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**APPLICATION DE LA RÉOLUTION 60/251 DE L'ASSEMBLÉE
GÉNÉRALE DU 15 MARS 2006 INTITULÉE
«CONSEIL DES DROITS DE L'HOMME»**

Rapport du Rapporteur spécial sur la promotion et la protection des droits de l'homme
et des libertés fondamentales dans la lutte antiterroriste, Martin Scheinin

**AUSTRALIE: ÉTUDE SUR LE RESPECT DES DROITS DE L'HOMME
DANS LA LUTTE CONTRE LE TERRORISME***

* Le présent résumé est distribué dans toutes les langues officielles. Le corps du rapport, qui figure en annexe, est distribué uniquement dans la langue dans laquelle il a été présenté.

Résumé

Le Rapporteur spécial sur la promotion et la protection des droits de l'homme et des libertés fondamentales dans la lutte antiterroriste, Martin Scheinin, présente son étude sur la législation et la pratique australiennes en matière de lutte antiterroriste. Le chapitre I traite du cadre dans lequel s'inscrit la lutte contre le terrorisme en Australie, de la législation applicable et de questions plus vastes se rapportant à la réforme législative et à la protection des droits de l'homme. Le chapitre II examine la façon dont la législation australienne caractérise le terrorisme, en mettant l'accent sur les modalités selon lesquelles l'Australie donne effet aux indications du Comité des sanctions concernant Al-Qaida et les Taliban au sujet des listes d'entités, et sur les définitions données par la loi aux actes et aux organisations terroristes. Le chapitre III est consacré à la question de l'incitation et de la sédition. Les chapitres IV et V analysent les mesures applicables aux enquêtes, à la détention et au contrôle en vertu de la législation australienne, notamment les compétences de l'Organisation australienne de renseignement aux fins de la sécurité, et les nouveaux régimes applicables à la détention provisoire et aux ordonnances de contrôle. Le chapitre VI aborde des questions touchant l'immigration, le contrôle des frontières et le statut de réfugié. Le chapitre VII contient les conclusions et observations du Rapporteur spécial.

ANNEX

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

Australia: Study on Human Rights Compliance While Countering Terrorism

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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 established by the Commission on Human Rights in its resolution 2005/80. The resolution calls upon the Special Rapporteur to “make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism” and to “identify, exchange and promote best practices on measures to counter terrorism that respect human rights and fundamental freedoms” (paras. 14 (a) and (c), respectively). To that end, the Special Rapporteur, whose mandate has been assumed by the Human Rights Council, pursuant to General Assembly resolution 60/251, is undertaking a series of comprehensive thematic and country/region-specific studies. As part of this series of studies, Australia’s counter-terrorism legislation and practice has been considered with a view to identifying the compliance of these with human rights standards.

2. This study was undertaken through an interactive written process.¹ The Special Rapporteur identified a list of preliminary questions, which was provided to the Government of Australia, the academic community in Australia, as well as non-governmental organizations. Based upon information provided in response to those questions, further supplementary questions were presented to the Government of Australia. All information provided was used to assist in the preparation of this report, an advance draft of which was given to the Government for comment. The Special Rapporteur expresses his gratitude to the Government of Australia for its assistance in the conduct of this study, as well as those within civil society who provided him with information and submissions.

3. Chapter I sets out an overview of Australia’s counter-terrorism framework, its legislation, and broader issues of legislative reform and human rights protection. Chapter II includes the means by which terrorism is characterized under Australian law, focusing upon the means by which it acts upon the listing of entities by the Security Council Al-Qaida and Taliban Sanctions Committee, and the legislative definitions of terrorist acts and terrorist organizations. Chapter III is dedicated to the issues of incitement and sedition. Chapters IV and V contain analyses of investigative, detention and control measures under Australian law, including powers of the Australian Security Intelligence Organisation, and the new regimes for preventive detention and control orders. Chapter VI sets out issues relating to immigration, border control and refugee status. Chapter VII contains the Special Rapporteur’s conclusions and observations.

I. AUSTRALIA’S COUNTER-TERRORISM FRAMEWORK

4. Australia is a party to 11 of the 12 extant terrorism-related conventions, and a signatory to the recently adopted International Convention for the Suppression of Acts of Nuclear Terrorism. Australia has reported that it is committed to accession to the Convention on the Marking of Plastic Explosives for the Purpose of Detection, with the Law and Justice Legislation Amendment (Marking of Plastic Explosives) Bill 2006 having been recently introduced. Following the release of an exposure Bill in December 2005, Australia has also introduced the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 for the purpose of implementing key aspects of the Revised Financial Action Task Force 40 Recommendations (adoption of which was urged by the Security Council in its resolution 1617 (2005), para. 7).

A. Australia's domestic law on counter-terrorism

5. The obligations under the conventions to which Australia is party have been implemented into domestic law through various Acts and Regulations of the Australian Commonwealth and States.² Australia's counter-terrorism framework is set out within those and various other items of legislation, including:

(a) Legislation amending the Crimes Act 1914 and the Criminal Code Act 1995 for the purposes of strengthening powers of law enforcement authorities, establishing terrorism offences, addressing issues of bail and parole with respect to those offences, and establishing procedures for preventative detention and control orders;³

(b) Legislation amending the Passports Act 1938, and dealing with various other aspects relating to border security;⁴ and

(c) Legislation setting out, and extending, the jurisdiction and powers of the Australian Security Intelligence Organisation (ASIO), and concerning national security information.⁵

B. Bilateral and regional relations

6. The Government of Australia has concluded 12 bilateral memoranda of understanding on counter-terrorism with Malaysia, Thailand, the Philippines, Fiji, Cambodia, Papua New Guinea, Indonesia, India, Timor-Leste, Brunei Darussalam, Pakistan and Afghanistan - aimed at supporting practical, operational-level cooperation. In May 2005, the Government of Australia announced a regional counter-terrorism assistance package totalling \$40.3 million over four years aimed at the development of counter-terrorism legal frameworks and measures to improve border-control and maritime security. Australia's initiative and leadership in the region is to be applauded. The Government reports that these initiatives are being adopted in a way that does not reduce its development assistance budget. The Special Rapporteur takes the opportunity to note that counter-terrorism assistance should not replace, but rather supplement, development assistance. This is important since the United Nations Global Counter-Terrorism Strategy, adopted by the General Assembly on 8 September 2006 in the annex to its resolution 60/288, welcomes initiatives to eradicate poverty and promote sustained economic growth, to reinforce development, to reduce marginalization and to promote the rule of law, human rights and good governance.

7. Many from civil society within Australia have questioned the need for legislative reform since 11 September 2001. Australia has itself reported that "extensive and effective legislation" was already in place before 2001.⁶ It appears, however, that legislative reform was at least necessary to bring Australia into compliance with Security Council resolution 1373 (2001) and with the work of the Al-Qaida and Taliban Sanctions Committee (see chapter II below). Australia's Security Legislation Review Committee recently reported that it was satisfied that separate security legislation, in addition to general criminal law, was necessary in Australia.⁷ The Government of Australia advises that its national response seeks to recognize that contemporary terrorism is generally an international phenomenon that is not confined by national borders.

8. In the case of the Anti-Terrorism Act (No. 2) 2005, it appears that the federal Government had not intended to release the Bill for public consultation prior to its introduction to Parliament. The Bill was instead leaked by the Chief Minister of the Australian Capital Territory.⁸ The initial timetable set by the Government had forecast that the Bill would be introduced into Parliament, debated and passed in a short period of time. This schedule was adjusted so that the Bill was referred to the Senate Legal and Constitutional Legislation Committee on 3 November 2005 for inquiry and report by 28 November 2005. The Committee advertised the inquiry in the *Australian* newspaper on Saturday, 5 November 2005 and submissions were called for by Friday, 11 November 2005.⁹ The Committee held three public hearings, in Sydney only, on 14, 17 and 18 November 2005. Civil society has complained that this was a highly truncated period for public consultation, although the Committee received 294 submissions. The Bill was introduced as an urgent amendment because the Government of Australia had received specific intelligence and police information which it reports gave cause for serious concern about a potential terrorist threat. This information was provided to the Leader of the Opposition and the shadow Minister for Homeland Security. In light of the concerns the Special Rapporteur has with various aspects of law enacted under the Anti-Terrorism Act (No. 2) 2005, however, and as considered below, it is regrettable that a more thorough level of public consultation was not undertaken. States should endeavour to consult widely when enacting counter-terrorism legislation that may limit the rights and freedoms of those within its territory. Because of the potentially profound impact of counter-terrorism legislation on human rights and fundamental freedoms, it is particularly important that Governments seek to secure the broadest possible political and popular support for such legislation.

C. Human rights protection in Australia

9. States have a duty to protect their societies and to take effective measures to combat terrorism. States are also obliged, by reason of their international obligations and as emphasized within various documents of the United Nations, including resolutions of the Security Council, to counter terrorism in a manner that is consistent with international human rights law.¹⁰ As stated in the United Nations Global Counter-Terrorism Strategy (part IV) effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ones. The defence of human rights is essential to the fulfilment of all aspects of a global counter-terrorism strategy.

10. It is of concern to the Special Rapporteur, in that regard, that Australia does not have domestic human rights legislation capable of guarding against undue limits being placed upon the rights and freedoms of individuals - although he notes with encouragement that the Australian Capital Territory has such legislation and that other Australian states are looking to do the same. Although the Government of Australia points to a robust constitutional structure and framework of legislation capable of protecting human rights and prohibiting discrimination, this is an outstanding matter that has been previously raised by the Human Rights Committee in its observations on Australia's reports under the International Covenant on Civil and Political Rights (ICCPR).¹¹ The Special Rapporteur identifies in this report a number of areas in which the rights and freedoms of those in Australia have been, or may be, limited in the pursuit of countering terrorism. It is therefore essential that there be means of dealing with potential excesses, and the Special Rapporteur urges Australia to move towards enacting federal legislation implementing the Covenant and providing remedial mechanisms for the protection of rights and freedoms.

D. Victims of terrorism

11. It is disappointing to note that the federal Government of Australia, although active in providing assistance to victims in the immediate aftermath of the Bali bombings of 2002 and 2004, has not introduced any national mechanisms for the compensation of victims of terrorism.¹² An effective global strategy to counter international terrorism must focus upon supporting the victims of terrorist acts, including the provision of adequate and readily accessible compensation.¹³

II. THE CLASSIFICATION OF “TERRORISM”, TERRORIST ENTITIES AND ORGANIZATIONS

A. Definition of “terrorism”

12. Although the term “terrorism” is not defined in Australian law, part 5.3 of the Criminal Code Act 1995 instead sets out a range of offences related to a “terrorist act” (as defined by sect. 100.1 (1) of the Act). The Act makes it an offence to engage in a terrorist act; provide or receive training connected with terrorist acts; possess things connected with terrorist acts; collect or make documents likely to facilitate terrorist acts; and other acts done in preparation for, or planning, terrorist acts. An organization engaged in a terrorist act can be listed by the Attorney-General as a “terrorist organization”, with a further range of offences linked to such organizations (considered later). Section 100.1 (1) of the Criminal Code defines a “terrorist act” as follows:

“(1) In this Part:

terrorist act means an action or threat of action where:

“(a) the action falls within subsection (2) and does not fall within subsection (3); and

“(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

“(c) the action is done or the threat is made with the intention of:

“(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

“(ii) intimidating the public or a section of the public.

“(2) Action falls within this subsection if it:

“(a) causes serious harm that is physical harm to a person; or

“(b) causes serious damage to property; or

“(c) causes a person’s death; or

- “(d) endangers a person’s life, other than the life of the person taking the action; or
- “(e) creates a serious risk to the health or safety of the public or a section of the public; or
- “(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - “(i) an information system; or
 - “(ii) a telecommunications system; or
 - “(iii) a financial system; or
 - “(iv) a system used for the delivery of essential government services; or
 - “(v) a system used for, or by, an essential public utility; or
 - “(vi) a system used for, or by, a transport system.

“(3) Action falls within this subsection if it:

- “(a) is advocacy, protest, dissent or industrial action; and
- “(b) is not intended:
 - “(i) to cause serious harm that is physical harm to a person; or
 - “(ii) to cause a person’s death; or
 - “(iii) to endanger the life of a person, other than the person taking the action; or
 - “(iv) to create a serious risk to the health or safety of the public or a section of the public.”

13. Security Council resolution 1566 (2004) calls upon 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.

14. In the view of the Special Rapporteur, this cumulative characterization represents the type of conduct that should be acted against when States respond to calls to suppress international terrorism.¹⁴ As to the third cumulative element, that “terrorist” conduct must comprise acts constituting offences within existing terrorism-related conventions, there is a qualification to be made. Where a State is responding to an international call to suppress terrorism, this third cumulative element is essential in determining what type of conduct is to be suppressed. States may, however, feel compelled to implement additional counter-terrorist measures according to regional or domestic threats. Where there is evidence that a State must respond to domestic or regional terrorist threats, it may therefore have genuine reasons to proscribe acts that fall outside the scope of offences under the universal terrorism-related conventions. This is permissible, in the view of the Special Rapporteur, so long as strictly necessary and provided that the definition or proscription complies with the requirements of legality (accessibility, precision, applicability to counter-terrorism alone, non-discrimination and non-retroactivity).¹⁵

15. The Special Rapporteur takes the view that Australia’s definition of a “terrorist act” goes beyond the Security Council’s characterization:

(a) By including acts the commission of which go beyond an intention of causing death or serious bodily injury, or the taking of hostages (see sections 100.1 (3) (b) (iii) and 100.1 (3) (b) (iv)); and

(b) By including acts not defined in the international conventions and protocols relating to terrorism (see sections 100.1 (2) (b), (d), (e) and (f)).

16. The latter aspects of Australia’s definition of “terrorist acts” clearly include criminal activity, such as the interference with an information system with the intent to create a serious risk to the safety of the public (through the combination of sections 100.1 (2) (f) (1) and 100.1 (3) (b) (iv)). The Special Rapporteur takes the view, however, that although it is permissible to criminalize such conduct it should not be brought within a framework of legislation intended to counter international terrorism unless that conduct is accompanied by an intention to cause death or serious bodily injury. The Government of Australia reports that Australia has been identified by jihadist groups as a terrorist target and that authorities consider that a terrorist attack within Australia could well occur, possibly without notice, thus assessing the level of alert as “medium” (a terrorist act could occur). To go beyond the cumulative restrictions of resolution 1566 (2004), however, there must be a rational link between threats faced by Australia and the types of conduct proscribed in its legislation that go beyond proscriptions within the universal terrorism-related conventions. Australia must clearly distinguish terrorist conduct from ordinary criminal conduct.

17. It is also relevant to note that the definition of a terrorist act includes not just action on the part of a person, but also a “threat of action” (sect. 101.1 (1)). The Special Rapporteur calls for caution in this respect, in order to ensure compliance with the requirements of legality.

B. Listing of terrorists and associated entities

18. As a Member State of the United Nations, Australia has various obligations to freeze the assets of entities listed by the Security Council Al-Qaida and Taliban Sanctions Committee. Australia has implemented those obligations under the Charter of the United Nations Act 1945 and the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002. Section 18 of the Act operates such that where the Sanctions Committee lists a person or entity under its procedures, that person or entity is automatically proscribed under Australian law and added to a Consolidated List maintained by Australia's Department of Foreign Affairs and Trade (DFAT).

19. The listing of an individual or entity does not itself establish a criminal offence (i.e. it is not an offence to be on the list). Certain acts done in relation to such entities are, however, criminalized. Once an individual or entity is listed on the DFAT Consolidated List, it becomes a criminal offence under the Charter of the United Nations Act 1945 to either deal with their assets (sect. 20) or to make available assets (sect. 21), directly or indirectly, to them. It is encouraging to see that some legislative safeguards exist so that holders of assets are not liable for actions done in good faith and without negligence (sect. 24), and that compensation is available for persons wrongly affected (sect. 25). These safeguards recognize that the impact of listing can be significant for both the listed person or entity and those that may engage in conduct with such a person or entity. In light of the potentially serious consequences of listing, the Special Rapporteur urges Australia to periodically review the means by which it maintains such lists.

20. States are placed in a position of having to comply with various resolutions of the Security Council concerning entities listed by the Al-Qaida and Taliban Sanctions Committee (see, in particular, Security Council resolutions 1267 (1999), 1333 (2000), 1373 (2001), 1390 (2002) and 1617 (2005)) and, to that end, Australia has opted to implement an automatic response to such listings. The Special Rapporteur notes that the procedures of the Sanctions Committee have been criticized by members of the United Nations as failing to comply with due process, and that the United Nations Office of Legal Affairs is currently undertaking a review of all Security Council Sanctions Committee procedures.¹⁶ Some of the pertinent issues are discussed in the Special Rapporteur's 2006 report to the General Assembly (A/61/267, paras. 30-41) and he urges Australia and other States to remain aware of these issues.

C. Listing of "terrorist organizations"

21. Additional to the listing process of the Al-Qaida and Taliban Sanctions Committee, Australia has taken steps to allow it to deal with "terrorist organizations". Although separate from the Sanctions Committee process, all 19 organizations currently listed in Australian law as a "terrorist organization" are also listed by the Committee. The listing of a "terrorist organization" may occur as a result of a judicial finding to that effect consequent to a prosecution of a person or entity for a terrorist offence. More commonly, the Criminal Code Act 1995 and the Criminal Code Regulations 2002 provide for the domestic listing of an organization. For this to occur, the Attorney-General must be satisfied on reasonable grounds that the organization is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act (see division 102A of the Criminal Code Act 1995.).

22. The effect of a listing under this process is more significant than a designation based upon a Sanctions Committee listing. It is an offence to be a member of, or associate with, such organizations (sects. 102.3 and 102.8 of the Criminal Code). It is an offence to direct the activities of, recruit persons into, receive training from or provide training to, receive funds from or make funds available to, or provide support or resources to a “terrorist organization” (see sects. 102.2, 102.4, 102.5, 102.6 and 102.7, respectively). Penalties for these offences can be up to 25 years’ imprisonment. This listing process is subject to various political safeguards, including giving notice to the Leader of the Opposition, the ability for a listed organization to seek de-listing, and review of listings by a Parliamentary Joint Committee.

23. The Special Rapporteur notes Australia’s decision to create a supplementary designation process that is capable of listing terrorist organizations under domestic law. In the view of the Special Rapporteur, however, it is problematic that an organization can be listed based upon an ordinary, rather than criminal, standard of proof, with severe criminal penalties flowing from such a listing. The Special Rapporteur notes that the Security Legislation Review Committee has recommended reform of the process of proscription to meet the requirements of administrative law.¹⁷

III. INCITEMENT AND SEDITION

24. The Anti-Terrorism Act (No. 2) 2005 added to offences under Australian law, including the proscription of sedition under a new section 80.2 of the Criminal Code Act 1995, which had previously been provided for under sections 24A to 24F of the Crimes Act 1914.

A. Incitement to terrorism

25. It is an offence under section 80.2 for a person to urge a group(s) to use force or violence against another group(s). Although extended geographical jurisdiction applies for offences under division 80, the conduct just described is only an offence if it would threaten the peace, order and good government of Australia (contrast sect. 80.4 with sect. 80.2 (5) (b)). Although section 80.2 will capture some aspects of the incitement to terrorism, however, it will not encompass incitement by individuals, of individuals, nor will it capture the incitement of terrorist acts against individuals or organizations, or of transboundary acts of terrorism. Indeed, the Government of Australia has reported that these provisions were not intended to cover incitement to terrorist acts.

26. The Special Rapporteur reminds Australia that the Security Council has called on States, under paragraph 1 of its resolution 1624 (2005), to suppress the incitement to terrorism and that article 20 (2) of the International Covenant on Civil and Political Rights requires States to proscribe any advocacy of national, racial or religious hatred that constitutes incitement to hostility or violence. Australia has a reservation to article 20 (2) to the effect that it has retained the right not to introduce legislation impacting upon the freedom of expression. The Special Rapporteur nevertheless calls upon Australia to consider expanding its proscription of sedition to encompass incitement to terrorism and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In doing so, he expresses his view that article 5 of the Council of Europe Convention on the Prevention of Terrorism represents a best practice in defining the proscription of the incitement to terrorism.¹⁸ Although this is a regional instrument, the proscription in article 5 was the result of careful negotiation. It

establishes incitement as a primary offence, rather than reacting to past events or treating the inciting person as a secondary party to the principal terrorist act. This proactive approach is encouraged by the United Nations Office on Drugs and Crime Terrorism Prevention Branch and resolutions of the Security Council.¹⁹ Although article 5 uses a somewhat odd title of “public provocation to commit a terrorist offence” instead of “incitement to terrorism”, the three elements of the offence under article 5 are properly confined to: an act of communication; a subjective intention on the part of the person to incite terrorism; and an additional objective danger that the person’s conduct will incite terrorism. The latter objective requirement separates the incitement to terrorism from more vague notions such as “glorification” of terrorism.

27. In the view of the Special Rapporteur, article 5 of the European Convention is compliant with articles 15, 19 and 20 (2) of the International Covenant on Civil and Political Rights. It is sufficiently precise, confined to the countering of terrorism, and is non-discriminatory and non-retroactive. It contains additional safeguards by requiring parties to establish the public provocation to commit a terrorist offence as a criminal offence, when committed unlawfully and intentionally. By proscribing only “unlawful” incitement, the proscription preserves any applicable criminal law defences (which might exclude, for example, an act of incitement undertaken as a result of duress). The requirement of intention contained in article 5, paragraph 2, reaffirms the subjective element within the definition of public provocation to commit a terrorist offence and, in the view of the Special Rapporteur, requires the act of communication to be intentional also.

B. Link with proscribed “terrorist organizations”

28. Legislative reforms have captured some elements of the Security Council’s call for the suppression of the incitement to terrorism. Advocating the commission of a terrorist act (whether or not it has occurred or will occur) is one of the grounds upon which the Attorney-General may list a “terrorist organization” (see chap. II above). The Special Rapporteur agrees that there is a legitimate need to suppress the incitement of international terrorism. In defining “advocacy”, however, section 102.1 (1A) (c) of the Criminal Code Act 1995 includes what might be described as the glorification of terrorism. The Special Rapporteur considers that this definition lacks sufficient precision and has the potential to cover statements which, in a very generalized or abstract way, somehow support, justify or condone terrorism. Effective judicial guarantees should accompany any measures related to the designation of entities as “terrorist organizations”.

C. Sedition and international humanitarian law

29. The Anti-Terrorism Act (No. 2) 2005 creates offences where a person urges another to engage in conduct intended to assist an organization or country either at war with Australia, or engaged in hostilities against Australian forces (see section 80.2 (7) and (8) of the Criminal Code). Although this may not be the intention of the legislative amendment, the extraterritorial application of these “Category D” offences (see section 15.4 of the Criminal Code) means that commanders of enemy forces overseas who order their troops to attack Australian forces may be liable for prosecution for sedition under Australian law. Under international humanitarian law, however, combatants lawfully participating in armed conflict are entitled to immunity and prisoner-of-war status upon capture. Although Australia reports that there is no intention for these provisions to interfere with international humanitarian law, the possibility exists and the

Special Rapporteur urges Australia to bring these laws in compliance with international humanitarian law.

IV. INVESTIGATIVE AND INTELLIGENCE-GATHERING POWERS

A. Search and seizure

30. Schedule 5 of the Anti-Terrorism Act (No. 2) 2005 extends the powers of the Australian Federal Police to stop, question and search persons in certain situations, including the ability to conduct random searches where the Attorney-General has declared an area or place to be a “specified security zone” (new sects. 3UA to 3UK of the Crimes Act 1914). These powers are triggered only where a terrorist act has occurred or where they would assist in preventing a terrorist act, with the exercise of them subject to judicial review and investigation by the Commonwealth Ombudsman. The Attorney-General is obliged to revoke a declaration where he or she is satisfied that there is no longer a threat of terrorism, or that the aftermath of an attack no longer requires it. Once made, however, a declaration has a life of 28 days and may thus have a considerable impact upon the liberty and security of individuals. In the absence of mechanisms requiring the Attorney-General to consciously decide whether to extend a declaration, the Special Rapporteur is of the view that this period imposes a potentially unnecessary or disproportionate interference upon liberty and security. To guard against this, he urges Australia to consider shortening the life of declarations. The Special Rapporteur further urges Australia to ensure that this mechanism is not used to suppress the right of persons to express political opinions through lawful demonstrations.

B. Security Agency powers of questioning

31. In 2003, the powers of the Australian Security Intelligence Organisation (ASIO) were enhanced by the Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003, which added Division III to Part III of the original Act (see appendix II). These powers have been extended for a further 10 years as a consequence of the recent passage of the Australian Security Intelligence Organisation Legislation Amendment Act 2006. The definition of politically motivated violence, within the investigative jurisdiction of ASIO, was expanded to include terrorism offences (see section 4 of the principal Act). ASIO, which is responsible for the gathering of intelligence about terrorist threats to Australia, was given the power to detain and question terrorist suspects, and non-suspects, who may have information on terrorist activities. The Act requires a person to provide information and answer questions where a warrant for questioning is issued (sects. 34D and 34G). Since this overrides the internationally recognized privilege against self-incrimination, the Special Rapporteur is encouraged to see that measures are in place so that the use of information provided at ASIO hearings is restricted to the gathering of intelligence. Such information is accordingly subject to “use immunity”, which means that the information may not be used in criminal proceedings against the person (sect. 34 (G) (9)).

32. The Special Rapporteur notes, however, that concerns have been raised about the potential “derivative use” of such information. That is, concern has been raised that information provided at an ASIO hearing may steer police officers who are present at the hearing towards a particular line of inquiry that would not otherwise have been pursued, and that evidence obtained through that line of inquiry might be used in criminal proceedings against the person giving the

information. The Federal Court of Australia ruled, in *A. v. Boulton* (2004) 136 FCR 420, that there is no derivative use immunity in respect of compulsory hearings before the Australian Crime Commission and it therefore appears that members of the police present during ASIO hearings are in a position to use information provided during those hearings in order to further their own investigations. In the context of Australia's common-law jurisdiction, the Special Rapporteur takes the view that police officers should not be present at ASIO hearings or, in the alternative, that derivative use immunity should be provided for within the ASIO Act. A clear demarcation should exist and be maintained between intelligence gathering and criminal investigations.

C. AML/CTF Bill

33. The Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 contains provisions which have caused the public and the Senate Legal and Constitutional Legislation Committee to make recommendations. The Committee has also recommended that a privacy impact assessment of the Bill be undertaken. Given the powers to be enacted under the legislation, it has been recommended that the Privacy Commissioner and/or the Human Rights and Equal Opportunity Commission be empowered to conduct regular audits of practices for the purpose of determining compliance with the law. To prevent any possible discriminatory application of the powers under the Bill, it has also been further recommended that protection against liability not include liability under Federal and State anti-discrimination statutes. The Special Rapporteur encourages the adoption of these three recommendations.

V. POWERS OF DETENTION AND CONTROL

A. Reversal of onus for the granting of bail

34. Australia reports that, up to the end of April 2006, 26 persons were charged with various terrorism offences (3 have pleaded guilty or been convicted, 4 have been committed for trial, and 19 are awaiting committal for trial). Of those persons, only four have been granted bail. It appears that this is a reflection of the operation of a new section 15AA of the Crimes Act 1914, which prevents a bail authority from granting bail to a person charged with, or convicted of, certain terrorism and other offences unless the bail authority is satisfied that exceptional circumstances exist to justify bail. This not only reverses the burden of establishing the need for detention, but places the very high threshold of requiring an accused or convicted person to establish "exceptional circumstances". The Special Rapporteur notes that article 9, paragraph 3, of the International Covenant on Civil and Political Rights provides, in part, that: "It shall not be the general rule that persons awaiting trial shall be detained in custody." This properly places the burden upon the State to establish the need for the detention of an accused person to continue. Where there are essential reasons, such as the suppression of evidence or the commission of further offences, bail may be refused and a person remanded in custody. The Special Rapporteur takes the view, however, that the classification of an act as a terrorist offence in domestic law should not result in automatic denial of bail, nor in the reversal of onus. Each case must be assessed on its merits, with the burden upon the State for establishing reasons for detention.

B. Conditions of detention while on remand

35. All persons charged with terrorism offences to date, at least in New South Wales under its Department of Corrective Services AA & Category 5 Inmates Management Regime, have been classified as “AA” inmates. Such inmates are remanded in maximum-security prisons, normally reserved for inmates convicted of serious offences. Each remand prisoner should be the subject of an individual risk assessment, with appropriate avenues available for the remanded person to seek an independent review of the classification. The Special Rapporteur reminds Australia that article 10 (2) (a) of the International Covenant on Civil and Political Rights and paragraphs 8 (b) and 85 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners require untried prisoners to be kept separate, and treated differently, from convicted prisoners.²⁰ The Special Rapporteur notes that, upon ratification of ICCPR, Australia lodged a reservation whereby it provided that “the principle of segregation is accepted as an objective to be achieved progressively”, rather than immediately. The classification of persons charged with terrorism offences as “AA” inmates is a recent practice. The Special Rapporteur would have expected the progressive achievement of the principle of segregation to be evidenced within Australia’s practices arising since ratification of the Covenant, and he therefore expresses regret that this practice has developed.

36. The Special Rapporteur makes a related observation concerning the segregation of persons *convicted* of terrorism offences. He is aware of general concerns that such persons may need to be segregated from the rest of the prison population in order to prevent the recruitment by those persons of inmates into a terrorist organization. The Special Rapporteur observes that such segregation might be permissible, but only when strictly necessary and if the person has been convicted of a “terrorist” offence in respect of which a proper definition of terrorism has been applied.

C. Control orders

37. The Anti-Terrorism Act (No. 2) 2005 established “control orders” under a new Division 104 to the Criminal Code Act 1995. A control order is one that imposes obligations on a person, under section 104.1, for the purpose of protecting the public from a terrorist act (including, for example, house arrest, the attachment to a person of an electronic tracking device, and various limitations upon where a person may go and who he or she may meet). The range of conditions that may be imposed are set out in section 104.5. It is a criminal offence to contravene the terms of a control order, rendering the person liable to imprisonment for up to five years (see section 104.27). Control orders can be no longer than 12 months, but can be renewed for subsequent periods of up to 12 months, with no limit on the number of possible renewals (sect. 104.5 (1) (f) and (2)). The Special Rapporteur welcomes the adoption by Australia of measures capable of protecting the public which fall short of actual detention. He urges Australia to ensure that the imposition of obligations upon the subject of a control order are proportionate, are only imposed for as long as strictly necessary, particularly having regard to the fact that control orders are issued based upon the non-criminal standard of proof on the balance of probabilities (sect. 104.4). The imposition of controls upon any person must not cumulate so as to be tantamount to detention. The Special Rapporteur notes in this regard that house arrest is a possible imposition under a control order (sect. 104.5 (3) (a) and (c)). Since this is a form of detention, the Special Rapporteur reminds Australia that house arrest (like any form of detention) is only permissible during the course of a criminal investigation; while awaiting

trial or during a trial; or as an alternative to a custodial sentence (while on parole, for example). Australia should similarly ensure that control orders do not unduly interfere with the rights to family life, employment and education.

38. Australian citizen Jack Thomas was in August 2006 made subject to a control order, with curfew and reporting conditions imposed under that order. These conditions, by themselves, do not appear to unduly restrict Mr. Thomas's freedom of movement if the allegation that he is likely to commit a terrorist act is correct. The Special Rapporteur is concerned, however, that there appears to be limited evidence upon which the control order was made. The imposition of a control order should never substitute for criminal proceedings and the Special Rapporteur expresses concern that the order imposed against Thomas came just days after a state Court of Appeal quashed a terrorist financing conviction against him. Where criminal proceedings cannot be brought, or a conviction maintained, a control order might (depending on the facts and the conditions of that order) be justifiable where new information or the urgency of a situation call for action to prevent the commission of a terrorist act. Transparency and due process must always be maintained in such cases, with the order regularly reviewed to ensure that it remains necessary.

39. Control orders are made by a two-step process. An interim control order is made *ex parte*. The person to whom the order applies will then be provided with notice of the order and will be entitled to appear at a confirmation hearing and contest the order. During a confirmation hearing, and for the purpose of protecting information likely to prejudice national security, persons made subject to a control order will only be entitled to a summary of the grounds upon which the order was made by the Court (see section 104.5 (2A) of the Criminal Code). This restriction applies to an appeal against, or review of, a decision made at a confirmation hearing. It is notable in this regard that control orders were also introduced in the United Kingdom under the Prevention of Terrorism Act 2005 (UK), and in very similar terms to the regime under Australian law. Recent judicial decisions in the United Kingdom have considered the British control-order regime and found it to be incompatible with the right to a fair hearing and article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (liberty of the person) because the regime prevents disclosure of certain information upon which control orders are sought and made.²¹ The Special Rapporteur likewise urges Australia to reconsider the means by which sensitive information is protected so that such protection would be compatible with the right to a fair hearing.

40. A further issue of concern relating to control orders is the potential for their use contrary to the *ne bis in idem* principle (that a person should not be tried or punished twice for the same offence). It is an offence, by way of example, for a person to receive or provide training connected with a terrorist act. Upon completion of sentence, it is conceivable that a person convicted of such an offence (because of the conviction) may thereafter be made the subject of a control order, including conditions of house arrest. The Special Rapporteur urges Australia to ensure that control orders are not imposed in a manner that would offend the *ne bis in idem* principle.

D. Investigative detention

41. The general rules on arrest and detention for Commonwealth offences is set out within the Crimes Act 1914. Where a person is arrested for a Commonwealth offence, they may be

detained for a reasonable period (but no more than four hours) for the purpose of investigating whether the person committed that or any other Commonwealth offence, having regard to the number and complexity of matters being investigated and discounting time for things such as transportation, consultation with counsel, the receipt of medical attention, or for the reasonable time involved in making and disposing of an application to extend the investigation period (sect. 23 (C) (2), (4), (6) and (7)). Where a person is arrested for a serious Commonwealth offence (punishable by imprisonment exceeding 12 months) an application for an extension of the investigation period may be made to a judicial officer who may then extend the investigation on prescribed grounds, but for no more than a total period of eight hours from the time of arrest (sect. 23 (D) (1), (2), (5) and (6)).

42. The latter provisions were amended by the Anti-Terrorism Act 2004 in respect of terrorism offences (terrorist activities using explosives or lethal devices, or involving “terrorist acts” - see chapter II above). In respect of all such offences, a judicial officer may extend a precharge investigation period for up to 20 hours (sect. 23D (7) of the Crimes Act 1914).

E. Preventive detention

43. The Anti-Terrorism Act (No. 2) 2005 established “preventive-detention orders” (PDOs) under a new Division 105 to the Criminal Code Act 1995. Preventive-detention orders may be issued in two situations. The first is where there are reasonable grounds to suspect that a person will commit an imminent terrorist act (or is in possession of materials for that purpose, or has done something in pursuit of that purpose) *and* the person’s detention would substantially assist in preventing a terrorist act from occurring *and* detaining the person is reasonably necessary for the latter purpose (sect. 105.4 (4) and (5)). A person may also be made subject to a PDO if a terrorist act has occurred within the last 28 days *and* the person’s detention is necessary to preserve relevant evidence *and* detaining the person is reasonably necessary for the latter purpose (sect. 105.4 (6)).

44. The normal period that a person may be detained under a PDO is no more than 24 hours, and only one PDO can be issued against any person relating to any one event (sects. 105.8 (5), 105.6 and 105.10 (5)). In limited circumstances, a “continued preventive-detention order” can see a person detained for up to 48 hours, upon extension by a judicial officer (sect. 105.12). A PDO can be accompanied by a “prohibited contact order”, on terms issued by the court, although the right to contact one’s lawyer is specifically preserved (see sections 105.15 to 105.17, and 105.34).

45. The Special Rapporteur again expresses concern over the potential use, in the making of preventive-detention orders, of secret information and reiterates his comments in the context of control orders about the use of such information being potentially contrary to the right to a fair trial (see sections 105.7 (2A), 105.8 (6A), 105.11 (3A) and 105.12 (6A)).

Security Agency powers of detention

46. As noted in chapter IV, the powers of ASIO have been enhanced to allow it to detain and question terrorist suspects, and non-suspects who may have information on terrorist activities. The Act introduced powers to detain and question for up to 168 hours (7 days) continuously (sect. 34SC). Before questioning and detention can take place: (a) the Director-General of

ASIO must obtain the consent of the Attorney-General to seek a warrant for questioning and detention; and (b) an “issuing authority” must be satisfied that there are reasonable grounds for believing that such questioning and detention will substantially assist the collection of intelligence that is important in relation to a terrorism offence (see sections 34D, 34E, 34F and 34G). Upon execution of the warrant, a person taken into custody must be brought before a “prescribed authority” for the questioning to be conducted (sect. 34H). An “issuing authority” is a federal magistrate or judge appointed by the Minister of Justice as an issuing authority. A “prescribed authority” is a person, also appointed by the Minister, who has served as a judge in one or more superior courts for a period of five years and no longer holds a commission as a judge of a superior court (sect. 34B (1)).

47. Although a detained person may make a complaint at any time to the Inspector-General of Security Intelligence, a detained person has no right to seek a judicial review of the validity, or terms, of an issuing authority’s warrant. A detained person has no right to be brought before any judicial body other than a prescribed authority. The absence of these rights is of grave concern to the Special Rapporteur, offending the right to a fair hearing and the right to have the legality of one’s detention determined by an independent and competent authority.

VI. IMMIGRATION AND REFUGEE STATUS

48. Security Council resolution 1373 (2001) imposed obligations upon States impacting upon immigration and refugee status.

A. Measures to prevent the transboundary movement of terrorists

49. Paragraph 2 (g) of resolution 1373 (2001) requires States to prevent the movement of terrorists through effective border controls and measures to secure the integrity of identity papers and travel documents. Australia implements various measures in an effort to achieve these requirements. All non-Australian citizens, except New Zealanders and other limited categories of persons, must hold a visa before being able to enter and remain in Australia. The visa application process includes checks against a person’s identity and criminal history. Australia also deploys Airline Liaison Officers at key hub international airports. The Department of Immigration and Multicultural Affairs (DIMA) regulates the movement of people across Australia’s borders, requiring both citizens and non-citizens to be able to identify themselves. DIMA staff at all airports are trained in document examination and have access to sophisticated examination equipment.

50. Two measures relating to border control raise the potential for concern. The first is the Advance Passenger Processing (APP) system, obliging all international flights into Australia to provide a list, in advance, of passengers and crew for inbound flights. The advantage of this system is that it allows Australia to verify the authority of passengers and crew to arrive in Australia before boarding a flight or international cruise ship. It allows DIMA to issue boarding directives to airlines and cruise companies that may prevent the boarding of passengers and crew who do not have permission to travel to Australia. The second feature is a database used by DIMA to store details about people and travel documents of immigration concern to Australia.

51. As part of a layered approach intended to prevent the transboundary movement of terrorists, and of others involved in criminal activity, the latter measures seem rational and,

according to authorities, are very effective. Notwithstanding this, the Special Rapporteur has two concerns about the latter measures. The first is that the Convention relating to the Status of Refugees, as well as article 12, paragraph 2, of the International Covenant on Civil and Political Rights, guarantees to every person the right to leave any country, including one's own country. States should be cautious of implementing measures that may effectively prevent persons from exercising this right, particularly in the context of those fleeing persecution in their own country with an intention to seek refugee status elsewhere. The ability to leave is essential to the operation of the framework safeguarding the rights of refugees.

52. The Special Rapporteur also urges Australia to ensure that these measures are used in an appropriate manner and that adequate safeguards are implemented to prevent use of the measures in contravention of the principle of non-discrimination or in breach of the right to privacy. The use of indicator clusters to profile potential suspects is, in principle, a permissible means of investigation and law enforcement activity. As defined by the Australian Customs Service, profiling is "a filtering process involving a single or cluster of indicators that, when grouped together, present the characteristics of a high-risk passenger or consignment".²² However, when one of the indicators on which profiling is based is a person's ethnic or national origin, this raises the question of the conformity of such profiling with the principle of non-discrimination.

53. The Special Rapporteur agrees with the view of the Committee on the Elimination of Racial Discrimination that even measures designed to counter terrorism must conform to this fundamental principle. At the conclusion of its sixty-first session in August 2003, the Committee demanded that "States and international organizations ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin".²³ In the view of the Special Rapporteur, this is equally applicable to the profiling of persons based upon their religion.

54. The limits of profiling in the context of countering terrorism was recently considered by the House of Lords in *Gillan and Another v. Commissioner of Police for the Metropolis and Another* ([2006] UKHL 12). The case concerned sections 44 and 45 of the Terrorism Act 2000 (UK), which authorize police to search members of the public without having to have any grounds to suspect wrongdoing on the part of the person.

55. The Special Rapporteur takes the view that profiling or similar devices: must strictly comply with the principles of necessity, proportionality and non-discrimination; be subject to close judicial scrutiny; and should be periodically reviewed.²⁴ He urges Australia to ensure that border security measures comply with these requirements. The permissible limits of profiling is a matter to be further considered by the Special Rapporteur within a thematic study to be presented in his general report (A/HRC/4/26) to the fourth session of the Human Rights Council. The Special Rapporteur urges Australia and other States to remain aware of this issue.

B. Refugees and asylum-seekers

56. In paragraph 3 (f) of its resolution 1373 (2001) the Security Council calls upon States members of the United Nations to take measures to ensure that refugee status is not granted to asylum-seekers who have planned, facilitated or participated in the commission of terrorist acts. Paragraph 3 (g) calls on States members to ensure that refugee status is not abused by

perpetrators, organizers or facilitators of terrorist acts. The words of both provisions require such measures must be in conformity with international standards of human rights.

57. Australia undertakes character and security checks as part of the application process for refugee status. Non-citizens of Australia who arrive in Australia without a valid visa, other than New Zealanders, are interviewed by DIMA staff to determine whether to allow or refuse entry into Australia. Where such a person applies for protection, the record of entry interview is forwarded to a senior DIMA official for an assessment of whether the person *prima facie* engages Australia's obligations under the Convention Relating to the Status of Refugees. Where that is not the case, the person will be refused immigration clearance and detained until he or she can be reasonably removed from Australia.

58. Where a person is so detained, the Special Rapporteur urges Australia to ensure that it complies with articles 9 and 10 of the International Covenant on Civil and Political Rights. He notes the Views by the Human Rights Committee in *A v. Australia* (Communication 560/1993) that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which there is appropriate justification. In that case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. The Committee was critical that Australia had failed to demonstrate that alternative and less intrusive measures were available. In *C v. Australia* (Communication 900/1999), the Committee took the view that a double violation of article 9, paragraphs (1) and (4), had taken place. The Human Rights Committee has noted its concern over Australia's mandatory detention regime and has, in its concluding observations on Australia's reports under article 40 of the Covenant, urged Australia to reconsider the regime with a view to instituting alternative mechanisms of maintaining an orderly immigration process.²⁵ Despite this, DIMA notes on its website that, as at 2 June 2006, 811 people were in immigration detention, including 75 in "residence determination arrangements" in the community.²⁶ The Refugee Council of Australia reports, as at 31 December 2004, that of those in immigration detention more than 200 persons had been held in detention for longer than 24 months.²⁷

59. It is of grave concern to the Special Rapporteur that a person may be indefinitely detained under the Migration Act 1958 and that the High Court of Australia has ruled that the mandatory and indefinite detention of unlawful non-citizens under the Act is valid, provided that this occurs for the purpose of removing or deporting the non-citizen from Australia.²⁸ The Special Rapporteur also notes that mistakes can and have occurred. He records that assets frozen as a result of an entity's listing under the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002 had to be unfrozen after it was established that the entity had no terrorist connections, although this occurred in a timely manner.²⁹ He further notes that a Kuwaiti refugee applicant was detained for two years between 1997 and 1999 based upon an incorrect assessment by the Australian Security Intelligence Organisation that he was a national security risk.³⁰ It should be noted that the applicant was subsequently awarded compensation for wrongful imprisonment, and that ASIO security certificates are subject to judicial review under paragraph 75 (v) of the Constitution of Australia and section 39B of the Judiciary Act. Notwithstanding this, the Special Rapporteur is gravely concerned that Australian law allows a person to be held in detention for such a long period of time, potentially indefinitely.

60. Reflecting article 1F of the Convention Relating to the Status of Refugees, an application for a protection visa may be refused under section 501 of the Migration Act 1958 where an

applicant declares an involvement in the commission of war crimes, crimes against humanity, crimes against the peace, or serious non-political crimes (or where there are reasons for believing that this is the case). Similarly, article 33, paragraph 2, of the Convention provides an exception to the application of the non-refoulement principle within the framework of the Convention (but not in respect of general human rights treaties such as article 7 of the International Covenant on Civil and Political Rights in the case of refugees that are a danger to the security of the State, or who have been convicted of a particularly serious crime and who are a danger to the community, reflected within Australian domestic law under section 501 (6) (d) (v) of the Migration Act. Australia reports that all offences established by the counter-terrorism instruments to which it is a party are considered serious non-political offences. This implies that an adverse character assessment would be made under section 501 (6) of the Migration Act 1958. The Special Rapporteur cautions that not all offences under the terrorism-related conventions are serious offences. The Convention on Offences and Certain Other Acts Committed on Board Aircraft, for example, 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. 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 on terrorism.³¹ The Special Rapporteur reminds Australia that the cumulative characterization of acts to be suppressed when countering terrorism, as discussed in chapter II above, is thus important. He also recalls that the Office of the United Nations High Commissioner for Refugees has issued guidelines in which it has emphasized that article 1F of the Refugee Convention is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence.³² Such activity, state the Guidelines, must have an international dimension. In the view of the Special Rapporteur, this reinforces the need to ensure that only acts possessing the characteristics identified in Security Council resolution 1566 (2004) should result in an adverse character assessment for the purpose of the Migration Act 1958.

61. Where an application for refugee status is refused, the applicant may seek a merits review of that decision by either the Refugee Review Tribunal or the Administrative Appeals Tribunal, depending on the basis for refusal. Under section 501 (3) of the Migration Act 1958, the Minister for Immigration and Multicultural Affairs may personally decide to refuse a protection visa, with such decisions capable of judicial review under section 476 (1) (c) of the Migration Act and section 75 (v) of the Constitution. This will be the case where the Minister reasonably suspects that the person does not pass the character test under the Act and that the refusal or cancellation is in the national interest. The term "national interest" is not defined within the Act. The Special Rapporteur reiterates his comments in the preceding paragraph concerning the characterization of terrorist acts.

C. Return and transfer of persons

62. Although not restricted to counter-terrorism, the Special Rapporteur notes with grave concern that the Migration Act 1958 does not prohibit the return of an alien to a place where they would be at risk of torture or ill-treatment. He notes that the Minister for Immigration and Multicultural Affairs may, if he or she considers it to be in the public interest, intervene and substitute a more favourable decision than the Refugee Review Tribunal (sect. 417). It is of some reassurance that the Minister has published guidelines identifying Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as relevant to the exercise of the latter discretion. It is of concern to the Special Rapporteur, however, that the latter guidelines are not binding and the latter discretion non-compellable and non-reviewable. The principle of non-refoulement is an absolute one and must be adhered to in order to avoid the extradition, expulsion, deportation, or other forms of transfer of persons to territories or secret locations in which they may face a risk of torture or ill-treatment.³³

VII. CONCLUSIONS AND RECOMMENDATIONS

63. **The Special Rapporteur is grateful to the Government of Australia for its assistance in the conduct of this study, as well as those within civil society who provided him with information and submissions. This study has identified some good practices in the area of human rights compliance when countering terrorism, although there is room for improvement in many of those practices. Some matters, in the view of the Special Rapporteur, require urgent attention.**

64. **The Special Rapporteur encourages Australia to continue work towards accession to the Convention on the Marking of Plastic Explosives for the Purpose of Detection and the adoption of the Financial Action Task Force recommendations on the suppression of terrorist financing. On the latter subject, the introduction of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 has prompted recommendations which, in the view of the Special Rapporteur, should be acted upon. He notes that Australia has signed the recently adopted International Convention for the Suppression of Acts of Nuclear Terrorism and that it is a party to all other universal terrorism-related conventions. While Australia is to be commended for its leadership in seeking to strengthen counter-terrorism in the Asia-Pacific region, it must ensure that the mechanisms it assists other States to adopt are in compliance with international obligations, in particular human rights, refugee, and humanitarian law. The Special Rapporteur further urges Australia to ensure that this assistance does not occur at the expense of development assistance.**

65. **The Special Rapporteur notes the speed with which recent counter-terrorism legislation has been passed in Australia. He urges Australia, and all States, to avoid this situation. Because of the potentially profound implications of counter-terrorism legislation, it is particularly important that Governments seek to secure the broadest possible political and popular support for such legislation. This is particularly relevant in Australia, which has no federal human rights legislation capable of guarding against undue limits being placed upon the rights and freedoms of individuals. Given that this study identifies a number of actual and potential human rights violations within Australia's counter-terrorism regime, the Special Rapporteur urges Australia to move towards enacting federal legislation implementing the International Covenant on Civil and Political Rights and providing remedial mechanisms for the protection of rights and freedoms. He also urges Australia to introduce national measures for the compensation of the victims of terrorist acts.**

66. **The definition of the term "terrorist act" in the Criminal Code Act 1995, in the view of the Special Rapporteur, goes beyond the characterization set out in Security Council resolution 1566 (2004) of conduct to be suppressed in the fight against international terrorism. He thus urges Australia to carefully reconsider its definition of the term, and**

urges caution concerning the current reference in the Criminal Code to the “threat” of certain action. As to the listing of terrorists and associated entities, it is worthy to note that Australia has formulated certain safeguards. He urges the periodic review of the means by which such lists are maintained, particularly in light of the existing problems with the procedures of the 1267 Sanctions Committee. The Special Rapporteur notes Australia’s initiative to create a supplementary designation process for terrorist organizations, although he expresses concern that the process is triggered by a civil standard of proof, despite the fact that such designation may result in severe criminal penalties.

67. As to the incitement to terrorism, the Special Rapporteur is of the view that Australian law is not adequate in proscribing such conduct. He reminds Australia, in that regard, of the Security Council’s recommendations in its resolution 1624 (2005) and of article 20, paragraph 2, of the International Covenant on Civil and Political Rights, notwithstanding its reservation to the latter provision. He also takes the view that the definition of “advocacy” of terrorism, in section 102.1 (1A) (c) of the Criminal Code Act 1995, is overly broad and insufficiently precise. He further notes that the extraterritorial application of section 80.2 (7) and (8) of the Criminal Code has the potential to conflict with international humanitarian law.

68. Under the Anti-Terrorism Act (No. 2) 2005 the powers of the Australian Federal Police have been extended to include the ability to conduct random searches where the Attorney-General has declared an area or place to be a “specified security zone”. Although certain safeguards against abuse of these powers exist, the Special Rapporteur is of the view that the 28-day life of such declarations imposes a potentially unnecessary or disproportionate interference upon liberty and security. He urges Australia to consider shortening the life of declarations and to ensure that this measure is not capable of use to restrict the ability of persons to undertake lawful demonstrations.

69. The Special Rapporteur notes the expanded investigative powers of the Australian Security Intelligence Organisation. He supports the accompanying use immunity for information obtained during ASIO compulsory interrogation hearings. He takes the view, however, that police officers should not be present at ASIO hearings or, in the alternative, that derivative use immunity should be provided for. A clear demarcation should exist and be maintained between intelligence gathering and criminal investigations.

70. There are various matters of concern with powers of detention and control in Australia. The Special Rapporteur takes the view that new bail provisions applying to those charged with terrorism offences are incompatible with article 9 (3) of the International Covenant on Civil and Political Rights. The Special Rapporteur would also have expected Australia’s progressive achievement of the principle of segregation of accused persons from convicted persons under article 10, paragraph 2 (a) of the Covenant, to be reflected within Australia’s practices arising since its ratification of the Covenant.

71. The Special Rapporteur commends Australia’s adoption, through the control order regime, of measures capable of protecting the public while avoiding detention. He urges vigilance in ensuring that control orders impose obligations that are necessary and proportionate, and notes in that regard that house arrest, which constitutes a form of detention, is only permissible during the course of a criminal investigation, while awaiting

trial, during trial, or as an alternative to a custodial sentence. He also urges Australia to reconsider the means by which it protects sensitive information so as to guarantee the right to a fair trial. Control orders should not be used in a manner contrary to the *ne bis in idem* principle. As with control orders, Australia's preventive-detention orders need to be obtained in a manner that guarantees the right to a fair trial.

72. Australia adopts a multilayered approach to prevent the movement of terrorists and secure the integrity of documentation. The Special Rapporteur urges Australia to ensure that its system of pre-boarding authorization does not deny the ability of persons to exercise their right to leave any country, particularly in the context of those fleeing persecution in their own country. He further reminds Australia that border security measures should never be used to undertake racial profiling. In the context of other, permissible, profiling measures he urges Australia to ensure that these are implemented in a manner that comply with the principles of necessity, proportionality and non-discrimination, that they be subject to judicial scrutiny, and be periodically reviewed. The Special Rapporteur further reminds Australia that the detention of rejected refugee applicants must be in compliance with articles 9 and 10 of the International Covenant on Civil and Political Rights. He expresses grave concern that the Migration Act 1958 allows a person to be held in custody indefinitely and that the Act does not prohibit the return of aliens to a place where they would be at risk of torture or ill-treatment. The Special Rapporteur reminds Australia of the need to comply with the principle of non-refoulement.

Notes

¹ The Special Rapporteur is grateful to Dr. Alex Conte for facilitating the communications with the Government and civil society in the preparation of this report.

² See the Aviation Transport Security Act 2004; the Crimes (Aviation) Act 1991; the Crimes (Hostages) Act 1989; the Crimes (Internationally Protected Persons) Act 1976; the Crimes (Protection of Aircraft) Act 1973; the Crimes (Ships and Fixed Platforms) Act 1992; the Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002; the Extradition Act 1988; the Extradition (Commonwealth Countries) Act 1966; the Extradition (Hostages) Regulations; the Extradition (Internationally Protected Persons) Regulations; the Extradition (Physical Protection of Nuclear Material) Regulations; the Extradition (Suppression of Terrorist Bombings) Regulations; the Mutual Assistance in Criminal Matters (Suppression of Terrorist Bombings) Regulations; the Nuclear Non Proliferation (Safeguards) Act 1987; and the Suppression of the Financing of Terrorism Act 2002.

³ See the Anti-Terrorism Act 2004, the Anti-Terrorism Act (No. 2) 2004, the Anti-Terrorism Act (No. 3) 2004, the Anti-Terrorism Act (No. 2) 2005, the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002, the Crimes Amendment Act 2002, the Crimes Amendment Act 2005, the Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002, the Criminal Code Amendment (Espionage and Related Matters) Act 2002, the Criminal Code Amendment (Offences Against Australians) Act 2002, the Criminal Code Regulations 2002, the Security Legislation Amendment (Terrorism) Act 2002, the Surveillance Devices Act 2004, and the Telecommunications Interception Legislation Amendment Act 2002.

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- ⁴ See the Anti-Terrorism Act (No. 3) 2004, and the Border Security Legislation Amendment Act 2002.
- ⁵ See the Anti-Terrorism Act (No. 3) 2004, the Australian Security Intelligence Organisation Act 1979, the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, the Australian Security Intelligence Organisation Legislation Amendment Act 2006, the National Security Information (Criminal and Civil Proceedings) Act 2004, and the National Security Information Legislation Amendment Act 2005.
- ⁶ Fourth report to the UN Counter-Terrorism Committee (Australia) (S/2003/1204, p. 3).
- ⁷ Commonwealth of Australia, Report of the Security Legislation Review Committee, June 2006, pp. 3 and 9.
- ⁸ See “Howard on attack over draft bill release” *Sydney Morning Herald* (15 Oct. 2005).
- ⁹ Commonwealth of Australia, Department of the Senate, Legal and Constitutional Legislation Committee, Provisions of the Anti-Terrorism Bill (No. 2) 2005 (Canberra: Senate Printing Unit 2005), p. 1.
- ¹⁰ See, for example: General Assembly resolution 60/1, 2005 World Summit Outcome, para. 85; the Declaration of the Security Council meeting with Ministers of Foreign Affairs on 20 January 2003, adopted under Security Council resolution 1456 (2003), para. 6; and Security Council resolution 1624 (2005), para. 4.
- ¹¹ See, for example, the concluding observations of the Human Rights Committee (Australia) (CCPR, A/38/40) (1983), para. 140.
- ¹² See, for example, Australian Broadcasting Association, “Calls for Government to compensate Bali victims” (radio transcript, 18 March 2003, available online at <http://abc.net.au/am/content/2003/s809348.htm>).
- ¹³ Report of the Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy* (A/60/825), paras. 6, 13 to 17, and 22 to 27. Consider, for example, Council of Europe, *Guidelines on the Protection of Victims of Terrorist Acts* (adopted by the Committee of Ministers at Strasbourg on 2 March 2005), DGII (2005) 6.
- ¹⁴ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (E/CN.4/2006/98, chap. III).
- ¹⁵ *Ibid*, paras. 45-50.
- ¹⁶ See, for example, the statement of Ellen Margrethe Løj (Danish Ambassador to the United Nations, and current Chair of the Security Council Counter-Terrorism Committee) (see S/PV.5229).
- ¹⁷ Report of the Security Legislation Review Committee, pp. 9-10 and chaps. 8 and 9.

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- ¹⁸ Council of Europe Convention on the Prevention of Terrorism, CETS No. 196.
- ¹⁹ See United Nations Office on Drugs and Crime, (Draft) Guide for the Legislative Incorporation and Implementation of the Universal Instruments Against Terrorism (Division of Treaty Affairs, Terrorism Prevention Branch, 2005 draft), 106; and Security Council resolutions 1373 (2001), para. 2 (b), and 1624 (2005), para. 1.
- ²⁰ United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crimes and the Treatment of Offenders, Geneva, 22 August-3 September 1955 (United Nations publication, sales No. 1956.IV.4), Annex I, sect. A, and approved by the Economic and Social Council in its resolutions 663c (1957) and 2076 (1977).
- ²¹ See *Re MB* [2006] High Court of England and Wales. EWHC 1000, and *Secretary of State for the Home Department v. JJ and Ors* [2006] EWHC 1623. The latter decision has been the subject of an appeal by the British Home Secretary, which confirmed the High Court decision. See *Secretary of State for the Home Department v. JJ and Ors* [2006] England and Wales Court of Appeal (Civil Division) Decision. (EWCA Civ 1141.)
- ²² Australian Customs Service, “Protecting our borders - Customs role in Australia”, online at www.customs.gov.au/site/page.cfm?u=4829 (last accessed on 6 June 2006).
- ²³ “Statement on racial discrimination and measures to combat terrorism”, in Report of the Committee on the Elimination of Racial Discrimination, Supplement 18, (A/57/18, p. 107). See also the Committee’s general recommendation 30, Discrimination Against Non-Citizens, (CERD/C/64/Misc.11/rev.3 (2004), para. 10).
- ²⁴ See the similar positions adopted by the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert Goldman (E/CN.4/2005/103, paras. 71-76). See also the Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (OEA/Ser.L/V/II.116 (22 October 2002), para. 353).
- ²⁵ Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia (A/55/40, paras. 526 and 527).
- ²⁶ Government of Australia, Department of Immigration and Multicultural Affairs, “Immigration detention facilities”, online at <http://immi.gov.au/detention/facilities.htm>.
- ²⁷ Refugee Council of Australia, “Australia’s refugee programme”, online at www.refugeecouncil.org.au/arp/stats-02.html.
- ²⁸ See *Al-Kateb v. Godwin* [2004], High Court of Australia 37; *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Khafaji* [2004] HCA 38; and *Behrooz v. Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36.
- ²⁹ Australia’s fourth report to the Counter-Terrorism Committee, p. 5.

³⁰ See Michael Head, “Refugee detained for two years on false ASIO intelligence” (2005), *Alternative Law Journal* vol. 30 No. 1, p. 34.

³¹ See above, paras. 35 to 40.

³² United Nations High Commissioner for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the Convention relating to the Status of Refugees* (HCR/GIP/03/05), para. 17.

³³ See the statement of the High Commissioner for Human Rights, *Address at Chatham House and the British Institute of International and Comparative Law (Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism, Strasbourg, 17 March 2006)*.
