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**ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER
FOR HUMAN RIGHTS AND REPORTS OF THE HIGH COMMISSIONER
AND OF THE SECRETARY-GENERAL**

**Report of the United Nations High Commissioner for Human Rights
on the protection of human rights and fundamental freedoms while
countering terrorism***

* The present report is submitted late so as to include as much up-to-date information as possible.

Summary

By resolution 7/7 of 28 March 2008 on the protection and promotion of human rights while countering terrorism, the Human Rights Council requested the High Commissioner for Human Rights to “implement the mandate given to her by the Commission on Human Rights in its resolution 2005/80 and the General Assembly in its resolution 60/158”, and to report to the Council. This report is submitted in accordance with the Council resolution.

The present report builds on the previous comprehensive report on this subject (A/HRC/4/88), which was submitted to the fourth session of the Human Rights Council pursuant to resolution 2/102 and the report of the Secretary-General submitted more recently to the General Assembly (A/61/353) pursuant to resolution 60/158, which remain relevant.

The report highlights the need to protect and promote all human rights and effective counter-terrorism measures. These are two complementary and mutually reinforcing objectives which must be pursued together as part of States’ duty to protect. It outlines the High Commissioner’s activities particularly in the context of the Secretary-General’s Global Strategy to counter terrorism. It also considers specific human rights concerns which arise in international cooperation while countering terrorism. It concludes with the identification of a number of practical challenges related to complying with human rights obligations in the context of counter-terrorism.

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Introduction

1. By its resolution 7/7 of 28 March 2008 on the protection and promotion of human rights while countering terrorism, the Human Rights Council requested the High Commissioner for Human Rights to “implement the mandate given to her by the Commission on Human Rights in its resolution 2005/80 and the General Assembly in its resolution 60/158”, and report to the Council. These two resolutions request the High Commissioner for Human Rights, making use of existing mechanisms, to continue:

(a) To examine the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources;

(b) To make general recommendations concerning the obligation of States to promote and protect human rights and fundamental freedoms while taking actions to counter terrorism; and

(c) To provide assistance and advice to States, upon their request, on the protection of human rights and fundamental freedoms while countering terrorism, as well as to relevant United Nations bodies.

2. The present report is submitted in accordance with the Council resolution.

3. Terrorist acts are crimes, albeit of particularly serious nature. Preventive measures, investigation and prosecution of these crimes must be founded on the rule of law, and based on internationally recognized human rights principles. The achievement of these measures is central to the effective implementation of the Global Counter-Terrorism Strategy adopted by the General Assembly at its sixtieth session.¹ The Strategy rightly situates human rights as the fundamental basis of the fight against terrorism and emphasizes that States must ensure that any measure taken to confront terrorism complies with their obligations under international law, in particular human rights law. It reinforces that an effective counter-terrorism approach must combine preventive measures with efforts to address grievances and underlying social, economic, and political conditions. These conditions include, but are not limited to, prolonged unresolved conflicts, dehumanization of victims of terrorism, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism. It is necessary to address the long-term structural conditions that may give rise to terrorism.

4. It has now become clear that upholding human rights is not at odds with confronting terrorism; on the contrary, the moral vision of human rights coupled with the nature of legal obligations to uphold these rights foster deep respect for the dignity of each person. National

¹ United Nations Global Counter-Terrorism Strategy, General Assembly resolution 60/288.

counter-terrorism strategies and international cooperation must include measures to prevent the spread of terrorism, and must also include measures to prevent ethnic, national or religious discrimination, political exclusion, and socio-economic marginalization, as well as measures to address impunity for human rights violations.

5. There is a broad recognition that not only is respect for human rights an essential element of an effective counter-terrorism strategy, but disrespect for human rights actually undermines counter-terrorism efforts. Terrorism often thrives in environments in which human rights are violated, where human rights are curtailed, where non-violent channels to express discontent are lacking and where discrimination and exclusion are rampant. In the same vein, resort to excessive use of force and indiscriminate attack by police, security and army personnel when seeking to combat terrorism tends to strengthen terrorists' support base, thus complicating the very goals that States set out to achieve.

6. The full impact of terrorism and counter-terrorism measures on the enjoyment of human rights, including economic, social and cultural rights has not been sufficiently clarified. I note with interest the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism that was submitted to the Council,² but further examination and analyses of this complex issue is still needed. The impact of security measures taken to combat and prevent terrorism on resources normally allocated to social and economic programmes, development assistance and poverty reduction is also significant but not yet measured in detail. The particularly severe impact of repressive security measures on the economic, social and cultural rights of specific populations, such as women; human rights defenders; indigenous peoples and minorities and people living in situations of armed conflict has also taken on greater focus and warrants closer study.

II. RECENT DEVELOPMENTS

A. Implementation of the Secretary-General's Global Counter-Terrorism Strategy

7. Through the Secretary-General's Global Counter-Terrorism Strategy, Member States committed to adopting measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism. They further resolved to take measures aimed at addressing the conditions conducive to the spread of terrorism, including lack of rule of law and violations of human rights, and to ensure that any measures taken to counter terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law. The General Assembly plans to review the Global Strategy by September 2008.

8. In July 2005, the Secretary-General established the Counter-Terrorism Implementation Task Force (CTITF) in an effort to ensure coordinated and coherent approach across the United Nations system to counter-terrorism. The CTITF formed a working group on "Protecting Human Rights While Countering Terrorism" led by OHCHR and comprised of the Special Rapporteur on the promotion and protection of human rights while countering terrorism,

² See A/HRC/6/17.

the United Nations Office of Drugs and Crime (UNODC), the Counter-Terrorism Committee Executive Directorate (CTED), the United Nations Office of Legal Affairs (OLA), the United Nations Interregional Crime and Justice Research Institute (UNICRI), the World Bank, and the International Maritime Organization (IMO). The aim of the working group is to support efforts by Member States to ensure the promotion and protection of human rights in the context of counter-terrorism, including through the development and implementation of human rights-compliant legislation and policies.

9. The Strategy and Plan of Action gave OHCHR a lead role in examining the question of protecting human rights while countering terrorism. In this context, my Office is developing a number of tools on countering terrorism with full respect for human rights. The tools aim at assisting practitioners; providing technical assistance to Member States, upon their request, in developing human rights-compliant counter-terrorism legislation and policies; and supporting relevant United Nations mechanisms. As part of this effort a fact sheet on “Human Rights, Terrorism and Counter-Terrorism” was finalized in April 2008. It is addressed to State authorities, national and international non-governmental organizations, national human rights institutions, legal practitioners and other individuals concerned with ensuring the protection and promotion of human rights in the context of terrorism and counter-terrorism. My Office is also in the process of updating the Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism, which was first published in 2003. OHCHR is also cooperating with UNODC on developing tools in the criminal justice system related to countering terrorism that are compatible with human rights laws.

10. Several workshops hosted by Member States were organized during 2007 and 2008 to consider action by Member States regarding the implementation of the Global Strategy. The workshops aimed at assessing the overall contributions of the United Nations to the fight against terrorism and to identify ways to make its institutions more relevant to national counter-terrorism strategies and better able to support implementation of the Strategy. The meetings involved, in particular, experts from Governments, relevant United Nations bodies and other multilateral bodies from different regions, as well as academic and research institutions. My Office participated in these efforts to ensure that human rights issues remain at the centre of implementation of the Strategy.

11. During these workshops, it was considered that one of the Strategy’s achievements was its prioritization of the respect for human rights and the rule of law and their integration into all pillars of its implementation. The challenge for both the United Nations system and Member States is to ensure that this human rights-based approach is reflected in all Strategy implementation efforts, rather than remaining simply of rhetorical value. It was recognized that while the United Nations has a role to play, Member States have the primary responsibility in this area. There was also recognition that progress has been made since 2002 in ensuring respect for human rights in the fight against terrorism, but that more work remains to be done. The workshops also assessed the United Nations engagement with regional, subregional and functional bodies and civil society in implementing the Strategy, and the role that these stakeholders can play in furthering the implementation of the Strategy and what steps the United Nations, in particular its CTITF, might take to stimulate this engagement. They also discussed the role of the United Nations in promoting and strengthening the rule of law and good

governance in the context of implementing the strategy. Efforts were also made with regard to the exchange of knowledge, experiences and techniques on countering challenges from terrorism through building national capacities. I welcome all efforts to ensure knowledge and commitments to the values incorporated in the Global Strategy.

B. The work of the Security Council's Counter-Terrorism Committee

12. In May 2006, the Counter Terrorism Committee (CTC) adopted a policy guidance note on how its Counter Terrorism Executive Directorate (CTED) can address human rights. The guidance note provides that when analysing States' implementation of Security Council resolution 1373 (2001), preparing draft letters to States, providing recommendations and organizing visits, CTED should provide advice to the CTC, including for its ongoing dialogue with States, on international human rights, refugee and humanitarian law, in connection with identification and implementation of effective measures to implement resolution 1373.³ It also provides that CTED should advise the CTC on how to ensure that any measures States take to implement the provisions of Security Council resolution 1624 (2005) comply with their legal human rights obligations. It requests the CTC and the CTED to liaise with my Office and other human rights organizations in matters related to counter-terrorism. The CTED, under the direction of the Committee, should incorporate human rights into their communications strategy. This policy note fed into the appointment of a Human Rights Adviser in CTED, which is an important development. OHCHR is cooperating with CTC and CTED through the work of this Adviser and I attach particular importance for the need to enhance the work of human rights with CTED.

13. The Security Council renewed CTED's mandate by resolution 1805 on 20 March 2008. The resolution again reminded States that they must ensure that any counter-terrorism measures comply with their international law obligations, including human rights. It also recalled that "CTED should continue in accordance with its mandate, to advise the CTC on issues relating to such law in connection with the identification and implementation of effective measures to implement resolutions 1373 (2001) and 1624 (2005)".

14. The CTC conducted its fifth special meeting with international, regional and subregional organizations on the "Prevention of Terrorist Movement and Effective Border Security" in Nairobi from 29-31 October 2007 with the support of the CTED. The meeting focused on States' obligations under relevant Security Council resolutions to take measures related to border security, the restriction of the international movement of terrorists and individuals suspected of terrorist acts, as well as measures linked to the provision of asylum and migration. During the meeting, OHCHR outlined the human rights perspective of these issues, particularly in the context of ensuring border security, and the treatment and the screening of individuals when crossing an internationally-recognized State border.

³ Second report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624 (2005), Chap. VII, paras. 27-32, on the compliance with obligations under international law.

C. The work of the United Nations human rights mechanisms

15. The United Nations human rights treaty bodies have continued to take up issues related to terrorism in their examinations of State party reports and individual complaints. In their concluding observations, different committees have urged States parties to recognize and ensure that the human rights treaties apply at all times, whether in peace, war or armed conflict, in any territory under their jurisdiction. The Human Rights Committee, in its consideration of some States' periodic reports, expressed concerns regarding the potentially overbroad reach of the definitions of terrorism under domestic law; the practice by some States parties of detaining people secretly and in secret places for months and years, as well as holding individuals. They also raised allegations of torture or cruel, inhuman or degrading treatment or punishment, in detention facilities in different locations; and of ill-treatment or poor conditions of detention in addition to issues of profiling and discrimination. Other serious concerns included the practice by some States parties of sending, or assisting in the sending of, suspected terrorists to third countries, for purposes of detention and interrogation, without the appropriate safeguards to prevent treatment in violation of human rights treaties.

16. The issue of respect for human rights while countering terrorism was also raised during the examination of country reports at the first session of the Human Rights Council's Working Group on the Universal Periodic Review in April 2008.

D. Other developments

17. On 14-18 April 2008, a meeting was organized in South Africa by the Inter-Parliamentary Union, in the context of its 118th Assembly. The meeting focused on three areas of human rights: security in the context of countering terrorism, xenophobia and trafficking in persons. The meeting was attended by the Regional Representative for Southern Africa on behalf of OHCHR. Background documents on human rights, terrorism and counter-terrorism were provided to it for background and guidance.

II. CERTAIN ISSUES OF CONCERN

1. National legislation: legality and definition

18. Terrorism is not a new phenomenon. It has been on the international agenda since 1934, when the League of Nations took the first major step towards outlawing this scourge by discussing a draft convention for the prevention and punishment of terrorism. Although the Convention was eventually adopted in 1937, it never came into force. Since 1963, the international community has elaborated no fewer than 13 universal legal instruments to prevent terrorist acts. Currently Member States are negotiating a fourteenth international treaty, a draft comprehensive convention on international terrorism. This keystone convention would complement the existing framework of international anti-terrorism instruments and would build on key guiding principles already present in recent anti-terrorist conventions. It focuses on the importance of criminalization of terrorist offences, making them punishable by law and calling for prosecution or extradition of the perpetrators.

19. Most countries have ratified the international human rights treaties as well as anti-terrorism conventions. Obligations arising from these conventions reinforce and complement each other when properly read together. In particular, the principle of legality, that is, sufficient clarity and certainty of law, is a non-derogable human rights principle and has been interpreted by the Human Rights Committee from article 15 of the International Covenant on Civil and Political Rights (ICCPR). States must observe this principle when drafting anti-terrorism laws and/or amending existing legislations.

20. However, many States have adopted national legislations with vague, unclear or overbroad definitions of terrorism. These ambiguous definitions have led to inappropriate restrictions on the legitimate exercise of fundamental liberties, such as association, expression and peaceful political and social opposition.

21. The principle of legality is one of the non-derogable principles of human rights and is embodied in article 15 of ICCPR. It states that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”. States must be guided by this principle when drafting anti-terrorism laws and/or amending existing legislations.

22. Some States have included non-violent activities in their national definitions of terrorism. This has increased the risk and the practice that individuals are prosecuted for legitimate, non-violent exercise of rights enshrined in international law, or that criminal conduct that does not constitute “terrorism” may be criminalized as such.

23. Defining crimes with insufficient precision can also lead to an inappropriate broadening of the proscribed conduct by means of judicial interpretation. There are several examples of hastily adopted counter-terrorism laws which introduced definitions that lacked in precision and appeared to contravene the principle of legality. Particular care must be taken, for instance, in defining offences relating to the support that can be offered to terrorist organizations or offences purporting to prevent the financing of terrorist activities in order to ensure that various non-violent conducts are not inadvertently criminalized by vague formulations of the offences in question. In previous reports, I have warned against counter-terrorism measures that themselves amount to human rights violations, notably measures that have adverse impact on particular groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media.⁴

2. Information, evidence sharing and the right to privacy

24. Intelligence-led policing has become a synonym for modern and effective policing. The acquisition, development and use of information about terrorist groups and their activities are

⁴ The Human Rights Committee has stressed that legislation enacted pursuant to Security Council resolution 1373 must be in conformity with the International Covenant on Civil and Political Rights. See CCPR/CO/77/EST, para. 8, CCPR/CO/75/NZL, para. 11, CCPR/CO/76/EGY, para. 16, CCPR/CO/75/MDA, para. 8, CCPR/CO/75/YEM, para. 18, CCPR/CO/73/UK, para. 6, CCPR/CO/83/UZB, para. 18, CCPR/C/NOR/CO/5, para. 9.

absolutely necessary in order to prevent terrorist acts. Intelligence-gathering activities, in particular covert surveillance activities, must be regulated by law, monitored as much as possible by independent agencies, and subject to appropriate judicial review. Under international human rights law, any act which impacts upon a person's privacy must be lawful; it must be prescribed and regulated by law. This means that any search, surveillance activity, or data collection about a person must be clearly authorized by law. The extent to which this is allowed to occur must not be arbitrary or left to discretionary authority. The law authorizing interference with privacy must specify in detail the precise circumstances in which the interference is to be permitted, and must not be implemented in a discriminatory manner.

25. All measures taken by law enforcement agencies to combat terrorism must be lawful, both under national and international law. Recent counter-terrorist strategies have often included efforts to collect, analyse and use information about large numbers of individuals. In recent years, many States have significantly expanded the surveillance powers and capacity of their law enforcement agencies. These practices all have the potential seriously to limit the privacy of the individuals concerned. Those measures also raise questions about how the data thus collected are to be protected, stored, and, when necessary, shared with other agencies of the same Government or indeed other jurisdictions. When personal information is collected, it must be protected against unlawful or arbitrary access, disclosure, or use.

26. Human rights concerns which may arise during the course of information gathering or evidence sharing include the impact of the sources of intelligence information on its admissibility as evidence; differences in the definition of the elements of terrorist crimes between jurisdictions, as well as "dual criminality" and legality concerns; the procedures for gathering evidence, in particular where interrogation of witnesses or suspects is coercive, involving torture or cruel, inhuman and degrading treatment; the rules relating to the use of confession evidence, particularly where the confession was obtained under duress; appropriate access to classified and secret information by the accused and his or her defence; unlawful interferences with privacy with respect to interception, search and seizure, surveillance; protection of witnesses as sources of such evidence; questions related to the appropriate burdens of proof in legal proceedings; and the overarching right to an effective remedy for violation of human rights in the context of evidence-gathering and information-sharing.

27. I appreciate that techniques such as electronic surveillance, undercover operations and controlled deliveries may be effective in preventing and combating terrorist acts. However, domestic arrangements and legislation relating to these techniques must be reviewed to reflect technological developments, taking full account of any human rights implications and the need to facilitate international cooperation. New technological developments and modern methods of investigation have created new concerns with respect to the legitimacy in human rights terms of certain methods and the protection of the rights of the individuals involved in the course of an investigation conducted further thereto. The police, prosecutors and the courts have a duty to ensure that these methods are used lawfully and in accordance with applicable human rights standards.

28. The sharing of information and intelligence between States has raised concerns for national prosecutors and courts. There are notably questions around the admissibility of evidence collected in other States through methods that would not necessarily be acceptable in their own State, as well as the use of evidence obtained by officials in another State in violation of the law

of that latter State. The verification of the legitimacy of evidence obtained as a result of international police cooperation is certainly not without its procedural and practical difficulties, and needs to be carefully addressed.

29. Issues regarding information gathering and surveillance are closely linked to the right to privacy which is protected under article 12 of the Universal Declaration of Human Rights and article 17 of the ICCPR which protects against the arbitrary or unlawful interference with privacy, family, home, or correspondence. The Human Rights Committee has elaborated on the meaning of arbitrary and unlawful interference with one's privacy, family, home or correspondence: The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view, the expression "arbitrary interference" can also extend to interference provided for under the law.⁵

30. There are a number of ways in which Governments, whether inadvertently or not, interfere with the right to privacy in the context of terrorism. New investigation techniques have been implemented to fight new threats, such as data mining, DNA tests, collecting fingerprints, telephone tapping, tracking devices, collection and systematic retention of private information, closed circuit television (CCTV) schemes, ID verification, monitoring of Internet activity, and interception of communications. Each of these pose their own challenges.

31. Legal safeguards should be established concerning the supervision of the relevant authorities granted secret surveillance powers, to ensure that they are in reality as well as in law subject to adequate control by judicial authorities as well as other oversight bodies. Parliaments should exercise oversight over security agencies to enforce their accountability, including in respect of surveillance and data collection, consistent with the values of a democratic society.

3. Prohibition of torture, cruel, inhuman and degrading treatment or punishment

32. Despite the absolute prohibition of torture, cruel, inhuman and degrading treatment or punishment, many States continue to engage in these illegal practices in the name of the fight against terrorism, and often in a systematic and widespread manner. Some States have also continued to be engaged in the practice of seeking diplomatic assurances to ensure that torture and other cruel, inhuman or degrading treatment or punishment will not be inflicted on an individual suspect who is transferred to a receiving State. As I have reiterated on several occasions, in my view diplomatic assurances per se do not work as they do not provide adequate protection against torture and ill-treatment, nor do they nullify the obligation of non-refoulement

⁵ Human Rights Committee, general comment No. 16 (1988), paras 3, 4 and 8. See also *Leander v. Sweden*, 26 March 1987, paras. 59 and 60. *Malone v. UK*, 1984, paras. 67 and 68. *Weber and Saravia v. Germany*, 29 June 2006, para. 95. *Klass and others v. Germany*, 6 September 1978, paras. 48-50, 55; ECHR, *Segerstedt-Wiberg and Others v. Sweden*, 6 June 2006, paras. 88, 120 and 121.

which continues to apply at all times. Some States continue to use diplomatic assurances, memoranda of understanding, and other forms of diplomatic agreement to justify the return or irregular transfer of individuals suspected of terrorist activity to countries where despite such assurances they face a real risk of torture or other serious human rights abuse, a practice which raises a number of serious concerns both as a matter of human rights law and policy.

33. A restrictive approach to the use of these assurances has recently been confirmed in regional human rights jurisprudence. The European Court of Human Rights (ECHR) in *Saadi v. Italy*⁶ and *Ismoilov v. Russia* reaffirmed that the ban on deporting individuals to countries where they are at risk of torture or ill-treatment is absolute and unconditional. The judgement also addressed whether a State's duty not to deport where there is a risk of torture or ill-treatment can be mitigated by promises of humane treatment from the State to which the individual is to be deported. The court held that such assurances do not automatically offset an existing risk, emphasizing "that the existence of domestic laws and accession to treaties were not sufficient to ensure adequate protection against the risk of ill-treatment". Applying this principle in practice, the Court has never found assurances capable of displacing the risk of torture. National courts have also played a more assertive approach in critically examining such assurances.⁷

34. In my view, national and international efforts to eradicate torture must focus first and foremost on prevention, including through the establishment of systems of regular visits, by independent international and national bodies, of places where people are deprived of their liberty. The Optional Protocol to the Convention against Torture sets out clear criteria in this regard. I encourage all States that have not ratified the Optional Protocol to do so as soon as possible to provide for enhanced system of prevention and as a sign of their good faith in this area.

35. The Venice Commission rendered its opinion 363/2005 on 17 March 2006 and dealt with the issue of rendition. In this Opinion, the Commission acknowledged that as movement around the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that terrorist crimes be prevented and that persons who are suspected of having committed a very serious crime and are suspected to have acted from abroad or who have fled abroad should be brought to justice. In this context, the Commission specified that under international law and human rights law, there are four situations in which a State may lawfully transfer a prisoner to another State: deportation, extradition, transit and transfer of sentenced persons for the purposes of serving their sentence in another country. The Commission examined each of these categories citing the relevant international law principles involved. The Commission considered that the transfer of an individual which takes place outside the rule of

⁶ ECHR, application No. 37201/06, No. 131, 28 February 2008.

⁷ See the two judgements on appeals of decisions from the Special Immigration Appeals Commission (SIAC), the Court of Appeal (Civil Division) in the UK cited torture and ill-treatment in the receiving countries as grounds for barring the deportation of two nationals of the receiving countries. SIAC blocked the transfers despite "memorandums of understanding" from the two Governments that promised that suspects would not be tortured and would receive fair trials upon return.

law and without due process may lead to a number of human rights violations, notably infringements of the right to liberty and security of the person, the prohibition of torture and other cruel, inhuman or degrading treatment and punishment, the right to recognition everywhere as an individual before the law, the right to a fair trial, the right to private and family life, and the right to an effective remedy. Depending on the circumstances, it may amount to an enforced disappearance.

36. In my previous reports, I have also expressed my concern about the use of unlawful rendition or transfers across borders of suspected terrorists who are considered to pose a security risk without judicial oversight and review prior to transfer. States should as a minimum satisfy their positive obligations under the different treaties and standards and ensure that they are not complicit in the practice of rendition through adopting a number of practical procedures. States have an obligation to investigate the role of its agents (both military and intelligence) who may have been involved in directly or indirectly assisting or facilitating these renditions. This requires the State to sanction those that are responsible and provide reparation for the victims.

37. Concerns raised in recent years regarding improper transfers of terrorist suspects, including so-called renditions, have not been fully addressed; indeed, appropriately transparent investigations remain a priority. In my view, a more comprehensive legal system of control should be put in to prevent the improper and illegal use of air traffic which would be an important way to put an end to such transfers. States have a responsibility to ensure that their airspace is not used unlawfully, be it by their own agents, foreign agents, or a combination of both. Assurances by transferring States that there will be compliance with international and national laws have been shown, in reality, not to offer sufficient guarantees in this respect. As a result, more rigorous approaches should be put in place in order to ensure there is no impunity on this question.⁸

38. It is axiomatic in theory, but too often neglected in practice, that detainees suspected of terrorist acts and prisoners should benefit from all safeguards and guarantees given to other detainees or prisoners. They should be dealt with, without discrimination, in accordance with international human rights laws and national legislations that guarantee humane treatment.

39. The International Convention for the Protection of All Persons from Enforced Disappearance provides that no one should be subjected to enforced disappearance and that each State party should take appropriate measures to ensure that enforced disappearance constitutes an offence under its criminal law. Incommunicado detention and over-incarceration, “extraordinary rendition” and the use of secret prisons in the context of any type of counter-terrorist campaign whether a threat of war, a state of war, internal political instability or any other public emergency, cannot be invoked to justify enforced disappearances. The Convention affirms the right of any victim to know the truth about the circumstances of an enforced disappearance, and the fate of the disappeared person, and the right to freedom to seek, receive and impart information. States parties should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, by

⁸ Following the approach of the Human Rights Committee in *Alzery v. Sweden* (communication 1416/2005).

an appropriate impartial body all cases of missing and disappeared persons in circumstances which may involve a violation of the right to life. I again call on all States to adhere to this important new treaty, as a sign of their good faith and commitment to the most basic principles of the rule of law.

4. Fair trial

40. It has been argued by some that existing safeguards associated with the right to fair trial in prosecuting terrorist crimes are inappropriate to ensure that the guilty are convicted, and that special courts with special procedures can be more suitable instead. I fundamentally disagree with such an argument, which insufficiently recognizes the ultimately criminal character of terrorist acts. Article 10 of the Universal Declaration of Human Rights and article 14 of the ICCPR, which both aim at ensuring the proper administration of justice, set out the bedrock norms applicable in all trials, whether of alleged terrorists or otherwise. State should ensure that all guarantees of due process are respected when arresting, charging and prosecuting a suspect of terrorism-related crime. They should benefit from the usual series of specific due process rights, including that all persons should be equal before the courts and tribunals; that in criminal or civil cases everyone has a right to a fair and public hearing by a competent, independent and impartial tribunal; that everyone charged with a criminal offence should have the right to be presumed innocent until proved guilty according to law; and that everyone convicted of a crime should have the right for his conviction and sentence to be reviewed by a higher tribunal according to law.

41. The Human Rights Committee has recently adopted its revised general comment 32 on the right to a fair trial and equality before the courts and tribunals, providing important fresh guidance in this area. The general comment re-emphasizes that the right to a fair trial and to equality before the courts and tribunals are key elements of human rights protection and serve by procedural means to safeguard the rule of law.

42. The use of exceptional courts to try civilians has impacted upon the effectiveness of regular court systems and often has seriously prejudicial impacts on due process and non-discrimination rights, depending upon the nature of the tribunal or court and any restrictions placed upon a person facing charges before such a tribunal. Guaranteeing the rights of terrorist suspects to a fair trial is critical for ensuring that anti-terrorism measures respect the rule of law and that such measures are seen to be fair. In particular, the circumstances are rare that a military court will be the appropriate venue to try a civilian.

43. Indefinite, secret and incommunicado detention of terrorist suspects without adequate access to courts and due process continues to be of grave concern. Where any individual is detained - regardless of the context - appropriate due process, judicial review and recognition before the law - are essential. Incommunicado or secret detention is a violation of States' legal obligation under article 7 of ICCPR.⁹

⁹ General comment No. 20 (1992) of the Human Rights Committee.

44. The practice of detaining terrorist suspects in secret detentions results in numerous human rights violations. Obviously the right to fair trial will be violated. The acknowledgement of the existence of some places of secret detention shows that this type of detention has prevented those detainees from practising their right to be heard and brought before independent courts. Therefore, safeguards must also be put in place to ensure that these practices do not recur, that governments do not act outside the law and do not by-pass the judicial process. States may also be held responsible when their agents have acted ultra vires their formal powers. In addition, where such violations have taken place, States have a duty to undertake prompt and effective investigations to identify and prosecute those responsible for the violation, as well as ensure that the victims are adequately compensated.

5. Sanctions issues: listing and delisting; asset-freezing and confiscation

45. The absence of human rights guarantees to the current international regime of targeted sanctions against individuals suspected of involvement in terrorist activity could infringe their right to property, right to be heard and right to effective judicial review, as has been increasingly recognized by a number of regional and national courts. This poses serious human rights issues. More effort continues to be needed to ensure a listing process which is transparent, based on clear criteria, and with an appropriate, explicit, and uniformly applied standard of evidence, as well as effective, accessible and independent review. Recent improvements to the United Nations sanctions procedures are a first, partial step towards ensuring fair and clear procedures for placement on and removal from sanctions lists, but comprehensive reform continues to be urgently required.

46. In the 2005 World Summit outcome document, Member States called upon the Security Council, with the support of the Secretary-General, to improve its monitoring of the implementation and effects of sanctions, to ensure that sanctions are implemented in an accountable manner, to review regularly the results of such monitoring and to develop a mechanism to address special economic problems arising from the application of sanctions in accordance with the Charter. They also called upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.¹⁰

47. The main human rights concerns regarding sanctions fall under respect for due process rights, notably the standards of proof and evidence in the listing procedures, the denial of a fair hearing, and the lack of consideration to remedies available to individuals whose human rights have been violated in the sanctions process. Individuals have a right to know an appropriate factual basis and reasons behind a listing decision, as well as the procedures available for challenging a decision. Open-ended periods of applicable sanctions, notably in respect of freezing the assets of suspects, have a direct punitive impact and readily threaten to go well beyond

¹⁰ 2005 World Summit, General Assembly resolution 60/1 of 16 September 2005, paras. 102-103.

the purpose of the United Nations to combat the terrorist threat posed by an individual case. There instead needs to be regular, comprehensive review of the situation of those subjected to such sanctions.

48. Legal procedures are necessary to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exemptions. In short, respect for due process rights must be guaranteed. International procedures under the authority of the Security Council level and at the domestic level should sensibly compliment each other in scope and protection. In my view, it is key that Parliaments debate how internationally binding obligations in this area properly transpose into domestic law. But at all levels, fair and clear procedures include the right of an individual to be informed of the measures taken and to know the case against him or her; the right of such a person to be heard within a reasonable time by the relevant decision-making body; the right to effective review by a competent, independent review mechanism; the right of such a person to representation with respect to all proceedings; and the right of such a person to an effective remedy. My Office has collaborated with the Office of Legal Affairs and the Department of Political Affairs in a process to “ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exemptions”.

49. Some improvements have been made recently to the procedures related to the United Nations targeted sanctions regime. While at present, there is no legal mechanism for reviewing the accuracy of the information behind a sanctions committee listing or the necessity for and proportionality of sanctions adopted, nor does the individual affected have a right of access to a review body at the international level. The only recourse for review of individuals and entities that may be wrongly listed, for example, is for the individual or entity to approach the Security Council through their State of nationality or residence. Member States are responsible for informing their nationals that they have been listed, but often this does not happen. Individuals have a right to know the reasons behind a listing decision, as well as the procedures available for challenging a decision.

50. Individual listings normally do not include an “end date” to the listing, which may result in a temporary freeze of assets becoming permanent. While targeted sanctions against individuals clearly have a punitive character, there is no uniformity in relation to evidentiary standards and procedures. The longer an individual is on a list, the more punitive the effect will be. States only have standing in the current sanctions regime, which assumes that the State will act on behalf of the individual. In practice, often this does not happen and individuals are effectively excluded from a process which may have a direct punitive impact on them.

51. Beyond procedural improvements in the listing process, there is a need for some form of appropriate review mechanism to which individuals and entities may appeal decisions regarding their listing. A review mechanism under the authority of the Security Council for consideration of delisting proposals should be established. An independent panel to consider delisting proposals with a judicial review of delisting decisions. All of these proposals should be taken into account in comprehensively addressing the human rights issues raised by asset freezing.

6. Victims

52. Victims of terrorism and their families have the right to an effective remedy when their rights have been violated in relation to terrorist acts. This legal right has also been recognized at the political level. In the 2005 World Summit Outcome, for example, Member States stressed “the importance of assisting victims of terrorism and of providing them and their families with support to cope with their loss and their grief”. Similarly, the United Nations Global Counter-Terrorism Strategy reflects the pledge by Member States to “promote international solidarity in support of victims and foster the involvement of civil society in a global campaign against terrorism and for its condemnation”.

53. Every State has a duty to provide reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. This obligation includes, inter alia, the duty to afford remedies to victims. The purpose of reparation should be for relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.

54. According to the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, set out in General Assembly resolution 40/34 of 29 November 1985, victims include “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”. Importantly, the Declaration notes that an individual may be considered a victim “regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim”.

55. As a result of frequent shortcomings in domestic jurisdictions for victims of terrorist acts, guidelines should be adopted to address issues of appropriate access to remedies in criminal and civil proceedings. It is best practice for victims’ interests to be represented by legal counsel during criminal proceedings, which should be available and accessible regardless of the income or resources of victims and families. It may also be inappropriate and unfair to condition compensation on victims’ ability to obtain reparations from perpetrators or their estates. It is preferable for victims of terrorism to have the option to benefit from State-administered compensation and assistance schemes. The assistance could be financial, psychological, medical or in any other form that the victims wishes, and that such assistance should be long-term. A number of elements can be explored in addressing the rights of victims. These include urgent assistance for the material and psychiatric needs of victims, long-term assistance including medical and psychological follow-up; the definition of a status for victims; respect for privacy and family life of victims; effective access to justice for victims and the need to ensure that evidentiary privileges are not an obstacle to transparency in the conduct of investigations and access to legal remedies; the role of victims and victims’ associations in criminal justice; with regard to reparations, the need to ensure equality and non-discrimination among victims; and the right to justice and to truth.

56. In the same vein as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147), and the Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/Sub.2/1997/20/Rev.1 and E/CN.4/2005/102/Add.1), the elaboration of a statement of human rights principles and guidelines drawing on national and international best practice that would comprehensively address the victims of terrorism is both appropriate and deserving of serious consideration.

III. CONCLUSIONS

57. I recall again the importance of placing human rights at the core of international cooperation in counter-terrorism and the obligation of all States to ensure that measures taken to combat crimes of terrorism comply with their obligations under international human rights law, in particular the right to recognition as a person before the law, due process, and non-refoulement. Compliance with international human rights standards is essential, never more so than where counter-terrorism measures involve the deprivation of individual liberty.

58. I am concerned with the practical obstacles to truly effective international and judicial cooperation in counter-terrorism which arise from unlawful interferences with privacy, search, seizure and surveillance; the insufficient remedies for violation of human rights in the context of evidence-gathering and information-sharing; the transfer and/or admissibility of evidence gathered by unlawful means; insufficient respect for the principle of legality in relation to the definition of terrorist offences; the protection of witnesses; and inappropriate redistributions of burdens of proof in particular legal proceedings in this area. My Office will continue to reflect on these issues with a view to assisting States in strengthening the effectiveness of mutual legal assistance, respect for human rights and upholding the rule of law in effectively countering terrorism.

59. I encourage all States that have not ratified the Optional Protocol to the Convention against Torture and the Disappearances Convention to do so. That said, ratification itself will not have full meaning unless it is accompanied by the compliance of national legislation with international human rights standards, the regular submission of periodic reports to the respective monitoring bodies and the implementation, at the national level, of their recommendations. Only through this way, can it be evenly guaranteed that all measures will comply with human rights law.

60. Targeted sanctions such as asset freezing and travel bans may be useful tools in States' efforts to combat terrorism and might be helpful in preventing terrorist activity, but such procedures must be improved fully to meet human rights standards.

61. States should increase awareness and support for victims of terrorism, by pointing to the importance of the work that is required in order to give victims a voice that can help to humanize them and provide an important counterpoint to a narrative of hate and violence.

62. States should cooperate openly and without reservation with the special procedures of the Human Rights Council in this area. In the sphere of the Global Counter-Terrorism Strategy, I encourage all States to issue a standing invitation to all special procedures of the Human Rights Council, in particular to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

63. Finally, States should strengthen the national capacities of their human rights institutions; provide training to their law enforcement authorities - including intelligence, customs and immigration services - on international human rights laws and standards, with proper remedies to ensure accountability. Failure by States to safeguard human rights in this area will lead directly toward increased instability and decreased legitimacy of Governments, to polarization in and between societies and to increasing radicalization.
