective measure of the poverty status of terrorists. As highlighted in other studies, terrorists often identify themselves with a broader victimised group.[41] Instead of being fuelled by personal experience of economic deprivation, they might be motivated by the subjective desire to advance the socio-economic position of a larger economically deprived group they purportedly represent.

In any case, the fact that terrorists tend to belong to the middle class does not give any basis to the conclusion that States can impoverish families of terror suspects and convicts while countering terrorism without undermining anti-terror efforts. Even where economic deprivation is not an initial cause, it may become a sustaining cause over time. As illustrated further below, counter-terrorism, if not carefully executed, can itself cause socio-economic deprivation of families of terror suspects and convicts, both directly and indirectly.

There are at least three key reasons why social rights of families of terror suspects and convicts need to be taken seriously while countering terrorism. First, paying attention to social rights decreases the potential for recruitment by terrorist networks. Children of actual terrorists are vulnerable to recruitment because kinship often implies trust and easier access to recruiters.[42] Denial of their social rights is likely to incite resentment and hamper social integration. The potential for radicalisation and eventual recruitment might thereby increase.

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[39] For an overview of relevant psychological research on this issue see: Moghaddam (2007) 70-72.

[40] Data on inequality disaggregated by identity-based cleavages could potentially reveal different results. A recent quantitative study has shown that inequalities that coincide with such cleavages are significantly correlated with the emergence of civil wars, see: Østby (2008).

[41] See: e.g., Della Porta (1995); Campbell and Connolly (2006).

[42] Abuza (2009) 195-196.

Second, upholding social rights of families of terror suspects and convicts increases the potential for disengagement. Once released from prison, former terrorists are unlikely to disengage from terrorism and reintegrate into society unless such option is economically and socially viable in the first place. Furthermore, while terror suspects and convicts are in prison, their families may become dependent on assistance from terror networks. Ensuring that basic socio-economic needs of the families are met can help avoid such dependencies.[43]

Third, unlawful, targeted economic deprivation of families of terror suspects and convicts while countering terrorism undermines the legitimacy of anti-terror efforts. It offers fuel for propagandists and might reinforce the subjective notion of individual terrorists of fighting for a just cause.

Finally, it should be mentioned at this point that social rights imply different levels of State duties,[44] and that the relevance of each level for counter-terrorism may vary depending on the context. Large-scale anti-poverty initiatives might be relevant, for example, in the context of addressing socio-economic grievances perceived by self-determination movements. Where terrorist groups do not articulate such grievances, the focus on restraint and precaution when dealing with families of terror suspects and convicts might be of more immediate importance.

To conclude, the fact that poverty has not been linked to terrorism does not mean that counter-terrorism can disregard social rights of families of terror suspects and convicts without undermining anti-terror efforts. There are good reasons to presume that inattention to social rights will increase the potential for engagement in terrorism and decrease the potential for disengagement. Social rights considerations in the context of counter-terrorism must pay attention to the context, as the relevance of various State duties imposed by social rights may vary, as implied further below.

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[43] Bjørgo and Horgan (2009) 245-255. See also: Bjørgo (2013) 86-94.

[44] The typology of State obligations is addressed in more detail in section 2.1.1.

1.3.2 Argument from legality

Failure to comply with social rights while countering terrorism may violate both international and domestic law. This argument provides a legal incentive for policy makers to pay heed to social rights considerations in the drafting process of anti-terror legislation, as well as for agencies that enforce counter-terrorism measures in practice. However, while it is clear that social rights contained in the ICESCR and rights contained in the International Covenant on Civil and Political Rights (ICCPR) are all human rights, some might question the former's legal nature. Do individuals possess social rights in the immediate way they possess civil and political rights, or are social rights inherently different – a mere aspiration of the nation? What kind of legal obligations, if any, do social rights actually impose on States? Lastly, can social rights be effectively invoked before courts? This subsection briefly addresses these preliminary questions by examining the status of social rights under both international law and Indonesian domestic law.

1.3.2.1 The nature of social rights under international law

Addressing the nature of State party obligations under the ICESCR, Article 2(1) sets out the obligation to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term 'progressive realization' has led some to conclude that, unlike human rights contained in the ICCPR, human rights contained in the ICESCR are mere "programmes for governmental policies".[45] However, the CESCR has dismissed such arguments, highlighting that the phrase must be read in the light of the overall objective of the Covenant, which is to establish clear obligations for State parties.[46] The Covenant contains two types of human rights: some entitlements must be realised over time, whereas others are capable of immediate application by judicial organs and must be recognised immediately.[47] According to the Committee, "while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available

[45] Vierdag (1978) 103.

[46] CESCR, *General Comment No. 3*, para. 1.

[47] In neither case is a State entitled to not act at all, as highlighted in Langford and King (2008) 487.

resources, it also imposes various obligations of immediate effect."[48] Potential counter-terrorism issues raised by progressive realisation of social rights are excluded from the scope of the thesis, and the present section therefore only focuses on immediate obligations.[49] It should also be noted that the purpose of this section is not to cover an entire spectrum of the recognised types of obligations, but only those identified as sufficiently relevant in light of the aims of the thesis.[50]

Of immediate application are, first, 'minimum core obligations'. The CESCR has noted that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."[51] This requires satisfaction of, for example, "essential foodstuffs, of essential primary healthcare, of basic shelter and housing, or of the most basic forms of education".[52] Failure to satisfy these basic requirements constitutes a prima facie violation, i.e., 'a presumption of guilt' which may be overturned only if the State is able to attribute the failure to a lack of available resources.[53] The Committee elaborated on minimum essential levels of the rights to food, health, education, water, work, social security and culture.[54] Nevertheless, the minimum core remains to be a contested concept, especially in regard of its legal determinacy.[55] While these elaborations provide a degree of specificity, a number of difficult issues related to legal interpretation remain, including the proper weight to be accorded to contextual considerations. As noted by Asbjørn Eide, Article 2 of the ICESCR implies that countries

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[48] CESCR, *General Comment No. 3*, para. 1.

[49] See section 2.1.1 below.

[50] For example, the obligation to 'take steps' recognized by the Committee is not discussed here.

[51] CESCR, *General Comment No. 3*, para. 10.

[52] Ibid. As noted by the Committee in the same paragraph, interpretation of the Covenant that would fail to establish such a minimum core would deprive the Covenant of its *raison d'être*.

[53] Ibid. See also: Craven (1995) 143.

[54] CESCR, *General Comment No. 12*, para. 8; CESCR, *General Comment No. 13*, para. 57; CESCR, *General Comment No. 14*, para. 43; CESCR, *General Comment No. 15*, para. 37; CESCR, *General Comment No. 18*, para. 31; CESCR, *General Comment No. 19*, para. 59(a); CESCR, *General Comment No. 21*, para. 55.

[55] Young (2008).

with more resources have a higher level of core content or immediate duties than those with more limited resources.[56] Such nuanced approach to the interpretation of the scope of minimum core obligations generally appears to be reflected in the Committee's Concluding Observations.[57]

Second, most, if not all obligations that can be characterised as 'negative', are also immediately applicable.[58] Unlike rights, obligations can be characterised as positive or negative. Positive obligations denote the duty of States to engage in an activity to secure the effective enjoyment of a right, whereas negative obligations require States to abstain from an activity that would impair the enjoyment of a right. It would be wrong to conceive of social rights as only implying positive obligations, just like it would be a mistake to conceive of civil and political rights as only implying negative obligations. Rather, most human rights impose both positive and negative obligations regardless of whether the specific right in question is a social right or one of civil and political rights.[59] For example, the right not to be subjected to torture, a classic civil right, demands both that States refrain from torture (a negative dimension) but also that States take action to prevent torture, for instance by introducing appropriate interrogation training for law enforcement officials (positive dimension).[60] The CESCR has expressly recognised negative dimension of social

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[56] Eide (2001) 27. In addition to contextual differences between countries, a separate issue concerns the question whether one should take account of (context-specific) needs along with desirable and feasible opportunities, see: Coomans (2002) 180.

[57] See: Langford and King (2008) 495.

[58] This is not to be read as implying that the two types of obligations (i.e., immediate obligations and negative obligations) are mostly the same obligations. The obligations to 'take steps', for example, are also immediately applicable.

[59] Antecedents of this argument can be traced back to the analytic philosophical exposition by Henry Shue, who has convincingly pointed out that active effort and considerable economic resources may be required not only to secure 'subsistence rights' but also 'security rights', see: Shue (1996) 36-40.

[60] The Human Rights Committee (HRC) has stated that the ICCPR requires States to take "specific activities" to enable individuals to enjoy their civil and political rights, and that "in principle this undertaking relates to all rights set forth in the covenant", see: HRC, *General Comment No. 3*, para. 1; see also: HRC, *General Comment No. 20*, para. 10.

rights[61] and enumerated examples of negative obligations as of immediate application.[62] This may imply that all negative obligations are immediately applicable. [63] However, the Committee has so far not stated so explicitly and has yet to address negative obligations in a comprehensive way. Addressing negative obligations related to forced evictions, the Committee simply noted that, "in view of the nature of the practice of forced evictions, […] the availability of resources will rarely be relevant."[64]

Third, positive obligations related to protection of social rights against arbitrary interference by private individuals are arguably also of immediate application. It is worth reiterating that civil and political rights – all of which have been interpreted as of immediate application – impose positive obligations, regardless of resource considerations. While the CESCR noted that protection against interference by private individuals often requires "positive budgetary measures",[65] it does not follow that such positive obligations are therefore automatically all subject to progressive realization. For example, the Committee considered that instances of arbitrary forced evictions are "prima facie incompatible with the requirements of the Covenant",[66] and later specified that "States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies."[67]

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[61] CESCR, *General Comment No. 2*, para. 6; CESCR, *General Comment No. 7*; CESCR, *General Comment No. 12*, para. 15; CESCR, *General Comment No. 13*, para. 47; CESCR, *General Comment No. 14*, paras. 33-34.

[62] CESCR, *General Comment No. 3*, para. 5; the same list is repeated in CESCR, *General Comment No. 9*, para. 10.

[63] See, e.g., Sepúlveda (2003) 184. Cf. Langford and King (2008) 487, who point out that compliance with negative obligations may not always be immediately feasible due to lack of extra resources (e.g., additional police forces to protect certain social interests).

[64] CESCR, *General Comment No.* 7, para. 8.

[65] CESCR (2007) para. 7.

[66] CESCR, *General Comment No. 4*, para. 18.

[67] CESCR, *General Comment No.* 7, para. 9.

To summarise, the ICESCR imposes binding legal obligations, including the obligation to recognise certain individual entitlements immediately. Minimum core obligations, negative obligations, and due diligence obligations are all immediately applicable and relevant in the context of counter-terrorism. Negative obligations demand that enforcement of counter-terrorism measures must not arbitrarily interfere with social rights. A State may limit social rights under certain circumstances, but only if certain criteria are fulfilled.[68] This is where the relevance of minimum core obligations comes in: limitation of a social right resulting from enforcement of a counter-terrorism measure must not impair the essence of the right in question. Lastly, due diligence obligations require States to take reasonable measures to ensure that social rights of family members of targeted terror-suspects and convicts are not interfered with by private individuals.

In the case of Indonesia, the responsibility for judicial enforcement of social rights recognised in the ICESCR ultimately lies on the domestic level. Indonesia has so far refrained from acceding into the complaints procedure under the ICESCR[69] and, as other Asian countries, is not subject to a regional human rights regime.[70] The next subsection therefore briefly examines the position of social rights within the Indonesian domestic legal system, with particular focus on the approach adopted by the Indonesian Constitutional Court.[71]

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[68] See section 2.1.3 below.

[69] The Optional Protocol to the ICESCR, which entered into force on 5th May 2013, provides the Committee competence to receive and consider communications from individuals claiming that their rights under the Covenant have been violated. This 'complaints procedure' does not amount to judicial enforcement in a strictly legal sense, as the views are not legally binding. A similar complaints procedure exists under the ICCPR, but Indonesia has not acceded to it.

[70] On human rights in Asia see, e.g., Ghai (2012).

[71] Abstract discussion of justiciability of social rights would go beyond the remit of the present thesis. For a succinct summary of the debate in light of burgeoning judicial practice see: Langford (2008).

1.3.2.2 The nature of social rights under Indonesian domestic law

The Constitution of the Republic of Indonesia contains a number of social rights that are expressly justiciable by the Indonesian Constitutional Court.[72] The Constitution grants a wholesome set of human rights, recognising both social rights and civil and political rights.[73] Among the recognised social rights are the right of a person to "develop him/herself through the fulfilment of his/her basic needs";[74] "to get education";[75] "to have a home" [76]; "to enjoy a good and healthy environment";[77] "to obtain medical care",[78] and "to social security".[79] Unlike the ICCPR and the ICESCR, the Indonesian Constitution also recognises the right to protection of property.[80] The State is responsible for "protection, advancement, upholding and fulfilment" of these rights.[81]

The Constitutional Court has "the final power of decision in reviewing laws against the Constitution"[82] Any potential debate on whether social rights are justiciable is moot in the Indonesian context, as the Court has reviewed legislation against social rights in several cases,[83] adopting a strong form of judicial review.[84]

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[72] The 1945 Constitution was amended four times. The last amendment of 2002 introduced the Constitutional Court, which was established the following year.

[73] Chapter XA of the Constitution.

[74] Art. 28C(1).

[75] Ibid.

[76] Art. 28H(1).

[77] Ibid.

[78] Ibid.

[79] Art. 28H(3).

[80] Art. 28G(1).

[81] Art. 28I(4).

[82] Article 24C(1).

[83] See, e.g., the cases concerning attempts to privatize the electricity industry and water resources translated in Chang, Thio, Tan and Yeh (2014) 968-983.

[84] Venning (2008).

However, the possibility to raise a legal challenge against deprivation of social rights is limited. On the positive side, legal standing before the Constitutional Court is broad where social rights are threatened by a specific law. In such case, an individual can bring an action for judicial review before the Court if his or hers constitutional rights have been impaired.[85] On the negative side, however, individuals cannot challenge acts or omissions before the Court, and the Court lacks the power to review the manner in which laws are implemented.[86] In principle, however, deprivation of social rights resulting from acts and omissions of public authorities as well as deprivation caused by private individuals may be challenged before ordinary courts.

[85] The impairment does not always need to be actual and can also be potential, see: Venning (2008) 116.

[86] The Court may, however, pronounce statues or specific provisions 'conditionally unconstitutional' (i.e., unconstitutional unless applied in conformity with conditions set by the Court), see: Butt and Lindsey (2012) 138-144.

2 Methodology and limitations

Analysing the effects of enforcement of counter-terrorism measures on social rights comes with a number of methodological challenges, both legal and empirical. The first part of the methodology section outlines the international legal framework. The focus is placed on key legal aspects, including the relevant types of State duties, indirect causation and legal responsibility, the principle of due diligence, and the principle of proportionality. The rest of the methodology section discusses challenges related to empirical investigation, addressing the conceptual issue of what should be considered a counter-terrorism measure as well as issues related to relevancy, collection, and reliability of the data.

2.1 International legal framework

The normative framework adopted in the thesis derives primarily from the International Covenant on Economic Social and Cultural Rights (ICESCR). Since Indonesia voluntarily ratified the Covenant in 2005,[87] the framework is not only legitimate, but also legally relevant. Setting out the typology of State duties, the first subsection concludes that the duties to respect and protect are of key relevance. The second subsection examines the relationship between factual causality and legal responsibility, explaining that legal responsibility may arise even in cases where the factual causal chain between counter-terrorism enforcement and impairment of social rights is indirect. Finally, the third subsection examines the extent to which counter-terrorism measures may lawfully limit social rights.

2.1.1 The duties to respect and protect

As already indicated, Article 2(1) of the ICESCR required some clarification in regard to the nature of obligations it imposes. Asbjørn Eide has contributed towards the clarification of States' obligations under the Covenant by introducing a tripartite typology of duties to

[87] In the same year, Indonesia also ratified the ICCPR.

respect, protect and fulfil.[88] This typology has been later explicitly adopted by the CESCR in its General Comment on the Right to Food[89] and has since been referred to by the Committee in its subsequent General Comments.

The duty to respect requires States to refrain from interfering with the enjoyment of social rights. This duty is relevant for the purposes of the thesis because the cases dealt with further below concern allegations of interference with social rights of families of terror suspects and convicts caused by the police.

The duty to protect requires States to take measures to prevent violations by third parties.[90] This duty is relevant as well, since the thesis also examines allegations of failure of the authorities to protect social rights of the families against violations by private individuals.

Finally, the duty to fulfil requires States to take appropriate legislative, budgetary, judicial and other measures towards the full realisation of social rights. This duty is not considered here, since the focus of the thesis is on the effects of enforcement of counter-terrorism measures, not on questions concerning the proper distribution of resources.[91]

In short, the conceptual distinction between the duty to respect and protect provides a commonly recognised analytical tool that is useful for the purposes of the present thesis. It will assist in real cases as a practical tool in disentangling the relevant obligations implied by concrete social rights alleged to have been interfered with when enforcing counter-terrorism measures.

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[88] UN ECOSOC (1987) paras. 66-69; Cf. Shue (1996) 52-53, who noted that all basic rights have a set of three correlative duties: to avoid depriving; to protect from deprivation; and to aid the deprived.

[89] CESCR, *General Comment No. 12*, para. 15.

[90] For early case-law dealing with issues conceptually falling under the duty to protect, see *Velasquez Rodriguez v. Honduras*, IACtHR (1988) or *Lopez Ostra v. Spain*, ECtHR (1995).

[91] The point that allocation of resources towards security measures may be to the detriment of programmes contributing towards full realisation of social rights has been noted, for example, in the report by the UN High Commissioner for Human Rights (2009) para. 45.

2.1.2 The causal link

A necessary step in demonstrating that enforcement of a counter-terrorism measure has wrongfully led to arbitrary interference with a social right is to establish a link between the State conduct (i.e., acts or omissions of enforcing agents) and the specific instance of the interference. Since the thesis will discuss effects of counter-terrorism of a potentially indirect character, it is important to examine how indirect factual causation affects responsibility.

From an empirical perspective, the factual link between interference with a social right and enforcement of a counter-terrorism measure is direct where the interference occurs during enforcement of the measure as a result of an act or omission by the enforcing agents. For example, where the police arbitrarily evict a person from his or her home, they interfere directly with the individual's right to housing. In such case, legal responsibility of the State arises because the enforcing agents directly trigger the State duty to respect.

The factual link between interference with a social right and enforcement of a counter-terrorism measure is indirect where the factual causal chain links the initial enforcement of the measure to a subsequent conduct of additional actor(s) before linking to the eventual interference. This refers to situations, discussed in more detail below, where counter-terrorism agents unintendedly inflict a social stigma on the family members of a terror suspect, leading subsequently to interference with social rights of the family by other persons, not the enforcing agents. Here, the issue arises whether the initial conduct of the enforcing agents may, as such, trigger State responsibility, in other words, whether a legal link may be established between the initial conduct of the enforcing agents and the eventual interference.

Insofar as the duty to respect is concerned, the question is that of legal causality: may the initial conduct of the public authority be considered as having caused, in a legal sense (i.e., according to legal criteria), the interference in question? The practice of international human rights adjudicatory bodies suggests that such assessment should involve a *sine qua non* test in combination with the requirement of foreseeability. For example, in the practice

of the Human Rights Committee, handing over an individual to authorities of another State may trigger international State responsibility of the initial sending State "if at that moment the State could establish a risk of a violation – a necessary and foreseeable consequence."[92] Similarly, in the jurisprudence of the ECtHR on the same matter, the initial sending State may be held responsible if there is "substantial evidence" that the individual could face "real risk of severe harm".[93] Where both the *sine qua non* test and the requirement of foreseeability are met, the issue left to be assesses is whether the State acted reasonably so as to avoid the interference.[94]

Insofar as the duty to protect is concerned, the notion of remoteness is already inherent in the concept and is usually dealt with under the rubric of due diligence.[95] Under this approach, it is not necessary that the additional actor in the factual causal chain be a State authority or even that the actor be identified. In a seminal case concerning an alleged act of enforced disappearance, the Inter-American Court of Human Rights noted that what is decisive is whether the disappearance occurred with the "support or acquiescence" of State authorities, or whether the authorities "allowed the act to take place without taking measures to prevent it".[96] State responsibility is thus triggered because of the lack of due diligence to prevent interference, not because of the interference itself.

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[92] *Mohammad Munaf v. Romania*, HRC (2009) para. 4.14.

[93] *Soering v. UK*, ECtHR (1989) paras. 90-91. In a more recent case, the European Court of Human Rights found Belgium responsible for violating Article 3 ECHR of an individual who was deported to Greece, where he faced the risk of being deported to Afghanistan without proper examination of his asylum claim, see: *M.S.S. v. Belgium and Greece*, ECtHR (2011) para. 359.

[94] Thus, for example, in respect to the issue of diplomatic assurances against torture used by countries to proceed with deportations to countries where torture is known to be a problem, the ECtHR would carefully examine their sufficiency, see: Othman (Abu Qatada) v. the United Kingdom (2012) 168.

[95] HRC, *General Comment No. 31*, para. 8; CRC, *General Comment No. 5*, para. 1; CESCR, *General Comment No. 14*, para. 33; *Bosnian Genocide*, ICJ (2007) para. 430; *Congo v. Uganda*, ICJ (2005) paras. 179 and 246 ('duty of vigilance'). For a recent study on the role of due diligence in different areas of public international law, including human rights, sees: International Law Association (2014).

[96] *Velasquez Rodriguez v. Honduras*, IACtHR (1988) para. 173.

Determining whether measures to avoid or prevent arbitrary interference with social rights are reasonable or in line with the principle of due diligence requires contextual assessment. As emphasized in the Limburg Principles, "it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights."[97]

The role that contextual considerations play in the application of the principle of due diligence under the duty to protect can be illustrated by the ECtHR case-law. In cases concerning the question of the extent of positive obligations related to protection of the right to life against threats posed by private individuals, the ECtHR frequently notes "the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources."[98] Depending on the facts of the case, the Court may hold a State responsible for failing to take a reasonable action to prevent harm inflicted to a particular individual.[99] The Court will refrain from doing so unless it is satisfied that the State authorities "knew or ought to have known" that a particular identified individual or individuals were facing "a real and immediate risk" and the authorities failed "to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[100] It is thus clear that due diligence does not demand the impossible. As stressed by the Court, the principle must not be applied in such a way as to impose "an impossible or disproportionate burden on the authorities."[101]

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[97] UN Commission on Human Rights (1987) para. 71. Hereafter referred to as 'Limburg Principles'.

[98] *Osman v. UK*, ECtHR (1998) para. 116.

[99] *Giuliani and Gaggio v. Italy*, ECtHR (2011) paras. 244-251; *Kılıç v. Turkey*, ECtHR (2000) paras. 75-76.

[100] *Osman v. the UK*, ECtHR (1998) para. 116; See also: *E and Others v The United Kingdom*, ECtHR (2002) para. 88.

[101] *Özgür Gündem v. Turkey*, ECtHR (2000) para. 43.

To conclude, a factual causal chain involving actions of several actors acting independently in separate events does not preclude the possibility of establishing responsibility for a human rights violation, provided that certain conditions are met. Responsibility for indirect effects may be established under the duty to respect if two conditions are fulfilled: the enforcement must represent a necessary condition for the interference (the *sine qua non* test) and the adverse effects of the enforcement must be foreseeable. Were both requirements are fulfilled, the question left to be assessed is whether the State acted reasonably so as to avoid the interference. In the alternative, responsibility for indirect effects may be established under the duty to protect. Here, the assessment is that of due diligence, implying the consideration of whether a risk of interference to a particular individual by private parties was real, immediate and foreseeable, and whether the State took reasonable measures to prevent the risk.

2.1.3 Proportionality

While international human rights law requires the protection of the individual's fundamental rights, it does not disregard the demands of the general interest of the community, including national security. Many domestic constitutions and international human rights treaties provide a framework in which the two competing interests may be balanced. Such balancing is usually enabled through limitation clauses that permit interference with some human rights to certain extent, subject to specific conditions and safeguards. Of central importance in such evaluation is the general principle that measures interfering with human rights must be proportionate.[102] Some constitutional courts, such as the Supreme Court of Canada[103] or the Supreme Court of the United Kingdom,[104] carry out proportionality analysis in accordance with a predefined, formal structure. Other courts, such as the Constitutional Court of South Africa, do not employ a formal structure in the

[102] For an overview of recent perspectives of the leading proponents and critics of the role of proportionality analysis in human rights, see: Huscroft, Miller and Webber (2014). See also: Bomhoff (2013); Barak (2012); Webber (2009).

[103] *R v Oakes*, SCC (1986) paras. 69-71.

[104] *Huang v. Secretary of State*, UKHL (2007) para. 19.

proportionality analysis and rely instead on different techniques.[105] The purpose of this section is not to provide a detailed exposition of proper application of the principle of proportionality. Instead, the present section critically elaborates upon key aspects of proportionality assessment highlighted by the CESCR and relates them to counter-terrorism.

The ICESCR reflects the principle of proportionality in Article 4, according to which social rights may be restricted "only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting welfare in a democratic society." This is a general limitation clause applying to all substantive rights in the Covenant. The terms of the provision have been clarified to a considerable extent, including by the CESCR. Additional guidance can also be gained by consulting the academic commentary[106] and soft-law instruments, such as the Limburg Principles.[107]

The CESCR has emphasized that the limitation clause "is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State."[108] In this regard, the Committee has highlighted in several General Comments that any limitation must be proportionate.[109] Referring explicitly to Article 4 of the ICESCR, the Committee has noted that limitations "must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society". Explaining further, the Committee stressed that "any limitations must therefore be proportionate, meaning that the least restrictive

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[105] Petersen (2013). For further analysis of South African practice, see, e.g., Woolman and Botha (2008); Botha (2003); Woolman (1994).

[106] For the most recent commentary see: Saul, Kinley, Mowbray (2014) chapter 7; see also: Sepúlveda (2003) 277-303. For earlier academic commentary including a detailed analysis of the *travaux préparatoires* see: Dankwa and Flinterman (1987); Alston and Quinn (1987).

[107] Limburg Principles, paras. 46-57. Cf. UN Commission on Human Rights (1984) 'Siracusa Principles' paras. 15-18.

[108] CESCR, *General Comment No. 14*, para. 42.

[109] CESCR, *General Comment No. 7*, paras. 14; CESCR, *General Comment No. 14*, para. 29; CESCR, *General Comment No. 19*, para. 63; CESCR, *General Comment No. 21*, para. 19.

measures must be taken when several types of limitations may be imposed."[110] The same formulation, also known as 'the minimum impairment test', has been mentioned by the Committee also in reference to Article 5(1),[111] which indicates that the Committee conceives of the principle of proportionality as a free-standing principle and considers the minimum impairment test to be at heart of the proportionality enquiry.

A preliminary question concerns the issue of whether prevention of, or response to, terrorist acts may satisfy the requirement of legitimate aim. It should be noted at the outset that Article 4 of the Covenant does not, in principle, preclude justifications based on the interests of national security, public order, and the protection of rights and freedoms of others – all of which are recognised under Article 8 of the same Covenant.[112] The provision imposes a separate, additional requirement that limitations under the Covenant must aim at "promoting welfare in a democratic society". This means that limitations must be aimed at protecting "the interest of the society as a whole."[113] Insofar as terrorism involves commission of serious violent crimes, potentially affecting the safety of the general public, measures aiming to prevent, or respond to, terrorism may, in principle, satisfy the requirement. Ultimately, however, the means-ends assessment must be made in light of the facts of each specific case.

Notwithstanding the gravity of the public concern posed by terrorism, measures affecting the minimum core may never be deemed proportionate.[114] This follows directly from the wording of Article 4 of the Covenant, according to which limitations of social rights may be imposed only to the extent "compatible with the nature of these rights". Similarly,

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[110] CESCR, *General Comment No. 21*, para. 19.

[111] CESCR, *General Comment No. 14*, para. 29.

[112] Since Article 4 of the ICESCR represents a general limitation clause, it subsumes particular legitimate aims contained in Article 8. See also Article 29(2), UDHR.

[113] Dankwa and Flinterman (1987) 143. See also: Limburg Principles, para. 52.

[114] It should be noted, however, that the concept of the minimum core is not entirely settled and may be controversial. As mentioned in section 1.3.2 above, the content of the minimum core may be contextually dependent.

Article 5 prohibits reliance on anything in the Covenant to 'destroy' the recognised rights. The Limburg Principles likewise declare that "a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned." Measures that do not affect the minimum core must still pass the minimum impairment test and, as addressed further below, be accompanied by adequate procedural safeguards.[115]

The minimum impairment test reduces, at least to an extent, the role of individual bias and value preference involved in balancing. Weighing an individual right against a public interest head-to-head would be methodologically untenable because interests on both sides are incommensurate. As famously put by the US Supreme Court Justice Scalia, such exercise would amount to asking "whether a particular line is longer than a particular rock is heavy."[116] The minimum impairment test only demands comparing measures on one side of the equation, seemingly disposing of the problem. Where several types of limitations may be imposed, one is simply asked to choose the least restrictive alternative. However, the test raises a challenge which reveals that qualitative, normative judgment cannot be completely avoided in such exercise.

A less restrictive measure can nearly always be imagined in practice, making it implausible to ignore considerations of effectiveness. What if, for example, an alternative measure exists which is slightly less restrictive but, at the same time, significantly less effective? On the one hand, ignoring effectiveness would render the protective standard too strict, as hardly any limitation could pass the test. On the other hand, however, demanding that an alternative be equally effective could potentially make the standard too weak, as only rarely would an alternative qualify exactly and clearly.

The above dilemma has been previously addressed by the Supreme Court of Canada. According to its recent jurisprudence, a less restrictive measure must be capable of

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[115] It should be noted, however, that the concept of the minimum core is not entirely settled and may be controversial. As mentioned in section 1.3.2 above, the content of the minimum core may be contextually dependent.

[116] *Bendix Autolite Corp. v. Midwesco Enter., Inc*., 486 U.S. 888, 897 (1988).

achieving the same objective in a "real and substantial manner".[117] Although this solution does not absolve the analyst from making a qualitative, normative judgment, it makes the normative nature of the assessment explicit, rendering the resulting analysis more transparent.[118]

Finally, restrictive measures must be accompanied by adequate procedural safeguards – an important supplement to the principle of proportionality. The CESCR has enumerated a number of rights-specific safeguards in respect to limitations concerning the right to housing,[119] health,[120] water,[121] and social security.[122] These safeguards typically include a reasonable notice of proposed actions, legal recourse and remedies for those affected, and legal assistance for obtaining legal remedies. The failure to adhere to any of the required safeguards when enforcing limitations of social rights will render the restriction arbitrary and constitute a human rights violation.

To summarise, counter-terrorism measures may limit social rights, provided the resulting limitation is proportionate. This means, firstly, that the limitation must in fact pursue a legitimate aim. Since terrorism poses a serious, general public concern, counter-terrorism measures may, in principle, satisfy the requirement, although the means-ends assessment must be carried out in light of the facts of each specific case. Secondly, despite the gravity of the public concern posed by terrorism, anti-terror efforts must never collide with the minimum core of social rights. Thirdly, a counter-terrorism measure may limit social rights only if there is no less restrictive alternative cable of achieving the legitimate aim in a real and substantial manner. Fourthly, and lastly, counter-terrorism measures that limit social rights must be accompanied by adequate procedural safeguards. If a counter-terrorism

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[117] *Alberta v. Hutterian Brethren of Wilson Colony*, SCC (2009) para. 55.

[118] Bilchitz (2014) 54-55.

[119] CESCR, *General Comment No. 7*, paras. 13-16.

[120] CESCR, *General Comment No. 14*, paras. 28-29.

[121] CESCR, *General Comment No. 15*, para. 56.

[122] CESCR, *General Comment No. 19*, para. 78.

measure limits a social right without meeting any single requirement set out above, it will constitute a violation of the right.

Until this part, the methodology section has dealt with legal issues. The remainder of the section will address issues arising in the context of carrying out empirical research.

2.2 What is 'a counter-terrorism measure'?

To adequately focus the empirical investigation, it is important to explicitly conceptualise the term 'counter-terrorism measure'. In the present thesis, the term will refer to any official act, both legal and extra-legal, the primary purpose of which is to address the terrorist threat as subjectively defined by the State. Paragraphs below address the core elements of this definition, justifying the underlying choices and highlighting ensuing limitations of the concept.

There are at least two reasons in favour of including extra-legal acts (i.e. acts not explicitly permitted by domestic law) into the scope of the thesis. First, counter-terrorism measures with basis in domestic law can be enforced in practice in ways not explicitly foreseen by the text of the law, without necessarily breaching that specific law or other domestic legislation. Even in such case, however, the practice could still contravene international law. Second, counter-terrorism measures can also be enforced in contradiction to both domestic and international law, whether due to inadequate training or a deliberate policy. Leaving extra-legal acts outside the scope of the study would thus seriously undermine the aim of the thesis to identify negative impact of anti-terrorism efforts.

Another aspect relates to the restriction of the meaning of the term only to such measures that are intended to primarily address the issue of terrorism. The aim of this restriction is to simply exclude general security measures from the scope of the study. It could be objected that this is merely a formal restriction, as general security measures, such as stop-and-search checks, have been used (and abused) in the context of counter-terrorism operations. However, the scope of the study is already potentially quite large, and certain formal restrictions are inevitable.

Finally, the last aspect concerns 'terrorist threat', which is left to the subjective definition of the State. Since the thesis focuses on the impact of State efforts, there is no need to set an objective definition of terrorism. Instead, the thesis relies on the definition provided in the Indonesian domestic legislation.

2.3 Relevancy, collection, and reliability of the data

The empirical part of the thesis relies on non-doctrinal legal research involving analysis of qualitative empirical data. Certain basic methodological standards of social science hence cannot be ignored. The thesis takes seriously the concerns that: (i.) the research must be focused on well-defined and justified sample of data; (ii.) the process of data collection must be valid; and (iii.) the conclusions reached must be justified by the data collected.[123]

Since the expectation is that negative impact of anti-terror efforts results from the failure of policy makers to take social rights into account, it would be inadequate to restrict the research to the study of relevant laws, administrative regulations or policy documents. Such texts certainly describe available counter-terrorism measures, but they will normally not reveal the potential for collateral effects, i.e., effects not initially foreseen or intended. Furthermore, it is possible that not all measures actually employed in the context of countering terrorism are explicitly stated in the existing law. To trace effects of counter-terrorism measures on social rights, the present thesis therefore focuses on concrete acts performed within the context of enforcement of anti-terror legislation.

The primary source of information relied on in the thesis comes from transcribed semi-structured interviews with members of 17 families of terror suspects or convicts. The interviews were conducted between 2008 and 2013 by the staff of the Center for Human Rights Studies of the Islamic University of Indonesia, which has kindly provided me with access to the results of their research. The focus of the interviews was on the families' experience of coming into contact with the Indonesian security apparatus and the

[123] Dobinson and Johns (2007).

subsequent consequences, including socio-economic hardship, stigmatisation and discrimination. I have gained supplementary information by meeting and consulting members of other institutes and NGOs with extensive knowledge of counter-terrorism issues in Indonesia, including Search for Common Ground, and the Institute for International Peace Building headed by Noor Huda Ismail.

Although the data sample is small and the analysis displays obvious selection bias, these shortcomings do not pose serious problems given the aim of the thesis. Striving to increase the number of observations and avoiding selection of cases on the dependent variable is important when one intends to assess causal efficacy of one or more independent variables on a dependent variable. That is predominantly the domain of quantitative research. In qualitative research, these two concerns are often irrelevant,[124] although a sufficient number of case studies can be used to indicate patterns. In the present thesis, the data are used to trace different causal pathways of how enforcement of counter-terrorism measures can lead to violations of social rights of families of terror suspects or convicts. Naturally, more testimonies could potentially reveal a greater variety of such pathways. However, even a single observation can reveal a number of different negative effects on social rights, both direct and indirect. The purpose of this research was not to assert that such effects are common or prevalent but to illustrate how serious the consequences can be, and identify the conditions under which they can occur.

Certain concerns regarding the data could be raised in regard to their reliability. I have not personally met the interviewed families. As I was advised by my informants during my stay in Indonesia, the families are inherently distrustful towards people they are unfamiliar with, especially foreigners. Furthermore, the families reportedly tend to be under constant surveillance. This posed the risk of getting involved with the State's security apparatus.

[124] Much confusion in this area is due to misunderstandings between qualitative and quantitative social scientists, for instance the misguiding general assertions by King, Keohane and Verba (1994) that qualitative researchers should strive to increase the number of observations and avoid selecting on the dependent variable. Several prominent statisticians have since convincingly refuted these assertions, see: Brady and Collier (2010).

Limitations posed by available time and resources were also relevant factors to consider. The collected data were therefore taken at their face value without any separate attempt at verification. The possibility that the empirical information relied upon in the thesis may be biased, inaccurate or incomplete thus cannot be ruled out. Nevertheless, these potential limitations do not seriously undermine the conclusions reached in the thesis. The analysis of specific cases purposefully avoids drawing conclusions as to whether human rights violations occurred. Instead, the aim is to illustrate key human rights issues at stake, to indicate enabling factors of violations, and to provide brief suggestions as to how potential violations could be avoided.

3 Adverse effects of counter-terrorism on social rights in Indonesia

The next two subsections analyse a number of selected cases of direct and indirect interference with social rights of families of terror suspects and convicts in Indonesia. The first subsection examines direct impact, that is, situations where the interference occurred during counter-terrorism enforcement as a result of an act or omission by the enforcing agents. The second subsection examines indirect impact, that is, situations where counter-terrorism agents unintendedly inflicted a social stigma on the family members of a terror suspect, leading subsequently to interference with social rights of the family by other persons, not the enforcing agents.

3.1 Direct effects

This section examines cases where the interference with social rights has allegedly been committed directly by Detachment 88, the Indonesian counter-terrorism police force. The cases analysed below indicate lack of social rights considerations in the operational framework of anti-terror operations. Three issues are addressed, namely enforced eviction, seizure of personal documentation, and damage or loss of property. While it is often possible to describe the same violation both in civil rights and social rights terms, it does not follow that social rights considerations are redundant. As illustrated below, a social rights framework provides an alternative perspective at the issues at stake and, at least in some cases, additional protection against arbitrary interference, especially in terms of the required procedural safeguards and remedies.

3.1.1 Enforced eviction

The first examined case concerns Mimi, a wife of a man convicted on terrorism charges. After a police raid and arrest of her husband, Detachment 88 began a search of their home and eventually reported to have found explosive material. During the search, Mimi, at the time late into her pregnancy, was told by the police to stay with the neighbours, along with her two small children. After two days of living at a neighbour's place, her home remained inaccessible due to a continuing investigation. The home was sealed with a police duct tape

and access remained officially prohibited for a prolonged period. Finding that she could not return, Mimi attempted to receive help from her relatives. However, apart from her mother, they were unwilling to extend support as she "shamed the family". The resources at Mimi's disposal were limited, but with some help she eventually managed to rent another house, where she lived in poor conditions, sleeping on carton boxes covered with a rug as a replacement for a mattress.

The main issue concerns the legality of the eviction, in particular the manner in which it was carried out. The issue could be analysed both from a civil rights and a social rights perspective. As a civil rights issue, the eviction could be analysed in light of several rights,[125] including the right to privacy under Article 17 of the ICCPR.[126] However, a social rights framework provides more detail on procedural safeguards – a key aspect in the present case.

The relevant provision to consider under the ICESCR is Article 11(1), which recognizes the right of "adequate standard of living", including "adequate food, clothing and housing". As noted by the CESCR, the core of the right to housing implies that States must, above all, ensure legal security of tenure.[127] In particular, States must protect individuals against forced evictions, defined by the Committee as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."[128] As further clarified by the Committee, evictions must conform to a set of procedural rules, including "adequate and reasonable" notice prior to the scheduled

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[125] The CESCR mentioned that the practice of forced evictions may result in violations of civil rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions, see: CESCR, *General Comment No. 7*, para. 4.

[126] The Human Rights Committee has considered legality of evictions under this provision in several cases, see, e.g., *Peiris v. Sri Lanka*, HRC (2009).

[127] CESCR, *General Comment, No. 4*, para. 8(a).

[128] CESCR, *General Comment, No. 7*, para. 3.

eviction and provision of adequate alternative housing "where those affected are unable to provide for themselves".[129]

In the present case, the police failed to take into consideration Mimi's vulnerable condition, which dictated provision of alternative housing. Mimi lacked financial resources, was pregnant, alone with two children, and had nowhere to go. By failing to provide alternative housing for the period necessary for the investigation of their house, the police in effect deprived Mimi and her children of the very essence of the right to housing. Since, arguably, prior notification of the eviction days before its execution would be unreasonable due to the nature of the investigation, provision of alternative housing for the required period was all the more important.

To conclude, counter-terrorism enforcement can lead to violations of the right to housing in cases where investigation of a suspect's house is prolonged. A key enabling factor of violations in this context is the failure to provide alternative accommodation to those in need. Such violations can be avoided by incorporating in the police practice a routine requiring vulnerability assessment of the family to be evicted along with automatic provision of alternative accommodation where necessary.

3.1.2 Seizure of personal documentation

Another examined situation concerns the cases of Ariani, one of the wives of a high-level Malaysian terror suspect Noordin Mohammad Top, and the case of Tuti, the wife of another man suspected of involvement in terrorist activities in Central Java. Both wives complained, among other things, about seizure of important documents by the police. As Tuti explains, "All of the family's documents, such as school certificates, the land certificate, marriage certificate, vehicle registration certificate, birth certificates, and citizenship cards were taken away." Ariani has experienced the same problem. In both

[129] CESCR, *General Comment, No. 7*, paras. 15-16. Provision of alternative accommodation is subject to maximum availability of resources. However, while availability of resources may raise issues in cases of mass evictions, it is hardly relevant in individual cases.

cases, the police have never returned the documents. Ariani and Tuti were therefore forced to set out to acquire all of the documents anew. After several months of having faced obstructions by the State's bureaucracy, including on account of being "the wife of a terrorist", they eventually succeeded in obtaining new citizenship cards and some other documents.

The issue arising in this case is the proportionality of the seizure of Ariani's and Tuti's documents. Lack of possession of legal identity documents is a more general phenomenon in Indonesia, and its adverse effects on the enjoyment of basic rights have been empirically well documented.[130] From a civil rights perspective, several concerns are at stake, including the right to equality before the law, recognised in Article 26 of the ICCPR. A person stripped of identification documents de facto ceases to be a person before the law, losing legal capacity to be a holder of rights[131] and an actor under the law.[132]

A social rights perspective sheds more light on what is at stake in socio-economic terms. The rights contained in the ICESCR relevant in the present context include the right to work (Article 6), the right to social security (Article 9), the right to housing (Article 11), the right to health (Article 12), and the right to education (Article 13). As noted by the CESCR on numerous occasions, acts that in effect restrict access to social rights may constitute a violation of the Covenant, in particular the State's duty to respect.[133] Furthermore, as mentioned in more detail in the methodology section, although limitations are permitted under certain circumstances, such limitations must be proportionate,

[130] See the report prepared by the Australia Indonesia Partnership for Justice (2014).

[131] Denial of equality before the law can affect other civil rights, including the right to vote and the right to access public service recognized in Article 25 of the ICCPR.

[132] To be an actor under the law implies the possibility to enter into legal relationships, including the possibility to access bank loans, mortgages and other forms of financial credit.

[133] CESCR, *General Comment No. 13*, paras. 6(b), 47; CESCR, *General Comment, No. 14*, paras. 12(b), 34; CESCR, *General Comment, No. 18*, paras. 12(b), 33; CESCR, *General Comment No. 19*, paras. 2, 27, 44.

"meaning that the least restrictive measures must be taken when several types of limitations may be imposed."[134]

In light of the standards above, the seizure of the family's documents is difficult to justify. The effects on social rights are serious: lack of proof of citizenship impairs access to healthcare services and social security benefits; the lack of proof of ownership of the land undermines the security of tenure; and lack of evidence of previous education complicates satisfaction of formal criteria to continue education or to secure an employment. Although initial seizure of identification documents can be important in an early stage of an investigation, a prolonged or permanent seizure may become disproportionate. A less restrictive measure would prioritise examination of the documents.

To conclude, seizure of personal documentation for the purposes of investigation of a terror threat can lead to a whole range of social rights violations. A key enabling factor of violations in this context is the failure to prioritise examination of the documents in the investigation. Such violations can be avoided by incorporating in the police practice a routine requiring assessment of the need to seize personal documentation in the first place and, in cases where the seizure is necessary, a routine requiring speedy examination and return of the documents.

3.1.3 Damage or loss of property

Several families complained about excessive damage to their property incurred during police raids. Rofiko, whose husband was accused of maintaining terrorist links, complained about broken equipment in both their house and the family owned internet café. Ariani and Tuti, already introduced above, have also experienced a police raid. Among other damage, Tuti complained about broken doors and glass windows. Ariani mentioned the police had caused damage not only to her property but also to some of the surrounding buildings belonging to the Islamic boarding school. According to the families, the damage was unnecessary, since nobody posed any resistance.

[134] CESCR, *General Comment No. 21*, para. 19.

The issue is whether sufficient measures are at place to prevent damage or loss of property while searching the premises where terror suspects might be present. Damage or loss of property can have serious socio-economic implications, especially for low-income families. The relevant socio-economic interests at stake concern not only the housing of the families but, like in the case of Rofiko, also their livelihoods. As such, these interests are protected under social rights, including the right to housing and the right to work. However, in the context of police raids, the same interests are better protected under civil rights, primarily the right to privacy,[135] since the relevant legal standards are more developed in this context.

The right to privacy contained in Article 17 of the ICCPR protects the privacy of individuals against "arbitrary or unlawful interference". As emphasized by the Human Rights Committee, the concept of arbitrariness implies that even interference provided for by law must be "reasonable in the particular circumstances".[136] The requirement of reasonableness requires that "any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case."[137] Specifically addressing police raids, the Committee noted that a search of a person's home "should be restricted to a search for necessary evidence and should not be allowed to amount to harassment."[138]

Considered in light of the rules above, the complaints of the families raise the question whether the police properly assesses the required amount of force in light of the particular circumstances of each case. The police should initially ask whether the particular circumstances require a forced entry. In principle, it is possible to conceive of a situation where the police obtain information about the presence of a potentially dangerous terror suspect at a specific house, necessitating a quick reaction. In such situation, entry into the

[135] The right to protection of property is also relevant. As recognised in Article 17(2) of the UDHR, "No one shall be arbitrarily deprived of his property". Although the right to protection of property has been retained neither in the ICCPR nor in the ICESCR, it is protected under the Indonesian Constitution under Article 28G(1).

[136] HRC, *General Comment No. 16*, para. 4.

[137] *Toonen v. Australia*, HRC (1992), para. 8.3. See also the principle of proportionality addressed above in section 2.1.3 of the present thesis.

[138] HRC, *General Comment No. 16*, para. 8.

house by force may be justified, provided that the intelligence relied upon possesses sufficient credibility and that, in light of the information available prior to the operation, less invasive options would endanger the operation. Once the entry is secured, further damage to property is difficult to justify as proportionate, especially if the police do not face any resistance.

To conclude, damage to property caused by a police raid of a terror suspect's home can directly harm basic socio-economic interests of the suspect's family, including those concerning their housing and livelihood. A key enabling factor of such harm is lack of adequate regard to the proportionality standard imposed by, among others, the right to privacy. The police can avoid human rights violations in this context by ensuring that the amount of force remains proportionate to the exigencies of the situation. In each case, the police should assess the credibility of the intelligence relied upon, as well as the viability of less invasive options than forced entry.

3.2 Indirect effects

Even though some in the Indonesian society might consider terrorists as heroes,[139] the cases examined in the present section illustrate a markedly different picture.[140] In none of these cases has a police raid on a terror suspect's home led to an improvement in the social status of the suspect's family within the local community. To the contrary, counter-terrorism enforcement, in particular police raids, has in these cases inadvertently inflicted social stigma both on the targeted individuals and their family members, including the children.

Analysing stigmatisation in a human rights framework is hardly a novel idea.[141] Social psychology highlights that stigmatisation involves recognition of difference and

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[139] See, e.g., Abuza (2009) 194; Ramraj (2012) 298-300.

[140] Since the cases on which the present analysis is based were mostly selected on the depended variable, the findings do not necessarily generalise beyond the examined sample.

[141] See, e.g., UN Special Rapporteur on the human right to safe drinking water and sanitation (2012).

devaluation and manifests itself in different ways, both overt and subtle.[142] Since humans have a strong cognitive tendency, at least initially, to perceive other humans in terms of category membership,[143] stigmatisation cannot be entirely prevented in all its forms. A human rights perspective is limited in this regard, as it does not aim to address all forms of stigmatisation or stigmatisation as such. Instead, the framework narrows the focus only on effects of stigmatisation that manifest themselves as discrimination of human rights.

The right not to be subjected to discrimination is itself a right recognised under Article 2(2) of the Covenant, which covers not only formal but also de facto discrimination.[144] Although families of suspected or convicted terrorists do not easily fit into any of the explicitly prohibited grounds of discrimination,[145] the Social Rights Committee has indicated that the provision may extend to "social groups" that face stigmatisation and negative stereotyping on account of their social situation.[146] However, the provision may only be applied in conjunction with substantive rights recognised in the Covenant, and its independent utility is limited.[147]

A special note should be made of the unique non-discrimination provision contained in the Convention on the Rights of the Child (CRC). Article 2(2) of the Convention requires States to ensure that the child is protected against discrimination based on grounds related to their parents, including the parents' activities and expressed opinions. The provision prohibits "all forms of discrimination" and is therefore not tied to the substantive rights contained in the Convention.

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[142] Bos, Pryor, Reeder and Stutterheim (2013).

[143] Moghaddam (2008).

[144] CESCR, *General comment No. 20*, para. 8.

[145] The provision prohibits discrimination "as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[146] CESCR, *General comment No. 20*, para. 35.

[147] See: Craven (1995) 175.

The present section only addresses serious manifestations of stigmatisation that substantively fall under the scope of social rights recognised under international law. As illustrated in the subsections below, the families of terror suspects and convicts have experienced socio-economic discrimination, including exclusion of their children from schools; inability to access social assistance programmes; and threats to privacy and security. The analysis below links these adverse effects with the enforcement of counter-terrorism measures and provides suggestions as to how violations of social rights could be avoided in this context.

3.2.1 Humiliation of children and their exclusion from schools

Children of terror suspects and convicts often deal not only with the trauma of witnessing the incarceration of their parents but also of the associated stigma of being labelled as a 'child of a terrorist'. Several interviewed families of terror suspects and convicts indicated that their children had been subjected to varying degrees of humiliating treatment at schools by their peers, teachers, or the administration. In some of these cases, this has led them to drop out or change schools. In some reported cases, the children have also faced obstructions from schools to continue their education. For example, the children of Fauzli Syarif, a terror suspect shot dead by the police in western Java, have been reportedly excluded from participating in school exams.[148] In another reported case, the children of Huda bin Abdul Haq, who was executed for his role in the 2002 Bali bombings, have had difficult time getting accepted to schools.[149]

These facts point to at least two human rights issues. First, the fact that several children had stopped attending or switched schools due to humiliating treatment indicates serious gravity of the public humiliation, raising the issue of disrespect towards the dignity of the children. Second, difficulties in securing admission to public schools raise the issue of

[148] The Jakarta Post, Hikmah (2013).

[149] Ibid.

denial of access to education, and the same issue is also raised by the decision not to let the children participate in school exams due to their father's crime.

Both issues clearly fall within the scope of the right to education. Referring to a fundamental guiding principle of dignity that permeates entire international human rights law,[150] Article 13 of the ICESCR requires that education must be directed to "the full development of the human personality and the sense of its dignity". The same Article, as well as Article 28(1) of the CRC, also implies the right to access education, which is also a key principle, particularly in regard to social rights. As emphasized by the CESCR, the obligation to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis comprises the minimum core of the right to education.[151]

For the sake of conceptual clarity, it is important to distinguish at this point between the responsibility of the government under international law that may arise as a result of the conduct of public schools and the responsibility for the conduct of the police. In regard to the former, the duty to respect may be triggered directly by the interference committed by public schools. One could still proceed to relate the interference by the public schools to counter-terrorism enforcement under this approach, albeit only in the form of a factual narrative, not as a part of a legal argument. It is for this reason that the latter approach is chosen.

The analysis of whether the conduct of the police triggers the government's duty to respect the right to education of the children must turn to consideration of whether a causal link can be established between the enforcement actions and the alleged interference. The *sine qua non* test is met, as the interference with the right would not have occurred had it not been for the social stigma inflicted on the children by the police raids and incarceration of

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[150] The "inherent dignity" of all individuals is recognised in all main international human rights instruments and some cases additionally emphasized in substantive provisions. The right to education contained in the Article 13 of the ICESCR requires that education be directed to "the full development of the human personality and the sense of its dignity".

[151] CESCR, *General Comment No. 13*, para. 87.

their parents. Arguably, the requirement of foreseeability is met as well, as the government should be able to foresee that the children may experience interference to their right to education as a result of such conduct. Nongovernmental organisations and child protection activists have already brought public attention to the fact that children of terror suspects experience both trauma and shaming at schools, although apparently to no response from the government.[152] The satisfaction of the *sine qua non* test and the requirement of foreseeability imply that the government is under the obligation to take reasonable measures in regard to the conduct of the police so as to avoid potential violations.

The suggestion submitted here is that the government could, for example, charge the police with the task of communicating the importance of ensuring the dignity of the children at risk to the principals of their schools. In doing so, the police could also indicate that discriminatory denial of access to education will not be tolerated. In addition, the government could also establish a program under which counter-terrorism enforcement operations would be automatically followed with the provision of services of a social worker or a psychologist competent to address potential adverse behaviour against the children at schools. Psychological services could also be offered to help the children at risk overcome potential issues of trauma so as to be able to enjoy the right to education to a full extent.[153]

To conclude, the social stigma inflicted on children of terror suspects and convicts as an unintended effect of counter-terrorism operations has led to interferences with their right to education. Arguably, the police are legally implicated in the interferences and is under the obligation to take reasonable measures to avoid them. The police could avoid potential violations by taking a range of measures, including by communicating the importance of ensuring the dignity of the children at risk to the principals of their schools and indicating that discriminatory denial of access to education will not be tolerated. In addition, counter-

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[152] Ramraj (2012) 302-303.

[153] Psychological research shows that parental crime, arrest, and incarceration may significantly impair children's abilities related to achievement in school, see: e.g., Johnston (1995) 76.

terrorism operations could be followed by provision of a social worker and psychological services.

3.2.2 Inability to access social assistance programs

A number of spouses of arrested or killed terror suspects have experienced serious financial insecurity. Unemployment and sudden loss of support from a spouse, sometimes accompanied by the loss of support from other relatives, are often exacerbated by the inability to access social assistance programs. Despite recent improvements, access to such programs is generally difficult in Indonesia for many people for a number of reasons, including protection gaps and implementation problems.[154] Stigmatisation of families of terror suspects and convicts brings additional obstacles, such as impaired ability of the families to obtain relevant information, as well as discriminatory treatment by the authorities responsible for the disbursement of the grants. This poses potential problems not only from a social rights perspective, but also from the perspective of terrorism prevention, since a number of terror networks provide financial assistance to such families instead of the State though their own programmes.[155] Nevertheless, it should be mentioned that, at least in some instances, socio-economic assistance has been provided to families of arrested terror suspects directly by the police to encourage cooperation of the detainee. For example, the police have negotiated and provided school fees for children, helped arrange paid work for spouses, covered travel and accommodation expenses for families seeking to visit their loved ones to prison, and occasionally also financed in-custody weddings of detainees.[156] However, there is no specialised program that would pay systematic attention to the needs of such families. The support by the police has been uneven, proceeding only on an ad hoc basis, and does not extend to families of terror suspects killed in police raids.

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[154] See, e.g., Hannigan (2011).

[155] According to Noor Huda Ismail, there are several such programms. For example, one is known as 'Gashibu', an abbreviation for 'Gerakan Sehari Seribu', translating as 'a movement of a thousand a day' (personal interview, 2014).

[156] International Crisis Group (2007) 13; Beech (2010).

The exposition above raises the issue of access to social assistance programs. The issue is raised, in particular, by the allegations of discriminatory treatment of the families by the authorities that are responsible for the disbursement of the grants, as well as the difficulties faced by the families in securing relevant information about the available programmes.

The issue of access to social security falls squarely within the scope of the right to social security. The relevant rule under international law concerning social assistance for those in need is recognised as the right to social security in Article 9 of the ICESCR. As clarified by the CESCR, the minimum core obligation imposed by the right to social security includes the requirement that States "ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups."[157] According to the Committee, a social security scheme must enable all individuals and families to acquire "at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education."[158]

The analysis of whether counter-terrorism enforcement triggers the government's duty to respect the right to access social security must turn to the consideration of whether a causal link can be established between the enforcement actions and the alleged interference. The *sine qua non* test is arguably met. On the one hand, it could be asserted that, because the access to social assistance is generally difficult, chances are that the families in question would not have secured access to social assistance even if no social stigma were inflicted upon them by the police. On the other hand, however, it could be responded that such argument is flawed because it is the element of discrimination on the account of being held to be associated with terrorism that represents the reason for the denial of access in question. These particular cases of discrimination would not take place had it not been for the stigma imposed by the police while countering terrorism. The requirement of foreseeability is arguably met as well. The government is well aware that general access to

[157] CESCR, *General Comment No. 19*, para. 59(b).

[158] Ibid, para. 59(a).

social assistance is not yet ideal, as indicated by its recent legislative efforts. It should not come as a surprise that vulnerable persons in need suffering from consequences of a serious social stigma are likely to face additional obstacles. The satisfaction of both of the requirements implies that, in regard to the police, the government is under the obligation to take reasonable measures to avoid potential violations.

The suggestion submitted here is that the police could facilitate the provision of information about the available social programmes in respect to all families in need who are affected by counter-terrorism operations. By arranging the provision of administrative assistance or services of a social worker for this purpose, the police could also take steps to ensure that access to social assistance is provided on an equal basis. The current police practice of providing ad hoc social assistance to the families of detainees as a favour in return for the cooperation is problematic, from a social rights perspective, at least in two respects. First, insofar as minimum essential levels of social rights are concerned, these must not be subject to negotiation. Second, such ad-hoc assistance excludes not only the families of those detainees who are unwilling to cooperate, but also those who get killed during police raids and those who are unable to offer any useful intelligence.

To conclude, families of arrested or killed terror suspects are at risk of being unable to enjoy the right to social security. Arguably, the police are legally implicated in the interferences and are under the obligation to take reasonable measures to avoid them. The police could avoid potential violations by facilitating the provision of information about the available social programmes in respect to all families in need who are affected by counter-terrorism operations and by ensuring that access to such programs is provided on an equal basis.

3.2.3 Threats to privacy and security

In several examined cases, families of terror suspects and convicts have been forced to leave their homes and livelihoods due to abuse or threat of abuse by members of their local communities. The abuses have varied in intensity and taken various forms, including verbal insults, harassment and, in more serious cases, threatened or actual violence against the

families or their property. Because most of the families have been unwilling to deal with the police due to previous negative experience with the counter-terrorism unit, they would often abstain from reporting such abuse. The police appear to have been generally unresponsive to the abuses, despite allegedly being engaged in surveillance of at least some of the families, which has added to the families' mistrust. One source of conflict has been, for example, the issue of burials of terror suspects shot dead by the counter-terrorism unit.[159] In this case, some families of the suspects got into conflict with the villagers of their home towns, who have forbidden the burial of the suspects because they did not want their village to be known as a terrorist village. The media have also contributed to the vulnerable situation of the families, as excessive disturbance and insensitive coverage have in several cases brought unwanted attention to the families, including the children.[160]

The threats to privacy and security to the families posed by the local communities raise the issue in regard to the extent of the government's duty to protect the families of terror suspects and convicts against potential abuses by the local communities.

The rights of the families that are at stake include the right to housing and the right to privacy. As already mentioned, the right to housing is a social right protected under Article 11 of the ICESCR, and the right to privacy is a civil right protected under Article 17 of the ICCPR. As recognised by the CESCR, the two rights are closely related, as the right to privacy is "a very important dimension in defining the right to adequate housing".[161] As emphasized by the Committee, the right to housing should not be interpreted in a restrictive sense that would view shelter exclusively as a commodity. Instead, the right should be understood as "the right to live somewhere in security, peace and dignity".[162]

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[159] On this issue see also: Ramraj (2012) 301.

[160] The media issue would deserve a separate discussion. Unfortunately, due to the constraints of both space and time, it cannot be made sufficient justice here.

[161] CESCR, General Comment No. 4, para. 9.

[162] Ibid, para. 7.

The analysis of whether the government may be held responsible for abuses falling within the scope of the right to housing and privacy committed by private individuals must turn to the consideration of due diligence. The question here is that of the extent to which the police can reasonably be expected to anticipate such abuses. In this regard, it is relevant to note that the identity of the individuals at risk of abuses is well known to the police, and it is the police that actually helped produce that risk, albeit unintendedly. Furthermore, the indications as to the continuous surveillance of the families by the police imply that the police are aware that the risk is not merely theoretical but real, as well as significant, as in several cases the families were forced to abandon their original places of residence. Such risk might not always be immediate, but the threshold can be reached by the presence of certain contextual factors indicating immanence of a conflict, such as the burial issue. For the above reasons, it is submitted here that, in principle, the police should be able to foresee that families of terror suspects and convicts face serious risks, and the question arises whether the police have taken reasonable measures to prevent potential violations.

The suggestion submitted here is that the responsiveness of the police to abuses by the local community against the families could be enhanced by a pro-active involvement of the police in resolving situations of conflict in cooperation with the local administrative authorities. In addition, to help prevent and resolve potential conflicts that the families may face, the police could also facilitate access of the families to free legal help as well as to other relevant services. Since trust is a key in ensuring effectiveness of such approach, it is important that any provided legal, social, or administrative assistance to this end be clearly separated from surveillance activities.

To conclude, the rights to housing and privacy of families of terror suspects and convicts have been threatened by members of their local communities. In principle, the police should be able to foresee that families of terror suspects and convicts face serious risks, and must therefore take reasonable measures to prevent such risks. The responsiveness of the police could be enhanced by a pro-active involvement in resolving situations of conflict in cooperation with the local administrative authorities. In addition, the police could also

facilitate access of the families to free legal help as well as to other relevant services, which should be clearly separated from any surveillance activities.

4 Conclusion

The aim of the thesis was to answer whether counter-terrorism enforcement in Indonesia has led to interference with social rights recognised under international human rights law. In doing so, the thesis did not aim to conclusively determine whether Indonesia has breached its obligations but, instead, it aimed to elaborate on how potential violations may be determined and avoided in this context.

To answer the question, the thesis traced negative effects of counter-terrorism and analysed them in a social rights framework, primarily derived from the International Covenant on Economic Social and Cultural Rights. To disentangle the relevant obligations implied by the substantive rights recognised in the Covenant, the thesis relied on the distinction between the State duties to respect and protect social rights. Since the scope of the thesis implied the need to address not just direct but potentially also indirect effects of counter-terrorism enforcement on social rights, the thesis examined when and how indirect factual causation affects the question of legal responsibility. Furthermore, the thesis examined the principle of proportionality, which provides means for finding a proper balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

The main finding of the thesis is that the enforcement of counter-terrorism measures in Indonesia has led to both direct and indirect interference with social rights. Direct interference refers to situations where the interference occurred during counter-terrorism enforcement as a result of an act or omission by the enforcing agents. Indirect impact refers to situations where counter-terrorism agents unintendedly inflicted a social stigma on the family members of a terror suspect, leading subsequently to interference with social rights of the family by other persons, not the enforcing agents.

Direct interference was illustrated in three types of situations. First, the thesis referred to the case of a family that was evicted in the context of a prolonged investigation of their house, illustrating that the failure to provide alternative accommodation to families that

lack means to secure it for the necessary period themselves may give rise to a violation of the right to housing. Such violations can be avoided by incorporating in the police practice a routine requiring vulnerability assessment of the family to be evicted along with automatic provision of alternative accommodation where necessary.

Second, the thesis referred to cases of seizures of legal identity documents, illustrating that the failure to prioritise examination of the documents in the investigation may give rise to a violation of an entire range of social rights, including the right to work, the right to social security, the right to housing, the right to health, and the right to education. Such violations can be avoided by incorporating in the police practice a routine requiring assessment of the need to seize personal documentation in the first place and, in cases where the seizure is necessary, a routine requiring speedy examination and return of the documents.

Third, the thesis referred to cases illustrating that police raids, which lead to damage or loss of property, may give rise to violations of the right to privacy. The police could avoid such potential violations by assessing, in each case, the credibility of the intelligence relied upon as well as the viability of resort to less invasive measures than forced entry.

Indirect interference was illustrated in three types of situations as well. First, the thesis referred to situations where the social stigma inflicted on children of terror suspects and convicts as an unintended effect of counter-terrorism operations, lead to interferences with their right to education. Arguably, the police are legally implicated in the interferences and are therefore under the obligation to take reasonable measures to avoid them. Here, the police could avoid potential violations by taking a range of measures, including by communicating the importance of ensuring the dignity of the children at risk to the principals of their schools and indicating that discriminatory denial of access to education will not be tolerated. In addition, counter-terrorism operations could be followed by provision of a social worker and psychological services.

Second, the thesis illustrated that families of arrested or killed terror suspects are at risk of being unable to enjoy the right to social security. Again, the police are arguably legally implicated in the interferences and are under the obligation to take reasonable measures to

avoid them. Here, the police could avoid potential violations by facilitating the provision of information about the available social programmes in respect to all families in need who are affected by counter-terrorism operations and by ensuring that access to such programs is provided on an equal basis.

Third, the thesis illustrated that the rights to housing and privacy of families of terror suspects and convicts have been threatened by members of their local communities. In principle, the police should be able to foresee that families of terror suspects and convicts face serious risks, and must therefore take reasonable measures to prevent such risks. The responsiveness of the police could be enhanced by a pro-active involvement in resolving situations of conflict in cooperation with the local administrative authorities. In addition, the police could also facilitate access of the families to free legal help as well as to other relevant services, which should be clearly separated from any surveillance activities.

These matters deserve attention for both legal and practical reasons. In regard to the former, the government of Indonesia has not only voluntarily bound itself to abide by social rights under international law, and must therefore comply with these in good faith, but it must also do so also under the Indonesian Constitution, which explicitly recognises a whole range of social rights. From a pragmatic perspective, the thesis argued, albeit briefly, failure to comply with social rights of families of terror suspects and convicts is likely to undermine Indonesia's anti-terror efforts.

4.1 Directions for further research

A comparative study examining the experience of several countries could provide further insights about adverse effects of counter-terrorism measures on social rights of families of terror suspects. Indonesian experience in particular could be compared with the experience of other countries in the region, especially Malaysia and Singapore. Although the nature of the terrorist threat in these three countries is in many respects similar, their counter-terrorism approaches vary. By examining the extent to which the strategies succeed in avoiding or minimising the negative impact on social rights, a comparative study could generate lessons relevant to the three countries, and potentially beyond.

Table of reference

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ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950
ICESCR	International Covenant on Economic, Social and Cultural Rights (adopted and opened for signature by General Assembly resolution 2200A (XXI) of December 16, 1966) 993 UNTS 3
ICCPR	International Covenant on Civil and Political Rights (Adopted and open for signature, ratification and accession by General Assembly resolution 2200A) (XXI) of 16 December 1966) 999 UNTS 171
UDHR	Universal Declaration of Human Rights, UN GA/RES/217 A (III), 10 December 1948
VCLT	Vienna Convention on the Law of Treaties (adopted and open for signature, ratification and accession by General Assembly resolutions 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967) 1155 UNTS 331

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