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

Summary

The present report is submitted in accordance with Human Rights Council resolution 10/15 of 26 March 2009 on the protection and promotion of human rights while countering terrorism, in which the Council requested the United Nations High Commissioner for Human Rights “to present [her report], bearing in mind the content of the present resolution, to the Council at its thirteenth session under agenda item 3, in conformity with its annual programme of work”.

In that resolution, the Human Rights Council called upon States to ensure access to an effective remedy in cases where human rights have been violated as a result of counter-terrorism measures, and provide adequate, prompt and effective reparations for victims. The Council recalled the absolute prohibition of torture and the right to be equal before courts and tribunals, and urged States to guarantee due process. It also reaffirmed resolution 7/7, in which the Council, among other things, urged States to respect their non-refoulement obligations as well as the safeguards concerning the liberty, security and dignity of the person.¹

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

¹ In resolutions 7/7 and 10/15 the Human Rights Council reaffirmed the non-derogability of certain rights in all circumstances, as well as the exceptional and temporary nature of derogations.

The present report highlights the need to protect and promote all human rights and to maintain effective counter-terrorism measures. These are mutually reinforcing objectives that must be pursued together as part of the duty of States to protect human rights. It outlines the High Commissioner's activities regarding counter-terrorism measures and her role in the implementation of the United Nations Global Counter-Terrorism Strategy and its Plan of Action. It concludes with the identification of challenges related to complying with human rights obligations, in particular the issues of accountability, ending impunity and effective remedies in the context of countering terrorism.

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I. Introduction

1. The present report is submitted in accordance with Council resolution 10/15. In its resolution 7/7, the Human Rights Council requested the United Nations High Commissioner for Human Rights to continue her efforts to implement the mandate given to her by the Commission on Human Rights in its resolution 2005/80 and the General Assembly in its resolution 60/158, and report to the Council. These two resolutions request the High Commissioner for Human Rights, making use of existing mechanisms, to continue:

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

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

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

2. In its resolution 10/15, the Human Rights Council called upon States to ensure access to an effective remedy where human rights are violated as a result of counter-terrorism measures, and provide adequate, prompt and effective reparations for victims. The present report addresses developments in respect of the protection of human rights while countering terrorism over the past year. In the same resolution, the Human Rights Council requested the High Commissioner for Human Rights “to present [her report], bearing in mind the content of the present resolution, to the Council at its thirteenth session under its agenda item 3, in conformity with its annual programme of work”.

II. Recent developments

A. Implementation of the United Nations Global Counter-Terrorism Strategy and the Counter-Terrorism Implementation Task Force

3. Through the United Nations Global Counter-Terrorism Strategy and Plan of Action, adopted by the General Assembly in its resolution 60/288, Member States reaffirmed that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy. They committed to adopting measures to ensure respect for human rights for all and to use the rule of law as the fundamental basis of the fight against terrorism. Member States also resolved to ensure that measures taken to counter terrorism comply with their obligations under international human rights law.

4. In the Plan of Action, it was reaffirmed that the Office of the United Nations High Commissioner for Human Rights (OHCHR) should play a lead role in examining the protection of human rights while countering terrorism. OHCHR continued to lead the Working Group on Protecting Human Rights While Countering Terrorism of the Counter-Terrorism Implementation Task Force established by the Secretary-General in 2005, in an effort to ensure a coordinated and coherent approach across the United Nations system to counter-terrorism. In 2008, the Monitoring Team of the Security Council Committee established pursuant to resolution 1267 (1999) (Counter-Terrorism Committee) joined the

Working Group and the Office for the Coordination of Humanitarian Affairs and the Office of the United Nations High Commissioner for Refugees as observers. The aim of the Working Group is to support efforts by Member States to ensure the promotion and protection of human rights in the context of counter-terrorism through, among other things, the development and implementation of legislation and policies that are compliant with human rights.

5. To assist Member States in strengthening the protection of human rights in 10 specific areas, my Office, in consultation with Member States, started to develop a series of basic technical reference guides on countering terrorism with the endeavour of providing full respect for human rights. Following consultations with Member States, the first four guides being developed are on (a) proscription of organizations, (b) stopping and searching of persons, (c) designing security infrastructure, and (d) the principle of legality in national counter-terrorism legislation.

6. On 14 and 15 October 2009, my Office participated in the Counter-Terrorism Implementation Task Force retreat in Vienna. This yearly meeting was focused on taking stock of the work that the Task Force and its working groups accomplished in the past year. It also set forth the plans for the future. Key issues discussed included, among others, the institutionalization of the Task Force in accordance with General Assembly resolution 62/272 and the communications strategy of the Task Force.

7. On 12 and 13 October 2009, my Office participated in the first International Workshop for National Counter-Terrorism Focal Points. The workshop was organized by the Counter-Terrorism Implementation Task Force and the United Nations Office on Drugs and Crime and was co-sponsored by the Governments of Austria, Norway, Switzerland and Turkey, as well as by Costa Rica, Japan and Slovakia. It gathered practitioners and policymakers from national Governments to share experiences and to develop strategies for better cooperation in the collective fight against terrorism. Participants represented more than 110 Member States. During the workshop, it was affirmed that the United Nations Global Counter-Terrorism Strategy is the policy framework within which concrete implementation actions need to be strengthened at the national, regional and international levels, and that the Strategy needs to be implemented in a comprehensive manner. Participants noted the importance of the prevention of terrorism. Action in the area of prevention includes promoting economic development, enhancing dialogue among civilizations, supporting victims, and protecting human rights. Participants also discussed steps towards enhancing coordination among governments, United Nations entities and other partners, including the Counter-Terrorism Implementation Task Force.

B. The work of the Security Council

8. On 29 October 2009, I addressed the Counter-Terrorism Committee. Guided by Security Council resolutions 1373 (2001) and 1624 (2005), the Committee has been working to enhance the ability of States Members of the United Nations to prevent terrorist acts both within their borders and across regions. The Committee is assisted in its efforts by the Counter-Terrorism Committee Executive Directorate, which carries out the policy decisions of the Committee, conducts expert assessments of each Member State and facilitates counter-terrorism technical assistance to countries. This was the third time that a High Commissioner for Human Rights addressed this important body.

9. During this briefing, I reiterated that upholding human rights while countering terrorism is an inescapable imperative, because human rights law offers a framework that can both meet public security concerns and protect human dignity and the rule of law. Some measures taken to counter terrorism, such as resorting to the use of excessive force and indiscriminate repression by the police, security and army personnel, can strengthen

terrorists' support bases, undermining the goals that States set out to achieve. Upholding human rights creates trust between the State and those under its jurisdiction, and such trust can serve as the foundation of an effective response to terrorism. I highlighted that meaningful protection also includes tackling the underlying causes of terrorism, such as the obstacles to the enjoyment of economic, social and cultural rights.

10. I sought to underscore that the time had come for the Security Council's counter-terrorism bodies to consider a broader approach in their vital work in this area, such as that of the General Assembly in the United Nations Global Counter-Terrorism Strategy and Plan of Action, which stressed not only the need for counter-terrorism measures, but also the impact of such measures on human rights. I noted that because the Counter-Terrorism Committee and the United Nations human rights machinery review counter-terrorism laws and measures in parallel, better cooperation between them could provide additional legitimacy and coherence to the United Nations system as a whole.

11. I shared with the Counter-Terrorism Committee my views that it could play a key role in placing the rule of law and human rights at the core of the fight against terrorism. I mentioned six areas in particular:

(a) The question of legality, including vague definitions of acts of terrorism that have led to the prosecution of individuals for the legitimate, non-violent exercise of their rights to freedom of expression, association and assembly, and which represent a violation of the principle of legality;

(b) The need to respect and protect non-derogable rights. I noted in this respect that national, ethnic, racial or religious profiling raises concerns with regard to the non-derogable principles of equality and non-discrimination. I also raised the question of torture and ill-treatment. These discriminatory and stigmatizing measures affect the rights of communities and may lead to further marginalization and possibly radicalization within those communities;

(c) The expansion of surveillance powers and capacities of law enforcement agencies and the need to adequately protect the right to privacy, which may severely undermine international cooperation; as well as the use of torture and ill-treatment for intelligence gathering, which taints evidence and makes it inadmissible at trial;

(d) Accountability for human rights violations, which is especially crucial to effective counter-terrorism strategies. True security can only be achieved where all members of society cooperate with State authorities and are confident that the measures adopted by these authorities to counter-terrorism are effective, proportionate, and respectful of their human rights and dignity;

(e) The issue of targeted sanctions. I noted that while I welcomed the recent improvements in procedures related to the United Nations targeted sanctions regime, further improvements were necessary to ensure a transparent listing process based on clear criteria, and with a uniformly applied standard of evidence. Accessible and independent mechanisms for review are also necessary;

(f) Issues regarding the proper integration of a human rights approach to the technical work of the Counter-Terrorism Committee. I suggested that consideration should be given to include a human rights expert on all Committee visits to Member States and to devote additional resources to this area of the Committee's work.

I also reaffirmed the OHCHR commitment to supporting the Committee and its Executive Directorate on all issues related to States' compliance with human rights.

12. From 8 to 10 November 2009, the Counter-Terrorism Committee Executive Directorate and the Government of Bangladesh held a regional workshop in Dhaka on

effective counter-terrorism practices for senior police officers and prosecutors from Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka; a representative of the South Asian Association for Regional Cooperation (SAARC) also attended. OHCHR participated in this workshop offering views on how human rights can be upheld at the operational level in the context of international legal cooperation.

13. On 17 December 2009 the Security Council adopted resolution 1904 (2009) to meet the challenges faced by Member States in implementing the sanctions regime against Al-Qaida and the Taliban. The resolution was aimed at improving the procedures to ensure that they are fair and the procedures are clear. In it, the Security Council decided, among other things, to create an office of the ombudsperson, which would assist in analysing available information concerning the delisting requests of those seeking removal from the Council's sanctions list.

C. The work of the General Assembly

14. In December 2009, the General Assembly adopted resolution 64/168 on the protection of human rights and fundamental freedoms while countering terrorism. In the resolution, the General Assembly, among other things:

- (a) Expresses serious concern at the occurrence of violations of human rights and fundamental freedoms;
- (b) Urges States countering terrorism to comply with their obligations in a number of areas, such as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the guarantee for liberty and security, the treatment of prisoners, non-refoulement, the legality in the criminalization of acts of terrorism, non-discrimination, the right to an effective remedy, due process and the right to a fair trial;
- (c) Highlights the need to protect economic, social and cultural rights;
- (d) Notes the need to continue ensuring that fair and clear procedures under the United Nations terrorism-related sanctions regime are strengthened to enhance their efficiency and transparency;
- (e) Urges States to ensure the rule of law and to include adequate human rights guarantees in their national listing procedures;
- (f) Requests OHCHR to continue to contribute to the work of the Counter-Terrorism Implementation Task Force, including by raising awareness on the need to protect human rights and the rule of law while countering terrorism;
- (g) Encourages the Security Council and its Counter-Terrorism Committee to strengthen dialogue with relevant human rights bodies, in particular with OHCHR, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, other relevant special procedures and mechanisms of the Human Rights Council and relevant treaty bodies.

D. Other relevant activities

15. The annual report of the Special Representative of the Secretary-General for Children and Armed Conflict (A/HRC/12/49) presented to the Human Rights Council at its twelfth session addresses terrorism and counter-terrorism and their impact on children. The Special Rapporteur noted that anti-terrorism measures often target children; in some cases, children are arrested or detained for reasons of alleged association with terrorist groups, and legal and practical safeguards are disregarded. The Special Representative also focused on

“collateral damage”, in which children are often the victims, resulting from precision aerial bombardment and other types of military operation.

16. The United Nations human rights treaty bodies have continued to take up issues related to terrorism in their examination of State party reports and individual complaints. In their concluding observations, different committees have urged States parties to recognize and ensure that the human rights treaties apply at all times, in any territory under their jurisdiction. The Secretary-General has recently reported on key developments in this field to the General Assembly (see A/64/186); I would like to focus on the most recent developments.

17. On 18 and 19 November 2009, my Office participated in a workshop in Jakarta hosted by the Center on Global Counterterrorism Cooperation and Nahdatul Ulama with support from the Governments of Germany and Sweden. The aim of the workshop was to raise awareness of the United Nations Global Counter-Terrorism Strategy among civil society in South-East Asia and to explore the possibilities for greater civil society participation in efforts to implement the global framework in a manner that reflects the needs and priorities across the region.

18. On 30 November 2009, OHCHR participated in an Arria Formula meeting on strengthening a United Nations integrated approach to human rights and counter-terrorism through the role of the Security Council. The meeting was convened by the Government of Mexico, which invited speakers who were members of the Eminent Jurist Panel of the International Commission of Jurists. Participants included members of the Security Council, representatives of the 1267 Committee, the Counter-Terrorism Committee Executive Directorate and the Chair of the Counter-Terrorism Implementation Task Force.

III. Issues of concern: accountability and reparations

19. A major challenge facing States today is accountability for serious violations of human rights that have taken place in the context of counter-terrorism measures and the rights of victims to remedy and reparations. In recent years, serious violations have taken place affecting fundamental rights, including wilful killings, summary executions, disappearances, torture and arbitrary detention. These practices have rarely been investigated thoroughly, perpetrators have often not been punished, and reparations to victims have not been forthcoming.

20. In article 2, paragraph 3, of the International Covenant on Civil and Political Rights, it is spelled out that in addition to effective protection of Covenant rights, States parties must ensure that individuals have accessible and effective² remedies to vindicate those rights,³ which was restated by the Human Rights Committee in its general comment No. 31 (2004). The Committee stated that it attaches importance to States parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee noted that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable

² See Committee against Torture, communication No. 291/2006, *Ali v. Tunisia*, 21 November 2008. See also European Court of Human Rights, application No. 52391/99, *Ramsahai and others v. the Netherlands*, 15 May 2007, para. 324. See also CCPR/CO/79/LVA, CCPR/C/LBY/CO/4, CCPR/C/79/Add.121 (Human Rights Committee, 2000), CAT/C/GUY/CO/1 (Committee against Torture, 2006).

³ Human Rights Committee, communication No. 1332/2004, *Juan García Sánchez and Benvenida González Clares v. Spain*, 31 October 2006.

constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.

21. The Human Rights Committee also stated in general comment No. 31 that article 2, paragraph 3, requires that States parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considered that the Covenant generally entails appropriate compensation. The Committee noted that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

A. Accountability

22. Where serious violations of human rights occur, States have the duty to ensure that such violations are properly investigated and, wherever possible, investigation should lead to a judicial or other appropriate response.⁴ The failure to conduct an independent investigation of serious human rights violations not only reinforces the violations that have already been committed but can lead to the serious deterioration of larger countrywide human rights situations. On the other hand, a timely and efficient inquiry can have a preventive effect and improve the overall national human rights situation. Failure to investigate also violates the human rights of the victims.⁵ Also, a failure by a State party to investigate allegations of violations could give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.⁶

23. States are under the obligation to investigate all human rights violations. Under extreme circumstances, where a state of emergency is declared, derogations from some rights and freedoms are permissible under article 4 of the International Covenant on Civil and Political Rights, but they should not exceed the exigencies of the situation.⁷ Article 4

⁴ See Committee against Torture, communication No. 257/2004, *Keremedchiev v. Bulgaria*, 11 November 2008, para. 11. See also Inter-American Court of Human Rights, *Montero Aranguren et al. v. Venezuela*, 5 July 2006, where the Court stated that “the State has the obligation to combat impunity by all available legal means, since it promotes the chronicle repetition of violations to human rights and the defenselessness of the victims and their next of kin”, para. 137.

⁵ See Committee against Torture, communication No. 188/2001, *Abdelli v. Tunisia*. See also the independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity, by Diane Orentlicher (E/CN.4/2004/88), and “The state of human rights in Europe and the progress of the Assembly’s monitoring procedure”, Council of Europe, Strasbourg, June 2008.

⁶ See Human Rights Committee general comment No. 31, para. 15, 29 March 2004. See also article 25 of the American Convention on Human Rights and *Velásquez Rodríguez v. Uruguay*, 26 June 1987, para. 91. See also Human Rights Committee, communication No. 1332/2004, *Juan García Sánchez and Benvenida González Clares v. Spain*, 31 October 2006.

⁷ Article 4 of the International Covenant on Civil and Political Rights cannot be invoked to derogate from the rules of the Geneva Conventions of 1949. Derogation measures must be consistent with State obligations under international humanitarian law. The minimum provided for in article 3 of the four Geneva Conventions of 1949 must be respected. In particular, the minimum provided in article 3

(2) of the Covenant lists various rights which are non-derogable at all times, such as: the right to life; the prohibition of torture and other inhuman or degrading treatment; the prohibition of retroactive criminal laws; freedom of thought, conscience and religion;⁸ and the prohibition of the death penalty (article 6 of the Second Optional Protocol to the International Covenant on Civil and Political Rights).

24. Under article 2 (1) of the International Covenant on Civil and Political Rights, State parties are obliged to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. General comment No. 15 of the Human Rights Committee indicates that this obligation is not limited to a State's citizens, but must be guaranteed to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and others who may find themselves subject to the jurisdictional regulations of the territory in which they are found.

25. Procedurally, States commit themselves to establishing suitable institutions (i.e. primarily judicial institutions, such as criminal, civil, constitutional and special human rights courts, or also national human rights institutions and torture rehabilitation bodies) to enable victims of torture to obtain redress.⁹ National mechanisms are required to give prompt, thorough, and effective attention to the obligations to investigate allegations of violations¹⁰ through independent¹¹ and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end by referring all those responsible for committing gross human rights violations to the criminal justice system for investigation.

26. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment indicated that in the light of the consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law, he expresses his opposition to the passing, application and non-revocation of amnesty laws which prevent torturers from being brought to justice and hence contribute to a culture of impunity. He called on States to refrain from granting or acquiescing in impunity at the national level, inter alia, by the

for persons taking no active part in hostilities entails, among other things: the prohibition, at any time and in any place, of violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, the taking of hostages, and outrage upon personal dignity. See also general comment No. 29, paras. 9 and 14 of the Human Rights Committee.

⁸ Articles 6, 7, 15 and 18 of the International Covenant on Civil and Political Rights. See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, second revised edition (Kehl am Rhein, Engle, 2005), p. 94.

⁹ See A/HRC/4/33, para. 63; Committee on the Elimination of Racial Discrimination, communication No. 10/1997, *Habassi v. Denmark*, 6 April 1999, paras. 9.3–10; Committee against Torture: conclusions and recommendations on Colombia, 4 February 2004, para. 9 (a); see also conclusions and recommendations on Yemen, 5 February 2004, para. 6 (e); conclusions and recommendations on Morocco, 5 February 2004, para. 7 (c).

¹⁰ See note 7 supra at paras. 15 and 18 of Human Rights Committee general comment No. 31. See also *Helen Mack Chang et al.* Case, Order of the Court of 6 June 2003, Inter-Am. Ct. H.R. (Ser. E) (6 June 2003). *Myrna Mack Chang v. Guatemala*, para. 210. The case can be found at www1.umn.edu/humanrts/iachr/E/chang6-6-03.html.

¹¹ See Committee against Torture, communication No. 257/2004, *Keremedchiev v. Bulgaria*, 28 September 2004; communication No. 1327/2004, *Grioua v. Algeria*, 10 July 2007, para. 7.10. See also European Court of Human Rights, *Barbu Anghelescu v. Romania*, 12 October 2004, on the requirement of independence, which entails not only the absence of all hierarchical or institutional links, but also practical independence. The court found that an inquiry carried out by military prosecutors did not satisfy this criterion.

granting of amnesties, such impunity itself constituting a violation of international law.¹² Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that each State party must ensure that all acts of torture are offences under its criminal law; this also applies to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. It also states that each State party must make these offences punishable by appropriate penalties which take into account their grave nature. The Convention against Torture contains obligations aimed at punishing perpetrators, preventing torture and assisting victims of torture.¹³

27. With regards to the right to life, in general comment No. 6 (1982) the Human Rights Committee specifies that not only do States have a negative obligation not to arbitrarily interfere with the individual right to life, but also, States have a positive obligation to adopt all measures that are appropriate to protect and preserve the right to life and to prevent and punish deprivations of life by criminal acts as well as arbitrary killings by their own security forces.¹⁴ The police have the duty to prepare and plan counter-terrorism operations so as to avoid any loss of life. Public investigations of any death in which State agents may be implicated are necessary.¹⁵

28. Covert actions raise particular challenges for accountability. Since they are secretive types of action, where information is classified, it is difficult for the legislator and the judiciary to be aware of them. It should be recalled that all measures taken by law enforcement agencies must be lawful under national and international law, and compatible with States' human rights obligations. This means that all activities undertaken by

¹² See A/56/156. See also A/HRC/10/44/Add.2.

¹³ See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40)*, vol. I, chap. IV, paras. 4, 7 and 12. See conclusions and recommendations of the Committee against Torture: Belgium (CAT/C/CR/30/6). The Committee recommended that Belgium include "a provision in the Penal Code expressly prohibiting the invocation of a state of necessity to justify the violation of the right not to be subjected to torture" (para. 7 (b)). See also CAT/C/XXVII/Concl.5.

¹⁴ See Human Rights Committee communication No. 1469/2006, *Yasoda Sharma v. Nepal*, 26 April 2006; communication No. 1327/2004, *Grioua v. Algeria*, 10 July 2007, para. 7.10; communication No. 213/1986, *H.C.M.A. v. The Netherlands*, 30 March 1989, para. 11.6; communication No. 612/1995, *Vicente et al. v. Colombia*, 29 July 1997, para. 8.8; communication No. 1196/2003, *Boucherf v. Algeria*, 30 March 2006, para. 11; and communication No. 1297/2004, *Medjnoune v. Algeria*, 14 July 2006, para. 10. See also footnote 11 supra in relation to Human Rights Committee general comment No. 31 on the kinds of effective remedy necessary in cases of violations of the right to life. Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, *Bulacio v. Argentina*, 18 September 2003 — obligation to adopt all appropriate measures to protect and preserve the right to life under the duty to ensure the full and free exercise of the rights by all persons under their jurisdiction. This obligation extends to all State institutions, the police and the armed forces — States must adopt all necessary measures to prevent, try and punish deprivation of life as a consequence of criminal acts carried out by its own security agents, as well as in general. See also Nils Melzer, *Targeted Killing in International Law* (Oxford Press, 2009), p. 94.

¹⁵ Note 7 supra at para. 18 of general comment No. 31. See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex). See also A/HRC/4/33, para. 62: in the leading case on article 14, *Guridi v. Spain*, the Committee against Torture, without explicit reference to the Guidelines, followed the terminology developed therein in its decision. In that case the perpetrators were subsequently pardoned after they had paid compensation. Despite the payment of compensation, the Committee found a violation of article 14 of the Basic Principles. It held that reparation should cover all the damages suffered by the victim, which included, among other things, restitution, compensation and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case.

intelligence agencies, including intelligence-gathering, covert surveillance activities, searches and data collection must be regulated by law, monitored by independent agencies, and subject to judicial review. The lack of transparency that prevails in a number of the investigations and trials related to terrorism is a cause for concern. Through the adoption or revival of State secrecy or immunity doctrines or the adoption of other measures to shield intelligence, military or diplomatic sources and information, in the name of national security interests, States have limited the access to the necessary information for an effective investigation and prosecution of cases relating to acts of terrorism. States are required to ensure that confined powers, review of accountability and oversight mechanisms are established against the misuse of exceptional powers granted to intelligence, military agencies or special police to counter terrorism. Such controls might encompass the process of authorizing special powers and the remedies for people claiming abuse of these powers. Controls can occur either before or after the use of powers.

29. The Convention against Torture requires States parties to prevent, within their territory, any acts of torture, or cruel, inhuman or degrading treatment.¹⁶ By virtue of the extraterritorial application of the prohibition of such acts, and the obligations under customary international law and Articles 55 and 56 of the Charter of the United Nations, States must also ensure that their officials do not undertake such practices overseas and that they are not complicit in such conduct by other persons. It is thus essential that those responsible for conducting or colluding in interrogation techniques amounting to torture or cruel, inhuman or degrading treatment are held accountable.¹⁷

30. The practice of holding terrorist suspects in secret detention has led to the denial of several rights of detainees, not only with respect to their rights associated with liberty, but also for example their right to a fair trial. In such circumstances, where confessions are extracted by torture and evidence gathered illegally through secret agents, the possibility of bringing to justice people who are responsible for committing the above-mentioned violations is unlikely. In its general comment No. 21 on article 10 of the International Covenant on Civil and Political Rights, the Human Rights Committee imposes on States an obligation to individuals who are vulnerable, such as juveniles, due to their status of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person.

31. Accountability and the right to effective remedies are connected to the right to a fair trial as guaranteed by article 14 of the Covenant, clarified by general comment No. 32 of the Human Rights Committee. Protecting the right of terrorist suspects to a fair trial is critical not only for ensuring that anti-terrorism measures respect the rule of law, but also for ensuring that perpetrators of human rights violations are held accountable. Indeed, violations carried out in the execution of “extraordinary renditions” and collecting evidence by illegal means are very unlikely to be adequately brought to light, and perpetrators brought to justice, if suspects of terrorism are tried in special courts with special procedures or sealed evidence which do not fully guarantee the right to a fair trial. Therefore, the guarantees of a fair trial are essential to ensure accountability and to combat impunity, as well as to provide effective remedies.¹⁸

32. Article 10 of the International Covenant on Civil and Political Rights has a clear relationship with the protection from torture, inhuman and degrading treatment and punishment. Human Rights Committee general comment No. 21 clarifies that article 10

¹⁶ See CAT/C/USA/CO/2, para. 13, 2006; CAT/C/TGO/CO/1, para. 15, 2006; CAT/C/AUS/CO/3, para. 8, 2008.

¹⁷ See A/HRC/10/44/Add.2, para. 64.

¹⁸ Human Rights Committee, communication No. 1416/2005, *Alzery v. Sweden*.

imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. The Committee also recalls that the principle set forth in article 10, paragraph 1, constitutes the basis for the more specific obligations of States parties in respect of criminal justice, which are set forth in article 10, paragraphs 2 and 3.

33. In the endeavour to protect intelligence sources, some States have amended the regulations governing legal or administrative procedures to allow the non-disclosure of materials to suspects.¹⁹ Secrecy and immunity doctrines should not be applied where serious human rights violations are being investigated, such as the absolute prohibition of torture and cases of killings or disappearances. Independent, impartial, transparent and credible investigations are required by law to ensure accountability. Individual responsibility cannot be avoided through amnesties or immunities, and other limitations to the recognition of legal responsibility.

34. States must refrain from granting or acquiescing in impunity at the national level through amnesties.²⁰ Amnesties for gross and serious violations of human rights and humanitarian law may also violate customary international law,²¹ and the continued passing, application and non-revocation of amnesty laws²² contributes to a culture of impunity.

35. Since September 2001, there has been a trend towards outsourcing the collection of intelligence to private contractors. While the involvement of private actors can be necessary as a technical matter in order to have access to information (for instance for electronic surveillance), there are reasons to be wary of using contractors to interrogate persons who are deprived of their liberty. The responsibility to protect the right to life, physical integrity or liberty of individuals should remain within the exclusive domain of the State. The combination of a lack of proper training, the introduction of a profit motive into situations which are prone to human rights violations, and the often questionable prospect that such contractors will be subject to judicial and parliamentary accountability mechanisms are all

¹⁹ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009), p. 78.

²⁰ See footnote 16 *supra* in relation to Human Rights Committee general comment No. 31, para. 18. See also principle 36 (a) of the set of principles for the protection and promotion of human rights through action to combat impunity; Human Rights Committee communication No. 45/1979, *Suarez de Guerrero v. Colombia*, 30 March 1982, para. 15; see also Human Rights Committee concluding observations on Venezuela, 26 April 2001 (CCPR/CO/71/VEN), para. 8.

²¹ International tribunals have had few opportunities to address the question of whether States' obligations under customary international law may be violated by an amnesty. A 1998 decision by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia suggested, however, that an amnesty for torture (and, by implication, for other conduct whose prohibition in international law has the status of a peremptory norm) would be "international unlawful" (see *Prosecutor v. Anto Furundzija*, case No. IT-95-17/1-T, Judgement of 10 December 1998, para. 155). See also *Prosecutor v. Morris Kalon and Prosecutor v. Brima Bazzy Kamara*, para. 82. See also Inter-American Court of Human Rights, *Barrio Altos v. Peru*, where it found that "Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect", 14 March 2001, para. 51/4.

²² See general comment No. 31 at para. 18. See also Inter-American Court of Human Rights, *Servellón García et al. v. Honduras*, where the Court noted that there is an obligation on States not to resort to legal concepts such as amnesties or other measures to eliminate responsibility, 21 September 2006. See also *Myrna Mack Chang v. Guatemala*, in which the Court noted that the State must "remove all de facto and legal mechanisms and obstacles that maintain impunity", para. 277.

elements that should be considered by Member States to ensure that those actors are accountable.

36. A particular concern is that of rendition and extraordinary rendition that arises from increased intelligence cooperation. Extraordinary rendition is almost certain to constitute or facilitate a violation of a variety of human rights, especially the rights that protect individuals against arbitrary arrest, forcible transfer, enforced disappearance or the subjection of torture and other cruel, inhuman or degrading treatment.²³ States must fulfil their obligations under the different treaties and standards, and ensure that their territory is not used to transfer persons to places where they are likely to be subjected to torture.²⁴

37. In the absence of procedural safeguards that protect legal rights such as due process, persons who are subject to such transfers have no means of challenging their transfer. Hence, States should take all practical steps to determine whether foreign movements through their territories involve practices that can lead to irreparable harm. States have an obligation to investigate the role of their agents (both military and intelligence) who may have been involved in facilitating these renditions,²⁵ to sanction those responsible, and to provide reparation for victims.²⁶ States also have a responsibility to put in place procedures to address these issues, whether in reference to their own agents or to foreign agents, and to regulate the use of their airspace. States are further required to ensure accountability for past practices.²⁷

38. There should be controls against the misuse of exceptional powers by institutions that are not subject to sufficient democratic and civilian control, in particular intelligence or military agencies or special police. States need to ensure confined powers, the review of accountability and oversight mechanisms. Such controls might encompass the process of authorizing special powers and the remedies for people claiming abuse of these powers. Controls can occur either before or after the use of powers.

39. Intelligence-gathering activities must be regulated by law, monitored as much as possible by independent agencies, and subject to judicial review. Under international human rights law, any act that impacts human rights must be lawful; it must be prescribed and regulated by law. This means that any search, seizure, surveillance activity, apprehension or data collection about a person must be clearly authorized by law. States amending regulations governing legal or administrative procedures to prevent the non-

²³ See footnote 20 *supra*, p. 81.

²⁴ In the Burgos Case (1981), the Human Rights Committee established that “jurisdiction” was not a reference to where the violation took place, “but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred”.

²⁵ Conclusions and recommendations on Colombia, 4 February 2004 (CAT/C/CR/31/1), para. 9 (d) (iii); conclusions and recommendations on Ecuador, 15 November 1993 (A/49/44), paras. 97–105, at 105. Case *Incal v. Turkey* of 9 June 1998, Reports 1998–IV, paras. 65–73. Committee on the Elimination of Racial Discrimination, Case *L.K. v. the Netherlands*, 16 March 1993 (CERD/C/42/D/1991), paras. 6.4 and 6.6.

²⁶ In article 23 of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; the jurisprudence and practice have been classified in the United Nations Principles on Reparation as encompassing, among others, measures such as ensuring civilian control over military and security forces, strengthening the independence of the judiciary, protection of legal, medical, media and related personnel and human rights defenders, and human rights training.

²⁷ See Statement by the United Nations High Commissioner for Human Rights on the International Day in Support of Victims of Torture, 26 June 2009.

disclosure of materials to suspects must ensure they do so in conformity with their human rights obligations, in particular, with due process.²⁸

40. Counter-terrorism measures that have an impact on the enjoyment of economic and social rights should also respect the principles of proportionality, effectiveness and legitimacy.²⁹ Access to justice and the existence of remedies, including adequate reparation for the victims, are key to upholding the accountability of States and to reducing impunity for violations of economic, social and cultural rights. In the context of countering terrorism, evictions and house demolitions are sometimes used as forms of targeted punishment for residents who are suspected of supporting terrorist groups. Where this constitutes a form of collective punishment it is considered a gross violation of human rights. It is often suffered by vulnerable communities, such as women, ethnic, religious and other minorities and indigenous peoples, who are suspected of supporting terrorist groups.

B. Remedies and reparation

41. In addition to States' duties to bring perpetrators of gross human rights violations before the criminal justice system, States' obligations have been described as requiring them to respect the right to truth, to justice and to reparation.³⁰ The right to truth puts an obligation on the State to investigate human rights violations and to present the facts to the public. The right to reparation comprises not only the right to compensation³¹ and restitution, but also the right to rehabilitation,³² satisfaction and guarantees of non-repetition,³³ as described by the United Nations set of principles for the protection and promotion of human rights through action to combat impunity. These are complementary rights. The right to reparation as established by international law include: restitution *in integrum*, payment of compensation, satisfaction and guarantees of non-repetitions, among others.³⁴ When restitution, *in integrum*, is not possible, other forms of reparation must afford relief. The different obligations of the State regarding remedies and reparation are unconditional.

42. Article 2, paragraph 3, of the International Covenant on Civil and Political Rights ensures an accessory right to effective remedy against violations of human rights. This obligation was established in order to ensure victims had a means of vindicating their rights. The right to an effective remedy requires that a domestic process to deal with the

²⁸ See footnote 20 *supra*, p. 78.

²⁹ See A/HRC/12/22. For more details, see the summary of discussions of the expert seminar on the impact of terrorism and counter-terrorism measures on the enjoyment of economic, social and cultural rights, held in Geneva from 5–7 November 2008, available at www.un.org/terrorism/pdfs/wg_protecting_human_rights.pdf.

³⁰ See article 27.2 of the American Convention on Human Rights; article 6 of the European Convention on Human Rights; article 7 of the African Charter on Human and Peoples' Rights. See also article 2 (3) of the International Covenant on Civil and Political Rights.

³¹ See note 7 *supra* at para. 16. See also *Velásquez Rodríguez v. Uruguay*, Interpretation of Compensatory Damages Judgement, Judgement of August 17, 1990, para. 27.

³² See note 7 *supra*, para. 16 of general comment No. 31. See also A/54/426, para. 50.

³³ Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169 of 17 December 1979), and the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

³⁴ Inter-American Court of Human Rights, *Loayza Tamayo Case*, Judgement of 27 November 1998, Series C, No. 42, para. 85.

complaint is available and that it provide the appropriate relief.³⁵ The procedural aspect of upholding accountability and reducing impunity for States' human rights violations³⁶ is access to justice, including proper judicial review, and the existence of remedies, including adequate reparation for the victims. An independent judicial review by States of counter-terrorism measures undertaken, including those affecting human rights, serves to ascertain their proportionality, effectiveness and legitimacy.³⁷

43. The Human Rights Committee has stressed that the acquisition, development and use of information on terrorist groups and their activities must be in conformity with the International Covenant on Civil and Political Rights.³⁸ While implementing the United Nations targeted sanctions, such as asset freezing and travel bans against individuals suspected of involvement in terrorist activities, it is necessary to ensure that those victims of wrong listing or listing which violated their rights should be also compensated within the same established set of rules.³⁹

44. According to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁴⁰ victims include "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power". In the Declaration, it is noted that an individual may be considered a victim "regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim".

45. In light of frequent shortcomings with respect to victims in domestic jurisdictions, guidelines should be adopted by States to provide victims of counter-terrorism measures that may violate human rights with urgent assistance for their material and psychiatric needs, as well as long-term assistance, including medical and psychological follow-up. Such guidelines should also grant effective access to justice and ensure that evidentiary privileges are not an obstacle to transparency in the conduct of investigations and access to legal remedies.

46. Human rights principles and guidelines that would comprehensively address victims of counter-terrorism deserve serious consideration, by drawing on national and international best practice and based on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines),⁴¹

³⁵ Jonathan Cooper, *Countering Terrorism, Protecting Human Rights: A Manual* (Warsaw, OSCE Office for Democratic Institutions and Human Rights, 2007), pp. 62–63.

³⁶ See general comment No. 31, para. 15. See also Committee on the Elimination of Discrimination against Women, general recommendation No. 19, Violence against women, 9 January 1992, para. 24 (t), in which it was held that effective protection included effective legal measures, including penal sanctions, civil remedies and compensatory remedies, preventive measures and protective measures.

³⁷ Committee against Torture, conclusions and recommendations on Egypt, 23 December 2002 (CAT/C/CR/29/4) para. 6 (c); conclusions and recommendations on Cambodia, 27 May 2003 (CAT/C/CR/30/2) para. 7 (d).

³⁸ See CCPR/CO/77/EST, para. 8, CCPR/CO/75/NZL, para. 11, CCPR/CO/76/EGY, para. 16, CCPR/CO/75/MDA, para. 8, CCPR/CO/75/YEM, para. 18, CCPR/CO/73/UK, para. 6, CCPR/CO/83/UZB, para. 18, and CCPR/C/NOR/CO/5, para. 9.

³⁹ Communication No. 1472/2006, *Sayadi and Vinck v. Belgium*, 22 October 2008.

⁴⁰ Adopted by the General Assembly in resolution 40/34 of 29 November 1985.

⁴¹ General Assembly resolution 60/147, annex.

and the set of principles for the protection and promotion of human rights through action to combat impunity.⁴²

47. The Basic Principles and Guidelines provide for different categories of reparation. Since torture constitutes a particularly serious violation of human rights, criminal prosecution and appropriate punishment is perceived by the victim as the most effective means of satisfaction and justice. Criminal investigations serve the purpose of establishing truth and pave the way for other forms of reparation. Guarantees of non-repetition, such as amending relevant laws, fighting impunity and taking effective preventive or deterrent measures, constitute a form of reparation if torture is practised in a widespread or systematic manner. Monetary compensation for the immaterial damage (pain and suffering) or material damage (rehabilitation costs, etc.) may provide satisfaction as an additional form of reparation.

48. In its general comment No. 15, the Human Rights Committee indicates that under article 2 (1) of the International Covenant on Civil and Political Rights, the obligation is not limited to a State's citizens, but must be guaranteed to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and others who may find themselves subject to the jurisdictional regulations of the territory in which they are found. Such remedies should be appropriately adapted to take account of the special vulnerability of certain categories of person, including in particular children. As was confirmed by general comment No. 31, this principle also applies to those within the power or effective control of the forces of a State acting outside its territory, regardless of the circumstances in which such power or effective control was obtained. States must ensure that individuals have accessible and effective remedies to vindicate the aforementioned rights, which should be appropriately adapted to the special vulnerability of certain categories of persons, particularly children.

IV. Conclusions and recommendations

49. **States are urged to ensure that measures taken to combat crimes of terrorism comply with their obligations under international human rights law, in particular the right to an effective remedy for victims of human rights violations.**

50. **States are urged to respect all rights, in particular non-derogable rights. It is extremely important that the Member States reconfirm their commitment to the absolute prohibition of torture and cruel, inhuman and degrading treatment, which are not to be permitted under any circumstances.**

51. **States are urged to cooperate with the special procedures of the Human Rights Council in enforcing accountability mechanisms and measures and means of providing remedies to victims.**

52. **States are urged to issue a standing invitation to all special procedures of the Human Rights Council, and in particular to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Working Groups on Arbitrary Detention and on Enforced or Involuntary Disappearances.**

⁴² E/CN.4/Sub.2/1997/20/Rev.1, annex II, and E/CN.4/2005/102/Add.1.

53. States are urged to strengthen legislation to protect the rights of arrested and detained individuals from torture and physical mistreatment and ensure they are afforded the full complement of due process rights in accordance with their obligations under international human rights.

54. States should ensure that national human rights institutions have the necessary capacity to contribute meaningfully to the protection of human rights and in particular to the provision of effective remedies in cases of substantive violations.

55. States should provide their law enforcement authorities, including intelligence agencies and prison staff, with training on international human rights laws and standards, including on the obligation to ensure effective remedies and accountability in the case of violations of human rights when committed by State agents or public officials.

56. To ensure accountability, torture or cruel, inhuman and degrading treatment committed by public officials and State agents should give rise to criminal liability and/or disciplinary measures. All allegations of torture or ill-treatment by any of the above-mentioned officers should be investigated and those found responsible punished. National laws and relevant regulating documents for public officials and State agents, including the police, intelligence officials and the military must comply with international human rights obligations to ensure that appropriate investigation and, where necessary, prosecution of alleged violations occur.
