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PROMOTION AND PROTECTION OF HUMAN RIGHTS

**Report of the Special Rapporteur on the promotion and protection of
human rights and fundamental freedoms while countering terrorism,
Martin Scheinin***

* Endnotes are being circulated in the language of submission only.

Summary

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, submits hereby his first report to the Commission. Chapter I summarizes the activities of the Special Rapporteur since he took up his mandate in August 2005, pursuant to Commission resolution 2005/80. Chapter II gives an overview of the communications sent by the Special Rapporteur and replies received thereto from Governments between 15 August and 15 December 2005. The summaries of all communications can be found in the addendum to this report (E/CN.4/2006/98/Add.1). In chapter III, the Special Rapporteur makes some preliminary observations on elements of a definition of terrorism as to the relevance of this issue for human-rights-conform responses to terrorism. Chapter IV consists of an analysis of the role of human rights in the review of Member State reports to the Counter-Terrorism Committee of the Security Council and sets out possible forms of cooperation between the Special Rapporteur and the Counter-Terrorism Committee. Chapter V contains brief reflections by the Special Rapporteur on certain issues of major importance that will require further elaboration in subsequent reports. The conclusions are contained in chapter VI.

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Introduction

1. The mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism was created by the Commission on Human Rights in its resolution 2005/80 on 21 April 2005. Martin Scheinin accepted the appointment as Special Rapporteur on 8 August 2005. He hereby submits his first report to the Commission, in accordance with the resolution.

2. The Special Rapporteur draws the attention of the Commission to his interim report to the General Assembly, submitted in accordance with paragraph 14 (f) of Commission resolution 2005/80, where he paid tribute to the preparatory work of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman,¹ and described the conceptual framework of the mandate as provided for by the resolution and the issues he intends to develop during his tenure. He pointed to four key features, namely *complementarity* with regard to other special procedures, i.e. special attention should be given to areas not covered by existing mandate-holders; *comprehensiveness*, provided by the general reference to “human rights and fundamental freedoms” in the title of the mandate; a *proactive nature* emphasizing a holistic approach through special attention to legislative issues, the identification of best practices and dialogue with other players, such as Governments but also international bodies and non-governmental organizations; and a *thematic approach*, meaning the intention of the Special Rapporteur to complement his country-specific work with thematic studies on substantive issues in the field of protection and promotion of human rights and fundamental freedoms while countering terrorism.

3. Chapter I summarizes the activities of the Special Rapporteur in 2005 since he took up the mandate. Chapter II gives an overview of the communications sent by the Special Rapporteur and replies received thereto from Governments between 15 August and 15 December 2005. The summaries of all communications can be found in the addendum to this report (E/CN.4/2006/98/Add.1). In chapter III the Special Rapporteur reflects upon the issue of defining “terrorism” as to the relevance of an internationally agreed definition or its absence for human-rights-conform responses to terrorism. Chapter IV consists of an analysis of the role of human rights in the review of Member State reports to the Counter-Terrorism Committee of the Security Council and sets out possible forms of cooperation between the Special Rapporteur and the Counter-Terrorism Committee. Chapter V contains brief reflections by the Special Rapporteur on certain issues of major importance that will require further elaboration in subsequent reports. The conclusions are contained in chapter VI.

I. ACTIVITIES OF THE SPECIAL RAPPORTEUR

4. The Special Rapporteur wishes to inform the Commission on the activities he has undertaken since accepting his appointment. Regarding country visits, the Special Rapporteur would like to report that he has made visit requests to the following countries: Egypt, Malaysia, Philippines, Tunisia and Turkey. The Special Rapporteur welcomes the fact that, on 14 December 2005, Turkey extended an invitation for a country visit to take place in February 2006 (see paragraph 18 below).

5. The Special Rapporteur, during his induction visit to Geneva from 11 to 14 September 2005, held meetings with Heads of Branches and other relevant units of the Office of the High Commissioner for Human Rights with a view to ensuring smooth coordination; with a number of non-governmental organizations, such as Amnesty International, the Organisation Mondiale contre la Torture, the Association for the Prevention of Torture and the International Commission of Jurists; and with representatives of several Permanent Missions in Geneva, such as those of Finland, Mexico, Norway, the Philippines, Tunisia, the United Kingdom of Great Britain and Northern Ireland and the United States of America.
6. On 11 October 2005, at the request of the Constitutional Law Committee of the Parliament of Finland, the Special Rapporteur (in his academic capacity) gave a written legal opinion on a Government Bill concerning a new Extradition Agreement between the European Union and the United States of America, and amendments to the 1976 bilateral Extradition Treaty between Finland and the United States. In that capacity, the Special Rapporteur expressed concern over article 12 of the European Union-United States treaty and the proposed amendment of article 20 of the Finland-United States treaty, as they appeared to legalize practices of “rendition” and the use of Finnish airspace and even airports for the purpose of transferring persons against their will from one third country to another third country, without a requirement that such transfer serve the purpose of putting the person on trial.
7. On 11 October 2005, the Special Rapporteur held a number of meetings at the Council of Europe in Strasbourg. He met with Terry Davis, Secretary General of the Council of Europe; Jane Dinsdale, Director for Human Rights; Alvaro Gil-Robles, Commissioner for Human Rights; and Guy de Vel, Director General for Legal Affairs. During the meetings the Special Rapporteur introduced his mandate and raised some issues of common interest, such as the Council of Europe’s Guidelines on “Human Rights and the Fight against Terrorism”, victims’ rights and questions related to article 5 of the Council of Europe Convention on the Prevention of Terrorism of 2005 (“public provocation to commit a terrorist offence”).
8. On 12 October 2005, the Special Rapporteur met in Geneva with Louise Arbour, United Nations High Commissioner for Human Rights, to discuss his mandate and cooperation with the High Commissioner and her Office.
9. On 24 October 2005, the Special Rapporteur met with the Security Council’s Counter-Terrorism Committee in New York. He set out possible areas of cooperation and answered Committee members’ questions about how he envisages fulfilling his mandate. In connection with this meeting, he liaised with the Counter-Terrorism Committee Executive Directorate (CTED) to discuss modalities of cooperation.
10. On 26 October 2005, the Special Rapporteur presented his report to the General Assembly. In his statement, he outlined the essential features of the mandate and explained that he intends to implement it through a holistic approach focusing on legislative issues, which will be complemented by taking up individual cases of alleged victims of human rights violations. After his presentation he gave a press conference. On 25 and 26 October 2005, the Special Rapporteur held meetings with a number of representatives of Governments, spoke at a workshop on the reform of United Nations human rights procedures at the Jacob Blaustein Institute for the Advancement of Human Rights, and had meetings with Human Rights Watch and Human Rights First in New York.

11. On 10 November 2005, the Special Rapporteur met in Turku, Finland, with Ms. Amy Hyatt, chargé d'affaires ad interim, and other representatives of the embassy of the United States of America in Finland. The discussions focused on the mandate of the Special Rapporteur and some thematic issues of concern. A follow-up discussion took place on 12 December 2005, with focus on the extraterritorial application of human rights treaties when countering terrorism.

12. On 20 and 21 November 2005, the Special Rapporteur participated in a conference organized by two non-governmental organizations, Reprieve and Amnesty International, entitled "The global struggle against torture: Guantánamo Bay, Bagram and beyond". He gave an overview of the international mechanisms for preventing human rights abuses in the war on terror, with special emphasis on the mandate of the new Special Rapporteur.

13. On 21 and 22 November the Special Rapporteur was in London to meet with officials of the United Kingdom's Home Office and Foreign and Commonwealth Office to discuss both his mandate and current draft legislation related to counter-terrorism measures. The issues discussed included questions relating to the scope of judicial review as permitted by international law in the event of prolonged pre-charge detention, the possible use by other Governments of British airspace and airports for practices of "extraordinary rendition" of terrorism suspects, the issue of diplomatic assurances when expelling or extraditing individuals from the United Kingdom to countries where torture is reported to be used during interrogation, and the British experience of promoting multicultural integration and dialogue between various ethnic and religious groups. In his meetings the Special Rapporteur acknowledged that many of the concerns voiced in his letters of 1 September and 3 October 2005 were addressed in the course of the legislative process. He indicated that he was troubled by the draft provisions on the concept of "recklessness" with regard to incitement of terrorism, and by the fact that proscription of organizations can be carried out on the basis of "glorification". He requested further clarifications on a number of other questions. He is grateful to the Government of the United Kingdom for providing the additional information requested, which he looks forward to considering further.

14. During his visit in London, the Special Rapporteur also held meetings with non-governmental organizations, Amnesty International and Justice, where issues related to the fight against terrorism in different countries, legal questions arising in the framework of the mandate, and areas and methods of cooperation were addressed.

15. On 30 November and 1 December 2005, the Special Rapporteur participated in a meeting of the United Nations Counter-Terrorism Implementation Task Force (CTITF), where discussions on how the Secretary-General's proposal for a counter-terrorism strategy can be developed to facilitate the deliberations among Member States on a comprehensive, coordinated and consistent response to terrorism took place. It was decided that the Special Rapporteur should coordinate the working group on human rights issues that was established during the meeting.

16. On 8 December 2005, the Special Rapporteur spoke about the impact of terrorism and counter-terrorism on the human rights of refugees and asylum-seekers at the fortieth anniversary of the Finnish Refugee Council. On that occasion he briefly met with the United Nations

High Commissioner for Refugees, Mr. António Guterres. On 15 December 2005, the Special Rapporteur met in Geneva with representatives of UNHCR's Department of International Protection to discuss issues of common concern and possible areas of cooperation.

17. On 9 December 2005, on the eve of Human Rights Day, the Special Rapporteur, together with 32 human rights experts from the United Nations, issued a statement on the absolute prohibition of torture, reaffirming that the very rationale of human rights is that they provide minimum standards that have to be respected by States at all times, in particular when new challenges arise.

18. On 14 December 2005, the Special Rapporteur met with representatives of the Permanent Mission of Turkey to the United Nations Office at Geneva, on which occasion the Government of Turkey announced that they extended an invitation for the Special Rapporteur to visit Turkey in February 2005. The mandate of the Special Rapporteur and its scope were discussed, as well as the modalities for the visit. In this context, the Special Rapporteur stressed that his approach is a holistic one and that he is interested in an assessment of the legal situation, in particular the definition of terrorism and related crimes, but also in practical issues related to the fight against terrorism, such as training for law enforcement, and trials and the detention of persons suspected of terrorist acts. The ambassador of Turkey stressed that his country is looking forward to showing the Special Rapporteur the progress that Turkey has made with regard to human rights over the last years in the particular context of their experience with terrorism. The Special Rapporteur wishes to thank the Government of Turkey for the prompt invitation and looks forward to a successful fact-finding visit there.

19. A meeting with the International Committee of the Red Cross was scheduled for 16 December 2005. The Special Rapporteur was to meet with the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime and with the Action against Terrorism Unit of the Organization for Security and Cooperation in Europe in Vienna on 19 December 2005. Among the issues that the Special Rapporteur hoped to discuss were international and national definitions of terrorism and the further work of the CTITF on the human rights dimension of a comprehensive counter-terrorism strategy.

II. COMMUNICATIONS

20. Concerning communications sent to Governments, the Special Rapporteur has been made aware of legislative developments and proposals within a number of United Nations Member States, and has also received allegations of breaches of fundamental freedoms and human rights in the course of what is said to be the combating of terrorism, from a variety of reliable sources, including international governmental organizations and non-governmental organizations. Within his mandate, the Special Rapporteur has corresponded, both separately and jointly with other Special Rapporteurs, with 11 States during September to December 2005.

21. In all communications sent, the Special Rapporteur has stressed that he is conscious of the fact that the obligation of States to protect and promote human rights requires them to take effective measures to combat terrorism and that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.

22. In the case of new legislation or proposed amendments on counter-terrorism, the Special Rapporteur has sought comprehensive information, sometimes accompanied with specific questions about the contents of legislation of which he has been made aware, from the Governments of Egypt, the Philippines, Tunisia and the United Kingdom of Great Britain and Northern Ireland. The Special Rapporteur also raised issues concerning states of emergency with the Government of Egypt, and the question of suicide bombings with the Government of the United Kingdom. He is very grateful for the timely response of the United Kingdom. The time for the replies requested from the other States mentioned has elapsed and the Special Rapporteur is disappointed not to have received any response from them.

23. In the case of allegations of human rights violations brought to his attention, the Special Rapporteur has corresponded with the Governments of Malaysia (concerning its Internal Security Act 1960 and powers of pretrial detention without charge), Tajikistan (concerning the trial of an opposition politician and the means of procuring evidence used at that trial), the United States of America (concerning detainees at Guantánamo Bay and alleged secret detention centres) and Uzbekistan (concerning ongoing trials and various associated matters). He is grateful for the recent response of Tajikistan, which he looks forward to considering further once it is translated. He notes the press release of Uzbekistan. He has had no response from Malaysia or the United States.

24. A matter raised in correspondence last month with Jordan, Indonesia, Yemen and the United States of America concerns the treatment during detention and questioning of two terrorism suspects in several countries. The Special Rapporteur looks forward to receiving a response from those States within the time frame requested.

25. Jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur issued, on 26 October 2005, a press statement expressing concern about the preparation of trials against terrorism suspects in Uzbekistan.

III. REFLECTIONS ON THE ISSUE OF DEFINING “TERRORISM”

26. An issue central to the Special Rapporteur’s mandate is how the international community or individual States define the notion of “terrorism”. The international framework on counter-terrorism, through the principal anti-terrorism conventions, and resolutions of the Security Council, General Assembly and Commission on Human Rights impose obligations and issue instructions to States on the question of terrorism without there being a comprehensive definition of the term. This is not only problematic for States in their ability to determine levels of proper compliance with those conventions and resolutions, but it also bears upon other matters. Different elements within the domestic terrorism offences of separate States are likely to pose difficulties for both extradition and mutual legal assistance. There may also be a potential failure by the international community to address some acts of terrorism by not having a comprehensive definition of the term.

27. Of particular concern to the Special Rapporteur’s mandate is that repeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights.

Calls by the international community to combat terrorism, without defining the term, can be understood as leaving it to individual States to define what is meant by the term. This carries the potential for unintended human rights abuses and even the deliberate misuse of the term. Besides situations where some States resort to the deliberate misuse of the term, the Special Rapporteur is also concerned about the more frequent adoption in domestic anti-terrorism legislation of terminology that is not properly confined to the countering of terrorism. Furthermore, there is a risk that the international community's use of the notion of "terrorism", without defining the term, results in the unintentional international legitimization of conduct undertaken by oppressive regimes, through delivering the message that the international community wants strong action against "terrorism" however defined.

Status of work towards defining terrorism and terrorist offences

28. None of the 13 anti-terrorism conventions contain a comprehensive definition of the term "terrorism". Rather, the conventions are operational in nature and confined to specific subjects, whether air safety, maritime navigation and platforms, the protection of persons, or the suppression of the means by which terrorist acts may be perpetrated or supported. Neither do resolutions of the various United Nations bodies adopt a definition, save that the Security Council has expressed in its resolutions 1269 (1999) and 1566 (2004) that all acts of terrorism are unjustifiable regardless of their motivation.²

29. A draft comprehensive convention on international terrorism, referred in 2001 to the Ad Hoc Committee established under General Assembly resolution 51/210, continues to be pursued.³ The controversial aspects of the draft convention concern the definition of terrorist offences (art. 2) and exceptions to this (art. 18).⁴ The proposed comprehensive definition under article 2 is detailed and addresses credible threats, attempts, accomplices and parties, and the organization of terrorist offences.

30. The Sub-Commission on the Promotion and Protection of Human Rights' Special Rapporteur on terrorism and human rights has already given consideration to the questions of the relationship between terrorism and armed conflict, legitimate struggles for self-determination, and the conduct of State and non-State actors.⁵ There is no need to repeat her useful analysis and recommendations in that regard.

31. For the purpose of this report, the Special Rapporteur focuses his attention upon the criminal proscription of terrorist conduct and the characterization of terrorism in that context.

Trigger-offences under existing conventions on terrorism

32. Four recent documents utilize a very useful "trigger" in determining what conduct - in the absence of a comprehensive definition - should be characterized as "terrorist" by linking the term to existing conventions on terrorism:

(a) The Council of Europe Convention on the Prevention of Terrorism, adopted in May 2005, defines a "terrorist offence" as any of the offences within 10 of the 12 anti-terrorism conventions in force (excluding the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft and the Convention on the Marking of Plastic Explosives for the

Purpose of Detection).⁶ All of the offences within the Convention are thus linked to the offences created by and definitions within the universal conventions on countering terrorism that are currently in force;

(b) In proscribing the financing of certain conduct, article 2, paragraph 1 (a), of the International Convention for the Suppression of the Financing of Terrorism takes a similar approach, linking itself to 9 of the 11 other conventions in force at that time;

(c) Security Council resolution 1566 (2004), as well as the report of the Secretary-General's High-level Panel on Threats, Challenges and Change (which will be considered further below), also make reference to conduct prohibited under the existing conventions on aspects of terrorism.⁷

33. The Special Rapporteur considers that use of the counter-terrorism conventions as a trigger for determining what conduct is to be proscribed in the fight against terrorism is, in the absence of a universal and comprehensive definition of "terrorism", the proper starting point. Although subject-specific, the conventions are universal in nature, so that the use of offences described in them can be treated as broadly representative of international consensus.

34. This approach must be qualified in one respect, to note that this linkage is not applicable in the case of the Convention on the Marking of Plastic Explosives for the Purpose of Detection. Because the Convention does not actually proscribe any conduct, but instead places obligations upon States relating to the marking of explosives, it cannot be used as a "trigger offence" treaty.⁸

Cumulative characteristics of "terrorism"

35. The use of existing conventions on terrorism to ascertain trigger-offences is not, by itself, sufficient to determine what conduct is truly "terrorist" in nature. To that extent, the Special Rapporteur would not see as fully satisfactory how the link to existing conventions was expressed by the High-level Panel in what he otherwise considers to be a good description of terrorism:⁷

"any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature and context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act". [emphasis added]

36. The point to be made can be illustrated with reference to the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft. The Convention calls on States to establish jurisdiction over acts that may or do jeopardize the safety of a civil aircraft, or of persons or property therein, or which jeopardize good order and discipline on board.⁹ While this certainly would capture conduct of a terrorist nature, the description of acts over which States must establish jurisdiction is very broad and likely also to include conduct with no bearing at all to terrorism. Thus, the High-level Panel formulation of "any action, in addition to actions already specified by the existing conventions on aspects of terrorism" is problematic, since not

all acts caught under these conventions (the Tokyo Convention being a prime example) will be of a terrorist nature. It is notable in that regard that neither the European Convention on the Prevention of Terrorism nor the International Convention on the Suppression of the Financing of Terrorism link themselves to the Tokyo Convention.

37. The solution to this problem can be drawn from Security Council resolution 1566 (2004). Although the resolution did not purport to define “terrorism”, it called on all States to cooperate fully in the fight against terrorism and, in doing so, to prevent and punish acts that have the following three cumulative characteristics:

(a) Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; and

(b) Irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act; and

(c) Such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

38. The third criterion represents the trigger-offence approach already identified. The important feature of the resolution is the cumulative nature of its characterization of terrorism, requiring the trigger-offence to be accompanied with: the intention of causing death or serious bodily injury (or the taking of hostages); for the purpose of provoking terror, intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act. This cumulative approach acts as a safety threshold to ensure that it is only conduct of a terrorist nature that is identified as terrorist conduct. The Special Rapporteur emphasizes that not all acts that are crimes under national or even international law are acts of terrorism or should be defined as such.

39. By way of further example, there are clear parallels between acts of terrorism and other international crimes, including crimes against humanity (whether in the terms set out in the Statute of the International Criminal Court, or the proscription of such crimes under general international law). The Security Council, the General Assembly and the Commission on Human Rights have also identified terrorism as something that: endangers or takes innocent lives; has links with transnational organized crime, drug trafficking, money-laundering and trafficking in arms as well as illegal transfers of nuclear, chemical and biological materials; and is also linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, the taking of hostages and robbery.¹⁰ Notwithstanding such linkages, counter-terrorism must be limited to the countering of offences within the scope of, and as defined in, the international conventions and protocols relating to terrorism, or the countering of associated conduct called for within resolutions of the Security Council, when combined with the intention and purpose elements identified in Security Council resolution 1566 (2001). That an act is criminal does not, by itself, make it a terrorist act.

40. A cumulative approach is, in fact, the one taken in defining prohibited conduct under the International Convention against the Taking of Hostages. Hostage-taking is defined as the seizure or detention of a person (a hostage) accompanied by a threat to kill, injure or continue to detain the hostage, in order to compel a third party to do or to abstain from doing any act. To that extent, hostage-taking (as described) encapsulates all three characteristics identified within Security Council resolution 1566 (2004), except that it does not expressly state that the motivations of such conduct cannot render it justifiable.

41. The International Convention for the Suppression of Acts of Nuclear Terrorism adopted in 2005 is at odds with this cumulative approach. The Convention requires States parties to prohibit the possession or use of nuclear material or devices with the intent: to cause death or serious bodily injury; to cause serious property damage or damage to the environment; or to compel a person, organization or State to do or abstain from doing any act.¹¹ The wording of article 2 (1) does not fit with Security Council resolution 1566 (2004), treating the resolution's first two characteristics (intent to cause death or injury or the taking of hostages; for the purpose of influencing conduct) as alternative, rather than cumulative requirements. The Special Rapporteur is concerned that, just as in the case of the Tokyo Convention already discussed, this may capture conduct that does not meet the general criteria for defining what acts are terrorist in nature. He therefore reiterates the need for a cumulative characterization of terrorist conduct.

Summary on the characterization of “terrorist” offences

42. It is essential to ensure that the term “terrorism” is confined in its use to conduct that is of a genuinely terrorist nature. The three-step characterization of conduct to be prevented - and if not prevented, punished - in the fight against terrorism in Security Council resolution 1566 (2004) takes advantage of the currently agreed upon offences concerning aspects of terrorism by using these as trigger-offences and goes on to establish an appropriate threshold by requiring that such offences are also: committed with the intention of causing death or serious bodily injury, or the taking of hostages; and for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act.

Conduct in support of terrorist offences

43. The latter approach is not inconsistent with a number of instructions by, and recommendations of, the Security Council concerning conduct in support of terrorist offences. By way of example, and although not phrased in mandatory language, Security Council resolution 1624 (2005) calls on States to prohibit and prevent the incitement to commit a terrorist act or acts.¹² Again, the resolution does not define what terrorist acts are. The answer lies in making reference to the three-step cumulative methodology of resolution 1566 (2004). Only the incitement of conduct (which itself meets the three characteristics) should be treated as the “incitement to terrorism”. While the incitement of other criminal conduct might be unlawful, and making it punishable may in some cases even be required under article 20, paragraph 2, of the International Covenant on Civil and Political Rights or article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, such incitement should not be characterized as “incitement to terrorism”.

44. This confinement of “conduct in support” type offences and State obligations by reference back to the three-step cumulative methodology of resolution 1566 (2004) is equally applicable to the Security Council’s calls upon States:

- (a) To themselves refrain from providing any form of support to those involved in terrorist acts;¹³
- (b) To prevent the commission of terrorist acts;¹⁴
- (c) To bring to justice any person who supports, facilitates, participates in or attempts to participate in the financing, planning, preparation or commission of terrorist acts or who provides safe haven to terrorists;¹⁵
- (d) To prevent the movement of terrorists;¹⁶
- (e) To ensure, prior to the granting of refugee status, that the person claiming asylum has not planned, facilitated or participated in terrorist acts;¹⁷ and
- (f) To prevent and suppress all active and passive support to terrorism.¹⁸

Definitional requirements of the rule of law and human rights law

45. The Special Rapporteur is of the view that a universal, comprehensive and precise definition of terrorism would be the best cure to the problems resulting from the current absence of such a definition. Meanwhile, human rights law and the rule of law impose certain requirements that help in countering the negative consequences of the lack of an agreed definition of terrorism. Article 15, paragraph 1, of the ICCPR, which covers a non-derogable right under the Covenant, is particularly instructive, providing 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

46. The first requirement of article 15, paragraph 1, is that the prohibition of terrorist conduct must be undertaken by national or international prescriptions of law. To be “prescribed by law” the prohibition must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct.¹⁹ Terrorism offences should also plainly set out what elements of the crime make it a terrorist crime. Similarly, where any offences are linked to “terrorist acts”, there must be a clear definition of what constitutes such acts.

47. Arising from the need for precision, and to avoid use of the fight against terrorism as an excuse to unnecessarily extend the reach of criminal law, it is essential that offences created under

counter-terrorist legislation, along with any associated powers of investigation or prosecution, be limited to countering terrorism. Crimes not having the quality of terrorism (as earlier characterized), regardless of how serious, should not be the subject of counter-terrorist legislation. Nor should conduct that does not bear the quality of terrorism be the subject of counter-terrorist measures, even if undertaken by a person also suspected of terrorist crimes. The Special Rapporteur reaffirms earlier statements of the Sub-Commission's Special Rapporteur on terrorism and human rights to the same effect.²⁰

48. Outside the scope of article 15 of the ICCPR, but a matter required by article 26 of the same Covenant and by the rule of law, is the need for any legal prescription to respect the principle of non-discrimination and equality before the law. Similarly, article 4, paragraph 1, of the ICCPR provides that any derogation of rights in times of an emergency threatening the life of the nation may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.²¹ The General Assembly and Commission on Human Rights have, in their latest resolutions on the protection of human rights and fundamental freedoms while countering terrorism, stressed that the enjoyment of rights must be without distinction upon such grounds.²²

49. The final element of article 15 of the International Covenant on Civil and Political Rights concerns non-retroactivity. Any provision defining a crime must not criminalize conduct that occurred prior to its entry into force as applicable law. Likewise, any penalties are to be limited to those applicable at the time that any offence was committed and, if the law has subsequently provided for the imposition of a lighter penalty, the offender must be given the benefit of the lighter penalty.

Conclusion

50. The absence of a universal, comprehensive and precise definition of "terrorism" is problematic for the effective protection of human rights while countering terrorism. It is encouraging to see the continued work of the Ad Hoc Committee established under General Assembly resolution 51/210 on a draft comprehensive convention on international terrorism. It is essential, in the meantime, to ensure that the term "terrorism" is confined in its use to conduct that is genuinely of a terrorist nature. The three-step characterization of conduct to be prevented - and if not prevented, punished - in the fight against terrorism in Security Council resolution 1566 (2004) is indispensable in that regard. "Terrorist offences" should be confined to instances where the following three conditions cumulatively meet: (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism. Similarly, any criminalization of conduct in support of terrorist offences should be restricted to conduct in support of offences having all the above characteristics. In the prohibition of terrorist conduct, it is important for States to ensure that prescriptions to that effect are accessible, formulated with precision, applicable to counter-terrorism alone, non-discriminatory, and non-retroactive.

IV. THE ROLE OF HUMAN RIGHTS IN THE REVIEW OF MEMBER STATE REPORTS TO THE COUNTER-TERRORISM COMMITTEE (CTC) OF THE SECURITY COUNCIL, AND COOPERATION WITH THE CTC

The mandate of the Counter-Terrorism Committee

51. The Counter-Terrorism Committee (CTC) was established pursuant to Security Council resolution 1373 (2001), in the immediate aftermath of the atrocious terrorist attacks of 11 September 2001. The Security Council, acting under Chapter VII of the Charter of the United Nations, identified a number of Member State obligations in countering terrorism and established the CTC for the purpose of monitoring, inter alia by considering reports, the performance of Member States in implementing the resolution.²³

52. Resolution 1373 (2001) makes only one passing reference to human rights, in a very specific context.²⁴ Consequently, it could be argued, and has indeed been argued, that the CTC has no mandate to monitor the compliance of counter-terrorism measures with human rights norms when those measures are implemented by States pursuant to the resolution. Besides, and rightly so, the need for a human-rights assessment by the CTC is said to be subsidiary in relation to the work of treaty-based and other human rights monitoring bodies and mandates within the United Nations framework.

53. That said, the Special Rapporteur wishes to emphasize that Security Council resolution 1456 (2003), adopted at the level of Ministers of Foreign Affairs, includes the well-known formulation according to which “States must 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”.²⁵ This unconditional affirmation of human rights obligations forms a part of the context in which the parts of the resolution that refer to the work of the CTC must be read. The same resolution encourages the CTC, inter alia, to bear in mind and work towards the sharing of “best practice” in the fight against terrorism.²⁶ As the notion of “best practice” also appears in the Commission on Human Rights resolution establishing the mandate of the Special Rapporteur,²⁷ the Special Rapporteur asserts that human rights conformity must be seen as one of the defining characteristics of “best practice” in the field of counter-terrorism measures.

54. Furthermore, and perhaps more importantly, Security Council resolution 1624 (2005) explicitly conferred a human rights mandate on the CTC by directing it to include in its dialogue with Member States the implementation of this new resolution,²⁸ which includes a number of references to the requirement that counter-terrorism measures must comply with human rights.²⁹ Read in the context of the resolution as a whole, the new task of the CTC clearly includes reviewing the human rights conformity of measures taken by Member States.

Dialogue between the Special Rapporteur and the CTC

55. In Commission on Human Rights resolution 2005/80, establishing the mandate of a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the mandate-holder is entrusted with the task of developing a regular dialogue and discussing possible areas of cooperation with all relevant actors, in particular

the CTC, fully respecting the respective mandates of these actors and with a view to avoiding duplication of effort. By letter dated 23 September 2005 the Special Rapporteur approached the chairperson of the CTC, proposing that the Special Rapporteur could meet with and address the CTC in order to give a short presentation of current trends in States' counter-terrorism measures as to their conformity with human rights, and to explore possibilities for cooperation between the CTC and its Executive Directorate (CTED) and the Special Rapporteur's mandate in four areas:

(a) The questions and comments by the CTC in the consideration of State reports in relation to human-rights-sensitive issues and in order to avoid misunderstandings or abuse;

(b) The possible involvement of the Special Rapporteur in the CTC's consideration of State reports or, alternatively, direct access to the comments given by the CTC;

(c) Working together towards "model laws" or for the identification of "best practices" while countering terrorism; and

(d) The possibility of parallel, coordinated recommendations in the field of technical assistance, advisory services or country visits.

56. In a meeting with the members of the CTC, arranged in New York on 24 October 2005, the Special Rapporteur outlined some of the "current trends" that in his view would deserve increased interaction between the CTC and the human rights world:

(a) First of all, the very old trend of States resorting to the notion of "terrorism" to stigmatize political, ethnic, regional or other movements they simply do not like, is also very much a new trend. What is new is that, since September 2001, the international community seems to have become rather indifferent to the abuse of the notion of terrorism. The result is that calls for and support for counter-terrorism measures by the international community may in fact legitimize oppressive regimes and their actions even if they are hostile to human rights. A common international definition of terrorism would be the best cure to this illness but, in the meantime, the main point of reference remains human rights law, primarily article 15 of the International Covenant on Civil and Political Rights, which contains a non-derogable provision on the requirements that criminal law must meet: all crimes must be defined by law in a manner that is precise and foreseeable, that specifies the applicable penalty and that can be applied only in respect of acts that were committed after the enactment and entry into force of the law;

(b) Secondly, perhaps the most alarming "new trend" related to counter-terrorism measures is the increased questioning or compromising of the absolute prohibition of torture and all forms of cruel, inhuman or degrading treatment. This trend manifests itself in many different forms. Some have called for torture in so-called "ticking bomb" situations. Some States try to define torture narrowly in order to distinguish it from other forms of cruel, inhuman or degrading treatment, disregarding the fact that all these practices are subject to an absolute and non-derogable prohibition under ICCPR, article 7. Further, there are practices that amount to torture by proxy, for instance the dumping of crime suspects for interrogation to countries that are known widely to practise torture. Moreover, there are proposals to compromise the rule of non-refoulement through calls for a "balancing approach", through diplomatic assurances, or through amendments to human rights treaties or calls to change their established interpretation;

(c) Thirdly, although incitement to commit serious crimes is defined as a criminal offence in almost every country, in the current era of unpredictable terrorist attacks such as suicide bombings within democratic and traditionally peaceful societies there is now a trend to move beyond actual incitement, in order to criminalize the “glorification” or “apology” of terrorism, or the publication of information that may be useful in the commission of acts of terrorism. As a sound response which would respect human rights, the Special Rapporteur wishes to make reference to the Council of Europe Convention on the Prevention of Terrorism which, in its article 5, includes a definition of “public provocation” of terrorism, based on a double requirement of a subjective intent to incite (encourage) the commission of terrorist offences and an objective danger that one or more such offences would be committed;

(d) A fourth current trend in counter-terrorism measures by States relates to various forms of tightening immigration controls, including through so-called (racial, ethnic or religious) profiling, sharing of information between countries, and new forms of long-term or even indeterminate detention. Many countries are also moving towards eliminating the suspensive effect of appeals against negative asylum decisions, in spite of criticism and jurisprudence by human rights bodies such as the European Court of Human Rights and the Human Rights Committee requiring suspension of the implementation of those decisions, at least whenever an arguable claim of a human rights violation has been made;

(e) As a fifth and final trend, terrorism has largely replaced drug-related crime as the primary public justification for extending the powers of the police in the investigation or prevention of crime. Many of the traditional safeguards, such as targeting only persons suspected of having committed crimes and prior judicial authorization, are being disposed of in the fight against terrorism even if their abandonment is not necessarily confined to terrorist offences.

Consideration by the CTC of Member State reports pursuant to resolution 1373 (2001)

57. In order to assess the role of the CTC in promoting methods of counter-terrorism that are in conformity with human rights, insensitive to human rights or, in the worst case, hostile to human rights, the Special Rapporteur went through most of the roughly 640 reports submitted by Member States pursuant to resolution 1373 (2001). Although in most cases the questions or comments by the CTC as quoted or paraphrased in subsequent reports by States were of a technical nature, without apparent human rights implications, there were also instances where reports by States indicated the contrary. As a methodological observation, it needs to be emphasized that it was not the authentic comments or questions by the CTC that were studied but, rather, what was looked at was the form in which they were reproduced in subsequent reports by the States concerned. For the purpose of assessing the human rights implications of the questions and comments by the CTC, this is perhaps even more important than what the CTC actually said since the subsequent reports by States indicate how States understood the message given to them by the CTC. Examples of four types of different messages received by States from their interaction with the CTC are presented below. Many of these examples are related to the current trends in human rights implications of counter-terrorism measures that are described above.

58. The first category could be described as a “best practice” from the perspective of the Special Rapporteur’s mandate. These are cases where the CTC has been explicitly promoting responses to terrorism that are in conformity with human rights. The CTC expressed interest in the drafting in Belgium of new counter-terrorism legislation that would at the same time preserve human rights.³⁰ It also expressed a question to Kenya on the compliance with human rights of its counter-terrorism measures.³¹ Even though these findings are few in number, they are a promising sign that the CTC is willing to give recognition to and promote responses to terrorism that respect human rights.

59. The second category consists of examples where the implementation of CTC recommendations, or of what was perceived as such, has been met with human-rights-based criticism or resistance at the domestic level. There have been occasions where States have responded to the CTC advising that their human rights obligations have not permitted implementation of recommendations received. This seems to be the case with regard to Paraguay, where the CTC appears to have engaged in a positive dialogue for the purpose of putting into operation counter-terrorism measures that at the same time comply with human rights.³² This example highlights some of the sensitivities involved in designing effective counter-terrorism measures in countries mindful of their record of past human rights violations. The exchanges with Peru³³ bear similar characteristics. The CTC appears to have also understood a human rights clause in the Austrian Penal Code as a political exception for the prosecution of terrorist acts and, hence, as incompatible with Council resolution 1373 (2001). In its subsequent report³⁴ Austria defended its law with a reference to the need to comply with human rights in the fight against terrorism and the possibility of avoiding impunity for terrorist crimes.

60. The third and perhaps most problematic category consists of instances where subsequent reports by a State suggest that the CTC’s questions and recommendations to the State in question might have been insensitive to human rights. It appears that the CTC, in its dialogues, has been routinely asking questions about a long list of crime investigation techniques that manifestly constitute interferences with the right to privacy and family life. From a human rights standpoint, the crucial issue in this regard is whether such measures are necessary to achieve a legitimate aim, such as the investigation of a crime, and whether they are at the same time proportionate to the resulting interference with privacy and family. Against this background, it is problematic that the CTC seems to be recommending that the potential range of investigative techniques (such as “controlled delivery”, pseudo-offences, anonymous informants, cross-border pursuits, bugging of private and public premises, interception of confidential communications on the Internet and telephone, etc.) should be maximized. At least sometimes, safeguards required by human rights law (such as the requirement that only actual crime suspects may be subjected to the measures, the requirement of prior judicial authorization, and the requirement of limited duration) that may be in place under domestic law should be relaxed. Unless the applicable human rights standards are referred to in this type of question, States may get the impression that they are requested to expand the investigative powers of their law enforcement authorities at any cost to human rights. In particular, it is a matter of concern to the Special Rapporteur that this line of questions has been addressed also to regimes whose law enforcement authorities are known to violate human rights. Law enforcement practices that violate human rights do not deserve to be legitimized by the Security Council. Belarus can serve as example of a case where

the questions or comments by the CTC have been used in a subsequent report to legitimize the country's practices in the field of crime investigation,³⁵ despite past criticism voiced by human rights mechanisms.³⁶

61. Other examples in this category include the following cases:

(a) Judging by subsequent State reports, States often seem to be confused about the important distinction between exclusion from refugee status and the physical exclusion or deportation of a person from the territory of a country when the person in question is guilty or suspected of terrorist offences.³⁷ From the perspective of ICCPR, article 7, it must be emphasized that no one may be deported to face torture or any form of inhuman, cruel or degrading treatment or punishment in another country, even when the exclusion clauses of the 1951 Convention on the Status of Refugees apply;³⁸

(b) With regard to a report by Australia following recommendations of the CTC, it appears that the latter had not taken into account the position of the Human Rights Committee³⁹ in the interpretation of article 6 of the ICCPR, namely that a country that itself has abolished capital punishment violates the right to life if it deports a person to another country where he or she may face the death penalty;⁴⁰

(c) Some of the State reports indicate that the States in question have understood that the CTC suggested that naturalized persons should not be allowed to change their name⁴¹ or to enter into a "marriage of convenience".⁴² These are matters related to the human right to respect for privacy and family life;

(d) When dealing with a report by Colombia, the CTC apparently identified persons providing medical treatment to terrorists as being covered by paragraph 1 (c) of resolution 1373 (2001) and called for the freezing of their assets.⁴³ In the view of the Special Rapporteur, this represents too broad a reading of paragraph 1 (c).

62. Finally, a review of State reports to the CTC reveals that in its consideration of earlier reports by the same States the CTC has shown little, if any, interest in the definition of terrorism at the national level. This presents a problematic "message", as it is well known that States frequently apply terrorism definitions that either do not meet the requirements of ICCPR article 15 (*nullum crimen sine lege, nulla poena sine lege*, non-retroactivity) or, even worse, are designed in bad faith to outlaw political opposition, religious entities, or minority, indigenous or autonomy movements that have never resorted to violence against persons. If the human-rights-conformity of national terrorism definitions is not reviewed, and the restriction of the use of the term to acts of a genuinely terrorist nature ensured, the CTC may end up being understood as encouraging the application of measures designed to implement resolution 1373 (2001) in respect of anything that under national law qualifies as "terrorism", however defined.

Conclusion

63. With the adoption of Security Council resolution 1624 (2005), it has become explicit that the Counter-Terrorism Committee has a mandate to review that counter-terrorism measures by Member States are compatible with human rights. Nevertheless, on the basis of his study on the

reports submitted by States to the CTC, the Special Rapporteur remains concerned that the message that States receive from the consideration of their reports by the CTC has not always been sufficiently clear in respect of the duty to respect human rights while countering terrorism. In some instances, States may even have understood the CTC as promoting measures of counter-terrorism irrespective of their adverse consequences for human rights. The Special Rapporteur wishes to continue his dialogue with the CTC and the Counter-Terrorism Executive Directorate. In particular, joint identification and compilation of “best practices” in the field of effective and human rights compatible responses to terrorism is an area where the Special Rapporteur looks forward to continued and intensified cooperation.

V. FURTHER ISSUES WITHIN THE SPECIAL RAPPORTEUR’S MANDATE

Victims of terrorism and “root causes” of terrorism

64. As a reflection on the full title of his mandate, the Special Rapporteur wishes to point out that the notion of the “promotion and protection of human rights and fundamental freedoms while countering terrorism” does not merely refer to the risk of human rights violations as a side effect of concrete action in the fight against terrorism. The comprehensive remit of his mandate also includes issues such as sustainable strategies to prevent acts of terrorism, inter alia through addressing the “root causes” of terrorism - or, more appropriately, “conditions conducive to terrorism” - and calling for effective protection for the human rights of victims of terrorism and their families.

65. As to any argument that a discussion on “root causes” of or even “conditions conducive” to terrorism would be counterproductive, or even amount to a justification of acts of terrorism, the Special Rapporteur takes the view that efforts to explain, inter alia on the basis of multidisciplinary scientific research, why some movements or individuals resort to terrorism, will *not* amount to legitimizing or justifying terrorism, provided that such undertakings are accompanied by a clear and uncompromised condemnation of all acts of terrorism. Acts of terrorism are never committed without the morally unjustifiable decision of a morally responsible individual to resort to lethal or otherwise grave violence against civilians, or to other acts of terrorism as properly defined. Hence, efforts to understand why some individuals resort to terrorism as a tactic do not represent the slightest degree of sympathy in respect of such immoral and inexcusable decisions by the individuals in question.

66. As to victims of terrorism, the Special Rapporteur wishes to promote a human-rights-based approach to the issue and will return to the matter in his subsequent reports. In his view, victims of terrorism and their families have a human right to an effective remedy, and the corresponding State obligations include a duty to exclude any possibility of impunity for acts of terrorism.

The issue whether non-State actors can violate human rights

67. Various resolutions adopted by intergovernmental organizations in response to the threat of terrorism apply different approaches to the issue of whether the perpetrators of acts of terrorism may be described as “violating” human rights. Variation in the wording of such resolutions reflects different doctrinal and political positions on the question of whether only

States may commit human rights violations, or whether such violations can also be attributed to non-State actors. The point of departure of the Special Rapporteur in this discussion is the wording used in the Commission resolution that establishes his own mandate. According to the preambular part of resolution 2005/80, acts, methods and practices of terrorism in all its forms and manifestations are activities “aimed at the destruction of human rights”. This can be contrasted, on the one hand, with another part of the preamble of the same resolution where the Commission deplors the occurrence of human rights “violations” - apparently by States - in the context of the fight against terrorism, and, on the other hand, with Commission resolution 2004/44 which clearly represents the position that also terrorist groups can violate human rights.⁴⁴

68. The Special Rapporteur is building his actions on the wording of the resolution establishing his mandate, hence condemning all acts of terrorism as being aimed at the destruction of human rights. He is mindful, however, of the fact that the general public may feel perplexed by the distinction between this language and a more straightforward reference to human rights violations. What the Special Rapporteur wishes to emphasize in this context is that the legally binding normative framework of human rights law is established in human rights treaties. Those treaties are clearly based on human beings as their beneficiaries and the States parties as bearers of corresponding obligations. Further, all the monitoring mechanisms under human rights treaties are geared towards making States accountable for human rights violations. In the exercise of the competencies of human rights treaty bodies, a finding of a human rights violation represents the end result of the application of the treaty in a concrete case or situation, and includes an attribution of State responsibility for a breach of its obligations. Under other, non-treaty-based procedures, such as the special procedures of the Commission, a finding of a human rights violation entails a pronouncement that a State has acted in breach of its obligations under international human rights law.

69. No similar treaty-based or other monitoring mechanisms generally exist in respect of non-State actors. Hence, even assuming that the notion of human rights violations could meaningfully be applied in respect of non-State actors, there are for the time being no mechanisms through which the actors in question could be made accountable. To a certain limited extent, the development of international criminal law has come to serve as a substitute for the inability of treaty-based or other human rights mechanisms to address situations of non-enjoyment or outright destruction of human rights caused by non-State actors. For instance, in the Rome Statute of the International Criminal Court, many of the crimes for which an individual can be prosecuted and punished have a direct destructive effect on the enjoyment of human rights by the victims of those crimes. In some instances, the Rome Statute may be applicable in respect of specific acts of terrorism. In many other cases, acts of terrorism are defined as “international crimes” in the broader sense, meaning that international treaties require their States parties to criminalize the acts in question.

70. The Special Rapporteur supports the view that every human being is entitled to the full respect of his or her human rights and fundamental freedoms, in respect of which not only States, but also other actors, must not act in a way that would render nugatory the rights in question. This is true, in particular, with respect to those rights and freedoms that belong to the category of fundamental standards of humanity,⁴⁵ representing the traditions of humanitarian law and human rights law and applicable in respect of all actors in all circumstances, including during states of emergency or armed conflict. The fact that acts of terrorism are aimed at and result in the

destruction of human rights calls for intensified work by the international community to promote awareness of the existence and contents of fundamental standards of humanity, and for the creation of mechanisms for their effective implementation, also in respect of non-State actors.

71. The Special Rapporteur will closely follow the work of the Commission on the issue of fundamental standards of humanity and will, in due course, address the matter in his own reports.

VI. CONCLUSIONS

72. In chapter III of the report it was explained how the absence of a universal, comprehensive and precise definition of “terrorism” was problematic for the effective protection of human rights while countering terrorism. In its absence, it was essential to ensure that the term was used solely with reference to conduct of a genuinely terrorist nature. “Terrorist offences” should be confined to instances where the following three conditions cumulatively meet: (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism. Similarly, any criminalization of conduct in support of terrorist offences should be restricted to conduct in support of offences having all these characteristics. In the prohibition of terrorist conduct, it is important for States to ensure that prescriptions to that effect are adequately accessible, formulated with precision, applicable to counter-terrorism alone, non-discriminatory and non-retroactive.

73. As elaborated in chapter IV above, the Counter-Terrorism Committee of the Security Council now has an explicit mandate to monitor the compliance with human rights of counter-terrorism measures taken by Member States. The Special Rapporteur remains concerned that States are not receiving a clear enough message from the Committee concerning their duty to respect human rights while countering terrorism. The Special Rapporteur wishes to continue his dialogue with the Committee and the Counter-Terrorism Executive Directorate including, in particular, the joint identification and compilation of “best practices” in the field of effective and human rights compatible responses to terrorism.

74. As matters included within his broad mandate, the Special Rapporteur also intends to give further consideration to the position and human rights of victims of terrorism, the conditions conducive to terrorism, and the question of non-State actors and fundamental standards of humanity.

Notes

¹ See the report by the independent expert, E/CN.4/2005/103.

² Security Council resolution 1269 (1999), paragraph 1, and resolution 1566 (2004), paragraph 3.

- ³ General Assembly resolution 51/210 (1996), paragraph 9. This mandate continued to be renewed and revised on an annual basis by the General Assembly in its resolutions on the topic of measures to eliminate international terrorism.
- ⁴ See A/59/894, the Sixth Committee report to the General Assembly, Measures to eliminate international terrorism. The report of the coordinator on the results of the informal consultations on a draft comprehensive convention on international terrorism appears as appendix I to the latter report; the draft convention appears as appendix II.
- ⁵ Sub-Commission on the Promotion and Protection of Human Rights, *Final Report of the Special Rapporteur on Terrorism and Human Rights*, E/CN.4/Sub.2/2004/40 (2004). See also the report of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, A/59/565, paragraphs 157-164.
- ⁶ Council of Europe Convention on the Prevention of Terrorism, adopted 16 May 2005, *Council of Europe Treaty Series* No. 196. The list of conventions mirrors the list contained within the International Convention for the Suppression of the Financing of Terrorism, but also includes the latter Convention.
- ⁷ Security Council resolution 1566 (2004), paragraph 3; report of the Secretary-General's High-level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility", A/59/565 (2004), paragraph 164 (d).
- ⁸ Convention on the Marking of Plastic Explosives for the Purpose of Detection, opened for signature 1 March 1991, ICAO document 9571 (entered into force 21 June 1998), articles 2 and 3 (1).
- ⁹ Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature 14 September 1963, 704 *UNTS* 219 (entered into force 4 December 1969), articles 1 (1) and (4), and 3 (2).
- ¹⁰ See Security Council resolutions 1269 (1999), preambular paragraph 1; 1373 (2001), paragraph 4; 1377 (2001), paragraph 6; 1456 (2002), preambular paragraphs 3 and 6; and 1540 (2004), preambular paragraph 8. See also General Assembly resolutions 3034 (XXVII) (1972), paragraph 1; 31/102 (1976), paragraph 1; 32/147 (1977), paragraph 1; 34/145 (1979), paragraph 1; 36/109 (1981), paragraph 1; 48/122 (1993), preambular paragraph 7; 49/185 (1994), preambular paragraph 9; 50/186 (1995), preambular paragraph 12; 52/133 (1998), preambular paragraph 11; 54/164 (2000), preambular paragraph 13; 56/160 (2002), preambular paragraph 18; 58/136 (2003), preambular paragraph 8; 58/174 (2004), preambular paragraph 12; 59/153 (2004), preambular paragraph 10; and 59/194 (2004), preambular paragraph 3 and paragraphs 2, 4 and 14. See also Commission on Human Rights resolutions 2001/37, preambular paragraph 16 and paragraph 2; and 2004/44, preambular paragraph 7.

¹¹ International Convention for the Suppression of Acts of Nuclear Terrorism, adopted and opened for signature under General Assembly resolution 58/290, article 2, paragraph 1. See also paragraphs 2 to 4 of article 2, which set out party and associated offences.

¹² Security Council resolution 1624 (2005), paragraphs 1 (a) and (b). See also Security Council resolution 1373 (2001), paragraph 5 (3), which: “*Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations”.

¹³ Security Council resolution 1373 (2001), paragraph 2 (a).

¹⁴ *Idem*, paragraph 2 (b).

¹⁵ *Idem*, paragraph 2 (c), (d) and (e), resolution 1566 (2004), paragraph 2, and resolution 1456 (2003), paragraph 3.

¹⁶ *Idem*, paragraph 3 (f) and (g).

¹⁷ *Idem*, paragraph 2 (h).

¹⁸ Security Council resolution 1456 (2003), paragraph 1.

¹⁹ These two requirements were held to flow from the expression “prescribed by law” by the European Court of Human Rights in the *Sunday Times* case of 1978: *Sunday Times v. United Kingdom* (1978) 58 *ILR* 491, 524-527. See also: Human Rights Committee, *States of Emergency (Article 4)*, CCPR general comment No. 29 of 2001, reprinted HRI/GEN/1/Rev.6 at 186 (2003), paragraph 16; Sub-Commission on the Promotion and Protection of Human Rights, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4 (1985), paragraphs 15 and 17; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 (22 October 2002), paragraph 53; and Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism* (Council of Europe Publishing, 2002), article III.

²⁰ Sub-Commission on the Promotion and Protection of Human Rights, *Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, E/CN.4/Sub.2/2005/39, paragraph 33. See also the Sub-Commission Special Rapporteur’s final report of 2004, *ibid.*, paragraph 33 (c), and: the Council of Europe guidelines, *ibid.*, article III (2); the Inter-American Commission on Human Rights report, *ibid.*, paragraphs 51 and 55; and the Siracusa Principles, *ibid.*, paragraph 17.

²¹ See also Human Rights Committee, general comment No. 29, *ibid.*, paragraphs 8 and 16.

²² General Assembly resolution 59/191 (2004), preambular paragraph 12, and Commission on Human Rights resolution 2005/80, preambular paragraph 15.

²³ See Security Council resolution 1377 (2001), paragraph 6.

- ²⁴ *Idem*, paragraph 3 (f).
- ²⁵ Security Council resolution 1456 (2003), annex, paragraph 6.
- ²⁶ *Idem*, paragraphs 4 (iii) and 8.
- ²⁷ Commission on Human Rights resolution 2005/80, paragraph 14 (c).
- ²⁸ Security Council resolution 1624 (2005), paragraph 6.
- ²⁹ Security Council resolution 1624 (2005), in particular paragraph 4.
- ³⁰ S/2004/156. See section 1.3.
- ³¹ S/2004/181. See “Introduction” where the question by the CTC is quoted.
- ³² S/2003/700, S/2004/375, S/2005/516. In the last-mentioned fifth report, specific mention is made of the involvement of OHCHR expertise in the provision of technical assistance to the country in order to secure that its counter-terrorism legislation would be compatible with human rights. This can be contrasted with the following statement in the fourth report (S/2004/375): “At present, consideration of the preliminary draft anti-terrorism act by the National Congress has been suspended, and its approval is thought to be unlikely in the short and medium terms owing to the resistance it encountered at the time of its proposal at all levels of Paraguayan civil society, and in the press in general, as it was associated with other legislative instruments that resembled those of the period from 1954 to 1989 in which an authoritarian regime governed Paraguay. Like the preliminary draft act, the previously established provisions concerned the creation of special courts within the judiciary to try terrorism-related offences. It also established other provisions that, at the time of their submission to the legislative authorities, were considered to violate basic human rights with regard to individual freedom.”
- ³³ S/2003/896, S/2004/589. In both of these reports, Peru confirmed to the CTC that the fact that its Constitutional Court had declared national counter-terrorism laws unconstitutional for breaches of human rights, did not affect the commitment of Peru to implement resolution 1373. As expressed in the first mentioned report: “Declaring the aforementioned laws unconstitutional has had no negative impact on the implementation of resolution 1373 (2001), as the purpose was to repeal the legal provisions which violated the Political Constitution of Peru in substance and form, as well as international human rights standards. By rectifying this situation, national legislation to combat terrorism has been improved and brought into line with international human rights standards.”
- ³⁴ S/2005/231. See section 1.1 of the report.
- ³⁵ S/2004/255. See section 1.15 of the report where the questions by the CTC are quoted to include the following: “[C]ould the Republic of Belarus please indicate whether its laws permit, for investigative and evidentiary purposes in the fight against terrorism, the use of methods such as undercover operations; controlled deliveries; pseudo-purchase techniques; the use of informants; the use of other forms of encouragement to persuade persons to supply information

to the competent authorities; and the monitoring and/or the interception of communications (such as the Internet, radio, audio-visual media and other advanced communications techniques). Are there any impediments to the use of intelligence data in criminal investigation?"

³⁶ Reference is made to the fact that Belarus has not submitted a report under the ICCPR since 1995 and that in its most recent (1997) concluding observations the Human Rights Committee expressed its concern about reports of arbitrary infringements of the right to privacy, in particular of abuses by the authorities in regard to wire-tapping and house searches, and the absence of judicial review of such activities (CCPR/C/79/Add.86, para. 15).

³⁷ Bahrain (S/2003/1043), El Salvador (S/2002/729), Germany (S/2002/1193), Latvia (S/2002/1370), and Slovakia (S/2002/730).

³⁸ See *Mansour Ahani v. Canada* (Communication No. 1051/2002), Views by the Human Rights Committee, 29 March 2004. A similar norm is expressed in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden* (Communication No. 233/2003), Views by the Committee against Torture, 20 May 2005.

³⁹ See *Roger Judge v. Canada* (Communication No. 829/1998), Views by the Human Rights Committee, 5 August 2003.

⁴⁰ S/2003/1204. See section 1.6 where the question by the CTC is quoted.

⁴¹ Australia (S/2003/1204). See section 1.13 where the question by the CTC is quoted.

⁴² South Africa (S/2004/170). See section 1.14 where the question by the CTC is quoted.

⁴³ S/2004/403. See section 1.9 where the question by the CTC is quoted.

⁴⁴ See Commission on Human Rights resolution 2004/44. In the preamble, the Commission expresses serious concern "at the gross violations of human rights perpetrated by terrorists". In paragraph 5, in turn, the Commission "Welcomes the views expressed by the Secretary-General in his report to the General Assembly (A/58/533), considering that terrorism by itself is a violation of human rights".

⁴⁵ See Commission on Human Rights decision 2004/118.
