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PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

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

ADDENDUM

Communications with Governments*

* The present report is being circulated as received, in the languages of submission only, as it greatly exceeds the word limitation set by the relevant General Assembly resolution.

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Introduction

1. The present report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism contains communications transmitted to Governments between 1 January and 15 September 2007, as well as replies received up to 1 November 2007. In addition, the report also covers press releases issued in 2007.

2. During the period under review the Special Rapporteur corresponded with Governments, either separately or jointly with other mandate-holders, and he issued press releases that relate to a total of 14 countries or territories. The Special Rapporteur recognizes that problems concerning human rights and fundamental freedoms in the context of countering terrorism are not only confined to the countries and territories mentioned in this report.

3. During the period of review, the Special Rapporteur received replies from five Governments relating to communications sent in 2007 and communications that had not been replied to in 2006. The Special Rapporteur welcomes the detailed substantive information received from these Governments and encourages cooperation by those Governments which have not yet provided replies to his communications. Replies received after 1 November 2007 will be reflected in the next report to the Human Rights Council on communications.

4. As in previous years, the Special Rapporteur acted upon information received from reliable sources concerning individual cases of alleged breaches of fundamental freedoms and human rights in the context of countering terrorism, and also took action with respect to legislative developments and proposals undertaken by a number of Member States. In this context, the Special Rapporteur reiterates his encouragement to Member States to enter into dialogue, ideally during the preparatory stage of the adoption of new counter-terrorism legislation or legislation on terrorism-related offences, to seek his advice in accordance with paragraphs 14 (a) and (e) of Commission on Human Rights resolution 2005/80 (extended by the Human Rights Council pursuant to its decision 2006/102).

COMMUNICATIONS TRANSMITTED, REPLIES RECEIVED AND STATEMENTS MADE TO THE PRESS

Algeria

A. Communication envoyée au Gouvernement par le Rapporteur spécial

5. Le 29 janvier 2007, le Rapporteur spécial, conjointement avec le Vice-Président du Groupe de travail sur la détention arbitraire et le Rapporteur spécial sur la torture, a envoyé une lettre concernant la situation d'**Abderrahmane Mehalli**. Selon les informations reçues, M. Mehalli aurait été arrêté le soir du 26 décembre 2006 à 19 h 30 à son domicile de Bachdjerah par les services de la brigade mobile de la police judiciaire de Oued Ouchaeih et quelques membres des services du Département du renseignement et de la sécurité. Il aurait été détenu dans un lieu inconnu pendant douze jours, durant lesquels les agents des services du Département du renseignement et de la sécurité l'auraient roué de coups de poing et de pied. Ils lui auraient aussi bouché le nez en lui mettant, en même temps, un chiffon dans la bouche, et ensuite versé du liquide sur la tête. Ils l'auraient également menacé au moment où il devait être entendu par le juge d'instruction. Le 6 janvier 2007, M. Mehalli aurait été présenté devant le juge d'instruction de la 2e chambre du Tribunal d'Alger. Il aurait été placé sous mandat de dépôt et transféré à la prison de Serkadji où il serait encore détenu à ce jour. M. Mehalli serait accusé «d'appartenance à un groupe terroriste armé». Il aurait reconnu les faits qui lui sont reprochés sous le coup de la menace et aurait été contraint de signer un procès-verbal sans pouvoir le lire auparavant. Par ailleurs, M. Mehalli n'aurait pas reçu de soins médicaux suite aux actes subis mais aurait été obligé de signer un document attestant qu'il aurait été bien traité. Des craintes ont été exprimées quant à l'intégrité physique de M. Mehalli et à son état de santé.

B. Communication reçue du Gouvernement

6. Le 26 juin 2007, le Gouvernement a répondu à la lettre envoyée le 29 janvier 2007. Le Gouvernement a informé le Rapporteur spécial qu'Abderrahmane Mehalli a été arrêté le 27 décembre 2006 par les agents de la police judiciaire d'Alger, en même temps que plusieurs de ses complices. Présenté le 6 janvier 2007 devant le Procureur de la République d'Alger, Sidi M'hamed, celui-ci a requis l'ouverture d'une information judiciaire contre les mis en cause pour appartenance à un groupe terroriste. Les mis en cause ont été inculpés par le juge d'instruction de la 2e chambre et placés en détention provisoire. Le Gouvernement informe que l'affaire est toujours pendante devant le juge d'instruction.

Chile

A. Comunicación enviada al Gobierno por el Relator Especial

7. El 5 de abril de 2007, el Relator Especial envió una carta de alegación, junto con el Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, sobre **los recientes proyectos de reforma de la ley que determina conductas terroristas y fija su penalidad**, de 16 de mayo de 1984 (Ley Nº 18314), así como sobre otras **propuestas de reforma legislativa** que tendrían implicaciones para la situación de las personas que se encuentran actualmente cumpliendo condenas en virtud de esta legislación.

8. El artículo 1 de la Ley Nº 18314 califica el delito de terrorismo, para los efectos de la aplicación de la ley, como toda acción que "se cometa con la finalidad de producir en la población o en una parte de ella el temor justificado de ser víctima de delitos de la misma especie, sea por la naturaleza y efectos de los medios empleados, sea por la evidencia de que obedece a un plan premeditado de atentar contra una categoría o grupo de personas" (párr. 1) o para "arrancar resoluciones de la autoridad o imponerle exigencias" (párr. 2). Los Relatores Especiales creen que dicha definición es excesivamente amplia y vaga a la luz del principio de legalidad penal consagrado en el artículo 15 del Pacto Internacional de Derechos Civiles y Políticos. Dicho principio, inderogable incluso en caso de declararse el estado de excepción, implica que la responsabilidad penal debe determinarse a través de disposiciones claras y precisas establecidas por la ley, a fin de respetar el principio de certeza jurídica y de asegurar que éste no quede sujeto a una interpretación que permita ampliar el ámbito de la conducta penada.

9. La definición actual del delito de terrorismo ha permitido la condena de nueve miembros de comunidades mapuche en el período 2003-2005 por delitos de "amenaza de incendio terrorista", "lanzamiento de artefacto incendiario terrorista" o "incendio terrorista" en relación con actos violentos de protesta social asociados a reivindicaciones de tierras tradicionales indígenas. Estas condenas han sido objeto de grave preocupación en los últimos años, y han llevado a pronunciamientos de varios órganos internacionales de derechos humanos, así como de distintos procedimientos especiales del Consejo de Derechos Humanos. Así, el Comité de Derechos Económicos, Sociales y Culturales, en sus observaciones finales sobre Chile, expresó su preocupación "por la aplicación de leyes especiales, como la Ley de seguridad del Estado (Nº 12927) y la Ley antiterrorista (Nº 18314), en el contexto de las actuales tensiones por las tierras ancestrales en las zonas mapuches" (E/C.12/1/Add.105, párr. 14), y recomendó al Estado "que no aplique leyes especiales, como la Ley de seguridad del Estado (Nº 12927) y la Ley antiterrorista (Nº 18314), a actos relacionados con la lucha social por la tierra y las reclamaciones legítimas de los indígenas" (ibíd., párr. 35).

10. En términos similares, el informe sobre la visita a Chile del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, examinó la aplicación de la legislación antiterrorista en el contexto de la protesta social de las comunidades mapuches asociadas a las demandas de tierras. El Relator Especial recomendó al Gobierno que no se "criminalizaran o penalizaran las legítimas actividades de protesta o demanda social de las organizaciones y comunidades indígenas", y que no se aplicaran "acusaciones de delitos tomados de otros contextos ("amenaza terrorista", "asociación delictuosa") a hechos relacionados con la lucha social por la tierra y los legítimos reclamos indígenas" (E/CN.4/2004/80/Add.3, párrs. 69 y 70). El Relator Especial recomendó asimismo que el Gobierno de Chile "considere la posibilidad de declarar una amnistía general para los defensores indígenas de los derechos humanos procesados por realizar actividades sociales y/o políticas en el marco de la defensa de las tierras indígenas" (ibíd., párr. 75).

11. Asimismo, la situación de los líderes y activistas mapuches que cumplen condenas en virtud de la legislación antiterrorista fue objeto de comunicaciones dirigidas al Gobierno de Su Excelencia por distintos titulares de mandatos otorgados por el Consejo de Derechos Humanos,

con fechas de 24 de marzo y 19 de julio de 2005, y 21 de abril y 11 de mayo de 2006. En dichas comunicaciones se expresó preocupación por las alegaciones recibidas en relación con las violaciones al derecho al debido proceso de los condenados, derivadas en parte de la definición amplia del delito de terrorismo incorporada en la Ley Nº 18314.

12. En distintas comunicaciones dirigidas a los mecanismos especiales del Consejo, el Gobierno de Chile ha admitido asimismo la necesidad de revisar su política criminal en relación con la protesta social de las comunidades mapuches, en el marco del respeto a la legislación vigente. Así, en la respuesta del Gobierno de Chile a las recomendaciones del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas (febrero de 2005), el Gobierno señaló que estaba "analizando los tipos penales contenidos en la Ley antiterrorista, de acuerdo con las nuevas orientaciones de la política criminal, pues está conciente que tal legislación establece tipos penales demasiado amplios, por lo cual se hace necesaria su revisión" (pág. 7).

13. En la comunicación de 23 de mayo de 2006 en respuesta a la anterior comunicación de los Relatores Especiales, el Gobierno señaló que "[l]a Presidenta de la República, Sra. Michelle Bachelet, se ha comprometido a que el ejecutivo, en hechos futuros que se encuentren tipificados como delitos por la Ley antiterrorista y que puedan ser juzgados por la ley común cuando en éstos se vean involucrados indígenas en procesos de reivindicaciones de tierras, no invocara la aplicación de dicha ley" (pág. 1).

14. En su intervención ante el segundo período de sesiones del Consejo de Derechos Humanos (18 de septiembre a 6 de octubre de 2006), el Gobierno de Chile reiteró que "se ha comprometido recientemente a no aplicar la Ley antiterrorista en caso de hechos futuros que puedan ser juzgados a través de la ley común", e informó asimismo de que "el Parlamento se encuentra debatiendo un proyecto de ley que modifica la norma antiterrorista y que apunta a quitar el carácter terrorista a los atentados contra la propiedad" (19 de septiembre de 2006).

15. En este sentido, los Relatores Especiales querían referirse a informaciones que han recibido en relación con distintos proyectos de reforma de la legislación antiterrorista y para atender a la situación de los presos mapuches que se encuentran cumpliendo condenas de terrorismo. Según las informaciones recibidas: una primera propuesta de reforma legislativa fue presentada en el Senado el 15 de mayo de 2006 por los senadores Alejandro Navarro, Jaime Naranjo y Guido Guirardi, quienes presentaron un proyecto de ley "que permite conceder la libertad condicional a condenados por conductas terroristas y otros delitos, en causas relacionadas con reivindicaciones violentas de derechos consagrados en la Ley Nº 19253" (*Boletín* Nº 4188-07). El proyecto proponía una modificación al régimen de libertad condicional con el objeto de conceder el beneficio de la libertad condicional a los "condenados por conductas terroristas y otros delitos, en causas relacionadas con reivindicaciones violentas de derechos consagrados" en la Ley indígena. Según las informaciones recibidas, dicha propuesta constituyó un paso fundamental para la finalización de la huelga de hambre iniciada por varios presos mapuches en marzo de 2006, si bien fue posteriormente rechazada por la Comisión de Constitución del Senado el 6 de septiembre de 2006.

16. Un segundo proyecto de ley, "que modifica la Ley Nº 18314, que determina conductas terroristas y fija su penalidad", fue presentado por los diputados Juan Bustos, Eduardo Díaz, Antonio Leal y Jaime Quintana el 10 de mayo de 2006 (*Boletín* N° 4199-07). Este proyecto

propone revisar la Ley Nº 18314 para precisar la definición del ámbito de aplicación de la norma, circunscribiéndola a acciones cometidas por "bandas armadas o integrantes de ella contra la vida o la integridad física de las personas, con la finalidad de subvertir el régimen constitucional o el orden público y de producir en la población o en una parte importante de ella el temor de ser víctima de delitos de la misma especie" (ibíd., párr. 4). Según la información disponible, dicho proyecto se encontraría todavía pendiente de aprobación.

17. Por último, el Gobierno de Chile presentó el 5 de julio de 2006 el proyecto de ley "con el objeto de introducir una modificación en la Ley Nº 18314 que establece conductas terroristas y fija de su finalidad" (*Boletín* Nº 4298-07). El proyecto presentado por el Gobierno plantea una limitación del tipo penal de terrorismo actualmente existente en la ley, limitando los delitos terroristas a "aquellos que afecten la vida, la integridad física, la libertad y la salud pública". Según las informaciones recibidas por los Relatores Especiales, la propuesta del Gobierno de Chile fue presentada bajo el trámite de urgencia (30 días), pero dicha urgencia habría sido retirada el pasado 29 de agosto de 2006.

18. Los Relatores Especiales expresan su satisfacción por la voluntad expresada por el Gobierno de reformar la política criminal en relación con la protesta social de las comunidades mapuches, así como de reformar la legislación antiterrorista. Los cambios propuestos por los proyectos de ley actualmente en trámite de discusión restringirían la definición del tipo penal de terrorismo actualmente incorporado en la Ley Nº 18314 en un sentido que la haría compatible con los estándares internacionales de derechos humanos, evitando así posibles vulneraciones del derecho al debido proceso de las personas inculpadas en virtud de dicha ley.

19. Asimismo, les gustaría expresar su preocupación por las informaciones que han recibido respecto a la retirada del trámite de urgencia en agosto de 2006 del proyecto de ley presentado por el Gobierno, que en términos prácticos habría conducido al abandono de dicha iniciativa, así como a la falta de tramitación parlamentaria del proyecto de ley presentado por el diputado Juan Bustos y otros. La parálisis en la tramitación de dichos proyectos de ley, unida a la desestimación del proyecto de ley presentado por el senador Alejandro Navarro y otros, permite que se produzcan vulneraciones del principio de legalidad penal en la aplicación de la legislación antiterrorista, poniendo en entredicho la voluntad de reformar la política criminal.

20. A este respecto, los Relatores Especiales quisieran llamar la atención del Gobierno sobre el hecho de que, como ha sido señalado por el Relator Especial sobre la promoción y la protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo, toda definición de terrorismo y de acto terrorista debe identificar de manera precisa dichas conductas, limitando su alcance solamente a aquellos actos que son terroristas por naturaleza (E/CN.4/2006/98, párrs. 26 a 50). Ello asegura el pleno respeto al principio de legalidad consagrado en el artículo 15 del Pacto Internacional de Derechos Civiles y Políticos, así como en otros instrumentos internacionales de derechos humanos.

21. El Relator Especial ha indicado que la resolución 1566 (2004) del Consejo de Seguridad insta a los Estados a que cooperen plenamente en la lucha contra el terrorismo y, de este modo, prevenir o sancionar los actos que reúnan estas tres características de manera acumulativa: a) actos, inclusive contra civiles, cometidos con la intención de causar la muerte o lesiones corporales graves o de tomar rehenes; b) actos cometidos, independientemente de toda justificación por consideraciones de índole política, filosófica, ideológica, racial, étnica, religiosa

u otra similar, con la intención de provocar un estado de terror en la población en general, en un grupo de personas o en determinada persona, intimidar a una población u obligar a un gobierno o a una organización internacional a realizar un acto, o a abstenerse de realizarlo; y c) actos que constituyan delitos definidos en las convenciones y los protocolos internacionales relativos al terrorismo y comprendidos en su ámbito (ibíd., párr. 37).

22. Esta fórmula acumulativa sirve de umbral de seguridad para garantizar que sean únicamente los actos de carácter terrorista los que se identifiquen como tales. El Relator Especial subraya que no todos los actos que son delito con arreglo al derecho nacional o incluso internacional son actos de terrorismo ni deberían definirse así (ibíd., párr. 38).

23. Los Relatores Especiales son conscientes de la necesidad de los Estados de adoptar medidas efectivas para prevenir el terrorismo y luchar contra él pero, a la vez, les preocupa que la legislación actual de terrorismo no sea plenamente conforme a los estándares internacionales de derechos humanos. En consecuencia, quieren hacer un llamamiento tanto al Gobierno como a los demás poderes del Estado para que impulsen una pronta reforma de la legislación antiterrorista, y para que atiendan la situación de las personas mapuches que fueron condenadas en virtud de dicha legislación.

B. Comunicación recibida del Gobierno

24. No se recibió ninguna comunicación del Gobierno.

Egypt

A. Communications sent to the Government by the Special Rapporteur

25. On 11 January 2007, the Special Rapporteur, jointly with the Special Rapporteur on the question of torture, sent a letter regarding **Ayman Hkiri**, **Ahamed Lahbib**, **Mohamed Almadiri** and a **fourth person**, all Tunisian nationals studying in Egypt, held at the al-Khalifa detention centre in Cairo. According to the information received, the four men had been arrested at the end of November 2005, reportedly in connection with the activities of a so-called terrorist cell in Egypt recruiting people to fight against the United States forces in Iraq, but no official charges had been brought against them. After their arrest they were held at the State Security Intelligence office in Madinet Nasr, northern Cairo, where they were blindfolded and handcuffed, beaten and given electric shocks to sensitive parts of their bodies. They also were subjected to sleep prevention and forced to watch others being tortured. Subsequently they were transferred to al-Khalifa detention centre. Furthermore, the Egyptian authorities were planning to return the four men to Tunisia. Concern was expressed that they might face torture or ill-treatment if returned to Tunisia.

26. On 22 March 2007, the Special Rapporteur sent a letter to the Government of Egypt with regard to the **proposed amendment to article 179 of the Constitution of Egypt**. According to the information received, the amendment to article 179 together with proposed amendments to 33 other articles of the Constitution, had been approved by the Parliament on 19 March 2007. Further to the approval by the Parliament, it had been planned that these amendments will be put to a popular referendum on 4 April 2007. On 20 March 2007, however, it had been decided to conduct the public referendum 10 days earlier than the envisaged date, i.e. on 26 March. In this

connection, the Special Rapporteur drew the Government's attention to three main substantive areas of concern relating to the proposed amendment. In the Special Rapporteur's view the amendment of article 179 of the Constitution required reconsideration in order to secure that its adoption will not lead to human rights violations:

(a) The amendment to article 179 of the Constitution stipulates that the State strives to protect public security and order against the danger of terrorism. This danger or acts of terrorism, however, are not defined by the proposed amendment. The lack of definition of these acts in the proposed constitutional provision combined with the broad and vague definition of terrorism in article 86 of the Penal Code of Egypt, introduced in 1992, aggravates the Special Rapporteur's concern that the amendment would grant powers upon the authorities to employ measures under the new article 179 of the Constitution against actions which do not in fact amount to terrorism. The concern of the broad definition of terrorism contained in article 86 of the Penal Code, which seems to allow to be used against dissidents and opposition members and which has led to an increase in crimes punishable by the death penalty, has already been addressed in the letter of 21 September 2005;

(b) Moreover, the proposed amendment to article 179 of the Constitution foresees that the law shall regulate provisions for procedures which are necessary to confront the danger of terrorism in such a way that their implementation should not be hindered by articles 41 (1), 44 and 45 (2) of the Constitution of Egypt. Therefore, such laws to be adopted would confer powers upon the authorities to arrest and detain individuals, conduct house searches and monitor private correspondence, telephone calls and other communication without constitutionally defined limitations. In fact, based upon the amendment to article 179 of the Constitution, the legal provisions to be adopted may include a blanket authorization for the unrestricted limitation of rights and freedoms enshrined in the articles 41 (1), 44 and 45 (2) of the Constitution. Thus, the proposed amendment may even allow for the restriction of the very essence of these constitutionally guaranteed rights. Regarding the power to arrest individuals, the Special Rapporteur drew the attention of the Government to article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR), which affirms that everyone has the right to liberty of the person and no one shall be subjected to arbitrary arrest or detention. According to article 9, paragraph 3, of the ICCPR, anyone arrested or detained on criminal charge shall be brought promptly before a judge and shall be entitled to trial within a reasonable amount of time or release. The right to challenge the lawfulness of any detention before a court is provided by article 9, paragraph 4, of the ICCPR. The Human Rights Committee confirmed in its general comment No. 29 of 2001 that the above-mentioned right is protected at all times, including during a state of emergency. This is partly because of the crucial role of procedural guarantees in securing compliance with the non-derogable right under article 7 of the ICCPR not to be subjected to torture or any other form of inhuman, cruel or degrading treatment;

(c) Finally, the proposed amendment confers upon the President the power to refer any terrorism-related case to any judicial authority stipulated in the Constitution or the law. Thus, this amendment authorizes the President, as head of the executive branch, to bypass otherwise applicable rules concerning jurisdiction. This may imply that individuals suspected for terrorism-related reasons may be tried before a military or special court, depending upon Presidential discretion.

27. On 27 June 2007, the Special Rapporteur sent a communication responding to the **letter sent by the Government of Egypt on 8 June 2007** regarding the proposed amendment to article 179 of the Constitution of Egypt on the protection of public security and order against the danger of terrorism. According to the letter of the Government, the comments of the Special Rapporteur on the draft amendments to the Constitution fell within the scope of advisory or technical assistance and could therefore be presented only at the request by the Government. As such assistance had not been requested, the letter sent by the Government expresses the view that the letter of 22 March 2007 from the Special Rapporteur fell outside his mandate. In his letter of 27 June 2007, the Special Rapporteur explained why he takes a different view. Paragraph 14 (a) of Commission on Human Rights resolution 2005/80 (extended by the Human Rights Council pursuant to decision 2006/102) entrusts the Special Rapporteur on human rights and counter-terrorism to make concrete recommendations, including about the provision of advisory services or technical assistance by the Office of the High Commissioner for Human Rights. Hence, the Special Rapporteur's letter of 22 March should not be understood as a form of technical assistance or advisory services. Rather, it falls under paragraph 14 (e) of the Commission resolution mandating the Special Rapporteur to develop "a regular dialogue" with all relevant actors, including Governments. The Special Rapporteur underlined his firm opinion that a proactive approach, addressing also issues that have not yet been finally decided on the national level, is often more productive than reacting to alleged human rights violations after the fact (see paragraph 14 (b) of the above resolution). The Special Rapporteur expressed his hope that this clarification as to the procedural question of the scope of the Special Rapporteur's mandate will be of assistance to the Government in preparing a substantive response to his letter of 22 March. The Special Rapporteur reminded the Government that on 9 December 2005 he had requested an invitation for a country visit. The Special Rapporteur expressed his belief that such a visit would also be an optimal occasion to discuss the parameters of the Special Rapporteur's mandate with the competent authorities of the Government for the purpose of clarifying any remaining misunderstandings and to engage in a substantive dialogue on important issues concerning the impact of human rights and fundamental freedoms in the context of countering terrorism.

B. Communications from the Government

28. As at 1 November 2007, there has been no reply to the Special Rapporteur's correspondence of 11 January 2007.

29. By letter of 8 June 2007, the Government of Egypt replied to the communication sent on 22 March 2007. First, the Government recalled its unwavering commitment to the cause of promoting and protecting human rights, and that it has undertaken legislative, political, and economic and social reforms with a view to promoting and protecting the human rights of the Egyptian people in all fields.

30. The Government further highlights the fact it is an ardent advocate of the principle of protecting human rights while countering terrorism, which is best evidenced by the Government's co-sponsorship of the General Assembly resolution on the protection of human rights and fundamental freedoms while countering terrorism and by its support for the Commission on Human Rights resolution 2005/80 on human rights and terrorism. Moreover, Egypt is also working constructively with the member States of the United Nations Human Rights Council to re-examine, revise and reform the working methods of the previous

Commission on Human Rights and the United Nations human rights special procedures. Within that context, Egypt has always emphasized the important role that Special Procedures play in promoting and protecting human rights, and has strongly defended the preservation and strengthening of that role within the new Council.

31. It is important to specify that the letter of the Special Rapporteur falls within the scope of advisory or technical assistance which must be applied only at the request of the concerned State. The Government recalls that it is stipulated in the mandate of the Special Rapporteur and does not apply in this instance. The Government blames this on the fact that his assessment seems to be primarily based on a hypothetical possibility of the presumed deviation of the draft legislation from human rights norms.

32. The Government considers that any evaluation should be based in actual articles of the law dealing with this issue when it is approved by the legislative branch of the Government. It is also unfortunate that the request of the Special Rapporteur to reconsider the amendment to article 179 must be deemed as unwarranted intervention in the functions and operations of the legislative organs of the State, which have totally conformed to constitutional and legal parameters.

33. The Government believes that it is outside the Special Rapporteur's mandate to intervene in the national debate on a matter of constitutional amendments which have been decided upon by the Egyptian people, through a democratic process of national referendum.

34. By letter of 30 July 2007, the Government replied to the communication sent on 27 June 2007, concerning the Egyptian Constitution and the new anti-terrorism law still in its drafting stage.

35. First, the Government of Egypt stresses its firm commitment to the promotion of all human rights and fundamental freedoms, which are enshrined in the instruments Egypt has ratified. Furthermore, any international or regional human rights instrument becomes, upon ratification, part of the Egyptian legal system and hence national courts are bound to implement these instruments as national.

36. The Government emphasizes that the recent constitutional amendments, including the amendments to article 179, followed all the relevant procedural requirements stipulated in the Constitution; they were first approved by both Houses of the Egyptian Parliament, after being the subject of extensive debates and discussions, then they were put to a public referendum where the sweeping majority of Egyptian voters were in favour of such amendments.

37. Despite finding it premature to prejudge the content and nature of the new anti-terrorism law before its final promulgation, as it is currently in its drafting stages, the Government of Egypt, in the light of its adamant desire to engage in constructive dialogue with all Special Rapporteurs, is hereby responding to the Special Rapporteur on human rights and counter-terrorism's letter dated 22 March 2007 on amending article 179 of the Constitution.

38. The Government notes that article 179 of the Constitution does not constitute any infringement on Egypt's international human rights obligations. According to the text of this article, the provisions of the anti-terrorism law will only regulate the investigation and

verification procedures - the recourse to which will only be under the condition of necessity - while not regulating any of the adjudication procedures. Moreover, article 179 stipulates that the implementation of these procedures must be under the full supervision of the judiciary.

39. It is further stressed that, according to article 179 of the Constitution, the President has the right to refer any terrorist-related case to any judicial authority stipulated in the Constitution or in the law. Thus, article 179 does not allow for any arbitrariness in the conduct of justice, since all judicial authorities function in consonance with, and abide by, the principles of fair and impartial trial as stipulated in both the Constitution (chapter 4 on the Rule of Law) and all relevant Egyptian legislation. Furthermore, new amendments were recently introduced to the law regulating military courts in Egypt. This new law aims at enhancing the independent nature of military courts as a specialized judicial authority. A Higher Court on Military Appeals that enjoys the same jurisdiction as the Court of Appeal was introduced by the new law. This Higher Court of Appeal will consider appeals presented against the verdicts issued from military courts, thereby adding a new guarantee pertaining to the impartiality and fairness of military courts.

40. As regards the anti-terrorism law currently being drafted by a committee established particularly for that purpose, it will function as the legislative replacement for the exceptional procedures of the emergency law that are going to expire on 31 May 2008. The Committee mandated to draft that law is currently studying and comparing relevant legislation worldwide.

41. The jurisprudence of the United Nations human rights treaty bodies and the United Nations model law in this regard equally constitute important reference points for the work of the Committee. In drafting the law, the Committee is also keen to ensure its compliance with Egypt’s international commitments that stem from the international human rights to which Egypt is a party.

42. The Government of Egypt stressed that it was keen on securing the widest participation possible of all stakeholders in the discussion and debates on the new law before presenting it to both Houses of Parliament. The Committee sought the vision of the National Council for Human Rights (the independent national institution established in accordance with the Paris Principles adopted by the General Assembly) with regard to the guarantees that the new law should provide in order to protect fundamental rights and freedoms while combating terrorism. The Committee will provide the National Council for Human Rights with the draft law as soon as it finishes such a draft in order to seek its detailed comments on it.

43. In light of the above, the Government of Egypt asserts that the meticulous and thorough drafting process of the new anti-terrorism law reflects its determination to avoid any shortcoming that arose in similar laws drafted worldwide for the same purpose. The Government asserts as well its eagerness to achieve and maintain the delicate balance between combating terrorism on the one hand and safeguarding the fundamental rights and freedoms of its citizens on the other.

44. Finally, the Government of Egypt underlines that it is keen to continue to engage with the Special Rapporteur in a constructive dialogue within the parameters of the Special Rapporteur’s mandate, and to respond to communications transmitted to it and provides all information needed with the aim of enhancing the promotion and protection of human rights.

Ethiopia

A. Communication sent to the Government by the Special Rapporteur

45. On 13 February 2007, the Special Rapporteur, jointly with the Special Rapporteur on the question of torture, sent a letter regarding **Bashir Ahmed Makhtal**, 42, a Canadian citizen born in Dagahbur, Ogaden; **Abdi Abdulahi Osman**, 41, a Somali citizen born in Gunagado, Dagahbur, Ogaden; **Ali Afi Jama**, 33, a Somali citizen born in Godey, Ogaden; and **Hussein Aw Nuur Gurraase**, 35, a Somali citizen born in Gunagado, Ogaden, all of them ethnic Ogadenis trading in second-hand clothing in the Horn of Africa (see also paragraphs 62 and 99). According to the information received, on 31 December 2006, Bashir Ahmed Makhtal, Abdi Abdulahi Osman, Ali Afi Jama, and Hussein Aw Nuur Gurraase were arrested by Kenyan authorities, who suspected them to be terrorists. The arrests were reportedly conducted on the basis of provisions of an anti-terrorism bill which had not yet been adopted. The four men were held in custody for three weeks without official charges. On 21 January 2007, Bashir Ahmed Makhtal, Abdi Abdulahi Osman, Ali Afi Jama, and Hussein Aw Nuur Gurraase were transferred to the Ethiopian armed forces in Mogadishu. Concern was expressed that the four individuals might be subjected to ill-treatment because of their ethnicity.

B. Communication from the Government

46. As at 1 November 2007, no reply had been received to the Special Rapporteurs' correspondence.

Fiji

A. Communication sent to the Government by the Special Rapporteur

47. On 16 August 2007, the Special Rapporteur, jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the question of torture, sent a letter to the Government relating to **three incidents this year in which persons are reported to have died in either police or military custody in Fiji**, following their initial arrest. It is reported that investigations into the killings have been inconclusive and that the perpetrators have not been prosecuted. According to information received, **Tevita Malasebe** was arrested at the family home in Suva on 4 June 2007 during the night by eight members of the Fiji Police ("strike-back team"). Shortly after his arrest, members of Tevita's family travelled to the Valelevu Police Station asking to see him. Officers at the station however denied that Tevita was being held, although the van that had transported him to the station was reportedly parked outside and three officers involved in Tevita's arrest were observed at the station. A few hours later, a phone call was received advising the family that Tevita was in CWM hospital, where family members later observed Tevita's bruised corpse. A Police Officers Order for Burial/cremation (form 5) reports the cause of his death as "shock and internal haemorrhage due to multiple bruises as a complication of multiple blunt impacts". Post-mortem photos we have reviewed appear to indicate substantial bruising to the body of the deceased. According to information received, **Sakiusa Rabaka** was arrested in the course of a joint military police operation on 28 January 2007. He was questioned by the military in Nadi and reportedly died three weeks later of a brain haemorrhage, for which he received emergency surgery. Then police Commissioner Romanu Tikotikoca reportedly stated that police were treating his death as

murder and investigations were ongoing against suspects including one police man and six or seven soldiers. According to information received, **Nimilote Verebasaga** was arrested by the police at the family home in Nakaulevu early in the morning of 5 January 2007 and taken to the military barracks for questioning. He was pronounced dead on arrival at the CWM hospital in Suva and the body reportedly showed visible signs of broken ribs and a broken neck. The family later recovered his body from the Suva morgue.

B. Communication from the Government

48. As at 1 November 2007, no reply had been received to the Special Rapporteurs' correspondence.

Germany

Communication from the Government

49. By letter of 16 February 2007, the Government replied to the communication sent on 18 December 2006 (see A/HRC/4/26/Add.1, para. 24). The Government reported that the transfer of the terror suspects to the United States of America authorities by the Bosnia and Herzegovina authorities in January 2002 became known to the public through media reports in November 2006 and had led to violent protests in Sarajevo. The Government does not have further detailed information to conclude whether the allegations are accurate.

50. The Government reports that, at the time, two German liaison officers were deployed to US-EUCOM. The German liaison detachment acts as a point of contact for the American forces in Germany and is mainly responsible for the exchange of information between US-EUCOM and the German territorial commands. From 21 January 2002 onwards this detachment was augmented by an additional officer and senior NCO. These additional soldiers joined a multinational planning group which dealt with issues of support for the United States in preparing and implementing Operation Enduring Freedom and developed exercise scenarios for basic planning. None of the liaison officers were involved in planning or activities connected with the transfer and transport of the terror suspects. The case of the transfer of the "Algerian Six" had already been presented and commented on by the Special Rapporteur of the Council of Europe, Dick Marty.

51. On 27 November 2006, the Association of Public Broadcasting Corporations of Germany (ARD) current-affairs television programme "Report Mainz" broadcast a report about the transfer of six Algerian citizens from Bosnia and Herzegovina to Guantánamo via Turkey, and the alleged role of US-EUCOM headquarters in Stuttgart-Vaihingen. Immediately prior to the broadcast of the report, Südwestrundfunk (SWR) 2 sent a press release to the Stuttgart Public Prosecution Office dated 23 November, together with photocopies of various documents intended as evidence of the responsibility of US-EUCOM headquarters.

52. The Stuttgart Public Prosecution office instituted an appraisal of the matter on 27 November 2006 on the basis of the information provided by Südwestrundfunk, and forwarded this to the office of the Public Prosecutor General at the Federal Court of Justice, asking it to examine whether it should potentially take over the matter. This was done in view of the fact that the Public Prosecutor General at the Federal Court of Justice is the competent

authority pursuant to section 142a of the Courts Constitution Act (CCA) for criminal prosecution with regard to the offences listed in section 120 (1) and (2) of that Act. Because this list is exhaustive, the Federal Public Prosecutor General can only take over criminal proceedings if there is suspicion of an offence that is listed in section 120 (1) and (2) of the Act. This is due to the fact that, under the division of jurisdiction in the German Basic Law, criminal prosecution is fundamentally the remit of the Länder (constituent states of the Federation); section 120 (1) and (2) of the CCA more closely define the exceptional cases of federal jurisdiction referred to in article 96 paragraph 5 of the Basic Law. The importance of a case on its own cannot give rise to the Federal Public Prosecutor General having jurisdiction.

53. In the present case, the Stuttgart Public Prosecution Office contacted the Federal Public Prosecutor General because the facts, as they stood, might cover the offence of abduction pursuant to section 234a of the Criminal Code, and could therefore give rise to jurisdiction on the part of the Federal Public Prosecutor General (section 120 (2), sentence No. 1, in conjunction with section 74a (1) No. 5 of the CCA). As a mandatory requirement within the definition of this criminal offence, the victim must have been exposed to the danger of being persecuted for political reasons. Having regard to article l6a (1) of the Basic Law, the Federal Public Prosecutor General takes the legal view that political grounds within the meaning of section 234a of the Criminal Code include racial, religious or philosophical grounds, and beyond these, association with a political party or group. The persecution must therefore involve one of these elements. A contravention of the ride of law alone, however, does not necessarily turn persecution into political persecution within the meaning of this penal provision. The Federal Public Prosecutor General therefore decided on 21 December 2006 to refrain from initiating investigation proceedings, because no sufficient factual indications were apparent for any of these criminal offences, which, according to the definitive statutory regulation, can give rise to the Federal Public Prosecutor General having jurisdiction to prosecute. In particular, the Federal Public Prosecutor General did not see sufficient indications for the criminal offence of abduction according to section 234a of the Criminal Code.

54. This decision of the Federal Public Prosecutor General did not mean that the examination of the criminal information process has been concluded. Rather, it meant only that jurisdiction over the criminal persecution remains with the Stuttgart Public Prosecution Office which had the task of examining the facts of the case with respect to other criminal offences such as unlawful deprivation of liberty (section 239 of the Criminal Code). The same criminal procedure instruments are available to it for this purpose as to the Federal Public Prosecutor General.

55. The Stuttgart Public Prosecution Office has therefore undertaken a further examination of the allegations. With its order of 11 January 2007, it then also refrained from initiating investigation proceedings on suspicion of unlawful deprivation of liberty or other criminal offences (not within the remit of the Federal Public Prosecutor General), in accordance with section 152 (2) of the Code of Criminal Procedure. According to this order, there was no suspicion of criminal conduct by German citizens, in particular by German liaison officers working at the US-EUCOM headquarters, which would have required the initiation of investigation proceedings. In this respect, it stated that there is merely information that liaison persons of the German armed forces work at US-EUCOM headquarters in Stuttgart-Vaihingen and were also working there at the time of the action in question. However, there was no information linking these persons to participation in the transfer of the six Algerians to Guantánamo.

56. The Public Prosecution Office also stated that it was not known which persons were involved in arranging the handover, in whatever manner, on the United States side, and it also was not known who was responsible for the action (particularly at the US-EUCOM headquarters in Stuttgart). Furthermore, according to the order, members of the United States forces are not subject to German jurisdiction. Article VII 3 (a) (ü) of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces (NATO Status of Forces Agreement - SOFA) of 19 June 1951 establishes a primary right for the United States military authorities to exercise jurisdiction over a member of their force or of a civilian component in relation to offences arising out of any act done in the performance of official duty. According to the Public Prosecution Office, the act in the present case - provided that it involved criminal liability - would without doubt constitute such an act done in the performance of official duty.

57. In conclusion, the Stuttgart Public Prosecution Office was not able to establish that anyone subject to German jurisdiction was in fact involved in any criminal offence under German law and therefore no further investigations were carried out. Moreover, it stated there has been no waiver by the United States authorities of their primary right to exercise jurisdiction over American military personnel in EUCOM, nor is such a waiver expected.

58. Since the group of prisoners was not transferred through Germany to Guantánamo, Cuba, the question of what safeguards are in place to ensure no such transfers occur, does not arise.

59. Measures taken in the fight against terrorism, such as arrests of individuals, their transfer from the custody of one State to that of another, and the treatment afforded to detainees, must at any time be in conformity with the relevant rules of international law, including where applicable the rules of international humanitarian law and recognized human rights standards.

60. The presence of the United States military in Germany is sanctioned by the Convention on the Presence of Foreign Forces in the Federal Republic of Germany, which was concluded by the Federal Republic of Germany, the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic on 23 October 1954. Their status is regulated by the Agreement between the Parties of the North Atlantic Treaty Regarding the States of their Forces of 19 June 1951 and the Agreement to Supplement the Agreement between the Parties of the North Atlantic Treaty regarding the States of their Forces with Respect to Foreign Forces stationed in the Federal Republic of Germany of 3 August 1959.

Israel

Statement of the Special Rapporteur on his mission to Israel

61. On 10 July 2007, the Special Rapporteur issued the following statement during a press conference held in Jerusalem (see the Special Rapporteur's report on his mission to Israel, (A/HRC/6/17/Add.4), which highlights some, but not all, of his preliminary findings:

> "The Special Rapporteur conducted an eight-day mission to Israel, with visits to the Occupied Palestinian Territory. The purpose of the mission, conducted at the invitation of the Israeli Government from 3 to 10 July 2007, was to undertake a fact-finding exercise, and a legal assessment of Israeli law and practice in the fight against terrorism, measured against international law, and considering the impact of Israeli counter-terrorism practices

and policies. His conduct of country visits is also aimed at identifying and disseminating best practice in the countering of terrorism. Following this visit, a more thorough report, which will become publicly available, will be prepared and submitted to the Human Rights Council, a subsidiary body of the United Nations General Assembly. The Special Rapporteur will engage in a further process of written consultations between now and the completion of his final report for the purpose of clarifying open issues.

"The Special Rapporteur met with the Minister for Foreign Affairs, Ms Tzipi Livni in Tse'elim. In Jerusalem, the Special Rapporteur had meetings on a specialist level with the Ministry of Foreign Affairs, Ministry of Justice, Israeli Defence Force, Israeli Security Agency, members of the Knesset (Parliament), the Counter Terrorism Bureau, as well as the former and current President of the Supreme Court of Israel. The Special Rapporteur also travelled to other parts of Israel, including to the HaSharon and Hadarim prisons where he was able to conduct private interviews of security detainees, and to the Ofer Military Court where he observed ongoing proceedings. Within the Occupied Palestinian Territory he visited, inter alia, Bethlehem, Ramallah and Nablus, examined the route and impact of the barrier erected by Israel, and met with the President's Office of the Palestinian Authority. He met with lawyers, academics, victims of terrorism and non-governmental organizations from Israel and the Occupied Palestinian Territory. He was also briefed by a number of international organizations, including United Nations interlocutors.

"The Special Rapporteur is deeply mindful of the difficulties faced by Israel in its efforts to combat acts of terrorism, and the long history of violence in the region, with devastating effects on the Israeli and Palestinian civilian population. He was touched by the personal accounts of victims of terrorism, who have not only faced the bereavement of family and other physical losses, but also struggle to overcome the psychological and fear-inducing consequences of terrorism. He emphasises that sustainable security can only be achieved through due respect for human rights.

"The Special Rapporteur notes with encouragement that Israel is reconsidering its derogation from aspects of the International Covenant on Civil and Political Rights under a declared state of emergency, which has been in existence since the establishment of the State of Israel. This reform is long overdue, as the current legal framework for countering terrorism is vague and outdated, partly based on pre-1948 instruments and hardly compatible with the requirement of legality and Israel's commitment to democracy. He was informed that new counter-terrorism legislation is being drafted and is further encouraged by advice from the Israeli Ministry of Justice that he will be consulted and invited to comment upon this legislation prior to its introduction to the Knesset.

"The Special Rapporteur is furthermore pleased to receive assurances from Israeli Government sources that Israel is not involved in any global programme of extraordinary rendition or secret detention. Central to Israel's strategy in the fight against terrorism has become the continuing construction of a barrier between Israel and certain towns in the West Bank. The route of the barrier, partly a wall and partly a fenced zone with multiple physical obstacles, does not follow the Green Line but is largely located within the Occupied Palestinian Territory, capturing on its western side or within so-called 'fingers' extending deep into the Palestinian Territory several Israeli settlements located there. At

the same time a considerable part of the Occupied Palestinian Territory, including towns and villages, is being separated from the rest of the Territory by the barrier. The winding route of the barrier is creating multiple obstacles for movement between even close-by communities within the Occupied Palestinian Territory. According to Israeli Government interlocutors heard during the visit, the barrier has, together with intelligence and surveillance technologies, resulted in a higher level of security and protection against terrorist attacks. It is nevertheless having an enormously negative impact upon the enjoyment of human rights by the Palestinian people.

"The Special Rapporteur heard from Israeli Government sources of a long-term perspective to replace the current and not yet complete unilaterally-positioned barrier with an agreed international border with a future Palestinian State. Until this is achieved on the basis of genuine negotiations and agreement, the Special Rapporteur emphasises that no part of the barrier must be treated as a fait accompli or annexation of territory. Further, any associated security measures must not impact disproportionately upon the lives of ordinary Palestinian people. Two crucial elements are relevant in this regard in order to both comply with the requirements of international human rights and to counteract the experiences by Palestinians of the barrier causing increasing arbitrariness and oppression. There must be a reduction in the level of hardship to people moving within the Occupied Palestinian Territory. The practical implementation of all security measures, including at checkpoints and terminals, must also be by professional, transparent, accountable and, to largest possible extent, civilian means. The current practices surrounding the route of the barrier, and associated security measures, bear a substantial risk of negative and counter-productive effects, which may in themselves create conditions conducive to the spread of, and recruitment to, terrorism.

"The Special Rapporteur is gravely concerned about the impact of the barrier and accompanying measures upon the freedom of movement, right to property, right to work, right to health, right to education, the right to private and family life, the right to non-discrimination and the human dignity of all persons. The route of the barrier and associated 'closures' is impacting upon the access of Palestinians to their land and water resources, including through the devastation or separation from villages of agricultural land in the course of erecting the barrier, and in some cases has had a devastating socio-economic impact upon communities. As a result of closures and the system of permits regulating the movement of people from one area to another, the Palestinian people are adversely affected in their ability to access education; health services, including emergency medical treatment; other social services; and places of employment. The means of security screening and searches at checkpoints raises concerns about privacy and non-discrimination, particularly heightened in the case of women and children. The permits regime furthermore impacts upon the integrity of family units and the ability of men and women to marry with persons outside their own permit zones. The legal framework against which Israel's conduct in its measures against terrorism is to be addressed is the combined effect of international humanitarian law and international human rights law.

"The Special Rapporteur identifies as a particularly problematic area in the overlap between armed conflicts and policing, Israel's policy of the targeted killing of persons identified as involved in terrorist conduct. Although always a morally inexcusable

decision, participation in terrorism does not create a vacuum in the application of the law, and the Special Rapporteur is encouraged in that regard by the position of the Supreme Court of Israel that the fight against terrorism must be achieved through compliance with the law, including international law. He is, however, troubled by the decision of the Supreme Court concerning targeted killings, in which the court correctly noted that under international humanitarian law a person directly participating in hostilities may during armed conflict be a legitimate military target, but where it applied an overly broad and vague explanation of what amounts to direct participation in hostilities and paid insufficient attention to the fact that not every instance of terrorist conduct will fall under the law of armed conflict. The Court nevertheless qualified its position by stating that such recourse must be by way of last resort and that arrest must always be preferred and actively pursued. The Special Rapporteur is concerned that the policy of targeted killings may in fact result in cases of extrajudicial execution.

"The Human Rights Committee welcomed, in 1999, the decision of the Supreme Court invalidating the former governmental guidelines governing the use by the Israeli Security Agency (ISA) of 'moderate physical pressure' during interrogation. The same decision left open the possibility of the application, ex post facto, of the 'necessity defence' under Israeli Penal Law. Even when properly applied this defence does not validate the application of physical or psychological means of torture or any form of cruel, inhuman, or degrading treatment, but instead means that such wrongful conduct may, in certain very limited circumstances, go unpunished in respect of a particular individual but never absolve the duty of the state to secure accountability and provide an effective remedy for the human rights violation suffered.

"The Special Rapporteur was shocked by the unconvincing and vague illustrations by the ISA of when such 'ticking bomb' scenarios may be applicable. He was troubled by the process by which individual interrogators would seek approval from the Director of the ISA for the application of special interrogation techniques, potentially rendering this as a policy rather than a case-by-case, ex post facto, defence in respect of wrongful conduct. He was furthermore concerned by the lack of truly independent and impartial investigation mechanisms following the application of such methods. A number of further issues will be examined by the Special Rapporteur in his full report including, but not limited to: the definition and classification of terrorism, terrorist organizations, and security suspects; the demolition of houses; the use of 'human shields' by the Israeli Defence Force; the movement of goods and people to and from Gaza; the use of, and procedures surrounding, the administrative detention of security suspects and military courts to try terrorist suspects; the use of military force by Israel, including outside its own territory; and the rights of victims of terrorism and their families."

Kenya

A. Communication sent to the Government by the Special Rapporteur

62. On 14 February 2007, the Special Rapporteur, jointly with the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the question of torture, sent a letter to the Government of Kenya regarding the **detention of over 70 persons**, Kenyans and non-Kenyans. According to the information received, during the month of January 2007,

about 70 individuals of Kenyan and other nationalities were arrested by units of the Kenyan Police, apparently for terrorism-related reasons. A significant number of these individuals had been held or continued to be held incommunicado. In view of their incommunicado detention, concern was expressed for their physical and mental integrity. In this context, the Special Rapporteur also received information about Bashir Ahmed Makhtal, aged 42, a Canadian citizen born in Dagahbur, Ogaden; Abdi Abdulahi Osman, 41, a Somali citizen born in Gunagado, Dagahbur, Ogaden; Ali Afi Jama, 33, a Somali citizen born in Godey, Ogaden; and Hussein Aw Nuur Gurraase, 35, a Somali citizen born in Gunagado, Ogaden, all ethnic Ogadenis trading in second-hand clothing in the Horn of Africa (see also paragraphs 45 and 99). According to information received, the four men were arrested by Kenyan authorities on 31 December 2006. They were held in custody for three weeks without official charges. For two weeks, the authorities interrogated them in the absence of lawyers or Canadian Embassy officials. Mr. Makhtal, who holds a Canadian passport, was denied access to the Canadian High Commission for the first two weeks. Only on 15 January 2007 was Mr. Makhtal granted a brief meeting with a Canadian High Commission official and a lawyer his family hired for him. On 21 January 2007, Mr. Makhtal, Mr. Osman, Mr. Jama and Mr. Gurraase were transferred to the Ethiopian armed forces in Mogadishu without any legal basis and without having been given the opportunity to appeal the transfer.

B. Communication from the Government

63. As of 1 November 2007, no reply had been received to the Special Rapporteurs' correspondence.

Philippines

A. Communication sent to the Government by the Special Rapporteur

64. On 5 March 2007, the Special Rapporteur sent a letter to the Government of the Philippines regarding the "**Act to Secure the State and Protect our People from Terrorism**", the so-called "**Human Security Act of 2007**". By letter of 27 September 2005, the Special Rapporteur had already addressed several concerns related to his mandate concerning the previous draft legislation, which had been under consideration by the Parliament at that moment. According to information received, the Human Security Act of 2007, which had been approved by the Senate and the Congress in February 2007, was awaiting signature by the President and was to enter into force in May 2007. In this connection, the Special Rapporteur drew the Government's attention to four main substantive areas of concern relating to the new provisions. In the Special Rapporteur's view, certain aspects of the Act required reconsideration in order to secure that its adoption will not lead to human rights violations.

65. Section 3 of the Act sets out which crimes are qualified as terrorist crimes. The section provides that: "Any person who commits an act punishable under any of the following provisions of the Revised Penal Code (arts. 122, 134, 134 a, 248, 267 and 324) or under Presidential Decree No. 1613; Republic Act No. 6969, Republic Act No. 5207; Republic Act No. 6235; Presidential Decree No. 532; and Presidential Decree No. 1866, as amended, thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism."

66. The principle of legality in criminal law, enshrined in several international human rights instruments such as article 15 of the International Covenant on Civil and Political Rights (ICCPR), to which the Philippines is a party, implies that the requirement of criminal liability is limited to clear and precise provisions in the law, so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation which would broaden the scope of the proscribed conduct.

67. In the Special Rapporteur's view, at the national level, the specificity of terrorist crimes is properly defined by the presence of three cumulative conditions: (a) the means used, which can be described as deadly or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; (b) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to doing or refraining from doing something; and (c) the aim, which is to further an underlying political or ideological aim. It is only when all of these three conditions are fulfilled that an act may be criminalized as terrorist (see E/CN.4/2006/98, para. 50).

68. While commending the approach taken by the Philippines to define terrorist acts as a combination of a serious ordinary crime with a "terrorist" intent and effect, the Special Rapporteur expressed his preoccupation at the large number of ordinary crimes listed in the Act. As outlined above, it needs to be ensured that the list of offences only includes crimes that involve deadly or otherwise serious violence against human persons (condition 1). For example, this condition does not seem to be automatically inherent in crimes committed under articles 134, 134a and 324 of the Revised Penal Code. Furthermore, the Special Rapporteur stressed that reference to complete statutes, such as contained in the Act in the form of references to certain presidential decrees and republic acts, and does not meet the requirement of clear and precise provisions so as to respect the principle of legal certainty of the law.

69. Thus, the definition of terrorist acts as contained in section 3 of the Human Security Act suffers from the absence of at least one of the three cumulative conditions for classifying a crime as a terrorist crime, i.e. the condition that the crime which is committed is "deadly or otherwise serious violence against members of the general population or segments of it". Furthermore, the reference to entire statues without specifying the actual criminal offence leads to an over-inclusive definition of terrorist crimes. In the Special Rapporteur's opinion, these omissions lead to the qualification of crimes as terrorist crimes, which, in fact, do not dispose of the distinctive force of terrorist acts. Thus, the definition as contained in the Human Security Act is overly broad and therefore at variance with article 15 of the ICCPR.

70. In this connection, the Special Rapporteur also referred to the penalty of 40 years of imprisonment, without the benefit of parole. The Special Rapporteur expressed his concern at this strict penalty for two reasons. First, it applies to all crimes listed in section 3 in an undifferentiated manner. For some of theses crimes, this provision may amount to a disproportionate punishment. Secondly, the pre-determined, unalterable number of years of imprisonment does limit the judicial discretion of taking into consideration the individual's personal guilt and other significant circumstances when rendering the verdict. In this respect, however, the Special Rapporteur noted his sincere relief that capital punishment has not been included as a punishment for terrorist crimes, which, in his view, reflects an important development affecting a broader range of issues in the Philippines.

71. Section 19 of the Act provides that "in the event of an actual or imminent terrorist attack, suspects may not be detained for more than three (3) days without the written approval of a municipal, city, provincial or regional official of a Human Rights Commission or judge of the municipal, regional trial court, the Sandiganbayan or a justice of the Court of Appeals nearest the place of the arrest".

72. While noting with satisfaction that the maximum period of detention has been decreased considerably, the Special Rapporteur would like to highlight his concern as to the competence of officials of Human Rights Commissions of the Philippines to approve a detention of an individual according to international standards.

73. According to article 9, paragraph 1, of the ICCPR, everyone has the right to liberty of the person and no one shall be subjected to arbitrary arrest or detention. According to article 9, paragraph 3, of the ICCPR, anyone arrested or detained on criminal charge shall be brought promptly before a judge and shall be entitled to trial within a reasonable amount of time or release. The right to challenge the lawfulness of one's detention before a court is provided by article 9, paragraph 4, of the ICCPR. The Human Rights Committee confirmed in its general comment No. 29 of 2001 that this right is protected at all times, including during a state of emergency. This is partly because of the crucial role of procedural guarantees in securing compliance with the non-derogable right under article 7 of the ICCPR not to be subjected to torture or any other form of inhuman, cruel or degrading treatment.

74. According to the information obtained, Human Rights Commissions are composed of members of the executive branch. Therefore, "a municipal, city, provincial or regional official of a Human Rights Commission" does not amount to a court in the meaning of article 9, paragraph 4, of the ICCPR. Hence, this provision of the Act is incompatible with the ICCPR, which the Philippines have ratified without reservations.

75. Section 26 of the Act provides for restrictions on the right to travel, movement, communication and correspondence "[i]n cases where evidence of guilt is not strong, and the person charged with the crime of terrorism or conspiracy to commit terrorism is entitled to bail and is granted the same (…)" upon order by the court. In this respect, the Special Rapporteur highlighted that conditions for such restriction to the right to travel, or imposition of house arrest should not be defined through the absence of evidence "in cases where evidence of guilt is not strong", which, in any case raises concerns as to the legal certainty of this clause. Instead, the pre-condition for such restriction should be the degree of suspicion or evidence which must meet a certain threshold. Furthermore, the restrictions in correspondence and communication would amount to a disproportionate measure when it was imposed as an automatic or default consequence of home arrest. It should be enshrined in the act that the court may order such measures when they are considered necessary, suitable and proportionate in the individual case at hand.

76. Lastly, section 53 of the Act establishes the Anti-Terrorism Council and assigns it functions as enshrined in section 54 of the Act. According to the information obtained, the Council is exclusively composed of members of the executive. Given its composition and the broad powers vested in the Anti-Terrorism Council, the question of its accountability arises. Furthermore, the Special Rapporteur referred to paragraph 8 of article 54 of the Act, which appears to confer the power to rearrange the organization of the judiciary on an ad hoc basis to

the Anti-Terrorism Council. These arrangements ought to be regulated by the legislature as they may endanger the principle of the separation of powers in general and the independence of the judiciary in particular.

77. The Special Rapporteur, after several meetings and communications with the Government of the Philippines has proposed a 10-day period for a visit during the dates of 10 to 22 January 2008.

B. Communication from the Government

78. By letter dated 9 May 2007, the Government replied to the Special Rapporteur's communication of 5 March 2007. The Government of the Philippines thereby provides views and comments on the concerns raised by the Special Rapporteur on human rights and counter-terrorism with regard to the Human Security Act of 2007.

79. The Special Rapporteur's first concern is that there is a need to be ensured that the list of offences only includes crimes that involve deadly or otherwise serious violence against human persons. This condition does not seem to be automatically inherent in crimes committed under articles 134, 134a and 324 of the Revised Penal Code.

80. A reading of the Senate deliberations shows that, for there to be a crime of terrorism, there must be present, in addition to any of the crimes enumerated in section 3 of the Human Security Act (HSA), both the elements of sowing and creating a condition of widespread and extraordinary fear and panic among the populace, attempting to coerce the Government to give in to an unlawful demand.

81. Special Rapporteur's second concern is that reference to complete statutes, such as contained in the Act in the form of references to certain presidential decrees and republic acts, does not meet the requirement of clear and precise provisions so as to respect the principle of legal certainty of the law. The reference to the entire statutes without specifying the actual criminal offence leads to an over-inclusive definition of terrorist crimes.

82. The Government of the Philippines disagrees. Section 14 (1) and (2), article III (Bill of Rights), of the 1987 Constitution of the Philippines provides that: "No person shall be held to answer for a criminal offense without due process of law" and that "In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him."

83. In addition, section 8, rule 110 (Prosecution of Offenses) of the Rules of Court states:

> "Designation of the offense: The complaint or information shall state the designation of the offense given by the statute, aver the acts or omissions constituting the offense, and specify its qualifying and aggravating circumstances. If there is no designation of the offense, reference shall be made to the section or subsection of the statute punishing it. It is a constitutional right of any person who stands charged in a criminal prosecution to be informed of the nature and cause of the accusation against him or her."

84. Pursuant to section 8 of rule 110 cited above, for a complaint or information to be sufficient, it must, inter alia, state the designation of the offence by the statute, and the acts or omissions complained of as constituting the offence. This is essential to avoid surprises for the accused and to afford him the opportunity to prepare his defence accordingly. To comply with these fundamental requirements of the Constitution and the Rules on Criminal Procedure, it is imperative for the specific statute violated to be designated or mentioned in the charge. However, there is no law which requires that, in order for an accused to be convicted, the specific provision which penalizes the offence be mentioned in the inquiry. It is not the designation of the offence in the complaint or inquiry that is decisive. What is decisive are the allegations therein which directly apprise the accused of the nature and cause of the accusation against him.[1] Therefore, although no particular provisions of the special laws were cited in section 3 of the HSA, so long as the complaint or the charges filed against the accused contains an allegation of the acts or omissions constituting terrorism, the requirements of the Constitution and of the Rules of Court are deemed complied with.

85. The Special Rapporteur's third concern is the penalty of 40 years imprisonment, without the benefit of parole. This is a strict penalty because it applies to all crimes listed in section 3 of the Act in an undifferentiated manner. The pre-determined, unalterable number of years of imprisonment limits judicial discretion for taking into consideration the individual's personal guilt and other significant circumstances when rendering the verdict.

86. Section 2 of Act No. 1403 (Indeterminate Sentence Law), as amended, which enumerates the instances wherein the convicted persons are not entitled to parole, reads:

> "This Act shall not apply to Persons convicted of offenses punished with the death penalty or life-imprisonment; to those convicted of treason, conspiracy or proposal to commit treason; to those convicted of misprision of treason, rebellion, sedition or espionage; to those convicted of piracy; to those who are habitual delinquents; to those who shall have escaped from confinement or evaded sentence; to those who having been granted conditional pardon by the Chief Executive shall have violated the terms thereof; to those whose maximum term of imprisonment does not exceed one year, not to those already sentenced by final judgment at the time of the approval of this Act, except as provided in Section 5 hereof".

Since the crime of terrorism is considered a crime against national security and the law of nations, persons convicted of the crime of terrorism are likewise not entitled to parole because their cases are analogous to these enumerated in Act No. 1403, as amended. It is worth mentioning that on 24 June 2006, President Gloria Macapagal-Arroyo signed into law R.A. No. 9346, which prohibited the imposition of the death penalty.

87. The Special Rapporteur's fourth concern is that human rights commissions are composed of members of the executive branch. "A municipal, city, provincial or regional official of a

[1] *Criminal Procedure*, Ricardo J. Francisco, second edition (1994), p. 52, citing cases.

Human Rights Commission" does not amount to a court in the meaning of article 9, paragraph 4, of the ICCPR. Hence, this provision is incompatible with the Covenant, which the Philippines has ratified without reservations.

88. An understanding of what the Commission on Human Rights is, vis-à-vis the courts in the Philippines, needs amplification. To set the record straight, the Commission on Human Rights is not composed of members of the executive branch. It was created by the 1987 Constitution as an independent office, although not at the same level as the other Constitutional Commissions. It serves as the "watchdog" or Ombudsman of the people to guard against human rights abuses committed against them. The Commission should be distinguished from the Human Rights Committee, now renamed and reconstituted as the Presidential Human Rights Committee (PHRC), which was formed to serve as the primary advisory body to the President in effectively addressing urgent human rights concerns/issues in the entire country. PHRC is composed of members from the executive branch. Under Administrative Order No. 163, s. 2006, the Chairperson of the CHR, the Ombudsman, the Chairperson of the Senate Committee on Justice and Human Rights and the Supreme Court Administrator may join the PHRC as observers.

89. The Special Rapporteur's fifth concern is that the conditions for the restriction to the right to travel, or imposition of house arrest under section 26 of the Act should not be defined through the absence of evidence "in cases where evidence of guilt is not strong". Instead, the precondition for such restriction should be the degree of suspicion or evidence which must meet a certain threshold. The restrictions on correspondence and communication under section 26 of the Act would amount to a disproportionate measure when imposed as an automatic or default consequence of house arrest. It should be enshrined in the Act that the court may order such measures when they are considered necessary, suitable and proportionate in the individual case at hand.

90. Section 26 of the HSA should be read in relation to the following provisions of article III (Bill of Rights), of the 1987 Constitution: "All persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required."

91. Section 6 states that the liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.

92. The Special Rapporteur's sixth concern is section 53 of the Act establishes the Anti-Terrorism Council. According to the information obtained, the Council is exclusively composed of members of the executive. Given its composition and the broad powers vested in the Anti-Terrorism Council, the question of its accountability arises. Under section 1, article XI (Accountability of Public Officers) of the 1987 Constitution, "Public office is a public trust". The notion of a public trust connotes accountability. Congress has put in place mechanisms to see to it that the rights of the people will be safeguarded. Under section 59 of the HSA, a Joint Oversight Committee, composed of five members each from the Senate and the House in addition to the Chairs of the Committees of Public Order of both Houses was created to oversee

the implementation of the Act. Upon the expiration of one year after the Act is approved by the President, the Committee shall review the HSA, particularly the provisions that authorize the surveillance of suspects of, or persons charged with, the crime of terrorism.

93. To that end, the Committee shall summon the police and law enforcement officers and the members of the Anti-Terrorism Council and require them to answer questions from the members of Congress and to submit a written report of the acts they have done in the implementation of the law, including the manner in which the persons suspected of or charged with the crime of terrorism have been dealt with in their custody and from the date when the movements of the latter were subjected to surveillance and his or her correspondences, messages, conversations and the like were listened to or subjected to monitoring, recording and tapping. A Grievance Committee was also created composed of the Ombudsman as Chair, and the Solicitor General and an under-secretary from the Department of Justice, as members, to receive and evaluate complaints against the actuations of police and law enforcement officials in the implementation of the HSA.

94. Moreover, to discourage frivolous accusations and to ensure that only airtight indictments of terrorism are brought before the courts, section 50 of the HSA entitles the person accused of terrorism, upon acquittal, to the payment of damages in the amount of P 500,000 for every day that he/she has been detained or deprived of liberty or arrested without a warrant as a result of such an accusation. The award of damages shall be without prejudice to the right of the acquitted accused to file criminal or administrative charges against those responsible for charging him/her with the case of terrorism. In addition, section 41 for the HSA also entitles the person suspected of or charged with the crime of terrorism or conspiracy to commit terrorism, upon his or her acquittal or the dismissal of the charges against him or her, to the payment of damages in the amount of P 500,000 a day for the period in which his properties, assets or funds were seized. In both instances, the amount of damages shall he taken from the appropriations of the police or law enforcement agency that caused the filing of the charges against him/her.

95. The Special Rapporteur’s seventh concern is that article 54 (8) of the Act appears to confer the power to re-arrange the organization of the judiciary on an ad hoc basis to the Anti-Terrorism Council. These arrangements ought to be regulated by the legislature as they may endanger the principle of the separation of powers in general and the independence of the judiciary in particular. The Philippines disagrees. The designation of special courts will not in any way affect the independence of the judiciary. It is a power vested in an independent Supreme Court to provide focus and expedite terrorism cases pending in the lower courts. Under the Constitution, the jurisdiction of courts, other than the irreducible jurisdiction of the Supreme Court prescribed under section 5, article VIII of the 1987 Constitution, is determined by Congress. However, it is the Supreme Court which has administrative supervision over all lower courts and their personnel. This is a significant innovation towards strengthening the independence of the judiciary.

96. The authority to promulgate rules concerning pleading, practice and procedure and admission to the practice of law is a traditional power of the Supreme Court. The grant of this authority, coupled with its authority to integrate the Bar, to have administrative supervision over all courts, and to discipline judges of lower courts, in effect places in the hands of the Supreme

Court the totality of the administration of justice and thus makes for a more independent judiciary.[2] The Supreme Court, in the exercise of its administrative supervision over all courts, has, in the past and pursuant to law, designated special courts to handle special cases. For example, section 90 of R.A. No. 9165 (Comprehensive Dangerous Drugs Act of 2002) provides that "the Supreme Court shall designate special courts from among existing Regional Trial Courts to exclusively try and hear drugs cases". Pursuant to R.A. No. 8369 (Family Courts Act of 1997), the Supreme Court issued Administrative Memorandum 99-1-13 which established the Family Courts. Under Section 5 of R.A. No. 9160 (Anti-Money Laundering Act), as amended, "(T) he regional trial courts shall have jurisdiction to try all cases of money laundering". Acting on the request of the Anti-Money Laundering Council (AMLC), the Supreme Court *en banc* issued a resolution designating the existing commercial courts as anti-money laundering courts. So even in the absence of an express provision of law, the Anti-Terrorism Council can request the Supreme Court to designate anti-terrorism courts to try and decide violation of R.A. No. 9372. Said request will not affect the independence of the judiciary since the discretion to establish anti-terrorism courts falls not with the Anti-Terrorism Council but, with the Supreme Court, in the exercise of its administrative supervision over all courts.

C. Statement of the Special Rapporteur on the Human Security Act of 2007

97. The Special Rapporteur issued the following statement on 12 March 2007:

> "On 6 March the Bill, titled The Act to Secure the State and Protect our People from Terrorism, otherwise known as the 'Human Security Act of 2007' was signed into law by the President of the Philippines. This law is scheduled to take effect in July 2007, two months after the May elections. During this interim period, the Special Rapporteur encourages the legislative branch of Government in the Philippines to reconsider this new counter-terrorism law which was approved by Congress in a Special Session of Parliament on 19 February 2007. It is the Special Rapporteur's hope that there will be further debate which may result in the introduction of specific amendments or repeal of the entire Act by the new Congress elected this spring, since implementation of this law could have a negative impact on human rights in the country and undermines the rule of law. There are some positive aspects of the definition of terrorist acts in the Human Security Act but the end result is an overly broad definition which is seen to be at variance with the principle of legality and thus incompatible with article 15 of the International Covenant on Civil and Political Rights (ICCPR). Further, the strict application of a penalty of 40 years' imprisonment undermines judicial discretion in individual cases and may result in a disproportionate punishment due to the broad definition of terrorist acts. While there has been some improvement regarding the length of pre-charge detention in the final version of this law, there is a further concern regarding the competence of various bodies authorized to review detention of an individual since some of these are members of the executive rather than an independent judicial body. Thus, section 19 of the Human Security Act appears to lack the procedural guarantees provided by article 9 of the ICCPR.

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[2] The 1987 Constitution of the Republic of the Philippines: A Commentary, 1996 edition, Joaquin G. Bernas, S.J., pp. 868-869.

> "Another area of concern is that the Act provides for restrictions on movement including the imposition of house arrest where the legal basis is simply 'in cases where evidence of guilt is not strong' rather than positive suspicion or a higher evidentiary threshold.
>
> "The Philippines is a country facing many challenging issues and the Special Rapporteur wishes to reaffirm that he is fully conscious of the need to take effective measures to prevent and counter terrorism, and of the difficulties of States in doing so without compromising the freedoms of a civil society. However, the Special Rapporteur is concerned that many provisions of the Human Security Act are not in accordance with international human rights standards."

The Special Rapporteur wrote to the Government back in September 2005 and addressed several concerns regarding the draft version of this legislation on counter terrorism which was under consideration by the Parliament at that time. He also communicated his concerns to the Government regarding the most recent version of the bill just before it was due to become law.

Saudi Arabia

A. Communication sent to the Government by the Special Rapporteur

98. On 8 February 2007, the Special Rapporteur, jointly with the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the question of torture and the Special Representative of the Secretary-General on the situation of human rights defenders, sent a letter to the Government of Saudi Arabia regarding **Sulieman al-Rushudi**, lawyer, **Essam al-Basrawi**, lawyer, **Saud al-Hashimi**, a medical doctor, **Al-Sharif Saif al-Ghalib**, **Musa al-Qirni**, a university professor, **Abdel Rahman al-Shumayri**, also a university professor, **Abdelaziz al-Khariji**, and at least three other persons, whose identities are yet to be confirmed. All these individuals have been active as human rights defenders. In particular, they engaged in signing petitions addressed to King Abdullah Bin Abdulaziz Al-Saud, calling on him to initiate political and democratic reforms and to respect human rights. According to the information received, the above-mentioned persons were arrested in the cities of Jeddah and Madinah on 3 February 2007, where they had met to discuss the organization of peaceful activities in favour of political and democratic reforms in Saudi Arabia. The 10 men were held incommunicado at the offices of the General Intelligence Service (al-Mabahith al-'Amma) in Jeddah. Requests for access by their families and to appoint lawyers have been denied by the General Intelligence Service. On 5 February 2007, Mr. Al-Basrawi's son asked for a visit and attempted to hand over medicine for his ill and disabled father. He was ordered to return home and warned never to ask again to meet with Mr. Al-Basrawi. The Ministry of the Interior issued a statement alleging that the detainees were arrested on suspicion of fund-raising to support terrorism. Mr. Al-Rushudi and Mr. Al-Ghalib had been detained before and released after several weeks following the signing of a petition in March 2004 calling for political change in Saudi Arabia. Concern was expressed that the detention of Mr. Al-Rushudi, Mr. Al-Basrawi, Dr. Al-Hashimi, Mr. Al-Ghalib, Dr. Al-Qirni, Dr. Al-Shumayri, Mr. Al-Khariji, and the three other persons mentioned above may be related to their legitimate and peaceful activities in defence of human rights. In view of their incommunicado detention concern was expressed that these individuals may be at risk of ill-treatment. Further concerns were expressed as regards

Mr. Al-Basrawi's status of health since he has reportedly been denied to receive medication from his son. Concern was also expressed that the charge of "terrorism" is used in order to prevent them from pursuing human rights and political activities.

B. Communication from the Government

99. As at 1 November 2007, no reply had been received to the Special Rapporteurs' correspondence.

Somalia

A. Communication sent to the Government by the Special Rapporteur

100. On 13 February 2007, the Special Rapporteur, jointly with the Special Rapporteur on the question of torture, sent a letter to the Government of Somalia regarding **Bashir Ahmed Makhtal**, 42, a Canadian citizen born in Dagahbur, Ogaden; **Abdi Abdulahi Osman**, 41, a Somali citizen born in Gunagado, Dagahbur, Ogaden; **Ali Afi Jama**, 33, a Somali citizen born in Godey, Ogaden; and **Hussein Aw Nuur Gurraase**, 35, a Somali citizen born in Gunagado, Ogaden (see also paragraphs 45 and 99). All of them are ethnic Ogadenis trading in second-hand clothing in the Horn of Africa. According to the information received on 31 December 2006, Bashir Ahmed Makhtal, Abdi Abdulahi Osman, Ali Afi Jama, and Hussein Aw Nuur Gurraase were arrested by Kenyan authorities, who suspected them to be terrorists. The arrests were reportedly conducted on the basis of provisions of an anti-terrorism bill which has not yet been adopted. The four men were held in custody for three weeks without charge. On 21 January 2007, they were transferred to the Ethiopian armed forces in Mogadishu. Concern was expressed that the four individuals might be subjected to ill-treatment because of their ethnicity.

B. Communication from the Government

101. As at 1 November 2007, no reply had been received to the Special Rapporteurs' correspondence.

South Africa

Statement of the Special Rapporteur on his mission to South Africa

102. The Special Rapporteur issued his preliminary findings on his mission to South Africa on 26 April 2007 during a press conference held in Pretoria (see report of the Special Rapporteur on his mission to South Africa, A/HRC/6/17/Add.2):

> "The Special Rapporteur conducted a 10-day visit to South Africa from 16 to 26 April 2007, at the invitation of the Government. The Special Rapporteur visited Pretoria, Johannesburg, Midrand and Cape Town. He had high-level meetings with ministers or officials responsible for foreign affairs, justice, defence, safety and security, intelligence, corrections and home affairs. During the visit, he met with the national police force, the national prosecuting authority, the judiciary, parliamentary committees, the Human Rights Commission, a representative of the United Nations High Commissioner for Refugees, lawyers, academics and non-governmental organizations (NGOs). The Special

Rapporteur also had the opportunity to visit a correctional detention centre and to observe a trial in the High Court of Pretoria related to charges that could fall under the notion of terrorism. The purpose of the visit was twofold: firstly, to examine South Africa's laws, policies and practices on counter terrorism and to assess how such measures affect the protection and promotion of human rights, and secondly, to examine the role South Africa plays in southern Africa and on the African continent in countering terrorism in the international context.

"Historical context: after the repression of apartheid, South Africa, in the early 1990s, made its transition from apartheid into a full-fledged parliamentary democracy, marked particularly by the adoption of the Constitution in 1995. The transition process was in many ways exceptional through its non-violent and inclusive approach. The strong constitutional foundation on which South Africa rests today is evident and enjoys broad support within society. South Africa has also demonstrated a leadership role on both the African continent and internationally, which includes at present holding a seat on the Security Council. The country continues to grapple with many challenges, particularly related to access to the most essential social and economic rights. An active civil society in conjunction with a full-fledged judicial system, including the Constitutional Court, has deepened the practical meaning of South Africa's human rights commitments.

"Perceived terrorists threats: this historical setting forms the background for South Africa's measures in the context of the promotion and protection of human rights while countering terrorism. The issue of protecting human rights while countering terrorism has a particular significance in today's South Africa. During apartheid, the notion of 'terrorism' was used as an instrument of widespread and systemic human rights violations by the regime. Today, the Government of South Africa does not perceive terrorism, from national or international groups, as a serious threat to the country. The Government, however, remains vigilant and expresses its readiness to cooperate in international measures to combat terrorism. Further the Government stresses its preference for multilateral action within the framework of the United Nations on this issue. The Government sees terrorist acts primarily as crimes, which are to be dealt with using the methods of intelligence, investigations and prosecutions within the framework of the ordinary criminal justice system. In the last decade, this approach is reflected in two incidents which could be referred to as terrorism. Firstly, the violence by PAGAD (People Against Gangsterism and Drugs) primarily in the Western Cape, and the violence attributed to 'Boeremag', a group of white South Africans suspected of carrying out acts of violence, including bombings with human casualties, in 2001-2002. PAGAD is today seen as a spent force without recruitment or financial basis. The Boeremag trial is ongoing since several years, but the violent attacks have ceased.

"The Counter-Terrorism Act of 2005: due to internal pressures and certain gaps in South Africa's national legislation, where particular terrorist acts committed outside South Africa were not criminalized, a report was prepared by the South African Law Review Commission. After extensive consultation with civil society, Parliament approved

the Protection of Constitutional Democracy against Terrorist and Related Activities Act (POCDATARA) in 2005. Today, this law provides the overall legal framework for counter-terrorism in South Africa. The Ministry of Safety and Security has main responsibility for its implementation.

"To date, no jurisprudence is available regarding the implementation of the new terrorism law. However, there is a pending prosecution, related to an associated crime in the Boeremag trial, which is scheduled to commence pursuant to the new law in the coming months. Hence, areas of concern can, at this stage, only be raised regarding the text as it stands, having not been applied.

"Thus, the Special Rapporteur draws attention in particular to the following:

- On the face of it, section 1, subsection 1 (xxv) (a) of the definition of terrorist activity appears overly broad, covering several offences that do not necessarily include deadly or otherwise serious violence against members of the general population or segments of it;

- Taking into account that the above concern is mitigated by the fact that in practice the range of crimes covered by the notion of terrorist activity would be narrowed down by the cumulative requirements of subsection (b) on terrorist intent and subsection (c) on political or analogous aim, subsection (a) nevertheless projects to the world, including other African countries, an incorrect message as to what kind of acts may amount to terrorism;

- The reporting duty set out in section 12 of the law in respect of all crimes under the Act raises issues related to the freedom of expression generally and, in particular, journalists' ability to protect their sources. Nevertheless, the Special Rapporteur recognizes certain elements of the Act as examples of good practice;

- The criminal proceedings pursuant to the Act basically fall under general South African criminal law and all its safeguards;

- The authorities clearly state that racial/ethnic/religious profiling are neither a part of the collection of intelligence or used in investigations, but rather any profiling is based on individual behaviour;

- There are no provisions of administrative detention in the South African counter-terrorism law.

"The Special Rapporteur draws attention to the fact that, in many countries, cases related to terrorism often trigger special procedures or even the jurisdiction of special courts, and that Governments may feel justified to proceed in an exceptional manner to such generally accepted practices such as the right to a public trial. In this context, the Special Rapporteur is concerned that the Government of South Africa has made an application for an *in camera* trial in a security-related case. Further, in the context of countering terrorism, national legislation is often borrowed and copied by other countries

in a piecemeal way, and if sections of the South African Counter-Terrorism Act are inserted into a national framework with less developed legal safeguards, it may indeed threaten human rights.

"Listing of Individuals and Entities: sections 25 and 26 of the Act relate to the listing of individuals and entities by the United Nations Security Council as terrorists pursuant to Security Council resolution 1267. According to section 25, the listings when completed are published by Presidential Proclamation in the *Government Gazette*. The lists are then submitted to Parliament, which may take any action which it may deem appropriate. The Special Rapporteur notes as a good practice that the law sets out a clear procedure for the publication of the list, as for instance, financial transactions with persons placed on the list may place other individuals within the ambit of criminal liability. However, for the individuals and entities listed, the nature and scope of the parliamentary action envisaged remain unclear. The Special Rapporteur received several interpretations of the proceedings that follow from the listing and the form and scope of potential judicial review, not provided explicitly by the Act itself. The Special Rapporteur is troubled by the fact that these discussions of a proper parliamentary procedure and a prospect of judicial review appear to have arisen only recently and in respect of a public discussion on the possible United Nations listing of two South African nationals. This current situation in South Africa also demonstrates the shortcomings of the United Nations listing process.

"Police services: law enforcement agencies naturally play a crucial role in counter-terrorism, and professional conduct and adherence to human rights is a central pillar in their ability to collect intelligence and conduct investigations in relation to terrorist acts. The apartheid era of South African law enforcement was grim, and therefore, it has been an enormous task to create a South African Police Service (SAPS) which has the trust of the community. However, allegations of police brutality persist in South Africa. For clarity and transparency on the issue of police unjustified use of force, the Special Rapporteur draws attention to the concluding observations by the Committee against Torture (CAT), which include the recommendation to prohibit in law all forms of torture and ill-treatment, and to incorporate in the law a specific criminalization of torture.

"Immigration in the context of counter-terrorism: in the international debate on terrorism, foreigners are often depicted as a risk. South African authorities and NGOs generally do not perceive immigrants as a risk for potential terrorist acts. It came to the attention of the Special Rapporteur that arrests of foreigners have taken place on the basis of security-related issues. Although formally, detention took place due to overstepping of immigration rules. At the same time, allegations or rumours were frequently raised concerning huge backlogs and corruption in the practices of the Department of Home Affairs. These trends raise concerns both in terms of the rights of foreigners and the risk of South Africa becoming a safe haven for organized crime or terrorist activities.
South Africa has a determined policy of non-discrimination and promotion of equality, enshrined in both its Constitution and legislation. Most rights in the Constitution apply to every person in South Africa, including the right to housing and the right to emergency health care. For instance in the *Lawyers for Human Rights* case the Constitutional Court delineated the applicability of the rights protections under the Constitution to foreigners.

Despite the clarity of the law, the Special Rapporteur was surprised at statements by even high-level governmental persons to the effect that illegal aliens would not enjoy rights in South Africa.

"Non-refoulement: before and during the visit, the case of Khalid Rashid, a Pakistani national who left South Africa on 6 November 2005, allegedly on a chartered airplane escorted by Pakistani authorities was brought to the Special Rapporteur's attention. Until April 2007, the whereabouts of Mr. Rashid was unknown. Numerous court submissions have been filed on his behalf, and the case is ongoing. Without assessing the merits of the case, the Special Rapporteur notes that the discussion around it gives rise to a number of general concerns:

- The distinction between extradition and deportation and the respective provisions to be followed;

- The principle of non-refoulement in South African law and practice, whilst clearly anchored in the Constitution and reaffirmed in the *Mohamed* case, does not appear to be understood by all authorities and is included neither in the Extradition Act nor in the Immigration Act;

- The detention practices in respect of foreigners subject to removal

"The Special Rapporteur recommends the insertion of a general non-refoulement clause in the legislation, prohibiting any removal of a person, be it extradition, deportation or other form of removal to face a real risk of capital punishment, torture, or any form of inhuman, cruel or degrading treatment or punishment.

"Immigration detention: the Immigration Act of 2002 gives immigration officers the power to detain a foreigner and to within 48 hours determine the status of the foreigner. If the person is illegally in the country, deportation procedures are to be instituted and the person can be detained by order of the immigration officer. No judicial or administrative review is required, and despite, inter alia, the right to legal counsel as stated in section 35 (2) of the Constitution, access to legal advice or counsel appears problematic. This is a cause of concern particularly in the counter-terrorism context, as the Special Rapporteur heard several reports of persons in security-related cases having been detained not in facilities subscribed as immigration holdings, but in police stations, especially in the Pretoria area. No independent monitoring agency is conducting visits to police detention facilities where detained foreigners might be held in terrorism-related cases. The Special Rapporteur regrets that the authorities were unable to facilitate his requests to visit these facilities in order to conduct interviews with staff and detainees, including on issues concerning access to counsel and access to judicial review of detention. Mindful of the commitment by post-apartheid South Africa to the principle 'no detention without trial', the Special Rapporteur regrets that this principle may not be complied with in respect of foreigners who, rightly or wrongly, are suspected by other countries of terrorism. The Special Rapporteur finds that the current practices of immigration detention may raise issues under article 9 of the International Covenant on Civil and Political Rights (ICCPR) concerning the right to personal liberty, and recommends that detention practices be

reformed so as to allow for mandatory judicial review of detention decisions, for access to legal counsel, and the institution of an independent body for oversight of immigration detention.

"Community relations: South Africa is committed to maintaining good community relations across ethnic, religious or other lines. Many of the governmental interlocutors of the Special Rapporteur also emphasized that South Africa's foreign policy is deliberately pursuing a strategy that is broadly supported at home so as to give the least possible occasion for resentment both within and outside its territory. The Special Rapporteur commends South Africa for its commitment to prevent terrorism. Concerns however have been raised in relation to the violence and even murders targeted towards Somalian nationals, mainly in the Cape. For good community relations to persist, concerted action is needed. The Special Rapporteur encourages South Africa to formulate clear policy objectives and concrete programmes for the eradication of xenophobia and inter-ethnic violence.

"Regional role: South Africa plays a key role in all major political forums on the African continent, including the African Union (AU), New Partnership for Africa's Development (NEPAD), and Southern African Development Community (SADC). The Government supports both the AU counter-terrorism centre in Algiers and the establishment of an early warning mechanism on conflict in the SADC region. The Special Rapporteur also learned about the research network on counter-terrorism, ANTCT. This is particularly encouraging in light of the need for multidisciplinary, international research on terrorism and conditions conducive to terrorism. The Special Rapporteur encourages South Africa, both within the AU and SADC, to work towards the development of model laws on counter-terrorism which are in conformity with international human rights standards. Also in this context the Special Rapporteur encourages accession to international human rights instruments. In particular, South Africa should take a leading role in promoting the ratification of the ICCPR, the CAT and their Optional Protocols, as well as other human rights treaties, by all African States, so as to ensure the international monitoring of the compliance with human rights in countering terrorism. The Special Rapporteur thanks the Ministry of Foreign Affairs for its cooperation. He would also like to thank all his interlocutors, both governmental and non-governmental institutions for sharing their insights and ideas. The Special Rapporteur expresses his appreciation for the logistical support provided by the Office of the High Commissioner for Human Rights in Pretoria. The Special Rapporteur will submit his full report on the visit to the United Nations Human Rights Council."

Spain

Comunicación recibida del Gobierno

103. El Relator Especial, tras mantener una serie de intercambios de comunicaciones con el Gobierno español, has propuesto como fechas para la realización de su visita al país del 7 al 14 de mayo de 2008.

Turkey

Communications from the Government

104. By letter of 11 April 2007, the Government replied to the communication sent by the Special Rapporteur of 24 July 2006 as follow-up to his mission to Turkey conducted in February 2006.

105. The Government reports that article 1 of the Anti-Terror Law dated 12 December 1991, No. 3713, defines terrorism as "any kind of acts which constitute an offence perpetrated by a person or persons who are members of an organization, through use of force and violence and by employing any of the methods of coercion, intimidation, oppression, suppression or threat for the purpose of altering the fundamentals of the Republic stated in the Constitution, its political, legal, social, secular and economic order, impairing the indivisible integrity of the State with its territory and nation, endangering the existence of the Turkish State and its Republic, weakening or annihilating or seizing the State authority, destroying fundamental rights and freedoms, impairing the internal and external safety of the State, public order or public health".

106. The Government further emphasizes that Law No. 4928, which was adopted in 2003, amended article 1 of Law No. 3713 in order to rearrange the components of the term "terrorism". Prior to this amendment, "use of force and violence" was among the methods of terrorism in the definition ("any kind of acts perpetrated … by employing any of the methods of force and violence, coercion, intimidation, oppression"). However, with the amendments introduced to the article, "use of force and violence" has been incorporated into the definition of terrorism as a fundamental component comprising this crime. The purpose of this amendment is to prevent overly broad interpretations of the definition of terrorism. Use of force and violence is now a threshold for acts of quality for terrorism. This constitutes a safeguard for those acts that fall within the boundaries of fundamental rights and freedoms. The new formulation of the definition of terrorism, which is given in paragraph 1 above, is consistent with principles enshrined in international instruments and the relevant rulings of the European Court of Human Rights.

107. The second and third paragraphs of article 1 of the Anti-Terror Law were repealed in 2006. The second paragraph defined the main elements of the term "terrorist organization". The third paragraph stipulated that certain terms, such as "gangs", formation and "group" used in other criminal laws, could also be considered as terrorist organization.

108. Article 220 of the new Turkish Criminal Code defines the term "organization", taking into account article 2 (a) of the United Nations Conventions against Transnational Organized Crime. One of the purposes of the Turkish Criminal Code is to provide harmonization of terminology used in the laws that fall within the criminal system. In this respect, the second and third paragraphs of article 1 of the Anti-Terror Law relating to the definition of "terrorist organization" were repealed in order to avoid confusion over this term.

109. Article 4 of the Anti-Terror Law, which was amended in 2006, stipulates that certain offences in the Turkish Criminal Code constitute terrorist crimes when they are perpetrated within the framework of the activities of terrorist organizations. These offences include, inter alia, production or trading of narcotics, documentation fraud, money and smuggling.

110. It should be underlined that the types of crimes committed by terrorist organizations may differ depending on the strategic targets that they select to advance their objectives. For example, tourism has often been a selected target of terrorist organizations in Turkey, since it is a large sector of the Turkish economy. Therefore, terrorist organizations have plotted terrorist bombings in tourist places, kidnapped foreigners and in many instances deliberately started forest fires in tourist regions. It is for this reason that "deliberately starting a forest fire" has been included in the crimes set forth in article 4 of the Anti-Terror Law.

111. It should also be pointed out that it has not been possible to formulate a clear-cut and comprehensive definition of terrorism in international law, due to the immense variety of the motives, forms, conditions, objectives and ideologies that are linked to terrorist movements active in the world. Whereas terrorist acts have been set out in various international instruments, including the European Convention on the Suppression of Terrorism, to which Turkey is party, the Convention only makes a general reference to the term "terrorism".

112. Amendments made to articles 6 and 7 of the Anti-Terror Law have been referred to the Constitutional Court by the President. The review by the Constitutional Court is ongoing.

113. Article 8 of the Anti-Terror Law, entitled "financing of terrorism", has been formulated in accordance with Turkey's international obligations, particularly arising from the international Convention for the Suppression of Terrorism, to which Turkey is party.

114. The recent amendments made to article 10 of the Anti-Terror Law allow for certain restrictions on defence rights, which are all exceptional in nature and must be authorized by the decision of a judge. Such decisions are subject to appeal.

115. Paragraph 1 (b) of article 10 states that "a detainee's right to access to defence counsel may be delayed by 24 hours by the decision of the judge upon the request of the Public Prosecutor, however, during this period a statement cannot be taken". The purpose of this provision is to prevent the detainee from assisting other perpetrators of a terrorist crime as well as to ensure that the evidence of the crime is not destroyed by the terrorist organization.

116. Counter-terrorism investigations require different methods than that of ordinary crimes due to the necessity to respond to the complex nature of terrorist tactics in a commensurate way. In general, the first 24 hours following the apprehension of a terror suspect are very important for the investigation. Any evidence or information obtained on the suspect or from the surrounding environment contributes significantly to the investigation and assists in finding other perpetrators, preventing other terrorist offences as well as seizing materials that will be used in other crimes. Furthermore, various terrorist organizations have developed a so-called "alarm system", which triggers an alert process aimed at eliminating the evidence, organizational information and documentation when any member is apprehended.

117. In this respect, the restriction provided in article 10 (b) of the Anti-Terror Law is a precautionary measure against terrorist acts deemed necessary under exceptional circumstances and on the basis of concrete evidence that needs to be found justifiable by the judge. Judicial scrutiny is a safeguard against arbitrary practices. Another safeguard in the provision is making a statement only in the presence of a lawyer, and the ban on taking a statement from the suspect during the restricted period. The suspect will give a statement only in the presence of a lawyer,

as is the case with other suspects. Medical examination of the suspect will be conducted after his apprehension, before detention and at the end of the detention period. If the suspect does not have the financial means to afford a lawyer's fee, it will be borne by the State. Therefore, article 10 (b) does not prevent suspects from exercising their defence rights or benefiting from the safeguards provided for suspects.

118. The new article 10 (e) of the Anti-Terror Law sets a general rule that documents, files and papers of the defence counsel cannot be examined during the investigation. However, the same article provides for an exception to this rule, limited to cases in which there is evidence to support the contention that the defence counsel acts as a liaison between the members of a terrorist organization for organizational purposes. In this case, the judge may order that an official be present during the meetings and that the documents exchanged between the suspect and the defence counsel be examined by the judge. However, such decisions by the judge are subject to appeal. The purpose of this provision is to prevent terror suspects from communicating with other members of the terrorist organization after they are apprehended.

119. Article 10 (b) of the Anti-Terror Law states that a terror suspect can appoint only one defence counsel during the detention period. During the investigation of ordinary offences, three lawyers are allowed to be present in statement-taking. However, due to the complex nature of terrorist crimes and heavy workload which needs to be done expeditiously during the detention period, as well as to prevent any abuse of rights by terrorist organization (which has been experienced on a large scale), the number of defence lawyers to be appointed during the detention period has been reduced to one, with a recent amendment introduced to article 10 (b) of the Anti-Terror Law.

120. The authority of defence lawyers to examine case files has been provided in article 153 of the Criminal Procedure Code. According to this article, defence lawyers may access case files and obtain copies of documents free of charge during the investigation. However, article 10 (d) establishes an exception to this rule, which has a very limited application. It stipulates that in cases in which examining or obtaining a copy of a document from the investigation file by a defence lawyer poses a serious risk to the purposes of the investigation, the authority to gain access to such documents may be restricted by a court upon the request of the Public Prosecutor. After the indictment is accepted by the court, defence lawyers may examine any document in the case file or any evidence under protection, without being subject to any restriction.

121. Furthermore, circular No. 24 issued by the Ministry of Justice addressed to all Chief Public Prosecutors states that, taking into consideration that the main purpose of the criminal procedure law is to establish the concrete facts in a manner respectful of human rights. The right to defence has been safeguarded in the section on fundamental rights and duties of the Constitution of Turkey, which is also protected in the European Convention on Human Rights within the framework of the right to trial. The procedures and legal provisions concerning the authority of defence lawyers to have access to suspects, to be present during the interrogation, to render them legal assistance, to examine case files and to obtain copies of any document from there free of charge should be fully respected and implemented. In view of the above, no shortcoming exists in terms of the legislative framework on access to case files by defence lawyers. So far, no problem has been encountered in practice relating to these provisions.

122. By letter of 31 May 2007, the Government replied to the communication sent by the Special Rapporteur on 22 December 2006 as follow-up to his mission to Turkey conducted in February 2006, which related to the Law on Compensation for Damages that Occurred due to Terror and Counter-terrorism ("Compensation Law"). The Government reported that the Compensation Law has recently been amended by Law No. 5666, which entered into force upon its promulgation in Official Gazette No. 26537, dated 30 May 2007. According to the amendment, the deadline for submission of compensation claims to the Damage Assessment Commissions envisaged by the Compensation Law has been extended for a period of one year starting from the date on which Law No. 5666 entered into force. Therefore, the deadline for compensation claims has been extended until 30 May 2008.

123. The unofficial translation of Law No. 5666 (date of adoption: 24 May 2007) reads as follows:

> "Article 1 - The following provisional article has been added to the Law on Compensation for Damages that Occurred due to Terror and Counter-terrorism No. 5233 and dated 17/7/2004. 'Provisional article 4: The provisions of this Law also apply to pecuniary damages of real persons and legal entities of private law, that have sustained damages due to any act that falls within the scope of articles 1, 3 and 4 of the Anti-Terror Law No. 3713, committed between 19/7/1987 and the date on which this Law enters into force or that have sustained damages due to measures taken within the framework of counter-terrorism within the aforementioned dates, provided that they submit an application to the relevant offices of governors or county governors within one year following the date of entry into force of this Law. Applications submitted in accordance with this article, shall be concluded within two years from the date of application. In the case that this time limit also elapses and the claims are not concluded, the Council of Ministers may extend the time for a period not exceeding one year each time.'
>
> "Article 2 - This Law enters into force on the day of its promulgation.
>
> "Article 3 - The provisions of this Law are enforced by the Council of Ministers."

United States of America

Statement of the Special Rapporteur on his mission to the United States

124. On 25 May 2007, the Special Rapporteur highlighted some, but not all, of his preliminary findings on his mission to the United States of America during a press conference held in Washington D.C. (see report of the Special Rapporteur on his mission to the United States of America, A/HRC/6/17/Add.3):

> "The Special Rapporteur conducted a 10-day visit to the United States, at the invitation of the Government, from 16 to 25 May 2007. The purpose of the mission was to undertake a fact-finding exercise, and a legal assessment of United States law and practice in the fight against terrorism, measured against international law. His conduct of country

visits, including that in the United States, is also aimed at identifying and disseminating best practice in the countering of terrorism. Following this visit, a more thorough report, which will become publicly available, will be prepared and submitted to the Human Rights Council, a subsidiary body of the United Nations General Assembly.

"In Washington D.C., the Special Rapporteur had meaningful meetings on a specialist level with the Department of State, Department of Homeland Security, Department of Defence, and Department of Justice. He also met with members of Congress and their staff, academics and non-governmental organizations. Mr Scheinin travelled to Miami to observe a day of the trial against Jose Padilla and others. It was disappointing that the Special Rapporteur was not provided with access to places of detention, including at Guantánamo Bay, with guarantees permitting private interviews of detainees. It is a part of the Standard Terms of Reference for all United Nations Special Rapporteurs that any visits to detention centres involve unmonitored interviews with detained persons. This is a universally applied term of reference which in many parts of the world is essential for protecting individuals against abuse. It would give a wrong message to the world if the Special Rapporteur were to deviate from this standard condition in respect of the United States. The Special Rapporteur therefore hopes that he can soon visit the United States again for the purpose of visiting places of detention, including Guantánamo Bay, prior to the consideration by the United Nations Human Rights Council of his report on this country visit. That visit should also include observing military commission hearings at Guantánamo Bay.

"The Special Rapporteur is deeply mindful of the tragic events of September 11, 2001, as well as preceding acts of international terrorism against the United States, including the bombing of its embassies in Kenya and Tanzania. He is also mindful of domestic acts of terrorism, including the Oklahoma City bombing. Addressing the situation of victims of terrorism with appropriate compensation and access to health care and rehabilitation is an important aspect of a comprehensive strategy against terrorism, and should be seen as a matter of best practice. The Special Rapporteur notes with encouragement the establishment by the United States Government of a process by which the victims of the terrorist attacks of September 11 have been able to seek compensation. In a world community which has adopted global measures to counter terrorism, the United States is a leader. This position carries with it a special responsibility also to take leadership in the protection of human rights while countering terrorism. The example of the United States will have its followers, in good and in bad. The Special Rapporteur has a deep respect for the long traditions in the United States of respect for individual rights, the rule of law, and a strong level of judicial protection.

"Despite the existence of a tradition in the United States of respect for the rule of law, and the presence of self-correcting mechanisms under the United States Constitution, it is most regretful that a number of important mechanisms for the protection of rights have been removed or obfuscated under law and practice since the events of September 11, including under the USA PATRIOT Act of 2001, Detainee Treatment Act of 2005, Military Commissions Act of 2006, and under Executive Orders and classified programmes. The Special Rapporteur thus sees his visit as one step in the process of

restoring the role of the United States as a positive example for respecting human rights, including in the context of the fight against terrorism. He dismisses the perception that the United States has become an enemy of human rights. It is a country which still has a great deal to be proud of.

"The framework of public international law: the Special Rapporteur does not consider the international fight against terrorism as a 'war', at least not in other than rhetorical terms. During high-level meetings with government officials, it has been repeated that the United States sees itself as being engaged in an armed conflict with Al Qaeda and the Taliban, commencing prior to the events of September 11 and continuing today; until the capabilities of Al Qaeda can be so degraded that their conduct can be dealt with through regular law enforcement mechanisms. The United States consequently identifies humanitarian law as the applicable international law to the apprehension, detention and trial of persons detained at Guantánamo Bay. The Special Rapporteur reminds the United States of the well-established principle that, even during an armed conflict triggering the application of international humanitarian law, international human rights law continues to apply. This is a point made clear, for example, by the Human Rights Committee in its general comment 29, and has been confirmed by the International Court of Justice. The conduct of the United States must therefore comply not only with the Geneva Conventions, but also with applicable international human rights law.

"The same bodies, the Human Rights Committee and the International Court of Justice, have also confirmed that human rights, including those enshrined in the International Covenant on Civil and Political Rights (ICCPR), are also legally binding upon a State when it acts outside its internationally recognized territory. The fact that the United States more than 50 years ago, when the ICCPR was being drafted, expressed that it could not be expected to 'legislate' for occupied countries, cannot constitute a valid justification to engage extraterritorially in outright human rights violations such as arbitrary detention, torture, or other cruel, inhuman or degrading treatment.

"The Special Rapporteur accepts that the United States was engaged in an international armed conflict from the commencement of *Operation Enduring Freedom*, proclaimed as an exercise of self-defence under Article 51 of the Charter of the United Nations, and until the fall of the Taliban regime as the de facto government of Afghanistan. He further accepts in principle that an international terrorist organization, if organized hierarchically as an armed force within the meaning of Common article 3 of the Geneva Conventions, could be engaged in a transborder, albeit technically non-international (as not between two States), armed conflict. However, this does not mean that any act of terrorism, or of international terrorism, would constitute an armed conflict.

"The Special Rapporteur is aware of the reservations and declarations entered by the United States upon its ratification of the ICCPR and the Convention against Torture (CAT). Under international law, reservations that are contrary to the object and purpose of a treaty are impermissible. The relevant treaty bodies, the Human Rights Committee and the Committee against Torture, have requested that the United States withdraw its

reservations and declarations relevant to this context. In light of this, the Special Rapporteur sees his mandate as requiring him to address the law and practice of the United States with reference to international treaty standards, without making an assessment of whether its reservations and declarations are permissible.

"Guantánamo Bay detainees: the persons detained at the United States military facility at Guantánamo Bay have been categorized by the United States as alien unlawful enemy combatants. It must be made clear that this is a description of convenience only without legal effect, since there is no such third category of persons under international law. Those that participate in hostilities are either 'combatants' or 'civilians' who have participated in hostilities and are thus subject to detention and prosecution. Although combatants who are apprehended during the course of an international armed conflict and detained as prisoners of war will be released at the end of hostilities, this will not be the case for persons who are held as persons suspected of war crimes. The international community has recognized the need to ensure that there is no impunity for those that commit war crimes. While acknowledging this principle, it should also be recognized that the chance of ensuring a fair trial diminishes over time.

"In the case of those who have been captured during armed hostilities in an international or non-international armed conflict, but in respect of which there is no allegation of offending against the laws of war, such individuals should be released, or tried by civilian courts for their suspected other crimes. The Special Rapporteur considers that the detention of this group of persons for a period of several years without charge undermines the right of fair trial, and that the United States has thereby placed itself in a position of having to release many of these persons without charge.

"There are serious concerns about the ability of detainees at Guantánamo Bay to seek a judicial determination of their status, and of their continuing detention. Upon the arrival of a detainee at Guantánamo Bay, a Combatant Status Review Tribunal is convened to determine whether the detainee is an 'unlawful enemy combatant' and whether that person should continue to be detained. This occurs once only, unless new evidence about the person's status becomes available. Added to this, an Administrative Review Board undertakes annual reviews of each detainee's status to confirm whether continued detention is required. As confirmed by the Department of Defence, these are administrative processes, rather than judicial ones. Detainees are not provided with a lawyer during the course of the Combatant Status Review Tribunal hearing. Even more problematic is the fact that decisions of the Combatant Status Review Tribunal and Administrative Review Board are subject to limited judicial reviews only, meaning that any reference to ordinary courts is limited to the procedure. The most that a reviewing court may do is to order reconsideration of a decision, not release. These restrictions result in non-compliance with the ICCPR which prohibits arbitrary detention (article 9 (1)), requires court review of any form of detention and entailing a possibility of release (article 9 (4)), and provides a right to a fair trial within reasonable time for anyone held as a criminal suspect (article 9 (3) and article 14 (3)). Article 9 (4) is also relevant to the removal of habeas corpus rights under section 7 of the Military Commissions Act 2006, which purports to expressly deny the jurisdiction of ordinary courts to hear an application for habeas corpus.

"Closure of Guantánamo Bay: the Special Rapporteur is encouraged by the announcement of the President of the United States that he wishes to move towards the closure of Guantánamo Bay, and urges continued and determined action to that end. The Special Rapporteur has been advised that between 40 and 80 Guantánamo Bay detainees are expected to be tried by military commissions, and that the United States wishes to return the balance of detainees to their countries of origin or, where necessary, to a surrogate country, and that it is conducting negotiations with countries for this purpose. He supports initiatives to return detainees to their countries of origin, but also concludes that although the United States has advised that it will not do so in breach of the principle of non-refoulement, the current United States standard applied under this principle fails to comply with international law. While international law (primarily ICCPR article 7) requires that a person not be returned to a country where there is a risk of torture, or any form of cruel, inhuman or degrading treatment, the United States applies a lower threshold of non-return where it is 'more likely than not' that a person will be subject to torture as narrowly defined by the United States itself. Despite the fact that the United States has not yet abolished the death penalty, the Special Rapporteur emphasizes that the principle of non-refoulement is also applicable where a person is liable to the imposition of the death penalty in a jurisdiction where the standards of trial fall short of rigorous compliance with article 14 of the ICCPR on the right to a fair trial.

"The Special Rapporteur emphasizes that the United States has the primary responsibility to resettle any individuals among those detained in Guantánamo Bay who are in need of international protection. He further recommends that other States be willing to receive persons currently detained at Guantánamo Bay. The United States and the United Nations High Commissioner for Refugees (UNHCR) should work together to establish a joint process by which detainees can be resettled in accordance with international law, including refugee law and the principle of non-refoulement. In particular, the Special Rapporteur urges the United States to invite the UNHCR to conduct confidential individual interviews with the detainees in order to determine their qualification as refugees and to recommend to other countries their resettlement. He also urges the United States not to require from receiving countries the detention or monitoring of those returned in cases where such measures would not have basis in international and domestic law.

"Detainees in Afghanistan and Iraq: the Special Rapporteur is mindful of the fact that there are in Afghanistan some 700 and in Iraq around 18,000 persons detained by the United States. Some of these detainees appear to be held for reasons related to the fight against terrorism, under a legal status analogous to that at Guantánamo Bay. He reminds the United States and other States responsible for the detention of persons in Afghanistan and Iraq that these detainees also have a right to a fair trial within a reasonable time if suspected of a crime or, failing this, to release.

"The use of military commissions to try terrorist suspects: by Military Order in 2001, the President of the United States established military commissions for the purpose of trying enemy combatants. The United States Supreme Court ruled in 2006, in *Hamdan v. Rumsfeld*, that military commissions established under the Military Order were unconstitutional, since they were not established under the express authority of Congress, and that the structure and procedures of the commissions violated both the United States

Uniform Code of Military Justice and the four Geneva Conventions. Congress subsequently enacted the Military Commissions Act 2006, which largely reflects the military commission structure under the 2001 Order. The establishment of military commissions is not restricted geographically, permitting any non-United States citizen, including those holding permanent resident status, to be subject to trial by military commission if designated as an enemy combatant. Various aspects relating to the jurisdiction and operation of military commissions raise significant human rights concerns, including the jurisdiction and composition of military commissions, the potential use of evidence obtained by coercion, and the potential for the imposition of the death penalty.

"One of the principal reasons given by the Government for the establishment of military commissions, rather than the use of courts martial or ordinary courts, has been that those courts do not have jurisdiction over certain crimes which some detainees are suspected to have committed. Three matters of concern are raised by this position. First, the Military Commissions Act of 2006 purports to be a piece of legislation which codifies the laws of war and establishes the jurisdiction of military commissions over war crimes. However, the offences listed in section 950v (24)-(28) of the Act (terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) go beyond offences under the laws of war. The establishment of these offences, and the way in which they are described, therefore means that the military commissions have been given jurisdiction over offences which do not in fact form part of the laws of war and thus may result in civilians being tried by military tribunals, in breach of the established interpretation of ICCPR article 14. The second problem, concerning these same offences, is that to the extent they were not covered by the law applicable at the time of the commission of the actual acts, the military commissions will be applying criminal law retroactively, in breach of ICCPR article 15 and universally acknowledged general principles of law. Finally, it appears that the Government's justification for military commissions is incorrect as a matter of fact because ordinary courts martial have had the jurisdiction to try violations of the laws of armed conflict since 1916 under the Uniform Code of Military Justice, and that the nexus between the events of September 11 and United States citizens would allow ordinary courts to try other offences such as conspiracy and terrorism. This is borne out by the fact that the 1998 Embassy bombings were prosecuted by ordinary courts, and that Osama bin Laden was indicted for his action in the attacks on the USS Cole by a Grand Jury in 2000. The ability of ordinary courts to hear charges of conspiracy and material support for terrorism is further borne out by the fact that those being prosecuted in *United States v. Padilla et al.* in the United States District Court at Miami are charged with such offences. In contrast, a suspected co-conspirator, who is an alien and currently detained at Guantánamo Bay, is likely to face these charges before a military commission.

"As to the composition of military commissions, the Special Rapporteur has serious concerns about the independence and impartiality of the commissions, their potential use to try civilians, and the lack of appearance of impartiality. Whereas military judges in courts martial are appointed from a panel of judges by lottery, judges in a military commission are selected for each trial by the convening authority of military commissions. Although the current convening authority is a civilian and former judge, she is employed by the Department of Defence so that the appearance of impartial selection of military judges and members of individual commissions is undermined. Furthermore, there is no prohibition

against the selection of members of a commission who fall within the same chain of command so that more junior members of a military commission, despite any advice to the contrary, may be directly or indirectly influenced in their consideration of the facts. The ability of the convening authority to intervene in the conduct of trials before a military commission is also troubling. The plea agreement in the trial of David Hicks, for example, was negotiated between the convening authority and counsel for David Hicks, without any reference to the prosecuting trial counsel. The involvement of the executive in such matters is troubling.

"The Special Rapporteur is concerned that, although evidence which has been obtained by torture is inadmissible, evidence obtained by other forms of coercion may, by determination of the military judge, be admitted into evidence. Two problems arise in this context. The first is that an accused may not become aware of the fact that evidence has been obtained by torture or coercion since the interrogation techniques used to obtain evidence subsequently presented at trial may themselves be classified and thereby outside the knowledge of the accused. The next problem is that the definition of torture for the purpose of proceedings before a military commission is restricted so that it does not catch all forms of coercion that amount to torture or cruel, inhuman or degrading treatment, equally prohibited in non-derogable terms by ICCPR article 7. It is a clear and established principle of international law that no evidence obtained by torture or cruel, inhuman or degrading treatment may be used for the purpose of trying and punishing a person.

"The Special Rapporteur is furthermore concerned with the ability of a military commission to determine charges in respect of which the death penalty may be imposed. It is well established that article 6 of the ICCPR requires that, where a State seeks to impose the death penalty, it is obliged to ensure that fair trial rights under article 14 of the ICCPR are rigorously guaranteed. Given that any appeal rights subsequent to conviction are limited to matters of law, coupled with the concerns outlined, at the lack of fair trial guarantees in proceedings before military commissions, the Special Rapporteur concludes that any imposition of the death penalty as a result of a conviction by a military commission is likely to be in violation of article 6.

"Finally, the Special Rapporteur notes with concern that the acquittal of a person by a military commission, or the completion of a term of imprisonment following conviction, does not result in a right of release. This further undermines the principles of fair trial and would, if immediate release was not provided in an individual case, involve an arbitrary detention in contravention of article 9 (1) of the ICCPR.

"Interrogation of terrorist suspects: as a result of an apparent internal leak from the Central Intelligence Agency (CIA), the media in the United States learnt and published information about 'enhanced interrogation techniques' used by the CIA in its interrogation of terrorist suspects and possibly other persons held because of their links with such suspects. Various sources have spoken of such techniques involving physical and psychological means of coercion, including stress positions, extreme temperature changes, sleep deprivation, and 'waterboarding' (means by which an interrogated person is made to feel as if they are drowning). With reference to the well-established practice of bodies such as the Human Rights Committee and the Committee against Torture, the Special Rapporteur concludes that these techniques involve conduct that amounts to a breach of the

non-derogable right to be free from torture and any form of cruel, inhuman or degrading treatment. In a meeting with the Special Rapporteur, the Acting General Counsel for the CIA refused to engage in any meaningful interaction aimed at clarifying the means of compliance with international standards of methods of interrogation and accountability in respect of possible abuses. Despite repeated requests on the part of the Special Rapporteur, the CIA did not make themselves available to meet again with him. In light of this lack of cooperation and corroborating evidence from multiple sources, the Special Rapporteur can only conclude that the conduct of his country visit gives further support to the suspicion that the CIA has indeed been involved, and continues to be involved, in the use of enhanced interrogation techniques that violate international law. He urges the United States to ensure that all its officials and agencies comply with international standards, including the ICCPR article 7 and, in the context of an armed conflict, Common article 3 of the Geneva Conventions.

"The Special Rapporteur welcomes the revision of the United States Army Field Manual in September 2006. Although this Manual clearly states that acts of violence or intimidation against detainees is prohibited, and that interrogation techniques must not expose a person to inhumane treatment, there are nevertheless aspects of the revised Manual (when compared to the earlier version of the Manual) that cause concern. On the positive side, the revised Manual explicitly prohibits the use of waterboarding, something not expressly prohibited before. Nevertheless, a comparison of the two recent versions of the Army Field Manual could leave the impression that it is not prohibited during the conduct of an interrogation to slap a person being questioned, subject a person to extreme changes in temperature falling short of the medical state of hypothermia, isolate a detainee for prolonged periods, make use of stress positions, and subject a person to questioning for periods of up to 40 hours without sleep. The Special Rapporteur concludes that the Manual should be revised to expressly exclude such techniques.

"Rendition, and detention in 'classified locations': The Special Rapporteur refers to various sources pointing to the rendition by the CIA of terrorist suspects or other persons to 'classified locations' (also known as places of secret detention) and/or to a territory in which the detained person may be subjected to indefinite detention and/or interrogation techniques that amount to a violation of the prohibition against torture, or cruel, inhuman or degrading treatment. These reports suggest that such interrogation techniques may have been used either directly by CIA agents or in their presence. The existence of classified locations was confirmed by the President of the United States on 6 September 2006 when he announced the transfer of 14 'high value detainees' from these locations to Guantánamo Bay. Although the President announced that at that time the CIA no longer held any persons in classified locations, he reserved the possibility of resuming this program. Since that time, one further high value detainee has been transferred to Guantánamo Bay and the whereabouts of many others are unaccounted.

"The Special Rapporteur emphasizes that there is a difference between 'rendition to justice' (whereby a person is outside formal extradition arrangements handed to another State for the purpose of standing trial in that State, and so long as there is no risk of the person being subjected to torture, or being faced with an unfair trial where the death penalty might be imposed), versus 'extraordinary rendition' to another State for the purpose of interrogation or detention without charge. Rendition in the latter circumstances

runs the risk of the detained person being made subject to torture, or cruel, inhuman or degrading treatment. Furthermore, the removal of a person outside the legally prescribed procedures of extradition or deportation amounts to an unlawful detention in violation of article 9 (1) of the ICCPR. In addition, the use by the CIA of civil aircraft for the transportation of persons subjected to extraordinary rendition, whether by contract or by the establishment of airlines controlled by the Agency, is in violation of the Chicago Convention on Civil Aviation. Again due to the refusal of the Acting General Counsel for the CIA to engage in any meaningful interaction, and in light of corroborating evidence, the Special Rapporteur concludes that his visit supports the suspicion that the CIA has been involved in the extraordinary rendition of terrorism suspects and possibly other persons. This conclusion is corroborated by the recent findings of the Human Rights Committee and Committee against Torture in the cases of *Agiza v. Sweden* and *Alzery v. Sweden* in which Sweden was found to violate its human rights treaty obligations by handing over Mr. Agiza and Mr. Alzery to CIA agents in the course of their rendition to Egypt.

"Immigration and refugee issues: a number of troubling developments in the law and practice of the United States concerns the treatment of immigrants, those applying for visas, and those claiming a refugee status. The PATRIOT Act of 2001 amended provisions of the Immigration and Nationality Act, expanding the definition of terrorist activity beyond the bounds of conduct which is truly terrorist in nature, particularly in respect of the provision of 'material support to terrorist organizations'. The definition captures, for example, the provision by a person of a ransom to have a family member released by a terrorist organization or providing funds to a charity organization that was not then classified as a terrorist organization. The PATRIOT Act provides for the mandatory detention of those suspected of such conduct and a refusal of refugee status for such persons, albeit that the Secretary of Homeland Security has announced a policy of 'duress waiver'. The Special Rapporteur is troubled by the lack of transparency and judicial remedies in the application of such a waiver to persons some of whom may effectively be victims of terrorist conduct.

"Furthermore, the REAL ID Act of 2005, an enactment which ostensibly works to prevent the use of false identification and eliminate identity theft, contains provisions concerning the prevention of 'terrorists' from obtaining relief from removal. The Act raises the threshold concerning the credibility of asylum claims, and limits appeal rights for asylum-seekers, which is inconsistent with the general principle of providing a claimant with the benefit of the doubt as espoused by the United Nations High Commissioner for Refugees and applied by many national jurisdictions in asylum cases.

"Profiling and community outreach: the Special Rapporteur notes with encouragement and as an element of best practice that the Secretary of Homeland Security has openly stated that the application of law and practice by his department is not to involve racial or religious profiling. The Special Rapporteur nevertheless notes claims that country of origin has been, or may be, used as a proxy for such profiling. It is a significant problem in certain regions of the world that the religious status of persons is wrongly confused with the identification of such persons as potential terrorists. This is a troubling pattern that must be reversed, and the Special Rapporteur recommends that all States, including the United States, ensure that they do not act in a manner which might be seen as advocating this development.

"The Special Rapporteur is very much encouraged by the initiation of community outreach programmes by various governmental agencies including the Department of Homeland Security (DHS). Both on its own initiative, and in conjunction with civil society, the DHS has initiated a number of programmes aimed both at creating a constructive dialogue with communities, including Muslims, and at explaining Islamic faith and practice to members of the public and state employees. The alienation of sections of society, and the treatment of groups in violation of their human rights, has been recognized by the international community as constituting conditions conducive to the emergence of terrorism, or recruitment into terrorist organizations. The Special Rapporteur therefore identifies the efforts to reach out to the community as a best practice in the fight against terrorism.

"Surveillance measures: the Fourth Amendment to the United States Constitution guarantees the right of United States citizens to privacy, albeit that international human rights law accommodates interference with privacy where necessary for legitimate purposes and implemented in a proportionate manner. The United States Supreme Court has held, in the 1972 decision *United States v. United States District Court*, that the Fourth Amendment prohibits the surveillance without a warrant of United States persons, even where this is carried out for national security reasons. Under United States law, the surveillance of United States persons (citizens or permanent residents of the United States) can only occur when authorized by the Wiretap Act of 1968, or the Foreign Intelligence Surveillance Act of 1978 (FISA). The PATRIOT Act of 2001 expanded the provisions of FISA so that applications for a surveillance warrant need only establish that foreign intelligence gathering is a significant purpose of the proposed surveillance rather than 'the purpose' of surveillance, as previously required under FISA. This regime raises a number of concerns. First is the low threshold in the availability of surveillance warrants, which leaves open the possibility for interference with privacy where this is not necessary for legitimate purposes. Next is the fact that the Attorney General's guidelines on the availability of surveillance warrants for the investigation of terrorist and related offences, or the gathering of related intelligence, is classified. Although the Special Rapporteur has been advised by the Department of Justice that these guidelines comply with international human rights law, there is no way of assessing the accuracy of this position, nor is there any transparency to guarantee compliance with the dual requirements of article 17 of the ICCPR to not interfere with privacy and to protect against the arbitrary interference with privacy. It is also relevant that the ICCPR obliges States parties to comply with these requirements not only in respect of citizens and permanent residents, but also in respect of all persons within the jurisdiction of the State. It is furthermore troubling that the use of FISA warrants, which have traditionally been treated as an exception to surveillance conducted under the Wiretap Act of 1968, has increased substantially since September 11.

"Operating outside the scope of the Foreign Intelligence Surveillance Act was a National Security Agency (NSA) program of secret surveillance without warrant, authorized by an Executive Order of the President. The existence of this program apparently came to light as a result of an internal leak. Whereas it is a crime under United States law to undertake surveillance without a court order, the NSA surveillance program was said to be authorized under an inherent right of the President to authorize warrantless surveillance under article II of the United States Constitution. Whether or not that is the case, the use of surveillance techniques without a warrant amounts to an

interference with privacy that is not authorized by a prescription by law. The Special Rapporteur therefore concludes that such surveillance is unlawful within the terms of article 17 of the ICCPR. Following media reports in 2005 exposing the existence of the NSA program, the United States President acknowledged the existence of the program and stated that NSA surveillance would in the future be carried out under FISA.

"A further development impacting upon privacy rights has been the expanded use of National Security Letters, a form of administrative subpoena facilitating expedited access to records by the Federal Bureau of Investigation and other intelligence agencies. Prior to the PATRIOT Act of 2001, the availability of National Security Letters was restricted to financial records, customer call records, and consumer reports, with the requirement that a certifying officer was satisfied that the subject of investigation was acting on behalf of a foreign power. The Act broadened the type of records accessible under National Security Letters and extended the authority to counter-terrorism investigations. The Special Rapporteur is concerned with the lack of checks and balances in this authority, a matter that fails to properly ensure that there is no arbitrary interference with privacy.

"Freedom of the press: the Special Rapporteur takes the view that although the criminalization of incitement to terrorism and other serious crime may fall within the scope of lawful restrictions upon freedom of expression as guaranteed by ICCPR article 19, States should be careful not to use vague terms such as 'glorifying' or 'promoting' terrorism when restricting expression.

"The exercise of freedom of expression is a cornerstone of democratic society, and in ensuring accountable governance. It is evident that the freedom of the press, and its ability to bring executive action to light, has been a significant factor in the raising of public awareness and debate on issues central to the promotion and protection of human rights and fundamental freedoms within the United States. The Special Rapporteur is encouraged, in that regard, by the fact that the Government of the United States has not acted to restrain media interest or publication. The free media of the United States itself has in the years following September 11 operated as a device for ensuring transparency and accountability in respect of the adverse consequences upon human rights of counter-terrorism measures undertaken by the Government. This is a feature of best practice which all countries should aspire to."
