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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 currently used 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 summaries of communications transmitted to Governments between 15 September 2007 and 31 December 2008, as well as replies received up to 31 January 2009. In addition, the report covers press releases issued in 2008.

2. During the period under review the Special Rapporteur corresponded with Governments, either separately or jointly with other Special Procedures mandate-holders, in 30 communications and he issued 3 press releases, all relating to a total of 26 countries or territories. In specific cases, the Special Rapporteur decided to address the concerns related to his mandate in a separate letter, instead of joining communications by other special procedures.

3. The Special Rapporteur received replies from 13 of the 26 Governments he corresponded with during the period under review, including some replies to communications the Special Rapporteur sent that were reflected in the previous report (A/HRC/6/17/Add.1). Most of the Governments offered detailed substantive information on the allegations received. The Special Rapporteur underlines that it is crucial that Governments share their information and views with him on the allegations received. The Special Rapporteur encourages cooperation from those Governments which have not yet provided replies to his communications. Replies received after 31 January 2009 and replies received during the reporting period but not yet translated will be reflected in the next communication report to the Human Rights Council.

4. The Special Rapporteur acted upon information received from reliable sources concerning individual cases of alleged breaches of human rights and fundamental freedoms in the context of countering terrorism. In addition, he also took action with respect to legislative developments and proposals undertaken by a number of Member States. 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.

5. In accordance with paragraph 2(b) of Human Rights Council Resolution 6/28, the Special Rapporteur entered into a dialogue with several Member States on the preparation of legislation designed to combat terrorism. The Special Rapporteur, to the greatest possible extent, engaged with respective Governments during the drafting stage of the legislation. In the form of communications, press releases and consultations, the Special Rapporteur conveyed his main concerns to the Governments, some of which took the opportunity to reply, outlining their views and responding to specific questions posed by the Special Rapporteur. He regards this exchange as a positive and constructive dialogue resulting in a joint effort to draft and implement legislative frameworks that are equipped to successfully combat terrorism while at the same time aim at the effective promotion and protection of human rights and fundamental freedoms. With a view to his mandate, including the reference to advisory services or technical assistance found in paragraph 2(a) of Resolution 6/28, the Special Rapporteur encourages more 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.

COMMUNICATIONS TRANSMITTED, REPLIES RECEIVED AND STATEMENTS MADE TO THE PRESS

Afghanistan

A. Communication sent to the Government

6. On 1 July 2008, the Special Rapporteur, jointly with the Special Rapporteur on the independence of judges and lawyers, sent a communication regarding allegations they had received relating to **trials** taking place in Afghanistan **of detainees previously held in custody in the U.S. administered Bagram Theatre Internment Facility (BTIF), as well as detainees repatriated from Guantánamo Bay Naval Base facilities to Afghanistan**.

7. According to the information received, some of the individuals formerly detained by the United States Government at Guantánamo Bay and Bagram have been, and continue to be, transferred to the Afghan National Detention Facility (ANDF) where they await prosecution.

8. This system of detention and transfer of detainees would seem to allow for prolonged detention in BTIF custody, and the prosecution and conviction of detainees without due consideration to legal requirements. Based on the information received, in the Special Rapporteurs' opinion, the system of detention and transfer of detainees fails to comply with fair trial international standards including the right to court review over any form of detention, the presumption of innocence, the right to defence and access to legal counsel, and the right to be tried without undue delay as laid down in Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), which provides, inter alia, that "anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and should be promptly informed of any charges against him" and that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". According to the information received, many detainees, prior transfer to the ANDF were under United States custody without charge for several years. In addition, to date, trials of ANDF detainees lack many basic due process of law guarantees, including access to a lawyer while under investigation and adequate time and facilities for the preparation of the defence.

9. With respect to trials and the evidence before the prosecution, the information the Special Rapporteurs received suggests that the United States Government provides the Afghan prosecution team, that investigates national security cases, with supposedly general and declassified versions of the Detainee Assessment Branch Reports of Investigation (ROIs), which typically state the date of capture, the capturing force and the detainee's alleged actions. These ROIs then form the basis of the Afghan Government's prosecution charges. However, this is done without any examination of individual witnesses or statements in the court dossier—sworn or unsworn, often United States personnel or officials involved in the capture and/or interrogation of the detainee. To date an estimated number of 303 detainees have been transferred from United States custody to the Government of Afghanistan. The National Directorate for Security has investigated some 201 cases. The situation of the other 102 detainees is not clear regarding the grounds for their detention, and concerning some of them having been detained for several months.

10. Furthermore, it has been brought to the attention of the Special Rapporteurs that the default status for these detainees transferred to the ANDF is that of pre-trial detention until a judicial decision regarding their cases are taken. The Special Rapporteurs are concerned over the potential negative effects of the prolonged pre charge detention in Guantanamo Bay and BITF that may compromise the ability of the Government of Afghanistan to ensure a fair trial for these persons.

11. Moreover, the trials are conducted based on the in-court reading of investigative summaries prepared by United States and Afghan officials which do not respect the principle of equality of the parties before the court. The use of evidence in this way and the fact that the convictions can be based on it, may violate international standards, including the prohibited use of evidence obtained under torture and other cruel, inhuman or degrading treatment or punishment. The Afghan Constitution explicitly prohibits the introduction, as evidence, of statements obtained "by means of compulsion" and "recognizes a confession as voluntary only if taken before a judge". The Special Rapporteurs urge the Government to assure full compliance with the Afghan criminal procedure code and international fair trial standards included in the Universal Declaration of Human Rights (UDHR) and the ICCPR, including by requiring in-court witness testimony, and by allowing the defendant to challenge the evidence through cross-examination. The Special Rapporteurs called on the Government to ensure that trials are conducted in accordance with international fair trial standards, as laid down in the UDHR and ICCPR. In this connection, the Special Rapporteurs express concern regarding the above mentioned issues and wish to refer to Articles 7, 25, 27(2), and 31 of the Afghan Constitution.

B. Reply from the Government

12. As of 31 January 2009, there had been no response to the Special Rapporteur's correspondence.

Algérie

A. Communication reçue du Gouvernement

13. Suite à la lettre du Gouvernement datée du 10 juillet 2006, en réponse la correspondance du Rapporteur Spécial datée du 26 juin 2006 (Voir A/HRC/4/26/Add.1, para. 11); le Gouvernement a envoyé une autre correspondance datée du 22 avril 2008 en réponse à la même note susmentionnée du Rapporteur Spécial.

14. Trois ressortissants algériens aux initiales 'V', 'I' et 'X' ont été effectivement expulsés de Grande Bretagne respectivement les 16 et 17 juin 2006 et le 06 juin 2007. A leur arrivée sur le territoire national, ces trois personnes ont été interpellées par les services de police pour examen de situation. Apres leur audition, elles ont été relâchées.

Chile

A. Comunicación enviada al Gobierno por el Relator especial

15. El 4 de enero de 2008, el Relator Especial junto con el Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, la Representante

Especial del Secretario-General para los defensores de los derechos humanos y el Relator Especial sobre formas contemporáneas de racismo, discriminación racial, xenofobia y formas conexas de intolerancia, han enviado una carta al Gobierno de Chile.

16. En este contexto, los Relatores quisieran señalar a la atención urgente del Gobierno la información que hemos recibido en relación con la Sra. **Patricia Roxana Troncoso Robles** y otros presos mapuches que cumplen condenas de prisión en la cárcel de Angol. Según las informaciones recibidas:

> Los Sres. José Huenchunao Mariñan, Héctor Llaitul Carrillanca, Jaime Marileo Saravia, Juan Millalén Milla y Patricia Roxana Troncoso Robles dieron inicio a una huelga de hambre seca el pasado 10 de octubre de 2007. Según las alegaciones, la huelga de hambre tendría como objetivo, entre otros, denunciar la situación de los numerosos dirigentes y activistas mapuches condenados en los últimos años a penas de prisión por actos de protesta asociados a reivindicaciones de derechos indígenas.
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> El 8 de diciembre de 2007, un equipo médico independiente habría emitido un informe sobre el estado de salud de los presos. Este informe habría señalado que los presos se encontraban en un estado de salud crítico, indicando pérdidas de peso de entre 13.4 y 22.6 Kg.
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> El 15 de diciembre de 2007, al cabo de 66 días de huelga, los Sres. José Huenchunao, Jaime Marileo y Juan Millalen habrían abandonado la huelga de hambre, aceptando la mediación del Obispo de Temuco, Mons. Camilo Vial. El Sr. Héctor Llaitual y la Sra. Patricia Troncoso habrían decidido sin embargo continuar con la huelga de hambre.
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> El 30 de diciembre de 2007, el Sr. Héctor Llaitual habría desistido de la huelga de hambre ante la extrema gravedad de su estado de salud.
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> Según las informaciones recibidas, la Sra. Patricia Troncoso continuaría todavía en huelga de hambre. Según la revisión del parte médico independiente llevado a cabo el pasado 30 de diciembre de 2007, la Sra. Troncoso habría perdido más de 23 Kg., presentando un cuadro clínico que indicaría un serio riesgo vital.
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> Según las alegaciones, existe grave riesgo por la vida de la Sra. Patricia Troncoso tras 85 días del inicio de su huelga de hambre, en particular teniendo en cuenta su delicado estado de salud como resultado de las huelgas de hambre emprendidas con anterioridad.
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> Según las informaciones recibidas, la Sra. Patricia Troncoso y el Sr. Jaime Marileo fueron condenados el 21 de agosto de 2004 a penas de 10 años y un día de prisión por el supuesto delito de “incendio terrorista” en relación con el incendio del Fundo Poluco Pidenco, en aplicación de la Ley No. 18.314 (“Ley Antiterrorista”) que determina conductas terroristas y fija su penalidad. Los Sres. Héctor Llaitul y José Huenchunao fueron detenidos el 21 de febrero y el 20 de marzo del 2007 respectivamente, y se encuentran en prisión para cumplir las condenas pronunciadas previamente en su ausencia en relación con los mismos hechos.
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> El Sr. Jaime Marileo y la Sra. Patricia Troncoso participaron en una primera huelga de hambre iniciada junto con otros presos mapuches cumpliendo condenas en virtud de la

legislación antiterrorista el 7 de marzo de 2005. Dicha situación fue objeto de la comunicación enviada por el Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas el 24 de marzo de 2005 (Ref. UA CHL 2/2005).

El Sr. Jaime Marileo y la Sra. Patricia Troncoso participaron asimismo junto con otros presos mapuches en una segunda huelga de hambre iniciada el 13 de marzo de 2006. Dicha situación fue objeto de la comunicación conjunta enviada el 11 de mayo de 2006 por el Relator Especial sobre el derecho a la alimentación, el Relator Especial sobre formas contemporáneas de racismo, discriminación racial, xenofobia y formas conexas de intolerancia, el Relator Especial sobre independencia de magistrados y abogados, el Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, el Relator Especial sobre la promoción y protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo y la Representante Especial del Secretario General para los defensores de derechos humanos [Ref.: UA G/SO 214 (42-1) G/SO 214 (107-5) G/SO 214 (3-3-12) G/SO 214 /78-11) CHL 3/2006], a la que respondió por medio de su nota de 26 de mayo de 2006 (s/ref.).

Según las informaciones recibidas, el 13 de mayo de 2006, los presos habrían puesto fin a la huelga de hambre a raíz de la mediación del Senador Alejandro Navarro, con el compromiso de promover las reformas legislativas necesarias para atender la situación de los presos mapuches cumpliendo condenas por supuestos delitos de terrorismo.

El 15 de mayo de 2006, el Senador Navarro, junto con los Senadores Guido Girardi y Juan Pablo Letelier, habría introducido en el Senado 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. 19.253” (Boletín 4188 -07), que fue aprobado el 17 de mayo de 2006 por la Comisión de Derechos Humanos del Senado y que desde entonces se encuentra en espera de tramitación parlamentaria. Dicho proyecto de ley, así como los proyectos de ley para la reforma de la Ley Antiterrorista presentados en mayo y julio de 2006 y también pendientes de tramitación parlamentaria (Boletín N° 4199-07 y 4298-07, respectivamente) fueron objeto de la comunicación conjunta enviada por el Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas y por el Relator Especial sobre la promoción y la protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo el pasado 5 de abril de 2007 [Ref. AL Indigenous (2001-5) Terrorism (2005-1) CHL 2/2007].

17. Asimismo, sin que ello implique en modo alguno una conclusión sobre la culpabilidad o inocencia de la Sra. Patricia Troncoso y de los presos mapuches que cumplen condena por supuestos delitos de terrorismo, los Relatores gustarían reiterar nuestra preocupación por el aparente uso descontextualizado de la legislación antiterrorista en Chile en relación con hechos de protesta social violenta asociados a reivindicaciones de derechos indígenas.

18. Por último, los Relatores gustarían volver a expresar nuestra preocupación por la falta de avances en la tramitación de los distintos proyectos de reforma legislativa presentados en el

Senado, incluyendo la reforma de la definición del tipo penal de terrorismo actualmente incorporado en la Ley No. 18.314 para evitar posibles vulneraciones del principio de legalidad penal.

19. En este sentido, los Relatores gustarían llamar la atención del Gobierno de Su Excelencia sobre las observaciones finales del Comité de Derechos Económicos, Sociales y Culturales sobre Chile, en las que el Comité 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 "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).

20. 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 la demandas de tierras. El Relator Especial recomendó al Gobierno que no se "criminaliza[ran] o penaliza[ran] 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, Párr. 69-70). 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).

21. Los Relatores quisieran también llamar la atención del Gobierno sobre el hecho de que, como ha señalado 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. 26-50). Ello asegura el pleno respeto al principio de legalidad consagrado en el artículo 15 del Pacto de Derechos Civiles y Políticos, así como en otros instrumentos internacionales de derechos humanos.

22. 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 a 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). 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. Además, los Relatores quisieran solicitar el Gobierno que garantice el derecho a la igualdad y a la no-discriminación de estas personas, en conformidad con el artículo 1 de la Declaración Universal de Derechos Humanos y los artículos 2 del Pacto Internacional de Derechos Civiles y Políticos y del Pacto Internacional de Derechos Económicos, Sociales y Culturales, según los cuales los Estados Partes en los Pactos se comprometen a garantizar los derechos reconocidos en los Pactos sin distinción alguna de raza, color, sexo, idioma, religión, opinión política o de otra índole, origen nacional o social, posición económica, nacimiento o cualquier otra condición social.

24. Los Relatores están conscientes de la necesidad que tienen los Estados de adoptar medidas efectivas para prevenir el terrorismo y luchar contra él, pero a la vez, se preocupa que la legislación actual de terrorismo no sea plenamente conforme a las normas internacionales de derechos humanos. En consecuencia, los Relatores quisieran volver a reiterar nuestro 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.

25. El 28 de octubre de 2008, el Relator Especial ha enviado une carta al Gobierno de Chile, para solicitando una invitación para una visita oficial al país.

B. Comunicación recibida del Gobierno

26. El 12 de marzo de 2008, el Gobierno de Chile ha enviado una respuesta al Relator Especial, en el siguiente relativa a la señora Patricia Troncoso Robles.

27. La señora Patricia Troncoso puso término a una prolongada huelga de hambre en que se encontraba, el día 28 de enero del presente año. Durante la duración de la huelga, el gobierno mantuvo una permanente preocupación por su estado de salud, adoptando las medidas necesarias para su protección y para prevenir eventuales daños irreparables, teniendo presente el respeto al derecho a la vida, que constituye uno de los pilares en que se sustentan las políticas públicas de derechos humanos implementadas por los gobiernos democráticos. El término de la medida que había adoptado la señora Troncoso fue posible en virtud de las conversaciones que el ejecutivo mantuvo en forma regular son la afectada, resultado de las cuales se logró acuerdo en orden a que podrá acceder a beneficios intrapenitenciarios, junto a otros dos dirigentes mapuches también condenados por delitos tipificados en la ley antiterrorista, Juan Millalen Milla y Jaime Marileo Saravia, que se materializarán a contar del presente mes de marzo. Estos beneficios les serán concedidos de conformidad con la legislación vigente y en ejercicio de las atribuciones legales de las autoridades penitenciarias chilenas. En este sentido, el acuerdo ya ha comenzado a operar y la señora Troncoso ha sido trasladada al Centro de Estudios y Trabajo (CET) de Angol, a partir del miércoles 5 de marzo. Los internos Huenchunao Mariñan, Marileo Saravia y Millalén Milla habían depuesto la huelga de hambre son fecha 14.12.07, mientras que el señor Llaitul Catrillanca la depuso et 30.12.07. Cabe señalar que Gendarmería de Chile realizó todas las acciones pertinentes y cumplió con et protocolo interno establecido para estos casos. Desde su inicio, se proporcioné a los huelguistas la oportuna y adecuada atención médica,

habiendo sido permanentemente atendidos y constantemente evaluados tanto física como psicológicamente. Para considerar probables patologías se les practicaron diversos exámenes médicos, tanto por profesionales médicos y enfermeros de Gendarmería de Chile, como de instituciones externas. Por otra parte, destacamos por su relevancia la creación de la figura de un Comisionado presidencial para los asuntos indígenas, lo que es inédito en nuestro país, a cargo del señor Rodrigo Egaña Baraona, destacado profesional en et ámbito del diseño e implementación de políticas publicas, de gran experiencia y una destacada trayectoria en el servicio público, cuya labor vendrá a reforzar las labores que desempeña la Corporación Nacional de Desarrollo Indígena (Conadi). De acuerdo al decreto que lo nombra, el Comisionado presidencial para asuntos indígenas tendrá por misión asesorar a la Presidenta de la República, en asuntos y materias indígenas. Para et cumplimiento de dicha función asesora, corresponderá al comisionado presidencial, en especial, las siguientes funciones: **a.** proponer los planes, políticas, programas, acciones y medidas relativos a los asuntos y materias indígenas; **b.** asesorar a los organismos competentes, en la formulación de políticas, planes o programas que tengan por fin, favorecer los cambios necesarios para que la sociedad chilena asuma plenamente su carácter multicultural y se favorezca la inclusión de todos sus integrantes, con pleno respeto a la ley y a los derechos de las personas; **c.** apoyar a los organismos competentes, en la evaluación y supervigilancia del avance de las políticas públicas hacia los pueblos indígenas, velando por el cumplimiento eficaz y oportuno de los compromisos asumidos por el supremo gobierno; **d.** reimpulsar et diálogo con las comunidades indígenas y sus dirigentes. Por último, se comunica a Relator Especial sobre la situación de los DD.HH. y libertades fundamentales de los indígenas sobre asuntos indígenas, que el Senado chileno aprobó, en los mismos términos en que lo hizo la Cámara de Diputados, el proyecto de acuerdo aprobatorio del Convenio n° 169 sobre pueblos indígenas y tribales en países independientes, adoptado por la Conferencia General de la Organización Internacional del Trabajo, el 27 de junio de 1989. Habiéndose cumplido et trámite legislativo, et Ejecutivo puede proceder a la promulgación del Convenio. De esta manera, entonces, se cumple una recurrente recomendación hecha por relatores y mecanismos multilaterales de protección de los derechos humanos de los pueblos indígenas, en orden a alcanzar la aprobaci6n del convenio n°169.

China

A. Communication sent to the Government

28. On 3 October 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 communication regarding Mr. **Husein Dzhelil**, an ethnic-Uighur of Canadian nationality. According to the allegations received:

> On 19 April 2007, he was sentenced to life imprisonment for “plotting to split the country” and to 10 years of imprisonment for joining a “terrorist organization”. These sentences were the result of an unfair trial which based on a confession extracted through torture. However, the High People’s Court of Xinjiang Uighur Autonomous Region (XUAR) denied Mr. Dzhelil’s appeal, assessing that the facts were clear, and that the evidence was reliable and adequate. Allegedly, during the trial, the court-appointed lawyer did not make any statements on behalf of Mr. Dzhelil.

29. In relation to Mr. Ismail Semed, an ethnic-Uighur (the subject of a previous joint communication, dated 13 April 2006) the Special Rapporteurs noted the Government's reply of 12 July 2006, where it was stated that the case is still under consideration. The Special Rapporteurs regret that no information was provided in relation to the allegations of torture, especially in light of recent information that Mr. Semed was executed on 8 February 2007, for offences of attempting to split the country and possession of firearms and explosives.

30. The Special Rapporteurs referred the Government to the International Covenant on Civil and Political Rights (ICCPR). While the Government has not ratified this international human rights treaty, it has, through its signature, accepted the obligation, in the period between signature and ratification, acceptance or approval, to refrain in good faith from acts that would defeat the object and purpose of the treaty. In this context, the Special Rapporteurs referred to article 14 3) of the International Covenant on Civil and Political Rights, which states: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

31. The Special Rapporteurs drew the Government's attention to article 15 of the Convention against Torture provides that, "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

32. Please indicate on the basis of what criteria organizations are qualified as terrorist organizations and whether they can appeal against such qualifications. Please provide the relevant legal basis.

33. On 31 July 2008, 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 communication regarding **the public execution of three men in Yengishahar, Xinjiang Province,** on 19 July 2008. They had been found guilty of being members of the East Turkistan Islamic Movement (ETIM), an organization classified as terrorist by the Government.

34. According to the information received, in January 2007, security forces arrested a group of 17 Uighur men, members of the East Turkistan Islamic Movement (ETIM), in Akto county, Xinjiang Province. The names of two of the men were **Mukhtar Setiwaldi** and **Abduweli Imin.** The men were subsequently charged with separatist activities, organizing and leading a terrorist organization, and the illegal production of explosives. At a trial held in November 2007 they were found guilty. Mukhtar Setiwaldi, Abduweli Imin and two or three other members of the group received death sentences, while the others were sentenced to terms of imprisonment. Some reports indicate that two of the defendants were executed immediately after the trial. On 9 July 2008, the local government authorities brought thousands of students and workers to a

public square in Yengishahar. Three men were brought before the crowd, death sentences were read out (indicating that the men were among those arrested in Akto in January 2007) and then the three men were executed by a firing squad. Some reports maintain that Mukhtar Setiwaldi and Abduweli Imin were among those executed on 9 July 2008, while others state that they had already been executed in November 2007.

35. The Special Rapporteurs fully recognize the Government's right and duty to forcefully combat heinous acts of terrorism. Indeed, the very recent explosion of two buses in Kunming which reportedly killed two persons and might have been the result of a terrorist attack, reminded us (if at all necessary) of the urgency with which the Government needs to combat terrorist activities and protect the population. The Special Rapporteurs recall, however, that the fight against terrorism must be conducted within the framework of international law. In particular, they recall UN GA Resolution 60/158 of 28 February 2006, which in its paragraph 1, stresses that "States must ensure that any measure to combat terrorism complies with their obligation under international law, in particular international human right, refugee and humanitarian law."

36. In this respect, the Special Rapporteurs recalled that the Human Rights Committee has observed that carrying out executions before the public is a practice that is "incompatible with human dignity", and the Special Rapporteur on extrajudicial, summary or arbitrary executions observed that "[there is no legitimate interest served [...] by making executions public spectacles, and this is itself a most inhuman form of punishment." (E/CN.4/2006/53/Add.3, para. 43).

37. According to the Special Rapporteurs' information, public executions are also prohibited by Article 212 of the Criminal Procedure Law of the People's Republic of China. The Supreme Court, too, has to the Special Rapporteurs' knowledge stated that public parading and other actions that humiliate the person being executed are forbidden. The Government informed the Special Rapporteur on extrajudicial, summary or arbitrary executions that, "on 24 July 1986 and again on 1 June 1988, the ministries responsible for law, the People's Procuratorates, public security and justice jointly issued a circular strictly forbidding the public display of condemned persons, and the pertinent authorities have since then treated this issue with the utmost gravity. In recent years, the phenomenon has thus been effectively prohibited".

38. Turning from the execution to the circumstances under which the death penalty was imposed, the Special Rapporteurs recalled that, although the death penalty is not prohibited under international law, it has long been regarded as an extreme exception to the fundamental right to life, and must as such be applied in the most restrictive manner.

39. In this respect, the Special Rapporteurs reminded the Government that in capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial admits of no exception. Relevant to the case at hand, these guarantees include the right to have one's conviction and sentence reviewed by a higher court. It is the understanding of the Special Rapporteurs that Chinese law now enshrines this guarantee, specifically providing that all death sentences have to be considered and confirmed by the Supreme Court. In the present case, reports do not clarify whether the three men executed on 9 July 2008 were able to exercise this right.

40. Please indicate what measures your Excellency's Government has taken or intends to take with regard to the apparent violation in this case of the prohibition of public executions. Please provide the exact wording of the provisions that form the legal basis for the arrest, detention, conviction and sentencing of the aforementioned persons. In particular, please explain how the notion of terrorism appears in the provisions in question, how it is defined and on what factual grounds all or some of the persons mentioned were considered to fall under the provisions in question.

B. Reply from the Government

41. The Government sent a reply on 15 January 2008 to the correspondence of 3 October 2007. To his great embarrassment, the Special Rapporteur is still awaiting a translation of the contents of the Government's response from the relevant Secretariat services.

Egypt

A. Communication sent to the Government

42. On 2 October 2007, the Special Rapporteur, jointly with the Special Rapporteur on the independence of judges and lawyers, sent a communication regarding **forty members of the organization *Muslim Brothers*** (الإخوان المسلمون) who, although they are civilians, are facing trial before the Supreme Military Court in Heikstep, northeast of Cairo, on charges of terrorism and money laundering. The forty defendants face charges that could incur the death penalty. Reportedly, some of the defendants were acquitted in January 2007 by a civilian court in Cairo, but their case was referred to a military court through a Presidential Order. The military trial commenced on 26 April and has been adjourned on a number of occasions. It has been reported that authorities did not provide defence lawyers with details of the charges until the trial began and that observers have been repeatedly denied access to the court. Apparently, a criminal court in Cairo was to hear an appeal filed by some of these defendants against the Public Prosecutor's decision to freeze their financial assets; the outcome of this appeal is not known. The military trial is still ongoing.

43. The Special Rapporteurs reminded the Government that the use of military courts to try civilians in most cases contravenes international law. In its General Comment No. 32 (2007), the Human Rights Committee underlined that article 14 of the International Covenant on Civil and Political Rights, to which Egypt is a party, requires that also trials by military court are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.

44. Furthermore, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted in 2003 by the African Commission on Human and People's Rights, expressly prohibit the use of military courts to try civilians and stipulate that all civilians have a right not to be tried by such courts.

45. The Special Rapporteurs referred to Principle 29 of the updated set of principles for the protection and promotion of human rights through action to combat impunity, recommended by the Commission on Human Rights at its sixty first session, which states that "The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel."

46. Moreover, the Special Rapporteurs drew the attention of the Government to the fair trial guarantees that are being violated when civilians are brought before military courts. A key principle of international law is the right of every individual to a fair trial before a competent and independent tribunal, as stipulated in Article 14 of the ICCPR. Military court judges are appointed by the deputy head of the armed forces and, therefore, they cannot be seen to be independent and impartial. Following arrests, suspects in terrorism and other security-related cases are routinely held for periods of weeks or months in pre-trial detention during which they are denied access to legal counsel or direct contact with their families.

47. Since 1992, military courts have reportedly sentenced at least 94 people to death on terrorism-related charges. Of these, at least 67 are known to have been subsequently executed.

48. Please indicate whether the organization Muslim Brothers is qualified as terrorist organization and the legal basis of such designation. Please advise why these 40 persons are, as civilians, being tried before a military tribunal. Please identify the legal basis for the military tribunal's jurisdiction over these individuals and how full compliance with international fair trial standards is in practice secured.

49. On 7 July 2008, the Special Rapporteur sent a communication to the Government in response to Parliament's approval on 28 May 2008 of the **extension of the state of emergency** for a further two years before its anticipated expiration on 31 May 2008. During his address to Parliament, Prime Minister Nazif informed Parliament that the emergency law would eventually be replaced since the Government still intends to produce a new counter-terrorism law and subject the bill to a public debate before its final adoption.

50. The Special Rapporteur referred to a meeting with the Permanent Mission of Egypt on 12 December 2007 whereby he indicated that he could share with the Government his views on areas of concern that he often encounter when examining a State's laws on countering terrorism. Since the Government is still deliberating a draft counter-terrorism law for future consideration, it is most timely that the Special Rapporteur can share four areas of concern regarding counter-terrorism legislation and its compatibility with international human rights law standards.

51. First, the definitions of "terrorism" or "terrorist act" as reflected either in general criminal law or in a specific act on counter-terrorism are often vaguely worded or have an overly broad application and therefore are at variance with Article 15 of the International Covenant on Civil and Political Rights (ICCPR) which enshrines the principle of legality in criminal law and

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.

52. 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: (1) 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; (2) the intent, which is to cause fear among the population or the destruction of public order or to compel the government or an international organisation to doing or refraining from doing something; and (3) the aim, which is to further an underlying political or ideological aim. It is only when these three conditions, or at least (1) and (2) are fulfilled that an act may be criminalized as terrorist. In particular, terrorism should not be defined through its political or ideological aims (see condition (3) above), unless the two other conditions are also met.

53. The second area of concern often flows as a direct result of the issue outlined above regarding vague or broad definitions of terrorism due to a negative impact on other human rights protected under the ICCPR. For example, such negative impact may result in restrictions upon or violations of: Article 18 on freedom of thought, conscience and religion; Article 19 on freedom of expression; Article 21 which provides for the right to freedom of association; Article 22 on freedom of assembly; and Article 25 on the right to participate in the conduct of public affairs. The Special Rapporteur underlined the importance of these particular rights since terrorism should never be defined so broadly as to negatively impact on the peaceful methods used by civil society, including political and social activists. The rights listed here are often impacted either through broad definitions of terrorism or through separate provisions on associated crimes. Although the Special Rapporteur fully supports the criminalization of financing of terrorism or incitement to terrorism, he emphasizes that such provisions need to be carefully crafted because of the danger of targeting not only persons and entities supporting terrorism but also peaceful activity in society, possibly merely because of sharing some of the political aims a terrorist group purports to be furthering.

54. Third, in his interaction with Governments the Special Rapporteur often raised concerns regarding the detention of terrorism suspects. This is because many States feel tempted, in respect of terrorist crimes, to modify the generally applicable rules on detention. For instance, through increased maximum duration of police, pre-charge or pre-trial detention; through restrictions on the detainees right to choose and communicate with counsel; and in the field of securing effective judicial review of any form of detention. In this regard, the Special Rapporteur refers to Article 9 of the ICCPR.

55. Finally, with respect to prosecuting terrorist suspects, some States have chosen to bring these cases before ordinary courts. However, in some instances these cases are tried before military, special or specialized courts either routinely or on an exceptional basis, sometimes at the discretion of the Executive. In some countries, such special courts have even been "faceless" in the meaning of being composed of anonymous hooded military officers instead of trained judges. While the Special Rapporteur does appreciate the need to introduce some modification to ordinary court procedures in terrorism cases, inter alia to protect potential witnesses or other participants in the proceedings, in his interaction with governments he emphasizes the priority of

the principle of normalcy and remain mindful that a number of fair trial principles are often denied or severely undermined through departures from ordinary procedure so as to violate Article 14 of the ICCPR.

B. Reply from the Government

56. The Special Rapporteur welcomes the Government's invitation extended on 16 January 2009 to visit Egypt for the purposes of examining its counter terrorism law and practice. This visit is expected to take place from 16 to 21 April 2009.

El Salvador

A. Comunicación enviada al Gobierno por el Relator especial

57. El 1 de octubre de 2007, el Relator Especial se dirijo al Gobierno en relación con la información que ha recibido relativa a **la Ley Especial contra actos de terrorismo, aprobada el 21 de septiembre de 2006 (Decreto No. 108)**, que determina las conductas terroristas y fija su penalidad, así como su implementación. Los siguientes aspectos de la Ley se preocupan al Relator Especial, especialmente:

58. La Ley Especial define en el artículo 1 su objeto, el cuál comprende aquellos delitos previstos en la misma, así como todas sus manifestaciones, incluido su financiamiento y actividades conexas que "por la forma de ejecución, medios y métodos empleados, evidencien la intención de provocar estados de alarma, temor o terror en la población, al poner en peligro inminente o afectar la vida o la integridad física o mental de las personas, bienes materiales de significativa consideración o importancia, el sistema democrático o la seguridad del Estado o la paz internacional".

59. El Relator Especial cree 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.

60. El Relator Especial se gustaría expresar su preocupación por el lenguaje abierto de esta Ley y temo que durante su implementación se violen derechos humanos esenciales tales como el derecho de reunión y asociación de los individuos. En este sentido, la interpretación actual de acto de terrorismo tuvo como consecuencia la detención provisional, el 7 de julio de 2007, de 14 personas imputándoseles el delito de "actos de terrorismo" en relación con actos de protesta social en reivindicación del "derecho al agua" acaecidos en la población de Suchitoto el 2 de julio de 2007.

61. Como es del conocimiento del Gobierno, este suceso ha sido anteriormente objeto de preocupación y ha llevado a una comunicación dirigida al Gobierno por parte del Relator Especial sobre la promoción del derecho a la libertad de opinión y de expresión y de la

Representante Especial del Secretario-General para los defensores de los derechos humanos, con fecha de 17 de julio de 2007. En dicha comunicación se expresó preocupación por las alegaciones recibidas en relación con la violación del derecho de los individuos, los grupos y las instituciones de promover y proteger los derechos humanos y las libertades fundamentales, así como del derecho a la libertad de opinión y expresión. Según las últimas informaciones recibidas, trece personas habrían sido puestas en libertad condicional y a todas se les siguen imputando "actos de terrorismo". En su calidad de Relator Especial, el acoje con satisfacción la liberación de estas personas pero continúa preocupado por su seguridad y su integridad personal debido al hecho de encontrarse bajo libertad condicional.

62. Del mismo modo, a mediados del mes de mayo, supuestamente esta misma Ley habría servido de marco para la realización de una operación de decomiso (operación "Vendedores Informales") que, según fuentes, terminaría en disturbios contra los vendedores ambulantes de la capital. Unas 200 personas pasarían a integrar la lista negra de la Policía Nacional Civil de sospechosos de terrorismo, la cual se distribuye, al menos, al FBI, a la base militar Comalapa y a la embajada estadounidense en la Colonia Santa Elena.

63. Según informaciones recibidas, la Honorable Sala de lo Constitucional de la Corte Suprema de Justicia estaría "retrasando los procesos de inconstitucionalidad presentados por la ciudadanía en contra de la Ley contra actos de terrorismo".

64. A este respecto, el Relator Especial quisiera llamar la atención del Gobierno sobre el hecho de que, como ya ha señalado el Relator Especial anteriormente, 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, párrafos. 26-50). Ello asegura el pleno respeto al principio de legalidad consagrado en el artículo 15 del Pacto de Derechos Civiles y Políticos, así como en otros instrumentos internacionales de derechos humanos.

65. En su calidad de Relator Especial, el 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, sancionan 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; y 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.

66. 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 se gustaría subrayar que no todos los actos que son delito con arreglo al derecho nacional o incluso internacional son actos de terrorismo ni deberían definirse así.

67. Otro aspecto de la Ley al que el Relator Especial gustaría hacer referencia en su calidad de Relator Especial es el relativo a las penas máximas establecidas por delitos de terrorismo que llegan a constituir una cadena perpetua *de facto*, lo cual entraría en contradicción con lo dispuesto en el artículo 27, inciso segundo de la Constitución de El Salvador.

68. El Relator Especial esta consciente de la necesidad de los Estados de adoptar medidas efectivas para prevenir el terrorismo y luchar contra él, pero a la vez, se preocupa que la legislación actual de terrorismo no sea plenamente conforme a los estándares internacionales de derechos humanos. En consecuencia, el Relator Especial quiere hacer un llamamiento al Gobierno para que se impulse una reforma de la legislación antiterrorista.

69. Es su Le ruego me facilite información detallada sobre el número de casos en los que se haya aplicado la Ley Especial contra actos de terrorismo. ¿Cuántas personas han sido condenadas y cuáles han sido sus sentencias? En la actualidad, ¿cuántos casos están pendientes de juicio o de apelación? ¿Pretende emprender el Gobierno de Su Excelencia medidas con el fin de definir clara y concisamente el terrorismo y los actos terroristas a través de la reforma de la Ley Especial o de otras leyes? Le ruego me proporcione información detallada sobre las penas previstas en dicha Ley y sobre cómo el Gobierno de su Excelencia enfocaría el que dichas penas puedan llegar a constituir una cadena perpetua *de facto*, a la luz de lo dispuesto en la Constitución.

70. El 14 de enero de 2008, el Relator Especial ha mandado una segunda carta al Gobierno de El Salvador.

71. El Relator Especial ha escribido en relación a su carta de fecha 1 de octubre de 2007. En este sentido el Relator Especial quisiera señalar a la atención del Gobierno que ha recibido nueva información sobre los hechos ocurridos en la ciudad de Suchitoto el 2 de julio de 2007, resultando en la detención de las señoras **Marta Lorena Araujo Martínez, Rosa María Centeno Valle, María Haydee Chicas Sorto, Sandra Isabel Guatemala, Martha Yanira Méndez, Beatríz Eugenia Nuila González, y los señores Manuel Antonio Rodríguez Escalante, Facundo Dolores García, José Ever Fuentes Herrera, Héctor Antonio Ventura Vasquez, Vicente Vásquez Basilio, Clemente Guevara Batres, Santo Noé Mancía Ramírez y Gertrudis Patricio Valladares Aquino**. Es el conocimiento del Relator Especial que dichas personas serán procesados el día 8 de febrero de 2008.

72. A este respecto, el Relator Especial quisiera reiterar su preocupación sobre la Ley Especial contra actos de Terrorismo (LECAT), como lo ha expresado en su carta del 1 de octubre de 2007. Una definición de actos de terrorismo tan amplia y vaga, como en dicha ley, podría dar lugar a graves violaciones de derechos humanos tales como la libertad de expresión y la libertad de reunión. Esto es muy preocupante si se toman en cuenta las penas establecidas en el artículo 5, LECAT, y el grave impacto que tienen sobre el derecho a la libertad de cualquier persona condenada.

73. También el Relator Especial desearía solicitar al Gobierno, que le facilite información sobre el resultado del proceso de las personas arriba mencionadas y el Relator Especial esperó que el juicio se lleve a cabo conforme a los estándares internacionales del debido proceso judicial.

74. El Relator Especial queda a la disposición del Gobierno para cualquier pregunta o solicitud relativa a la Ley Especial contra actos de Terrorismo u otros asuntos relacionados.

B. Comunicación recibida del Gobierno

75. Hasta la fecha del 31 de enero de 2009, ninguna comunicación del Gobierno fue recibida.

France

A. Correspondance par le Rapporteur spécial

76. Le 30 juin 2008, le Rapporteur spécial a reçu une réponse du Gouvernement français, relatif à correspondance envoyée le 26 avril 2006 (voir A/HRC/4/26/Add.1, paragraphe 22) intitulée : ‘’Observations de la chancellerie - demande de renseignements du rapporteur spécial pour la promotion et la protection des droits de l'homme et des libertés fondamentales dans le cadre de la lutte contre le terrorisme.’’

77. Question 1 : Selon le Rapporteur spécial, certains actes de terrorisme contenus dans les articles 421-1 à 421-2-3 du code pénal sont définis trop largement ce qui pourrait laisser le champ libre à des atteintes à certains droits de l'Homme. Il souhaiterait, par conséquent, obtenir des informations sur les mesures qui permettraient ‘’d'assurer que la définition des actes de terrorisme ne couvre que des actes qui sont terroristes par nature et qui atteignent un certain niveau de gravité, c'est à dire ceux qui présentent un certain danger pour les personnes ». La France s'est dotée progressivement d'une législation antiterroriste spécifique dont la loi du 9 septembre 1986 constitue la clé de voûte et qui a été régulièrement actualisée. Ce corpus législatif crée un droit spécialisé et dérogatoire, comme il en existe en droit pénal économique et financier ou en droit de la criminalité organisée, dans lequel le droit de la lutte anti-terroriste s'insère aujourd'hui. La loi, et notamment l'article 421-1 du code pénal, définit la notion d'acte de terrorisme par la réunion de deux éléments: -l'existence d'un crime ou d'un délit de droit commun incriminé par le code pénal. Les délits sont énumérés par une liste limitative établie par le législateur à l'article 421-1 du code pénal; -la relation de ces crimes ou délits de droit commun limitativement énumérés avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur, qui caractérise la circonstance de terrorisme. Ces actes de terrorisme sont punis de peines aggravées, en raison de leur particulière gravité (art. 421-3 et suivants du code pénal). Par ailleurs, se trouvent incriminées spécifiquement des infractions terroristes par nature ou pouvant en revêtir le caractère :

- l'acte de terrorisme écologique (art. 421-2 et 421-4 du code pénal) ; -l'association de malfaiteurs terroriste délictuelle et criminelle (art. 421-2-1, 421-5 et 421-6 du code pénal) ;

- la direction et l'organisation d'une association de malfaiteurs délictuelle ou criminelle en vue de préparer des actes terroristes (art. 421-5 alinéa 2 du code pénal) ;

- l'acte de financement d'une entreprise terroriste (art. 421-2-2 du code pénal). En outre, est créé un dispositif de gel des avoirs et une peine complémentaire de confiscation de l'ensemble des biens du délinquant terroriste et affectation du produit des condamnations au fonds de garantie des actes de terrorisme (art. 422-6 et 422-7 du code pénal) ;

- la non justification de ressources de toute personne étant en relations habituelles avec une ou plusieurs personnes se livrant à des actes de terrorisme (art. 421-2-3 du code pénal) ;

- le recel d'auteurs d'un acte de terrorisme (art. 434-6 du code pénal).

Toutes ces infractions terroristes atteignent donc un certain niveau de gravité (délits ou crimes) et présentent un certain danger, directement ou indirectement, pour les personnes qui en sont victimes. De plus, selon le rapporteur, l'article 421-2-3, qui punit le fait de ne pouvoir justifier de ressources correspondant à son train de vie tout en étant en relation avec des personnes se livrant à des actes qualifiés de terroristes, peut faire peser une présomption de culpabilité et peut aboutir à un renversement de la charge de la preuve. La condamnation du chef de ce délit résulte nécessairement de la démonstration, par l'accusation, d'une part, de liens avec des personnes se livrant à des actes qualifiés de terroristes, et, d'autre part, d'un rapport « déséquilibré » entre des ressources déclarées et un train de vie. Pour ce faire, l'étude tant du niveau de vie apparent de la personne suspectée que de son patrimoine réel est déterminante pour démontrer le déséquilibre avec ses revenus officiels. S'agissant cependant d'une présomption simple, le prévenu pourra rapporter la preuve contraire. Il convient de signaler que la chambre criminelle de la Cour de Cassation a estimé que ne constituait pas un renversement de la charge de la preuve, et donc n'était pas contraire aux dispositions de l'article 6 § 2 de la Convention européenne de sauvegarde des droits de l'homme, le fait de déduire la culpabilité d'une personne mise en cause sur le fondement de l'article 222-39-1 du code pénal (infraction jumelle du proxénétisme de la prostitution), de la circonstance que celle-ci se trouverait dans l'incapacité de justifier des ressources correspondant à son train de vie (Crim., 26 septembre 2001).

78. Question 2 : Le Rapporteur souhaiterait recueillir des éléments sur l'interprétation faite par les tribunaux du délit d'apologie du terrorisme prévu par l'article 24 alinéa 6 de la loi sur la liberté de la presse. Il voudrait notamment :

- savoir « comment sont conciliés » ce délit et la définition large des actes de terrorisme ;

- connaître la distinction entre ce délit et la provocation directe aux actes de terrorisme;

- savoir si la commission de ce délit comprend un élément intentionnel ainsi que la façon dont se a caractériserait » cet élément intentionnel.

L'article 24 alinéa 6 de la loi du 29 juillet 1881 dispose que sont punis de cinq ans d'emprisonnement et de 45.000 euros d'amende ceux qui auront provoqué directement des actes de terrorisme prévus par le titre II du livre IV du code pénal, ou en auront fait l'apologie. Pour être pénalement répréhensible, la provocation à la commission ou l'apologie d'actes de terrorisme doit être effectuée par l'un des moyens énoncés à l'article 23 de la loi du 29 juillet 1881 :

- soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics ;

- soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole, ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics ;

- soit par des placards ou des affiches exposées au regard du public ;

- soit par tout moyen de communication au public par voie électronique.

La provocation directe doit être interprétée comme le fait de « s'adresser à la raison ou d'exciter les passions» pour pousser à la commission d'une ou plusieurs infractions bien déterminées. Il a ainsi été jugé que ne correspondait pas à cette définition le texte ou le discours « qui tendrait à susciter non pas l'entreprise criminelle mais un mouvement d'opinion de nature à créer à son tour un état d'esprit susceptible de permettre la naissance de l'entreprise criminelle ». Elle se distingue de la complicité par don, promesse, menace, ordre, abus d'autorité ou de pouvoir, définie par l'article 121-7 du code pénal, en ce qu'elle se caractérise par un mode d'expression publique. L'apologie consiste à décrire, présenter ou commenter une infraction en invitant à porter sur elle un jugement moral favorable. Elle se distingue de la provocation en ce qu'elle reste punissable même quand l'auteur n'a pas désiré le renouvellement des infractions qu'il excuse ou justifie. L'apologie peut vanter une infraction dans l'abstrait, ou, dans une seconde forme plus souvent réprimée, s'appliquer à des infractions effectivement consommées. Les infractions de provocation et d'apologie d'actes de terrorisme se prescrivent dans le délai de trois mois. Ces délits ne sont en effet pas visés par l'article 65-3 de la loi du 29 juillet 1881, introduit par la loi 2004-204 du 9 mars 2004, qui a étendu à un an la prescription applicables à certaines infractions de presse. En application des articles 47 et suivants de la loi du 29 juillet 1881, la poursuite de ces délits ne peut par ailleurs intervenir qu'à la requête du ministère public.

79. Question 3 : Les recommandations faites à la France par le Comité des droits de l'Homme sur les procédures pénales relatives à la garde à vue sont mises en avant par le Rapporteur Spécial. Ce dernier voudrait connaître les mesures qui sont envisagées pour les mettre en œuvre et notamment :

- limiter au strict minimum le délai de la garde à vue et de la détention provisoire ;

- traduire dans le plus court délai le prévenu devant un juge ;

- rendre la traduction devant un juge obligatoire lorsqu'il est envisagé de prolonger la garde à vue après 96 heures pour affaire de terrorisme ;

- introduire un recours devant un tribunal afin que celui-ci statue sur la légalité de la détention ;

- garantir les droits des personnes gardées à vue pour voir un médecin de leur choix, contacter un membre de leur famille puis avoir rapidement accès à un avocat et communiquer librement avec lui, sans limitation de temps.

80. Concernant la garde à vue : La loi du 23 janvier 2006 a introduit la possibilité d'une garde à vue d'une durée de six jours, soit 144 heures (prolongation de 24 heures renouvelable une fois en plus des 96 heures existantes), mais uniquement dans deux cas exceptionnels :-s'il existe un risque sérieux de l'imminence d'une action terroriste en France ou à l'étranger ;-ou si les nécessités de la coopération internationale le requièrent impérativement. Au 7 mai 2008, la garde à vue de 6 jours n'a été utilisée qu'une seule fois, à l'encontre d'une seule personne, pour les nécessités de la coopération internationale. Cela démontre que les magistrats en font un usage particulièrement exceptionnel. Lorsqu'il est envisagé de prolonger la garde à vue après 96 heures, l'article 706-88 alinéa 7 du code de procédure pénale rend la présentation devant le juge obligatoire. En effet, c'est le juge des libertés et de la détention qui prolonge cette garde à vue, par décision écrite et motivée. Le gardé à vue peut alors s'entretenir avec un avocat à compter de la 96ème et de la 120ème heure. Le 19 janvier 2006 (décision n° 2005-532 DC), le Conseil constitutionnel a statué sur cette loi «relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers » dont il avait été saisi par plus de soixante sénateurs. Ceux-ci n'en contestaient que l'article 6 (réquisition administrative de « données de trafic » auprès d'opérateurs de communications électroniques, de fournisseurs de services en ligne et de « cyber-cafés »), et l'article 8 (photographie automatique des véhicules et de leurs occupants sur certains axes routiers et enregistrement provisoire de ces photographies aux fins de rapprochement avec les fichiers de véhicules volés ou signalés). Le Conseil constitutionnel n'a pas déclaré ces dispositions contraires à la Constitution eu égard, d'une part, à leur utilité dans la lutte contre le terrorisme et la criminalité, et d'autre part, aux limitations et précautions dont elles étaient assorties du point de vue de la protection de la vie privée.

81. Concernant le placement en détention provisoire : titre exceptionnel, la détention provisoire est ordonnée, en raison des nécessités de l'instruction ou à titre de mesure de sûreté, si les obligations du contrôle judiciaire se révèlent insuffisantes. Elle ne peut être ordonnée ou prolongée que si la personne mise en examen encourt une peine criminelle, ou une peine correctionnelle d'une durée égale ou supérieure à trois ans d'emprisonnement, ou enfin lorsque la personne en question se soustrait volontairement aux obligations du contrôle judiciaire. Les motifs de placement en détention provisoire sont limitativement énumérés par l'article 144 du code de procédure pénale, modifié par la loi n° 2007-291 du 5 mars 2007. Parmi ces motifs figure notamment la nécessité de mettre fin à un trouble exceptionnel et persistant à l'ordre public provoqué par la gravité de l'infraction, les circonstances de sa commission ou l'importance du préjudice qu'elle a causé, étant précisé que ce trouble ne peut résulter du seul retentissement médiatique de l'affaire. Aux termes de l'article 144-1 du code de procédure pénale, « La détention provisoire ne peut excéder une durée raisonnable, au regard de la gravité des faits reprochés à la personne mise en examen et de la complexité des investigations nécessaires à la manifestation de la vérité (...) ». En matière correctionnelle la détention provisoire ne peut excéder 4 mois si 1a personne n'a pas déjà été condamnée pour crime ou délit de droit commun soit à une peine criminelle, soit à une peine d'emprisonnement sans sursis d'une durée supérieure à un an et lorsqu'elle encourt une peine inférieure ou égale à cinq ans. Dans les autres cas, à titre exceptionnel, le juge des libertés et de la détention peut décider de prolonger la détention provisoire pour une durée qui ne peut excéder quatre mois par une ordonnance motivée. Cette décision peut être renouvelée selon la même procédure, la durée totale de la détention ne pouvant excéder un an. Toutefois, cette durée est portée à deux ans lorsqu'un des faits constitutifs de l'infraction a été commis hors du territoire national ou lorsque la personne est poursuivie pour trafic de stupéfiants, terrorisme, association de malfaiteurs, proxénétisme, extorsion de fonds ou

pour une infraction commise en bande organisée et qu'elle encourt une peine égale à dix ans d'emprisonnement. En matière criminelle, la personne mise en examen ne peut être maintenue en détention au-delà d'un an. Toutefois, le juge des libertés et de la détention peut prolonger la détention pour une durée qui ne peut être supérieure à six mois par une ordonnance motivée et rendue après un débat contradictoire organisé, l'avocat ayant été convoqué. Cette décision peut être renouvelée selon la même procédure. La personne mise en examen ne peut être maintenue en détention provisoire au-delà de deux ans lorsque la peine encourue est inférieure à vingt ans de réclusion ou de détention criminelles et au-delà de trois ans dans les autres cas. Les délais sont portés respectivement à trois et quatre ans lorsque l'un des faits constitutifs de (infraction a été commis hors du territoire national. Le délai est également de quatre ans lorsque la personne est poursuivie pour plusieurs crimes mentionnés aux livres II et IV du code pénal, ou pour trafic de stupéfiants, terrorisme, proxénétisme, extorsion de fonds ou pour un crime commis en bande organisée. A titre exceptionnel, lorsque les investigations du juge d'instruction doivent être poursuivies et que la mise en liberté de la personne mise en examen causerait pour la sécurité des personnes et des biens un risque d'une particulière gravité, la chambre de l'instruction peut prolonger pour une durée de quatre mois (renouvelable une fois) les durées prévues à l'article 145-2 du code de procédure pénale. Le placement, et le renouvellement, d'une détention provisoire est décidé par le juge des libertés et de la détention à l'issue d'un débat contradictoire qui se déroule en audience publique. Le parquet développe ses réquisitions, puis, le mis en examen et son avocat sont invités à prendre la parole. Le parquet peut s'opposer à la publicité des débats dans certains cas limitativement énumérés.

82. Question 4 : Le Rapporteur spécial souhaite avoir des éléments détaillés sur l'enclenchement de « la procédure d'exception » liée aux infractions sur le terrorisme notamment :

- l'autorité qui détermine s'il s'agit d'une affaire qui relève ou non des lois antiterroristes ;
- les éléments dont cette autorité dispose pour décider qu'une affaire relève des lois antiterroristes;
- l'éventuelle possibilité pour le gardé à vue de faire appel de cette décision.

L'article 706-17 du code de procédure pénale pose le principe d'une compétence concurrente pour la poursuite, l'instruction et le jugement des infractions entrant dans le champ d'application de l'article 706-16 du code de procédure pénale (actes de terrorisme). S'agissant de l'autorité qui détermine s'il s'agit d'une affaire qui relève ou non des lois antiterroristes, il s'agit de l'autorité judiciaire territorialement compétente : c'est en effet après s'être concerté avec la section anti-terroriste que le parquet territorialement compétent décide de rester compétent, ou de se dessaisir au profit des magistrats spécialisés. La juridiction qui se dessaisit dispose, parmi les éléments qui motiveront sa décision de dessaisissement, d'une circulaire et de sa connaissance des avantages présentés par la juridiction spécialisée. La circulaire du 10 octobre 1986 indique qu'en règle générale, il y aura lieu de centraliser à Paris les affaires de terrorisme mettant en cause des organisations étrangères et les affaires de terrorisme imputables à des groupes qui agissent ou qui sont susceptibles d'agir en tout point du territoire national. La circulaire indique surtout que chaque affaire donnera lieu à un examen particulier et qu'il conviendra de peser soigneusement les inconvénients d'une poursuite de l'enquête ou de l'instruction à Paris,

la gravité des faits pouvant à elle seule déterminer ce choix. Les avantages de la centralisation parisienne sont susceptibles de déterminer le dessaisissement de la juridiction territorialement compétente, en cas de compétence concurrente :

- Efficacité de la répression : cette compétence concurrente permet aux magistrats en charge de la lutte contre le terrorisme d'avoir une compétence nationale et aux parquets locaux d'exercer des pouvoirs d'enquête adaptés avant le dessaisissement concerté au profit du parquet de Paris ;

- Avantage d'une justice sereine et impartiale détachée des pressions locales : le dépaysement à Paris d'affaires confère plus de sérénité à la justice. Ainsi, dans le cadre des placements en garde à vue menées par les magistrats anti terroriste, le transfert des individus sur Paris permet d'éviter la multiplication de manifestations locales ;

- Facilitation des recoupements, par des magistrats spécialisés, entre les différentes procédures : cette spécialisation instituée par le législateur en 1986 présente l'avantage indéniable de centraliser les procédures, permet le recoupement avec d'autres faits en lien et s'appuie sur une connaissance effective par les juges de la matière. Ce dispositif de centralisation sert de référence dans les instances internationales et a été prolongé par la loi du 23 janvier 2006 par la centralisation de l'exécution des peines.

- Pratique des autorités judiciaires parisiennes de se déplacer fréquemment sur les lieux : les magistrats en charge de la lutte contre le terrorisme ont pour habitude de se déplacer sur les lieux de commission des faits, pour y mener les actes d'enquête mais également pour rencontrer leurs collègues locaux.

S'agissant de l'éventuelle possibilité pour le gardé à vue de faire appel de cette décision, elle lui est offerte à l'issue de la garde à vue, à l'occasion de sa mise en examen : en effet, pendant l'interrogatoire de première comparution, il pourra contester la qualification terroriste afin que le juge d'instruction s'estime incompétent (article 706-19 du code de procédure pénale), et si celui-ci s'estime compétent, la personne mise en examen pourra contester la mise en examen et la qualification terroriste retenue en demandant l'annulation de sa mise en examen devant la chambre de l'instruction de la cour d'appel (article 80-1 du code de procédure pénale). En cas de requalification par la cour d'appel en infraction de droit commun, la juridiction initialement saisie retrouvera sa compétence. Enfin, lorsque les faits terroristes ne sont pas avérés, la section anti terroriste du parquet de Paris ou les magistrats instructeurs en charge de la lutte contre le terrorisme se dessaisissent au profit des juridictions locales initialement saisies.

83. Question 5 : Le Rapporteur souhaite avoir l'avis du gouvernement sur la compatibilité des mesures sur le recours à la vidéosurveillance, les possibilités de contrôle des échanges électroniques et le traitement automatisé de données à caractère personnel avec le droit à la vie privée protégé notamment par l'article 17 du Pacte international relatif aux droits civils et politiques. A titre liminaire, il convient d'indiquer que cette question relève principalement de la compétence du ministère de l'intérieur (DLPAJ). Selon les informations dont nous disposons, le ministère de l'intérieur envisagerait une modification du régime juridique pour la vidéosurveillance dans le projet de LOPSI (modification envisagée de la loi 95-73 du 21.01.95 d'orientation et de programmation relative à la sécurité).

84. Sur les interceptions judiciaires : Les interceptions judiciaires sont des moyens d'investigation ordonnés dans le cadre de procédures judiciaires. Le secret des correspondances émises par voie des télécommunications est garanti par la loi du 10 juillet 1991 et par l'article L32-3 du code des postes et communication électronique. L'atteinte au secret de ces correspondances est sanctionnée par l'article 226-15 du code pénal. Les interceptions de communications sont donc des procédures exceptionnelles permettant de déroger à ce principe dans un cadre juridique clairement établi : « il ne peut être porté atteinte à ce secret que par l'autorité publique, dans les seuls cas de nécessité d'intérêt public prévus par la loi et dans les limites fixées par celle-ci » (article 1er de la loi du 10 juillet 1991). Les procédures développées à l'origine pour encadrer les interceptions dans le domaine des télécommunications fixes s'appliquent désormais à la téléphonie mobile ainsi qu'à l'Internet. Les articles 100 à 100-7 du code de procédure pénale issus de la loi du 10 juillet 1991 prévoient désormais que, pour les nécessités de l'information, les interceptions sont possibles « en matière criminelle et en matière correctionnelle, si la peine encourue est égale ou supérieure à deux ans d'emprisonnement ». Dans ce cas, le juge d'instruction peut « prescrire l'interception, l'enregistrement et la transcription de correspondances émises par la voie des télécommunications», pour une durée maximum de quatre mois, renouvelable. Toutefois, sa durée est limitée à deux mois renouvelables lorsqu'elle est ordonnée dans le cadre d'une enquête suivie pour recherche des causes de la mort ou d'une disparition inquiétante (art. 80-4 du code de procédure pénale). Il est à noter que « les enregistrements sont détruits, à la diligence du procureur de la République ou du procureur général, à l'expiration du délai de prescription de l'action publique. ». Enfin, les capacités d'interception pour ce qui concerne les « lignes » d'un député, d'un sénateur ou d'un avocat sont encadrées plus strictement. La loi n° 2004-204 du 9 mars 2004 a introduit un article 706-95 dans le code de procédure pénale, autorisant l'interception des correspondances émises par voie de télécommunications si les nécessités de l'enquête de flagrance ou de l'enquête préliminaire relative à l'une des infractions entrant dans le champ d'application de l'article 706-73 (criminalité et délinquance organisée) l'exigent. Le procureur de la République doit saisir le juge des libertés et de la détention qui est le seul habilité à donner l'autorisation pour la mise en place de la mesure. La décision est accordée pour une durée de 15 jours, renouvelable une fois dans les mêmes conditions de temps et de durée. Dans tous les cas, la décision d'interception judiciaire doit être écrite, comporter tous les éléments d'identification et n'est pas susceptible de recours. L'interception judiciaire est placée sous le contrôle du magistrat qui l'ordonne.

85. Sur le traitement automatisé des données à caractère personnel : 1. La loi n°78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, et son décret d'application n°2005-1309 du 20 octobre 1995, encadrent de manière très stricte la mise en œuvre et le fonctionnement des traitements automatisés des données à caractère personnel. A l'occasion de l'examen de la loi n°2003-239 du 18 mars 2003 sur la sécurité intérieure, qui a donné des bases légales aux fichiers de police judiciaire, le conseil constitutionnel (décision n°2003-407 du 13 mars 2003) a eu l'occasion de réaffirmer les principes à observer pour parvenir à concilier le respect du droit à la. vie privée et les objectifs légitimes de sauvegarde de l'ordre public et de recherche des auteurs d'infractions. Il appartient au législateur, en vertu de l'article 34 de la Constitution, de fixer les règles concernant les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques et donc notamment d'assurer la conciliation entre, d'une part, la sauvegarde de l'ordre public et la recherche des auteurs d'infractions, toutes deux nécessaires à la protection de principes et de droits de valeur constitutionnelle et, d'autre part,

le respect de la vie privée et des autres droits et libertés constitutionnellement protégés. Ainsi, il convient de rechercher un équilibre entre ces garanties fondamentales, équilibre auquel le conseil constitutionnel a estimé que le législateur était parvenu en précisant :

- que les traitements sont soumis au contrôle d'un magistrat;
- les personnes habilitées à utiliser les traitements et à obtenir communication des données personnelles y figurant;
- les modalités d'exercice du droit d'accès aux données personnelles par la personne figurant dans le traitement ;
- le renvoi à un décret pour préciser les modalités de mise en œuvre des traitements (durée de conservation des données par exemple).

En étant particulièrement attentif au maintien de l'équilibre indispensable entre respect de la vie privée et sauvegarde de l'ordre public, la Chancellerie estime assurer la compatibilité entre le recours aux traitements automatisés des données à caractère personnelles avec le droit à la vie privée protégée notamment par l'article 17 du pacte international des droits civils et politiques.

2. Enfin, un projet de décret relatif à la conservation des données de nature à permettre l'identification de toute personne physique ou morale ayant contribué à la création d'un contenu mis en ligne, qui devrait être prochainement examiné en section de l'intérieur du Conseil d'Etat, permettra de rendre applicables les dispositions de l'article 6, II et II bis, de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique. En effet, la loi précitée prévoit que doivent faire l'objet d'un décret en Conseil d'Etat, d'une part, la détermination des données que les prestataires techniques (fournisseurs d'accès et d'hébergement Internet) doivent conserver pour permettre l'identification de toute personne physique ou morale ayant contribué à la création d'un contenu mis en ligne, et d'autre part, la fixation des modalités d'application de l'article 6, II bis, de la loi précitée, notamment quant à la procédure de suivi des demandes administratives et aux conditions et durée de conservation des données transmises aux autorités administratives. Ce projet de décret, qui encadre la conservation par les prestataires techniques des données utiles aux services répressifs, garantira en outre un accès de ces derniers à des informations devenues indispensables à l'aboutissement de nombre d'enquêtes pénales. En effet, suivant en cela une évolution sociale plus générale, la délinquance connaît de profondes mutations en lien avec le développement de nouvelles technologies. La conservation des données permettant l'identification des personnes physiques ou morales ayant contribué à la création de contenus mis en ligne, puis leur mise à disposition des services et unités de police judiciaire, permettront ainsi à ces derniers de s'adapter aux nouveaux modes opératoires employés par les délinquants et criminels, et de mieux lutter contre ces derniers. S'agissant plus spécifiquement de la lutte contre le terrorisme, il est désormais solidement établi que les terroristes ont fréquemment recours à l'Internet pour leurs activités, qu'il s'agisse de propagande, de communication et d'organisation logistique au sein d'un même réseau ou encore de repérage ou d'acquisition de modes opératoires. Il est donc particulièrement nécessaire, dans un but préventif, de pouvoir accéder à certaines données techniques associées aux communications électroniques dans la sphère de l'Internet. Le projet de décret énonce donc une liste limitative des données que les prestataires techniques devront conserver. Il est en effet nécessaire que les fournisseurs et hébergeurs d'accès Internet connaissent avec précision l'étendue de leurs obligations de conservation, afin de

pouvoir mettre en œuvre les moyens nécessaires à ces fins. Les données conservées ne doivent porter que sur les personnes physiques ou morales ayant contribué à la création d'un contenu mis en ligne par un fournisseur ou un hébergeur d'accès Internet, à l'exclusion de toute information relative aux contenus eux-mêmes. Enfin, le projet de décret définit les modalités de désignation des agents spécialement chargés de prévenir le terrorisme et pouvant mettre en couvre les dispositions législatives précitées dans le cadre des demandes administratives, ainsi que le dispositif procédural correspondant mis en place.

86. Question 6 : Le Rapporteur voudrait avoir davantage d'informations sur la mise en œuvre du système d'indemnisation des atteintes corporelles subies par les personnes victimes d'actes de terrorisme et du fonds de garantie des victimes des actes de terrorisme et autres infractions, notamment sur les actes couverts par « la faute des victimes » pouvant amener à refuser ou à réduire la réparation en application de l'article L 126-1 du code des assurances. Un régime spécifique d'indemnisation des victimes d'actes de terrorisme par le fonds de garantie des victimes d'actes de terrorisme et d'autres infractions (F.G.T.I.) a été mis en place par l'article 9 de la loi du 9 septembre 1986 relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l'Etat. Les victimes d'attentats commis sur le territoire français, quelle que soit leur nationalité, peuvent bénéficier de l'indemnisation ; les citoyens français ayant leur résidence habituelle en France ou résidant hors de France et régulièrement immatriculés auprès des autorités consulaires sont également couverts lorsque les actes de terrorisme ont été commis à l'étranger. Dès la survenance d'un acte de terrorisme commis en France, le FGTI est informé de l'identité des victimes par le procureur de la République ; les autorités diplomatiques et consulaires l'informent des attentats survenus à l'étranger. L'indemnisation couvre l'intégralité des dommages corporels des personnes blessées et, pour les personnes décédées, les préjudices moraux et économiques des ayants droit y compris pour les ayants droit des victimes françaises qui seraient, quant à eux, de nationalité étrangère tout en résidant sur le territoire français. Toute personne qui s'estime victime d'un acte de terrorisme peut directement adresser au F.G.T.I. une demande d'indemnisation. Les indemnités sont réglées par le F.G.T.I. en accord avec les victimes ; la procédure est de nature transactionnelle. En cas de désaccord, la victime ou ses ayants-droit peut s'adresser au juge civil. L'indemnisation couvre l'intégralité des dommages corporels des personnes blessées et, pour les personnes décédées, les préjudices moraux et économiques des ayants droit. En application de l'article 20 de la loi n° 2006-64 du 23 janvier 2006, les ayants-droit des victimes françaises d'actes de terrorisme commis à l'étranger sont indemnisés quelle que soit leur nationalité (article L.126-1 du code des assurances). Peut prétendre à une indemnisation par le FGTI, la victime d'un acte de terrorisme commis en France après le 31 décembre 1984. Le FGTI indemnise intégralement tous les préjudices subis par les victimes de terrorisme indépendamment de la procédure pénale. Toute personne qui s'estime victime d'un acte de terrorisme peut directement adresser au F.G.T.I. une demande d'indemnisation. Les indemnités sont fixées et réglées par le F.G.T.I. en accord avec les victimes ; la procédure est de nature transactionnelle. La loi prévoit cependant que la réparation peut être refusée ou son montant réduit à raison de la faute de la victime. Jusqu'à présent, cette disposition n'ont trouvé à s'appliquer que dans le cas d'un journaliste qui s'était rendu en toute connaissance de cause dans un pays présentant des risques importants pour les personnes, et signalé comme tel par le ministère des Affaires étrangères. Par ailleurs, en application de l'article 26 de la loi du 23 janvier 1990, les victimes d'actes de terrorisme commis depuis le 1er janvier 1982 bénéficient des droits et avantages accordés aux victimes civiles de guerre par le code des pensions militaires d'invalidité et des victimes de la guerre ; il s'agit notamment du droit à pension de victime civile. Les victimes d'actes de terrorisme relèvent du ministère de la Défense et ont la qualité de

ressortissantes de l'Office National des Anciens Combattants (O.N.A.C.). Les victimes des actes de terrorisme commis entre 1982 et 1984 perçoivent une rente militaire d'invalidité, seule indemnisation possible, puisque ces attentats ne relèvent pas de la compétence du F.G.T.I. Aux avantages sociaux découlant de cette législation peut, selon les cas, s'ajouter celui d'une majoration à hauteur d'une demi-part, du quotient familial retenu dans le calcul de l'impôt sur le revenu (articles 195 et suivants du code général des impôts). Les victimes des actes de terrorisme commis après le 31 décembre 1984, ne peuvent pas cumuler cette rente avec l'indemnisation versée à titre principal par le F.G.T.I. Enfin, il convient de mentionner que les successions des victimes d'actes de terrorisme sont exonérées d'imposition.

Indonesia

A. Communication sent to the Government

87. On 22 July 2008, the Special Rapporteur, jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions, sent a communication regarding three men found guilty of involvement in the 12 October 2002 bombings on the island of Bali, which killed 202 people and injured a further 209: Mr. **Amrozi bin H. Nurhasyim**, Mr. **Ali Ghufron** alias **Mukhlas**, and Mr. **Imam Samudera**.

88. On 3 May 2006, the Special Rapporteurs wrote to the Government regarding these cases (see A/HRC/4/26/Add.1, para. 26). In that communication, they "fully recognize[d] the Government's right and duty to forcefully combat heinous acts of terrorism such as those the three above-named men have been found to be complicit in". The Special Rapporteurs recalled, however, that the fight against terrorism must be conducted within the framework of international law and expressed the concern that "it would appear that the death sentence against these individuals was not compatible with Article 6(2) and Article 15 of the ICCPR".

89. The executions, which appeared to be imminent in May 2006, were in fact put on hold. However, in January 2008 police and court officials informed Amrozi bin H. Nurhasyim, Ali Ghufron alias Mukhlas, and Imam Samudera that their renewed demands for a second judicial review had been rejected. The three men appealed against this decision, but on 17 July 2008, the Indonesian Supreme Court reportedly rejected this appeal and announced that they had exhausted their right of appeal, stating only one judicial review is permitted.

90. The Special Rapporteurs' concerns were based on the apparently retroactive application of the law allowing the imposition of the death penalty against the three men. In their previous correspondence they wrote:

> It is our understanding that on 18 October 2002, six days after the Bali bombing, President Megawati issued two "Government Regulations in lieu of law" (Peraturan Pemerintah Pengganti Undang-Undang, or "Perpus"), Perpus 1/2002 and 2/2002. Perpu 1/2002 provides that an act of terrorism, or the planning of or assisting in an act of terrorism, is punishable by death. Section 46 allows for its retroactive application if this is authorised by another Perpu or law. Perpu 2/2002 authorised that retroactive application "in relation to the [Bali] bombing incident". Perpus 1/2002 and 2/2002 were subsequently approved by Parliament in March 2003 and converted into the Law on Combating

Criminal Acts of Terrorism 15/2003. We have further been informed that on 23 July 2004, the Constitutional Court has ruled that the retroactive application of Perpu 1/2002 (i.e. Law 15/2003) violates Article 28I (1) of the Constitution and is therefore unconstitutional.

International law does not prohibit the death penalty per se as automatically violating the rights to life, but it mandates that it must be applied in the most restrictive manner. It is therefore crucial that all restrictions pertaining to capital punishment contained in international human rights law are fully respected in proceedings relating to capital offences. One such fundamental guarantee is that "the death penalty may be imposed only … in accordance with the law in force at the time of the commission of the crime" (Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR), to which Indonesia has become a party on 23 February 2006). This provision reinforces with regard to capital punishment the general principle that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed". (Article 15 ICCPR). We note that this principle is also enshrined in the Constitution of Indonesia, which in Article 28I(1) provides that "the right not to be prosecuted under retrospective laws [is a] basic human right that may not be diminished under any circumstances at all". All of these provisions, or at least their core, represent universal standards and customary international law. Moreover, Article 4(2) ICCPR provides that the right to life as enshrined in Article 6 and the protection against retroactive criminal legislation in Article 15 are among those rights that cannot be derogated from even "[i]n time of public emergency which threatens the life of the nation".

91. The Special Rapporteurs urged the Government not to proceed with their execution until all doubts in respect of the concerns raised have been dispelled. Please explain the grounds on which the Government intends to proceed with the execution of Amrozi bin H. Nurhasyim, Ali Ghufron alias Mukhlas, and Imam Samudera notwithstanding Article 28I(1) of the Constitution, the ruling of the Constitutional Court and your Government's obligations under Articles 6(2) and 15 of the International Covenant on Civil and Political Rights.

B. Reply from the Government

92. On 17 October 2008, the Government replied to the Special Rapporteur's correspondence and advised that Mr Nurhasyim, Mr Ghufron and Mr Samudera were arrested, charged and convicted for their role in the bombing that took place on 12th of October 2002 on the island of Bali and which resulted in the death of 202 people, as well as injury to 209 Chers. Mr Nurhasyim was found guilty of various charges which included, among others, the purchase of a Mitsubishi minivan and bomb-making chemicals which were used in the Bali bombings. Following their much publicized trials, they were convicted as terrorists under the provisions of the Government Regulation on the Elimination of Terrorism and were sentenced to death by the Denpasar District Court in 2003. It is true that aforementioned Regulation (Perpu) was one of two presidential decrees passed in the aftermath of the bomb attacks. These two presidential decrees have since been turned into Law No. 1512003, also known as the Law on Combating Criminal Acts of Terrorism. This law imposes a death penalty in specific instances for convictions that have been

judged as falling under the legally established definition of "terrorist" arts. It also allowed for those involved in the bombings in Bali to be tried retroactively as well as granting powers to security authorities to deter and eradicate acts of terrorism.

93. The exact explanation for this decision is explained in greater detail below. Following the bombing, the then incumbent President, Megawati Soekarnoputri issued two Government Regulations in Lieu of Law (Peraturan Pemerintah Pengganti Undang-Undang), namely Perpu No. 112002 on the Eradication of Criminal Acts of Terrorism, and Perpu No. 212002 on the Eradication of Criminal Acts of Terrorism in Relation to the Bomb Explosion Incident in Bali, on 12 October 2002. It was argued by some quarters that these laws, especially Perpu No. 112002 which was the revised version of an anti-terrorism Bill which was previously debated by the DPR (the Indonesian Parliament). In fact, Article 46 of this Bill allowed for its retrospective application as long as it is authorised by another Perpu or law. The Perpu No. 212002 authorised this retrospective application in relation to the Bali bombing incident. These Regulations were subsequently approved by Parliament in March 2003 and were then converted, as already mentioned above, into Law on Combating Criminal Acts of Terrorism, i.e. Law No. 1512003. Subsequently, the retroactive application of the latter Law was challenged at the Constitutional Court level, which on 23 July 2004 had ruled that the retroactive application of the 2003 Law on Terrorism legislation violated Article 281(1) of the amended 1945 Constitution, and was as a result, unconstitutional. In actual fart, according to the provisions of Article 22 of the 1945 Constitution, the President can in "the event of a compelling emergency", issue with the delayed and subsequent consent of the DPR, a Perpu government regulation in lieu of law which has the power to take precedence over the rule of law or the opinions of the Constitutional court. In this case, the trials of the three men took place over the course of several years and finally, the judgment of the court was handed down on separate occasions between 7 August 2003 and 2 October 2003. The three men refused to appeal or seek clemency as is their legal right under Indonesian law. On 14th of April 2006, the Attorney General's office made it clear to them that this deliberate refusal to seek clemency meant that according to the norms of Indonesia law, they had exhausted all the legal remedies available to them and as a result, their execution was set to proceed. It should also be clearly noted that the families of the convicted defendants can also request a presidential pardon or a judicial review. The Attorney General also confirmed that although the relatives were made aware of their legal right to seek these options on behalf of the accused, rather, they had chosen to respect the request of the detainees and had waived their right to seek a pardon. Furthermore, it should not be forgotten that the carnage and destructive loss of life caused by these men, who had so carefully and mercilessly plotted out and carried out this heinous act of terrorism led to unspeakable suffering and sorrow for the families and friends of the victims who today, survive them.

94. On the issue of retroactivity, since this dreadful tragedy and during the trial of those arrested for their involvement, there have been some questions raised on the validity of the law that was applied to convict these individuals. To this, it should be understood that while some of the laws may have had some retroactive effect, it should more importantly be recalled that in principle, as well as in actual application, the use of retroactive laws is often subject to exceptions. In certain cases, including in international law, they may be applied in cases of extraordinary or heinous crimes such as, but not excluding, terrorism. Indonesia wishes to recall to attention that as a signatory to the ICCPR which it ratified, does not believe that it is erroneous to apply to these terrorists, the provisions of its national law which imposes for such heinous

crimes, the death penalty. Indeed, it should be recalled that according to Article 15(2) of the ICCPR, there would be no prejudice for "...the trial and punishment of any person for any acts or omission which at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations". It is clear that because of the extraneous circumstances of the crimes committed, the government felt justified in applying a retroactive law which its Constitution legally allows it to impose. The various arguments relative to this matter have been considered in great detail and contrasted against potentially contradictory provisions of national legislation while at the same time realizing that the interests of national security were of greater importance.

95. Furthermore, the government's decision was not taken lightly given both international pressure following the terrorist attacks and the ensuing sensitivity it engendered for the different parties. In fact, the death penalty in Indonesia is not imposed arbitrarily or inevitably for crimes of a very serious nature. It must therefore be clear that although the law, as is the case with the provisions of international law relative to this matter, does not prohibit the death penalty, it is still not a sentence that is automatically or irrevocably imposed for similar crimes of this nature. The circumstances for its imposition always require a deliberate series of procedures to have been respected and a particular set of legal remedies to have been extinguished for its application to be considered definitive. In the case of the three above mentioned men, the crimes committed were indeed heinous, and the proof against them conclusive enough to exclude reasonable doubt, moreover, their deliberate failure to seek clemency or appeal - though they were clearly advised to do so by their legal counsel and the office of the Attorney General - indicates their unwillingness to utilize the legal resources at their disposal especially when informed of the relevance and the serious implications their consequent decisions would produce. It is therefore amiss to imply that derogations of this nature are not within the sovereign policy decisions of any nation that wishes to impose them as is clearly stipulated in the provisions of Article 6 (2) of the ICCPR. The Government takes this opportunity to renew its commitment to the promotion and protection of human rights, while at the same time, believes it is no less significant to ensure the respect of the norms that govern exceptional situations that threaten national security.

C. Observations

96. The Special Rapporteur acknowledges the Government's reply. Subsequently he has received updated information on this case confirming that Mr Amrozi bin H. Nurhasyim, Mr Ali Ghufron alias Mukhlas, and Mr Imam Samudera were executed by firing squad on 8 November 2008.

Iran

A. Communication sent to the Government

97. On 18 July 2008, 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 communication regarding the death sentences reportedly imposed on three ethnic Kurds and alleged members of the armed group Kurdistan Workers Party (PKK), **Farzad Kamangar** (also known as Siamand), **Ali Heydariyan** and **Farhad Vakili**. The Supreme Court of Iran is reported to have recently confirmed the death sentences and the execution of Farzad Kamangar might be imminent. According to the information received:

Farzad Kamangar, Ali Heydariyan and Farhad Vakili were arrested by Ministry of Intelligence officials in Tehran in July or August 2006. Farzad Kamangar was subsequently held incommunicado at a series of different locations, including in Kermanshah, Sanandaj and Tehran. In the course of his detention he was tortured, including by beating, flogging and electrocution. As a result of the treatment inflicted, he had to be transferred twice to prison clinics.

On 27 May 2007, the spokesperson of the Judiciary announced that Farzad Kamangar had been charged with membership in a terrorist organization and with holding explosives. In February 2008, the 36th Revolutionary Court in Tehran found Farzad Kamangar, Ali Heydariyan and Farhad Vakili guilty on charges of "mohareb", apparently in connection with their alleged membership in the PKK, and sentenced them to death. Ali Heydariyan and Farhad Vakili were also found guilty of forging documents and sentenced to ten years imprisonment, which they have to serve before any execution being undertaken.

Reportedly the Supreme Court confirmed the death sentences. It would appear from the information received, that the head of the Judiciary may already have issued the execution order for Farzad Kamangar.

98. Although the death penalty is not prohibited under international law, it has long been regarded as an extreme exception to the fundamental right to life, and must as such be applied in the most restrictive manner. Article 6(2) of the International Covenant on Civil and Political Rights, to which Iran is a party, provides that "in countries which have not abolished the death penalty", the "sentence of death may be imposed only for the most serious crimes".

99. Membership in a rebel armed group (classified as terrorist group by the Government) is often considered a serious offence. In interpreting Article 6(2) of the Covenant, however, the Human Rights Committee has consistently rejected the imposition of a death sentence for offences that do not result in the loss of life. As observed in a recent report to the Human Rights Council, the conclusion to be drawn from a thorough and systematic review of the jurisprudence of all of the principal United Nations bodies charged with interpreting the most serious crimes provision, is that a death sentence can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life (A/HRC/4/20, para. 53). Moreover, when the Human Rights Committee last considered a report presented by the Government, it expressly stated in its concluding observations that it "considers the imposition of [the death] penalty for crimes [...] that do not result in loss of life, as being contrary to the Covenant" (CCPR/C/79/Add.25, paragraph 9).

100. The above considerations highlight one reason why the imposition of the death sentence on charges of "mohareb" is so problematic. Reportedly this charge is directed mainly against political dissidents, critics of the Government and persons accused of espionage and might not be sufficiently well defined to satisfy the very strict standards of legality set by Article 6(2) ICCPR for the imposition and carrying out of the death penalty. In order for the sentence of death to be imposed "in accordance with the law", the law in question must be sufficiently precise to clearly allow distinction between conduct punishable with the capital sentence and conduct not so punishable.

101. Turning to the pre-trial detention of the three men, particularly Farzad Kamangar, the Special Rapporteurs reminded the Government that in capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in Article 14 of the ICCPR admits of no exception. Relevant to the case at hand, these guarantees include the right to be assisted by a lawyer of one's own choosing at all stages of the proceedings, to have adequate time and facilities to prepare one's defence, and the right not to be compelled to confess guilt.

102. The Special Rapporteurs recalled paragraph 6(c) of Human Rights Council resolution 8/8 of 2008 which urges States "to ensure that no statement established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". In addition to being a crucial fair trial guarantee, this principle is also an essential aspect of the non-derogable right to physical and mental integrity set forth, inter alia, in Article 7 of the ICCPR.

103. In this respect, the Special Rapporteurs drew the attention of the Government to paragraph 12 of General Assembly Resolution A/RES/61/153 of 14 February 2007, which "reminds all States that prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and dignity of the person;" Prolonged incommunicado detention furthermore negates the above-mentioned guarantees of the right to a fair trial, such as being assisted by a lawyer and having adequate facilities to prepare one's defence.

104. The Special Rapporteurs urged the Government to take all necessary measures to guarantee that the rights under international law of Farzad Kamangar, Ali Heydariyan and Farhad Vakili are respected. Considering the irreversible nature of capital punishment, this can only mean suspension of the death sentence against the three men until the question whether the acts they were found guilty of satisfy international criteria for what constitutes "most serious crimes" has been clarified, the allegations of torture have been thoroughly investigated and all doubts in this respect dispelled.

105. Please indicate the specific conduct Farzad Kamangar, Ali Heydariyan and Farhad Vakili have been found guilty of and the legal basis of the death sentences imposed against them. Please indicate how these are compatible with international norms, specifically with the requirement in article 6(2) of the ICCPR, to which Iran is a party, that the "sentence of death may be imposed only for the most serious crimes in accordance with the law". To date, the query to provide the definition of "mohareb" under Iranian law, however, has unfortunately remained without a reply. Please provide details regarding access to legal counsel, public nature of hearings and judgments, the conviction and sentence, and the post-conviction proceedings in the cases of Farzad Kamangar, Ali Heydariyan and Farhad Vakili.

B. Reply from the Government

106. As of 31 January 2009, there had been no response to the Special Rapporteur's correspondence.

Israel

A. Communication sent to the Government

107. On 28 July 2008, the Special Rapporteur, jointly with the Special Rapporteur on the situation of human rights defenders, as Special Rapporteur on the independence of judges and lawyers, sent a communication concerning Mr **Shawan Jabarin**, general director of *Al-Haq*, a Palestinian human rights organization based in the occupied West Bank.

108. According to information received, on 7 July 2008, the Israeli High Court rejected Mr Shawan Jabarin's petition to have the travel restrictions against him lifted. Previous petitions filed by Mr Shawan Jabarin against the travel restrictions were rejected in December 2006 and June 2007. With the travel restrictions in place Mr Shawan Jabarin is not permitted to leave the West Bank. The High Court's refusal to lift the travel restrictions against Mr Shawan Jabarin is reportedly based on secret information provided by the military and examined ex parte. This information allegedly justifies the Israeli High Court's decision by proving that Mr Shawan Jabarin is a security risk. Given that neither Mr Shawan Jabarin nor his lawyer has been able to gain knowledge of why the travel restrictions are in place, it has been impossible to defend Mr Shawan Jabarin. Because he cannot leave the West Bank, Mr Shawan Jabarin has been unable to represent his organization at various events in other countries.

109. The Special Rapporteurs expressed concern that no reasons for the travel ban imposed against Mr Shawan Jabarin had been given and as a consequence he cannot effectively continue his non-violent activities in defence of human rights in the occupied West Bank territory.

110. The Special Rapporteurs referred the Government to the International Covenant on Civil and Political Rights, which has been ratified by Israel in 1991, which states in its article 14.1 that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. According to the jurisprudence by the Human Rights Committee fundamental principles of fair trial are already enshrined in the first sentence of article 14 and hence apply in any matter dealt with by the judiciary, not merely the consideration of a criminal charge or a suit at law. As equality of arms is one of those fundamental principles, the Special Rapporteurs are concerned that it may not have been respected in the case of Mr Shawan Jabarin. The court upholding his travel ban admitted secret evidence provided by one of the parties but not shared with the other party. Please provide information on how the right to a fair trial as established in international norms and standards is being respected in this case.

B. Reply from the Government

111. On 31 July 2008 the Permanent Mission of Israel in Geneva acknowledged receipt of the correspondence. As of 31 January 2009, there had been no response to the Special Rapporteur's correspondence.

Italy

A. Communication sent to the Government

112. On 20 June 2008, the Special Rapporteur, jointly with the Special Rapporteur on the question of torture, sent a communication concerning the case of Mr. **Sami Ben Khemais Essid** (hereafter, Mr. Essid), a Tunisian citizen, who was reportedly deported from Italy to Tunisia on 3 June 2008 and held in Mornaguia prison outside the capital city of Tunis. According to the information received:

> Mr. Essid had been scheduled to appear in a Milan courtroom on 3 June 2008, for a preliminary hearing on terrorism charges but an expulsion order was issued on 31 May 2008 under the expedited procedure created by Law 155 of 31 July 2005. This law denies the right of suspensive appeal to those persons subject to removal on national security grounds.
>
> Having been convicted in February 2002 of membership in a terrorist organization and sentenced to six-and-a-half years in prison, Mr. Essid was indicted on new terrorism charges in 2005. He was remanded into pre-trial detention in June 2007 on the eve of his scheduled release from prison. It is reported that Mr. Essid had been held the maximum amount of time permitted in pre-trial detention for the charges against him and would have had to be released. However, according to our understanding, Italian law provides for the following alternatives to removal where such removal would violate international law: 1) compulsory residence (obbligo di soggiorno) and 2) special police supervision. Such measures could have potentially been pursued, especially in light of the ongoing criminal prosecution against Mr. Essid.
>
> The European Court of Human Rights (ECtHR) communicated a request for interim measures in respect of Mr. Essid in March 2007, after he had alleged that his expulsion to Tunisia would expose him to treatment in violation of article 3 of the European Convention on Human Rights (ECHR).

113. In this context the Special Rapporteurs recalled that since 2006, the ECtHR has issued interim measures on behalf of a number of Tunisians who were sought to be expelled under the expedited procedure. In addition, the Grand Chamber of the European Court clearly established in its 2005 decision *Mamatkulov and Askarov v. Turkey*, that a breach of interim measures constitutes a violation of the ECHR. This is in line with the practice of United Nations human rights treaty bodies.

114. The Special Rapporteurs referred to the ECtHR's recent decision in the case of *Saadi v. Italy*, whereby, the Court ruled on 28 February 2008, that Italy's efforts to deport Mr. Nassim Saadi, a Tunisian national, would violate article 3 of the ECHR. Reportedly, after the Saadi ruling, the ECtHR recommended to the Government of Italy that in similar cases pending before the court, including that of Mr. Essid, it would be advisable to seek friendly settlements in those cases. In this regard, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a communication on 17 October 2007 to the Government of Italy concerning Mr. Saadi.

115. The Special Rapporteurs recalled that in May 2007, the Committee against Torture (CAT) issued its concluding observations on Italy's fourth periodic report and expressed its concerns "at the immediate enforcement of these expulsion orders, without any judicial review," and […] "that this expulsion procedure lacks effective protection against refoulement".

116. The Special Rapporteurs expressed concern over Mr. Essid's deportation in light of the interim measures communicated by the European Court of Human Rights; and particularly that Mr. Essid may have been expeditiously deported due to his likely imminent release from pre-trial detention.

117. In addition, the Special Rapporteurs drew the Government's attention to the Convention Against Torture, and the International Covenant on Civil and Political Rights, which similar to the European Convention on Human Rights and Fundamental Freedoms, also prohibit torture and ill-treatment and provide that no person can be transferred to another country where he or she is at risk of torture and/or ill-treatment. This applies to all persons without consideration of their status or alleged crimes, and irrespective of the nature of the transfer, including extradition, expulsion, deportation and rendition.

118. Are there other individuals currently being held in Italy that face possible deportation who have their cases pending review by the ECHR and where the European Court of Human Rights has requested interim measures of protection? Is the Government monitoring the current legal status and treatment of Mr. Essid in Tunisia?

B. Reply from the Government

119. On 28 August 2008, the Government replied to the Special Rapporteur's correspondence, with the following information. The Italian Constitution of 1948 envisages the protection of rights and fundamental freedoms as contained in relevant international standards, such as the European Convention on Human Rights and Fundamental Freedoms, the Universal Declaration on Human Rights, and the International Covenant on Civil and Political Rights. The Italian legal system aims at ensuring an effective framework of guarantees, to fully and extensively protect fundamental rights, as enshrined, inter alia, in Art. 10 of the Italian Constitution, which sets forth: *(1) The legal system of Italy conforms to generally recognized principles of international law; (2) Legal regulation of the status of foreigners conforms to international rules and treaties; (3) Foreigners who are, in their own country, denied the enjoyment of those democratic freedoms as guaranteed by the Italian Constitution, are entitled to the right to asylum under those conditions provided by law; (4) Foreigners cannot be extradited for political offences.* Within this framework, Italy reiterates both the compliance with all relevant international standards, and the value of its Basic Law, to be considered of a mandatory nature and as guidance and basic criterion for the action, at all levels of the Italian Administration.

120. Mr. Essid Sami Ben Khemais was indicted as a member of a terrorist cell, active in Milan and in Lombardy, between the end of '90s and the year 2001. He was thus sentenced, by the Milan Tribunal, to a six-year and six-month detention penalty, on the ground of his membership to a criminal organization, aimed at terrorist activities. The pre-trial detention warrant was released by the preliminary investigation magistrate (acronym in Italian, *GIP*) at the Milan Tribunal. While Mr. Essid was serving the detention penalty, additional offences presumably committed by Mr. Essid, emerged further to the testimony by another member of the same

criminal cell. For these other offences, the *GIP* at the Milan Tribunal released, in June 2007, additional pre-trial detention warrants, affecting Mr. Essid and other individuals, within the framework of the investigation "4457/06- No. 179/07". Since the time limit of the above pre-trial detention warrant was expiring and, thus, Mr. Essid was about to be freed, by enforcing Art.13 of Legislative Decree No.286/98 and Art.3 of Act No.155/2005, concerning the legislation on international terrorism, the Ministry of Justice issued an expulsion measure, justified by the risk that Mr. Essid, once released, might be able to facilitate terrorist activities within the Italian territory. Meanwhile, the Police HQs. Immigration Unit in Milan requested the Tribunal in Milan to release the authorization (*nulla osta*) to proceed with the expulsion. In this regard, it must be recalled that such authorization may be denied only on "the solely proceeding ground when there is the need to ascertain the liability of other members of relevant criminal organization or of those defendants, whose trial has been initiated". Since this was not the case with Mr. Essid, the *GIP* at the Milan Tribunal released the requested authorization (*nulla osta*), on June 1, 2008. The repatriation of Mr. Essid took place on June 3, 2008. The Essid Sami Ben Khemais expulsion order was issued, in full compliance with the Italian legislation and international agreements, having it previously received the authorization (*nulla osta*) of the Italian magistrate, in contact with the Tunisian Authorities. The Tunisian Minister of Justice has recently affirmed publicly that Mr. Ben Khemais Essid was allowed to contact his defence counsel and that he would be tried publicly and fairly. The Italian News Agency, ANSA, reported on June 7th, 2008, that Ben Khemais Essid's lawyer had affirmed to have visited his client and that his client enjoys his rights and has not been subjected to ill-treatment. With specific regard to your question concerning other similar situations, in accordance with Arts. 13, para.1, of Legislative Decree No.286/98 and 3 of Act No.155/05, similar measures have been adopted by the Minister of Interior for other Tunisian citizens. Nevertheless the relevant measures have not been executed yet, further to the release of *ad interim* measures by the European Court of Human Rights. The Italian Authorities are effectively monitoring the situation of Mr. Essid. In particular, the Italian Embassy in Tunis is carefully and formally following this situation keeping in touch with their Tunisian counter-parts. Specifically, during a meeting in Tunis on July 24th 2008 the Tunisian Authorities stated that the detainee concerned has been allowed to meet his family (five times since the beginning of the detention), his defense counsel (four times since the beginning of the detention) and some physicians. Tunisian Authorities have committed themselves to providing relevant documentation/information and to pursuing the dialogue with all relevant interested parties.

121. With specific regard to the fight against terrorism, it is worth recalling that in the aftermath of September 11, 2001, the European Council, at its extraordinary meeting on 21 September 2001, approved the "*Action Plan to fight terrorism*". For the first time, the EU developed a coordinated, coherent and cross-pillar approach to all its policies and measures to fight terrorism. The European Council stated that "*terrorism is a challenge to the world and to Europe*", and that its combat will become "*more than ever, a priority of the European Union*". However the commitment to fight terrorism should go hand in hand with "*the respect for fundamental freedoms that are the basic foundation of our civilization*". In particular, the "Action Plan to fight terrorism" envisaged the following priority areas: Enhanced Police and judicial cooperation, to be developed through means, such as the European Arrest Warrant, a Common List of Terrorists, and the Europol; the development of international legal instruments against terrorism; fighting the financing of terrorism; reinforcing aviation security; and a coordinated global action by the European Union. Within the EU framework, Italy reiterated its

firm commitment towards the prohibition of torture, the necessity to respect human rights, refugee law and international humanitarian law while countering terrorism, as highlighted in the 11th December 2006 EU Council Conclusions.

122. At the domestic level, in the aftermath of 9/11, the Italian Government urgently adopted Law Decree No. 374/01, entitled "Urgent Provisions in order to fight international terrorism", which was confirmed by Act No. 438/01. By this Decree, the Government introduced into the Italian legal system the crime of "international terrorism" (see Art. 270 *bis* of criminal code). Art. 1 of Act No. 438/01 stipulates that "anyone, who promotes, sets up, organizes, directs or finances associations that intend to commit violent acts with the aim of terrorism or subversion of the democratic order, is punished with a detention penalty of up to seven years. Whoever participates in such associations is punished with a detention penalty of up to ten years. The terrorist aim emerges even when violent acts are directed against a foreign country, an international institution or organization". At the substantial law level, the most important change brought about by the amendment of Art. 270 bis of the criminal code is the broadening of the scope of terrorism. Under Article 270, para. 3, of the criminal code, the scope of terrorism has been extended by including, on one hand, violent acts committed against a foreign State, international institution or organisation, while the repression of the planning of violent acts with the aim of terrorism is also included. It was also introduced an additional criminal offence concerning "assistance to associates". Art. 270 of the criminal code provides for the detention penalty, up to four years to "whoever - excluding the case of participation in and abetting the crime – either shelters, or gives hospitality, or provides transport and communication means to those participating in the associations enlisted under Arts. 270 - 270 bis". By Act No. 34/03, the Parliament amended Art. 280 bis concerning "acts of terrorism by use of explosive and deadly devices. In doing so, the list of offences concerning attacks with subversive and terrorist's aim directed to damage personal property and assets was broadened.

123. Following the events in London and in Sharm-el-Sheik in summer 2005, Italy urgently adopted Law Decree No. 144/05, entitled "Urgent measures to contrast international terrorism". Law Decree No. 144/2005 was then converted into Act No.155/2005, which was adopted by a vast Parliament majority. This legislation was inspired by the human rights protection system, as laid down by the Italian Constitution, the EU relevant legislation and international standards. Act No. 155/2005 introduced a set of provisions containing anti-terrorism measures (the so-called "Pisanu decree"). The main modifications introduced in criminal matter by the above Law are hereinafter indicated. As to the identification of suspected persons by the judicial police, Article 349, para. 2, of the code of criminal procedure provides for the public prosecutor to authorize the judicial police to carry out coercive DNA tests by taking hair and saliva samples, while respecting the personal dignity of the individual. The time limit for judicial police detention was extended from 12 to 24 hours when suspected persons who are to be identified, refuse to be identified or give presumably false personal details or identification documents (Article 349, para. 4, of the code of criminal proceeding). Accordingly, by Article 349, para. 5, of the code, the public prosecutor is to be immediately informed of the time when an individual was accompanied to the judicial police's premises. The public prosecutor can order that said individual be released when considering that the conditions to retain him/her are not met. Moreover, para. 6 of said Section provides for the public prosecutor to be informed of the time when the accompanied person was released.

124. An aggravating circumstance is provided for when the suspected person gives false statements. The offence of using, possessing and making forged ID documents was introduced by Article 497 bis of the criminal code. With respect to said offence, the discretionary arrest in *flagrante delicto* is now provided for by Article 381, paragraph 2 of the code of criminal proceeding. The arrest in *flagrante delicto* is now mandatory also for terrorism offences and for offences committed with the intent to subvert the democratic order (Article 380, para. 2, letter i). Terrorism offences, including international terrorism, or offences committed with the intent to subvert the democratic order are now part of the offences, which are subject to police detention (Article 384, para. 1, of the code of criminal proceeding).

125. The detention of a suspected person on the initiative of the judicial police is provided for when specific elements are discovered, among which lies the possession of forged ID documents (as explicitly provided for by Article 384, para. 3, of the code of criminal proceeding). As to the procedural safeguards, in this context, it is worthy of mention that the Italian legal system aims at ensuring an effective framework of guarantees to protect human rights, by considering that the legal defence is an inalienable right (Please, see Arts. 97 – 98 of the criminal proceeding code in conjunction with Art. 24 of the Italian Constitution). More specifically, by Art. 98 of the criminal proceeding code, it is also envisaged the legal aid for the indigents. Also, by Presidential Decree No. 115/2002, the legal aid is ensured in the criminal field (Art. 74 ff.). To enjoy legal aid, neither specific conditions nor formalities are requested; a mere self-certification is sufficient, pursuant to Art. 79, para.1, letter c.

126. As to preventive measures, the arrest of individuals not caught in *flagrante delicto* is re-introduced when the obligations relating to special surveillance have been infringed (Article 9, para. 2 of Act No. 1423/1956). Article 1 bis of Act No. 431/2001 provides for any notification to be sent to the State Prosecutor for him/her to take any provisional measure in order to "freeze" property, to prevent property or resources available to terrorist organizations from being dissipated, concealed or used to finance terrorist actions. In doing so, the Law provides for the mandatory confiscation of the means and assets that are used or aim at committing the crime under reference. Article 270, paras. 4 and 5 of the criminal code provides for the offences of recruiting and training for terrorism purposes which are punishable with imprisonment up to 15 and 10 years, respectively. Article 270, para. 6, of the code of criminal procedure provides for the offence of conduct for terrorism purposes and explicitly makes reference to the definitions provided for by agreements and provisions of international law. Police interrogations for investigation purposes, already prescribed for mafia-related offences (Act No. 356/1992), were introduced to also obtain from convicted persons information which could be useful to prevent and fight against offences committed for terrorism purposes, including with an international scope, or to subvert the democratic order (Article 18 bis of Act No. 354/1975 on the prison system).

127. On this issue, there have been various interventions by the Constitutional Court, to emphasize primarily that the Italian legal system aims at ensuring an effective framework of guarantees, so as to fully and extensively protect the fundamental rights of the individual (When an Italian legal provision apparently seems to affect the basic individual needs expectations, in reality we are facing a "*modus operandi*", aimed at protecting fundamental rights, such as the right to life, safety, personal freedom and security, as well as national security and public order. This is somehow a method of "damage containing": by which a higher requirement is protected

while other legitimate requirements of the individual may be temporarily compressed). More importantly, as to the constitutionality of the above measures, the Constitutional Court has emphasized, with regard to the terrorism threat, as follows: 1. The admissibility of provisions with a broad content vis-à-vis cases conducive to offences of terrorism and subversion; 2. The superiority "of the careful and indefectible duty" of the legislative system as regards the democratic order and the public security against terrorism and subversion; 3. The admissibility of "ad hoc measures", though with a specific deadline.

128. Within this framework, it is also worthy of mention that the provisions under Rule 39, as provided by the Rules of the Strasbourg Court, consist in an indication to the Government that it would be desirable, in the interest of the parties and of the procedure before the Court, not to proceed to the expulsion of the applicant. As per procedure, the Committee of Ministers is informed about the provision and the Chamber may invite the parties to supply it with any information on any matter relevant to the implementation of the temporary provisions of its indication. In this context, it must be reiterated that even before the *Mamatkulov* judgment in 2005, when *ad interim* measures were considered not binding, Italy has always shown its full respect for the Court's invitation and complied with Art. 44A concerning the obligation of loyal cooperation. The Court has started only very recently (in 2006) to count the number of the requested *ad interim* measures, either granted or rejected. To date, the Court has not published yet any report considering that situation per each State-party. At the procedural level, it is worth considering two cases: i. When the Court may promptly release the requested measure, *inaudita altera parte*, unless revoking it subsequently if following additional information, it deems that it was groundless (see the last case: *Beganov vs. Italy*); ii. When the Court may postpone the decision while, in the meantime, requesting the State concerned with additional information, with a view to eventually releasing that measure (in the latter case, within the lapse of time provided for to the Government to reply), there is not yet a formal compulsory precautionary measure. In the latter case, it should be noted that, with only one exception, Italy has always suspended the execution of the challenged measure, even prior to the formal release of the precautionary measure, within the lapse of time necessary to provide the Court with the additional requested information. The Italian Government wishes to reiterate that it is aware of the value of the precautionary measures. Along these lines, the Government reiterated and continues to reiterate its commitment to cooperating fully and loyally with the Court, within the European Convention framework, and with all the other relevant international and regional mechanisms.

Kenya

A. Communication sent to the Government

129. On 21 August 2008, the Special Rapporteur, jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Special Rapporteur on the independence of judges and lawyers, sent a communication concerning **Mohammed Abdulmalik**, currently detained at the United States of America naval base of Guantanamo Bay (Cuba). According to the allegations received:

> On 13 February 2007, Mr. Abdulmalik was apprehended by the Anti-Terrorism Police Unit in a café in Mombasa, detained and held incommunicado in the Kilindini Port and Urban

Police Stations before being transferred to Hardy, Ongata and Spring Valley Police Stations in Nairobi. He was held on suspicion of the Paradise Hotel attack and the attempted attack on an Israeli Arkia Airlines plane in Mombasa in 2002.

It is reported that Mr. Abdulmalik was not charged with any offence, was denied the right to challenge his detention, denied access to a lawyer and contact with family members, and was not brought before a judge. On 26 March 2007, it was announced by the United States Government that Mr. Abdulmalik was transferred to Guantanamo Bay.

It is reported that no judicial proceedings were held in relation to the transfer of Mr. Abdulmalik from Kenyan to US custody.

130. The Special Rapporteurs drew the Government's attention to article 3 of the Convention against Torture, which provides that no State party shall expel, return (*refouler*), or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. In regard to article 7 of the International Covenant on Civil and Political Rights the Special Rapporteurs refer to paragraph 9 of General Comment 20 on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, in which the Human Rights Committee states that State parties "must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or *refoulement*."

131. Furthermore, paragraph 6d of Human Rights Council Resolution 8/8 urges States not to expel, return (refouler), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture and; the Council recognizes in this respect that diplomatic assurances, where used, do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of non-refoulement. The Special Rapporteur on the promotion and protection of human rights while countering-terrorism, as cited from his report A/HRC/6/17/Add. 3, wishes to underline that "diplomatic assurances sought from a receiving State to the effect that a person will not be subjected to torture or cruel, inhuman or degrading treatment do not absolve the duty of the sending State to assess individually the existence of a "real risk". (para. 17).

132. The Special Rapporteur on Torture recalled that in his report A/60/31651, he stated that "diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. He is of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return" and called "on Governments to observe the principle of non-refoulement scrupulously and not expel any person to frontiers or territories where they might run the risk of human rights violations, regardless of whether they have officially been recognized as refugees". (paras 51 and 52).

133. Furthermore, the Special Rapporteurs noted that most detainees currently held in Guantánamo Bay have been there for several years without charges or trial, and without effective access to court or to a legal council for the determination of the lawfulness of their detention, that some of the Guantánamo Bay detainees were expected to be tried by military commissions not meeting international fair trial standards, as laid down in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Special Rapporteurs also noted that the United States wishes to return another group of detainees to their countries of origin or, where necessary, to a surrogate country. The Special Rapporteur on the promotion and protection of human rights while countering-terrorism was advised that the U.S. Government is conducting negotiations with countries for this purpose. (A/HRC/6/17/Add.3 para. 16).

134. Have measures been taken towards securing the accountability of the persons responsible for the transfer of Mr Abdulmalik to United States authorities What has the Government done in order to secure either the safe return or Mr Abdulmalik or his right to immediate juridical review of the lawfulness of his detention and his right to be tried without delay by an independent and impartial court? Will a remedy be offered to Mr Abdulmalik?

B. Reply from the Government

135. As of 31 January 2009, there had been no response to the Special Rapporteur's correspondence.

Maroc

A. Correspondance par le Rapporteur Spécial

136. Le 29 juillet 2008, le Rapporteur spécial conjointement avec la Présidente-Rapporteur du Groupe de Travail sur la détention arbitraire et le Rapporteur spécial sur la torture ont envoyé une lettre sur la situation de M. **Abdelkrim Hakkou**, âgé de 30 ans, ressortissant marocain. Selon les informations reçues,

> Le 16 mai 2008, sur le chemin à son lieu de travail, M. Hakkou aurait été arrêté sans mandat d'arrêt et détenu au secret par les forces de sécurité marocaines.
>
> M. Hakkou aurait déjà été arrêté et détenu au secret en juillet 2005. A cette occasion, il serait resté en détention pendant cinq mois jusqu'à sa comparution devant la justice, qui l'a innocenté.
>
> Le 20 mai 2008, la disparition de M. Hakkou aurait été signalée au commissariat de police qui aurait nié l'arrestation et déclaré qu'il ne faisait pas l'objet de recherche. Le 29 mai 2008, le procureur général du tribunal d'appel de Meknès aurait été saisi. Le Ministre de la justice, le Ministre de l'intérieur et la primature, ainsi que le directeur général de la sûreté nationale auraient également été saisis. Le 30 mai 2008, une plainte a été déposée auprès du Ministre de la justice qui a répondu qu'il ne disposait d'aucune information. Le commissariat de police, le procureur général du tribunal d'appel de Meknès, le Ministre de la justice, le Ministre de l'intérieur et la primature, ainsi que le directeur général de la sûreté nationale, ont été contactés sur le cas de disparition de M. Hakkou.

Le 3 juillet 2008, les autorités marocaines auraient annoncé à la presse qu'ils avaient procédé, le 1er juillet, à l'arrestation de 35 personnes dans le cadre d'une enquête sur le démantèlement d'un réseau terroriste lié à Al Qaida Maghreb.

Le 3 juillet, un avocat désigné par la famille Hakkou aurait contacté le Procureur Général pour lui demander une réponse écrite sur la détention effective, le statut judiciaire de M. Hakkou, l'autorisation de rendre visite à son client et la consultation de son dossier. Le 11 juillet, M. Hakkou aurait été présenté au juge d'instruction de la Cour d'Appel de Salé en présence de son avocat qui aurait pu consulter son dossier, puis M. Hakkou aurait été conduit à la prison Zaki de Salé. C'est à cette date que la famille Hakkou aurait finalement eu confirmation de la détention de M. Hakkou par les autorités marocaines.

Lors d'entretiens, M. Hakkou aurait alors pu confirmer qu'il a été détenu au centre de détention secret de la DST (Défense et surveillance du territoire) à Temara pendant 47 jours durant lesquels il aurait fait l'objet d'actes de mauvais traitement notamment la privation de sommeil, de coups de bâton au corps et à la tête, de tentatives de viol par les enquêteurs, et ceci dans le but de lui extorquer des aveux. Il aurait été transféré par la suite à la brigade nationale de police judiciaire de Casablanca, où des agents de police auraient tenté, sans succès, de lui faire signer un procès verbal contenant des aveux. Les agents auraient alors menacé de le renvoyer au centre de détention secret à Temara. M. Hakkou serait actuellement toujours détenu à la prison de Zaki à Salé ; et à ce jour il n'existerait pas de poursuites judiciaires à son encontre.

137. Les Rapporteur spéciaux souhaiteraient également intervenir auprès du gouvernement pour tirer au clair les circonstances ayant provoqué les faits allégations ci-dessus, afin que soit protégée et respectée l'intégrité physique et mentale de M. Hakkou, et ce, conformément aux dispositions pertinentes de la Déclaration universelle des droits de l'homme, du Pacte international relatif aux droits civils et politiques, de la Déclaration sur la protection de toutes les personnes contre la torture et autres peines ou traitements cruels, inhumains ou dégradants et de la Convention contre la torture.

138. Veuillez fournir tout information concernant la base légale ayant prévalu à l'arrestation et la détention de M. Hakkou, et veuillez expliquer comment ces mesures sont compatibles avec les normes et standards internationaux applicable en matière de liberté d'expression contenus dans le Pacte international relatif aux droits civils et politiques. Egalement dans le contexte ci-dessus, veuillez indiquer quelles sont les charges ou poursuites judiciaires à l'encontre de M. Hakkou, et notamment si celles-ci sont basées sur des provisions qui contiendraient une référence au terrorisme. Veuillez indiquer comment votre Gouvernement définit un acte terroriste.

B. Correspondance du Gouvernement

139. Le 6 aout 2008, le Gouvernement du Maroc a répondu à la correspondance du Rapporteur spécial, par la suivante.Dans le cadre du démantèlement d'une cellule terroriste liée à Al Qaïda, la police judiciaire a procédé, le 11 juillet 2008, à l'arrestation de 36 personnes dans plusieurs villes du Royaume dont le dénommé Abdelkritn Hakkou. Cette cellule est impliquée dans le recrutement, (encadrement et la formation des volontaires, candidats aux opérations kamikazes, soit pour les envoyer en Irak soit pour rejoindre les campements militaires liée au réseau «Al Qaî"da dans le Maghreb islamique» et revenir ensuite au Maroc pour y mener des attentats

terroristes contre les intérêts nationaux. Après deux prorogations de la période de sa garde à vue, M. Hakkou a été présenté au Procureur Général du Roi prés la Cour d'appel de Rabat le 11 juillet 2008. Sa famille a été notifiée de cette procédure. Il convient de signaler que la durée de la garde à vue pour les crimes liée au terrorisme est de 96 heures, renouvelables deux fois, sur autorisation écrite du Procureur général du Roi (Article 66 du code pénal). Par ailleurs, (avocat de l'intéressé pouvait prendre attache avec ce dernier dès la première heure de la prorogation de la période de sa garde à vue. II était également possible à l'inculpé de demander à l'officier de police judiciaire de contacter son avocat durant la période de prorogation selon la loi en vigueur. Concernant les allégations de disparition du susnommé, elles sont dénuées de tout fondement, puisque son arrestation a été effectuée dans un lieu public et conformément aux lois et procédures en vigueur. Compte tenu de ce qui précède, le cas d'Abdelkrim Hakkou n'entre manifestement pas dans le cadre de la disparition forcée, telle qu'elle est définie parla Convention internationale pour la protection de toutes les personnes contre les disparitions forcées et, par conséquent, la GTDFI devrait rejeter ce cas et ne pas l'inclure dans la liste des présumée disparus soumise aux autorités marocaines.

New Zealand

A. Communication sent to the Government

140. On the 29 November 2007, the Special Rapporteur, jointly with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, and the Special Representative of the Secretary-General on the situation of human rights defenders, sent a communication concerning **the arrest of 17 Maori social activists suspected of terrorism-related offenses**. According to the information received:

> On 15 October 2007, the police began a series of raids, home searches which resulted in the arrest of 17 Maori people as suspects of terrorism-related offenses in the cities of Auckland, Wellington, Christchurch, Palmerstan North, Hamilton, Whakatane and Ruatoki. The 17 individuals are described as social activists, members of the Maori organizations and other social and environmental support groups. It is reported that search warrants were obtained under the Summary Proceedings Act to search for evidence of the commission of offences against the Arms Act and the Terrorism Suppression Act. Information has been obtained that the police were searching for items "of which there is reasonable ground to believe will be evidence as to the commission of an offense of participating in a terrorist group, unlawful possession of firearms and unlawful possession of restricted weapons". Initially, all but one of the 17 individuals were denied bail.
>
> It is furthermore alleged that the police operations leading to the arrest of the 17 individuals involved unnecessary disturbance of the life of one Maori community. According to the reports, blockades were set up by the police in the small township of Ruatoki, where all drivers and passengers were questioned by police officers. This also included the reported search of school buses of children on their way to pre-school by armed police officers. These disturbances, as well as the search of several homes, have led to the claim that the operations targeted the entire Maori community.

According to article 67 paragraph 1 of the Terrorism Suppression Act, the consent of the Attorney-General is required to bring charges against any person for alleged offences against this Act. On 8 November 2007, the Solicitor-General, to whom this competence is currently delegated, announced that he could not authorise charges to be laid under the Terrorism Suppression Act since there was not sufficient evidence that a group or an entity was planning or preparing to carry out a terrorist act.

The police stated that these searches and arrests have been carried out in the interest of public safety. Investigations started in December 2005 when a camp was discovered in north eastern New Zealand where armed men were training. This camp and others were then put under surveillance. The police reportedly also intercepted telephone calls and monitored a number of computer accounts.

It is also in this context that the Special Rapporteurs have received information about the Government's intention to amend the Terrorism Suppression Act. It is reported that the Government is particularly looking at broadening the definition of a terrorist act, reducing judicial oversight, allowing courts to consider classified information without giving it to defendants, and giving the Prime Minister sole responsibility for designating groups and individuals as terrorists. Information was also received that the third reading of the Terrorism Suppression Amendment Bill was underway in the Parliament.

141. Concern was expressed that the arrests of the said 17 individuals may be connected to their activities in defence of the rights of Maori people, and particularly of the land rights of the Ngai Tuhone community, which has involved a claim before the Waitangi Tribunal regarding alleged taking by the Crown. Concern is further expressed that the planned amendments to the Terrorism Suppression Act, if adopted and implemented, would not be in accordance with international human rights standards.

142. While the Special Rapporteurs referred the Government to existing international conventions and protocols on terrorist crimes, as well as Security Council resolution 1566 (2004) related to the characterization of acts of terrorism. Furthermore, the Special Rapporteurs draw the Government's attention to the Global Counter-terrorism Strategy adopted by the General Assembly in resolution 60/288 and to General Assembly resolution 59/191, which stresses in its paragraph 1 that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law", as do Security Council resolutions 1456 (2003) and 1624 (2005) in paragraphs 6 and 4 respectively. Please provide detailed substantive information about your Government's intention to amend the Terrorism Suppression Act.

B. Reply from the Government

143. On 30 January 2008 the Government replied to the correspondence by Special Rapporteur, as follows:

144. Questions in respect of the police investigation: This relates to an investigation by the New Zealand Police that was conducted over more than a year and that culminated in a series of searches and arrest over several days in mid-October 2007. The investigation related to the

alleged operation of training camps that included use of firearms and other weapons and related activities. The searches, which were conducted under judicially issued warrants, took place in Ruatoki, a rural area that is alleged to be the location of the camps, and in other locations throughout New Zealand, including Auckland, Palmerston North, Whakatane, Wellington and Christchurch. Seventeen people, a number of whom were Maori, were arrested. Sixteen of those arrested were initially remanded in custody, but have all now been conditionally released. Evidence obtained in the searches included firearms and other weapons. The searches and arrests were undertaken both under the Arms Act 1983, which concerns illegal use of firearms and other weapons, and under the Terrorism Suppression Act 2002 (TSA), which concerns terrorist acts. As a result of the investigation, 16 of the 17 people arrested have since been charged with offences under the Arms Act in relation to alleged illegal acts; involving firearms and other weapons.

145. Application for consent to charges under the Terrorism Suppression Act: No charges have been laid under the TSA. As with a range of other offence provisions that may touch upon human rights, such as incitement of racial disharmony, charges under that Act require the consent of the Solicitor-General. The Solicitor-General's role is to provide a constitutionally independent check upon such charges. The Police sought the consent of the Solicitor-General to prosecute 12 of the 17 arrested people for offences under the TSA. In a decision given on 8 November, the Solicitor-General declined that consent stating: "... I am of the view that at this stage there is insufficient evidence to establish to the very high standard required that a group or entity was planning or preparing to commit a terrorist act as that term is defined in the legislation." The Solicitor-General noted that the Police evidence had comprised hundreds of pages of intercepted communications and numerous photographs and video recordings. The Solicitor-General further observed in a public statement that the Police had had a proper and sufficient basis for the investigation under the TSA.

146. Investigations into conduct of the investigation: Details of "any investigation and judicial or other inquiries into abuse of public authority which may have been carried out' and the results of those investigations. The Government of New Zealand notes that the actions of the Police in the investigation are currently the subject of proceedings before several independent bodies. The charges under the Arms Act against 16 of the 17 people arrested will be heard in court in due course. Those facing charges will be accorded all fair trial rights, in accordance with the New Zealand Bill of Rights Act 1990, common law and international human rights standards. The hearing of the charges will involve careful scrutiny of the evidence of the activities alleged by the Police. It will be also be open to those charged to challenge the lawfulness (including the consistency with human rights standards, of the actions of Police in conducting the investigation, searches and arrests. The conduct of the investigation, searches and arrests in the Ruatoki area have been the subject of a claim for compensation and other redress by people said to have been unlawfully treated or otherwise adversely affected. Lawyers representing a number of such people have indicated that civil proceedings for compensation and other remedies will be filed in the courts in the near future. The claim may include claims under civil law and under the New Zealand Bill of Rights Act. In any case, these proceedings will, again, involve scrutiny of the lawfulness and reasonableness of the actions of the Police. The actions of the Police have also been the subject of claims or complaints to two independent official bodies. The Independent Police Conduct Authority is conducting an investigation into any misconduct or neglect of duty on the part of the Police, including in response to complaints made by lawyers acting for people in the Ruatoki area and by others. The Human Rights Commission has received

a number of complaints under the Human Rights Act 1993 alleging discrimination and other breaches of human rights standards and is able to conduct investigations and/or assist claimants in seeking to resolve the complaints. The complaints can, in turn, be pursued as civil proceedings for compensation and other redress before the Human Rights Review Tribunal. The conduct of each of these proceedings, including the further time that each will require, is a matter for the respective courts and other institutions and for the defendants and claimants concerned. Consistent with rights to fair trial and administrative fairness both under the New Zealand Bill of Rights Act and at common law, as well as New Zealand's responsibilities under international law, each matter is being or will be conducted in a timely, robust and fair manner.

147. Allegations of misconduct: Given the existence of current and proposed proceedings before the New Zealand courts and other authorities, it is inappropriate for the Government of New Zealand to comment at this stage upon the factual matters raised in the Note. These matters must be left to the independent determination of the courts and other authorities.

148. Relevance of human rights standard: More broadly, the Note sets out a number of human rights standards in relation to compliance with human rights in measures taken against alleged terrorism and the promotion and protection of human rights generally. As will be evident, the consistency of the Police actions with human rights standards can be considered, and is currently being considered, by the New Zealand courts and several other independent institutions. If actions were found to have breached human rights standards, appropriate redress would be directed by the courts and other institutions. It is, again, not appropriate for the New Zealand Government to comment further on these matters while they remain under consideration by the courts and other institutions.

149. Questions in respect of the Terrorism Suppression Amendment Bill 2007: The Terrorism Suppression Amendment Act 2007 (the Amendment Act) was enacted by the New Zealand Parliament in November 2007. It entered into force on 19 November 2007. Although the Amendment Act was enacted after the searches and arrests carried out in mid October 2007, the Bill which led to the Amendment Act was introduced into Parliament in December 2006 - and was unrelated to these events. The primary purpose of the Amendment Act was to ensure New Zealand's compliance with its obligations under the United Nations Charter and the relevant Security Council resolutions on terrorism. It was also decided that some provisions had proved unworkable in practice or uncertain as to their effect and should be amended or repealed. In addition, provisions were included to enable New Zealand to ratify two new international anti-terrorism treaties, the International Convention for the Suppression of Acts of Nuclear Terrorism and amendments to the Convention on the Physical Protection of Nuclear Material.

150. Designation of UN Listed Terrorist Entities: New Zealand is obliged under the UN Charter to give effect to mandatory resolutions adopted by the UN Security Council under Chapter VII of the Charter. Two key Chapter VII resolutions (UNSCR 1267 and UNSCR 1373) impose specific obligations on UN member states to take action against individuals and organisations involved in terrorism. As originally enacted, the TSA implemented the two sets of Security Council obligations, in so far as they required the imposition of financial and a number of other sanctions against terrorists, through one process. To achieve this, section 22 established a single procedure to designate: (a) terrorists on the UN terrorist list against whom New Zealand must take action, and (b) other terrorists against whom the Government has decided to take action in accordance with UNSCR 1373. As a result the Prime Minister was required to designate UN listed terrorist

entities under the TSA before those entities became subject to the provisions of the Act. Under the Amendment Act, individuals and entities on the UN terrorist list are automatically designated as terrorist entities under New Zealand law. The Amendment Act also provides for such designations to remain in force until such time as the individuals and entities are removed from the UN terrorist list. These changes were made to better reflect the mandatory nature of New Zealand's legal obligations under the Security Council's Al Qaeda and Taliban sanctions regime and to remove the risk of inconsistency between New Zealand's international obligations and the domestic legal regime.

151. High Court Extension of Designations: Prior to the passing of the Amendment Act, all final designations made under section 22 of the TSA, including designations of individuals and entities on the UN terrorist list lapsed automatically after three years unless extended by the High Court. Because a decision to designate under section 22 involves considerations of national security and national interest, it was considered that, subject to procedural safeguards, such decisions should be taken by the Executive rather than the Courts, whose role is better focussed on ensuring that the legal requirements of the designation and extension procedures are followed. Renewal through a court procedure also posed considerable evidential problems and risked New Zealand being in breach of its international legal obligations. Since New Zealand is obliged to maintain sanctions against those on the UN terrorist list until they are lifted by the Security Council, it was considered inappropriate for the TSA to include a renewal or review process for UN terrorist list designations. With respect to non UN list designations, the Amendment Act provides for s three-yearly review by the Prime Minister of these designations. In undertaking the review, the Prime Minister must apply the same test as for the original designation. Any decision made by the Prime Minister remains subject to judicial review. Furthermore, to ensure transparency in the exercise of the Prime Minister's powers, a new section 35(3A) was added, which requires the Prime Minister report to the Intelligence and Security Committee on the renewal of any non UN list designation.

152. General Offence of Committing a Terrorist Act: The Amendment Act inserted a new offence of committing a "terrorist act". The previous approach of relying on ordinary criminal offences was adequate where the relevant offence attracted a maximum penalty sufficient to meet the seriousness of the case. However, this may not always have been the case, thus the maximum penalty proposed in the Amendment Act for committing a "terrorist act" was set at imprisonment for life. The new offence provision relies on the existing definition of "terrorist act" set out in section 5 of the TSA.

153. Classified Information: No substantial amendments were made to the procedures for dealing with classified security information. The amendments streamlined the Act to provide for one procedure where classified information is involved, rather than two separate procedures depending on the type of proceeding brought by the applicant.

Pakistan

A. Communication sent to the Government

154. On 6 November 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 promotion and protection of the right to freedom of opinion and expression and the Special Representative of the Secretary-General on the situation of human rights defenders, sent a communication regarding **the imposition of the state of emergency by the President of Pakistan on 3 November 2007** and the suspension of fundamental freedoms, including the right not to be deprived of one's liberty, save in accordance with the law and to the enjoyment of safeguards as to arrest and detention, the right to freedom of movement, the right to assemble in public and the freedom of expression. Further, the proclaimed state of emergency entails an attack on the independence of the judiciary.

155. The State of Emergency declared by President Musharraf is said not to be a constitutional emergency envisaged in the Constitution, which has now been declared to remain in abeyance and replaced by a "Provisional Constitution Order". According to the information received, seven members of the Supreme Court issued a declaration against the emergency rule order stating that it appears not to be legal, neither under the Constitution nor under international law.

156. In particular, the Special Rapporteurs are concerned about the situation of some 70 human rights defenders who were arrested during a meeting inside the premises of the NGO Human Rights Commission of Pakistan (HRCP) in Lahore. They were taken to the police initially, and requested to sign a declaration not to engage in any human rights activities. They all refused to sign it and were verbally abused by police officers.

157. Those arrested on 4 November include the following 55 human rights activists (31 male and 24 female): Mr. **I.A. Reham**, Director of HRCP, Mr. **Syed Iqbal Haider**, Secretary General of HRCP, Ms. **Shahtaj Qazalbash**, Mr. **Mehboob Khan**, Mr. **Nadeem Anthony**, Ms. **Saleema Hashmi**, Ms. **Rubina Saigol**, Ms. **Samina Rehman**, **Brig Rao**, **Abid Hameed**, **Faisal Akhtar**, **Waseem Majeed Malik**, **Irfan Barket**, Dr. **Naseem Ali**, Dr. **Khurram Iftikhar**, Dr. **Yousaf Yaseen**, Mr. **Irshad Choudhry**, **Imran Qureshi**, **Shams Mahmood**, **Zaffar ul Hassan**, **Khalid Mehmood**, **Bilal Hassan Minto**, **Muhammad Bashir**, **Ali Cheema**, **Shahid Hafeez**, **Syed Mozam Ali Shah**, **Mansoor Ali Shah**, **Shahzeb Masood**, **Javed Amin**, **Suleman Akram**, **Muhammad Bilal Sabir**, **Shahid Amin**, **Khawaja Amjad Hussain**, **Mahmood Ahmed**, **Rahim ul Haq**, **Ashtar Ausaf Ali**, **Alia Ali**, **Samia Ali**, **Azhra Irshad**, **Jona Anderyas**, **Ayra Anderyas**, **Zeba**, **Neelam Hussain**, **Gulnar**, **Sonobar**, **Sadaf Chughtai**, **Nasreen Shah, Shaista Parvaiz Malik**, **Iram Sharif**, **Amina Sharif**, **Taina Sabah ud Din**, **Tamkant Karim**, **Lala Raukh**, **Huma Shah**, **Nasreen Shah**, and **Samia Ameen Khawaja**.

158. All 55 human rights activists were produced before the Judicial Magistrate on 5 November 2007 and were sent to Kot Lakhpat Jail Lahore. A hearing took place on 6 November 2007 and these 55 activists have reportedly been released on bail.

159. The practising lawyer and United Nations Special Rapporteur on freedom of religion or belief, Ms **Asma Jahangir**, has been placed under house arrest for a period of 90 days, and her house has been declared a sub-jail where some of the activists mentioned above are currently detained. Two women defenders, Ms Shahtag Qizilbash and Ms Salima Hashmi, were shifted to a police owned residence at an unknown location. None of them have been charged. Neither a warrant nor a judicial order was issued. The activists have not had access to lawyers or to their families and were detained for several hours without receiving food. Concern is expressed at the

health of some of these leaders who are rather elderly. One of the detained activists, Mr. Ashtar Ausaf Ali advocate was sent to hospital after suffering a heart attack in police custody.

160. The Proclamation of emergency states that some members of the judiciary have undermined the executive and legislative branches in the fight against terrorism and extremism, thereby weakening the Government's ability to address this grave threat. Immediately after the imposition of the State of emergency judges were required to take an oath of allegiance to the Provisional Constitutional Order to continue exercising their functions as judges. A high percentage of the judges refused to take the oath, as they refused to accept the state of emergency order, declaring it unconstitutional. In particular, only four out of the 17 judges of the Supreme Court took the oath. The Chief Justice of the Supreme Court was among those who did not accept taking the oath. All the judges of the Supreme Court who refused to take oath have been immediately replaced by new judges. They were not allowed to leave their homes and are prevented by Government forces from doing so.

161. Eight out of the 27 judges of the High Court of the Sindh Province took oath, while the other, including the Chief Judge, refused. In Balochistan, all five judges of the High Court accepted to take oath. In the Punjab Province, 17 out of the 31 judges of the High Court, including the Chief Judge, took oath. The most senior judge among those who refused to take oath, Mr **Bokhari**, is now under house arrest. In the North West Frontier Province, around 50% of the 17 judges have not taken oath.

162. On 5 November 2007, lawyers protested against the declaration of the state of emergency. There are indications of extreme brutality in the repression by the police and extensive arrests of lawyers. Some 150 lawyers have been arrested in Karachi and 50 in Lahore, including Ms **Hifza Aziz** and Ms **Abid Saqi**. Lawyers have been attacked by the police also inside the Court and the bar premises. All office bearers of the Bar Associations were arrested.

163. The Government has suspended the transmission of privately owned local and international television channels, in particular news stations. Agents of the Electronic Media Regulatory Authority (PEMRA) alongside police officers raided the premises of television and radio channels to confiscate equipment. Internet service providers were also ordered to stop their service, interrupting Internet access for a large number of users.

164. The President promulgated a new ordinance under which the print and electronic media have been barred from printing and broadcasting "anything which defames or brings into ridicule the head of state, or members of the armed forces, or executive, legislative or judicial organ of the state". The ordinance stipulated up to 3 years in prison as punishment for non-compliance.

165. The Special Rapporteurs drew the Government's attention to the Global Counter-terrorism Strategy adopted by the General Assembly in resolution 60/288 and to Security Council Resolutions 1456 and 1624 which have emphasize the duty of Member States to ensure that their counter-terrorism measures comply with international law, including human rights law. Inherent in this duty is the requirement of legality, enshrined in Article 11 (2) of the Universal Declaration of Human Rights, which must govern all national definitions of terrorism or terrorist acts, in order to prevent the abuse of these terms for the targeting of persons or activities that are

not genuinely terrorist in nature. As to proper characterization of terrorist acts in compliance with the requirement of legality, reference is made to existing international conventions against terrorism, as well as Security Council resolution 1566.

166. Information, as endorsed in E/CN.4/1996/39 of 1996, which provides that, in time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.

167. Please state the legal basis of the aforementioned arrests and detention of the above mentioned persons, and how these measures are compatible with international norms and standards as contained in the Universal Declaration of Human Rights and the Declaration on Human Rights Defenders. Please provide an explanation as to the use of the notions 'terrorism', 'terrorist' or 'terrorist act' as a justification for the proclaimed state of emergency or any measures taken pursuant to it. How is it secured that any action to combat terrorism is strictly limited to acts that fall under international conventions against terrorism and the characteristics applied in Security Council resolution 1566?

168. On 14 November 2007, the Special Rapporteur jointly with the Special Rapporteur on the independence of judges and lawyers, sent a communication regarding the **Pakistan Army (Amendment) Ordinance, 2007**. According to the information received:

> On 10 November 2007, President Pervez Musharraf issued Ordinance No. LXVI amending the 1952 Army Act. This measure was taken in the context of the proclamation of a state of emergency by President Musharraf on 3 November this year. This amendment will broaden the scope of the Act for civilians to be tried and convicted by military tribunals. Previously, the Army Act contained provisions enabling the army to try civilians, but only if at least one of the accused belonged to the armed forces. Under the amended Army Act, the military courts will not have to honour the strict requirements of due process of law and the examination of evidence as under civil adjudication. Moreover, lawyers would only be allowed to represent the accused in the capacity of a "friend". Furthermore, according to the ordinance, the amendment will have retroactive effect and include any of the above mentioned offences that have been committed since 1 January 2003. Government officials state that one of the reasons for the amendment to the Army Act is the inability of the existing anti-terrorism courts to hold proper or speedy trials of the people involved in acts of terrorism or armed militancy in the country.

169. Concern was expressed that the new amendment could be used to curb protest against the Government and the proclamation of the state of emergency, and to prevent individuals from pursuing political activities. With respect to the retroactive effect, concern was expressed that the amendment could be used to cover the hundreds of cases of "disappearance" that the Supreme Court under Chief Justice Iftikhar Muhammad Chaudhry was inquiring into.

170. The Special Rapporteurs appealed to the Government to reconsider the amendment to the Army Act as it may impede gravely on the right to fair proceedings before an independent and

impartial tribunal, in accordance with article 10 of the Universal Declaration of Human Rights. Article 10 of the Universal Declaration of Human Rights reads as follows: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." It should be noted that the trial of civilians in military courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.

171. In this context, the Special Rapporteurs referred the Government to Principle 29 of the updated Set of principles for the protection and promotion of human rights through action to combat impunity, drafted by Ms. Diane Orentlicher, independent expert on this topic, and recommended by the Commission on Human Rights at its sixty first session, which states that "The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel." In its recent General Comment No. 32 on the right to fair trial under the International Covenant on Civil and Political Rights the Human Rights Committee has provided further clarification as to the international standards related to the jurisdiction of military courts over civilians. Despite of Pakistan not being a party to the Covenant, we believe that in particular paragraph 22 of the General Comment (CCPR/C/GC/32) provides relevant guidance.

172. Furthermore, with a view to the retroactive effect of the law and the availability of heavier penalties for military tribunals, the Special Rapporteurs would like to refer to Article 11 para. 2 of the Universal Declaration of Human Rights, which states: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

173. With a view to the concerns expressed above, the Special Rapporteurs urged the Government to reconsider the Army (Amendment) Ordinance, 2007. The Special Rapporteurs believe this amendment could have a significant negative impact on human rights in the country.

B. Reply from the Government

174. As of 31 January 2009, there had been no response to the Special Rapporteur's correspondence.

Perú

A. Comunicación enviada por el Relator Especial al Gobierno

175. El 5 de mayo de 2008, El Relator Especial, junto con el Relator Especial sobre la promoción del derecho a la libertad de opinión y de expresión, han enviado une carta al Gobierno en relación con la Sra. **Melissa Rocío Patiño Hinostroza**, poeta y estudiante de administración de empresas. Según la información recibida:

> El 29 de febrero de 2008, la Sra. Hinostroza habría sido arrestada junto a otras seis personas en la ciudad de Tumbes cuando regresaba, en ómnibus, de asistir al Segundo Congreso de la Coordinadora Continental Bolivariana (CBB), que tuvo lugar en Quito, Ecuador. Los siete detenidos habrían sido acusados de "afiliación y colaboración con el

terrorismo" en relación con su asistencia a dicha reunión La CCB habría sido acusada de planificar un sabotaje a las reuniones de la Cooperación Económica Asia-Pacífico (APEC), que tendrán lugar en el Perú durante este año. Las seis personas detenidas junto a la Sra. Hinostroza serían ex-miembros del Movimiento Revolucionario Túpac Amaru (MRTA), un grupo marxista revolucionario. Si es declarada culpable, la Sra. Hinostroza podría recibir una sentencia de 20 años de prisión.

Según las informaciones, la presencia de la Sra. Hinostroza en el ómnibus que transportaba a los ex-miembros del MRTA habría sido circunstancial. Su participación en el congreso de la CBB habría estado motivada simplemente por intereses culturales y no políticos. Según la fuente, las autoridades no habrían todavía producido evidencias suficientes que involucren a la Sra. Hinostroza en supuestas actividades terroristas. La Sra. Hinostroza se encontraría actualmente detenida en una prisión de máxima seguridad.

El principio de legalidad en el derecho penal, establecido en varios instrumentos internacionales de derechos humanos, tales como el artículo 15 del Pacto Internacional de Derechos Civiles y Políticos (PIDCP, del cual el Perú es Parte, implica que la responsabilidad criminal esté limitada a provisiones claras y precisas en la ley, con el fin de respetar el principio de certeza de la ley y de asegurar que no se produzca una interpretación que aumente indebidamente el alcance de la conducta proscrita.

En conformidad con el Articulo 15 (1), nadie podrá ser condenado por actos u omisiones que en el momento de cometerse no fueran considerados delitos según el derecho nacional o internacional. Tampoco se impondrá pena más grave que la aplicable en el momento de la comisión del delito. Si con posterioridad a la comisión del delito la ley dispone la imposición de una pena más leve, se aplicará ésta.

Al nivel nacional, la especificidad de los delitos de terrorismo está propiamente definida por la presencia de tres condiciones acumulativas; (1) Los medios utilizados, que se pueden descritos como violencia letal o violencia seria contra los miembros de la población en general o contra segmentos de la población, o la toma de rehenes; (2) el propósito, que es provocar temor entre la población o destruir el orden público u obligar al gobierno o a una organización internacional a realizar, o a abstenerse de realizar, algo; y (3) el objetivo, que es avanzar hacia un objetivo político o ideológico subyacente. Un acto puede ser criminalizado como un acto de terrorismo únicamente cuando se cumplen las tres condiciones mencionadas (ver E/CN.4/2006/98, párrafo 50).

176. Sin implicar, de antemano, una conclusión sobre los hechos, los Relatores Especiales quisieran hacer un llamamiento urgente al Gobierno para que tome las medidas necesarias para asegurar que el derecho a la libertad de opinión y de expresión sea respetado, de acuerdo con los principios enunciados en el artículo 19 de la Declaración Universal de los Derechos Humanos y reiterados en el artículo 19 del Pacto Internacional de Derechos Civiles y Políticos: "Nadie podrá ser molestado a causa de sus opiniones. Toda persona tiene derecho a la libertad de expresión; este derecho comprende la libertad de buscar, recibir y difundir informaciones e ideas de toda índole, sin consideración de fronteras, ya sea oralmente, por escrito o en forma impresa o artística, o por cualquier otro procedimiento de su elección".

177. Por favor, proporcione información detallada sobre las investigaciones judiciales y administrativas iniciadas con relación a este caso. Por favor, proporcione información sobre los fundamentos jurídicos en la legislación nacional de la detención, en particular cuáles son los cargos contra los detenidos, y cuál es la definición del delito de "afiliación y colaboración con el terrorismo"; Por favor, precise si en esta definición de delito se encuentran todos los elementos necesarios para la vigencia del requisito de legalidad en derecho penal, según establece el Artículo 15 del Pacto Internacional de Derechos Civiles y Políticos.

178. El 28 de octubre de 2008, el Relator Especial ha enviado une carta al Gobierno del Perú, solicitando una invitación para una visita oficial al país.

B. Comunicación del Gobierno

179. Hasta la fecha del 31 de enero de 2009, ninguna respuesta fue recibida por el Relator Especial.

Russian Federation

A. Communication sent to the Government

180. On 14 February 2008, the Special Rapporteur sent a communication to the Government regarding the '**Federal Law No. 35-FZ on counteraction against terrorism**' of 6 March 2006 as amended on 27 July 2006 (henceforth 2006 Law) **and related provisions of the Criminal Code and the Criminal Procedure Code.** In this connection, the Special Rapporteur would like to draw the Government's attention to four substantive areas that give rise to concern and one issue of particular interest in relation to provisions of the above-mentioned laws: 1) the definition of terrorism; 2) the legal regime of counter-terrorism operations; 3) the lawful infliction of damage against terrorist suspects; 4) trials *in absentia* of terrorist suspects; and 5) compensation and social rehabilitation of victims of terrorism.

181. In the Special Rapporteur's view certain aspects of the laws require profound reconsideration in order to secure that their continued implementation will not lead to human rights violations.

182. Article 3 of the 2006 Law defines the terms 'terrorism' (paragraph 1), 'terrorist activity' (paragraph 2) and 'terrorist act' (paragraph 3), which are prescribed in a complementary manner. 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. (1) 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, (2) the intent, which is to cause fear among the population or the destruction of public order or to compel the government or an international organisation to doing or refraining from doing something and (3) the aim, which is to further an underlying political or ideological aim. It is only when all of these three conditions, or at least the two first ones, are fulfilled that an act may be criminalized as terrorist. In particular, terrorism should not be defined through its political or ideological aims (condition no. 3), unless the two other conditions are also met.

183. While commending the approach taken by the Russian Federation to define terrorist acts as a combination of means, as prescribed in article 3, paragraphs 2 and 3, together with the intent and the aim, both defined in paragraphs 1 and 3 of the same article, the Special Rapporteur expressed his preoccupation at the following: 'Terrorism' is defined as "the ideology of violence and the practice of influencing the adoption of a decision by public authorities, local self-government bodies or international organizations connected with frightening the population and/or other forms of unlawful violent actions". While this provision sets out the intent and aim as mentioned above, this definition, even read in conjunction with the defined terms of 'terrorist activity' and 'terrorist act', does not meet the requirement of clear and precise provisions so as to respect the principle of legal certainty of the law.

184. Furthermore, article 3, paragraph 2, of the 2006 Law, which defines 'terrorist activity', includes the "popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity", and also "informational or other assistance to planning, preparing or implementing an act of terrorism." In light of article 205.2 of the Criminal Code of the Russian Federation entitled "Public Appeals to Terrorist Activity or Public Justification of Terrorism", punishable by 4 to 8 years of imprisonment, the Special Rapporteur is concerned at the possible negative effect on freedom of expression. It should be noted that 'public justification' is further detailed as a "public statement recognizing terrorist ideology and practices as deserving support and imitation". However, as outlined above, this definition merely reflects one of the three above-mentioned conditions, i.e. condition no. 3.

185. Thus, in the Special Rapporteur's opinion, the definition as contained in the 2006 Law, in particular in conjunction with article 205.2 of the Criminal Code, is overly broad and therefore at variance with Article 15 of the International Covenant on Civil and Political Rights (ICCPR) which enshrines the principle of legality in criminal law and 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.

186. Articles 11 and 12 of the 2006 Law set out the provisions for the legal regime and the terms of conducting a counter-terrorist operation. Paragraph 3 of article 11 establishes a list of measures and temporary procedural restrictions that can be applied, where a counter-terrorist operation is established. These measures and procedural alternations carry with them significant restrictions of human rights and fundamental liberties.

187. The 1998 Law on Combating Terrorism contained a clause allowing such restriction only "in the area of a counter-terrorist operation zone", which was defined as "particular areas of land or water, vehicle, building, structure, installation, or premises and the adjoining territory or waters within which the aforementioned operation is carried out." In contrast, the 2006 Law does not confine counter-terrorist operations to a specifically defined zone, but provides for a possibility of counter-terrorist operations to take place in a "territory with a substantial number of residents" (article 12), without, however, specifying any limitations whatsoever. This leads to a wide discretion to apply the "regime of counter-terrorist operation" across a large area and to take measures, which could seriously interfere with human rights, in particular with respect to civilians, within the area of the counter-terrorism operation. Moreover, the area of

counter-terrorist operation is determined at the discretion of the head of the federal executive body in charge of security or an official appointed by the former authority and solely accountable to this authority (article 12, paragraph 2, of the 2006 Law). Besides, accountability mechanisms such as by the legislature are completely lacking.

188. It should further be noted that article 56 of the Constitution provides for certain restrictions of rights and liberties in a state of emergency. The 'Federal Constitutional Law on the State of Emergency' established a specific procedure of introducing the state of emergency which is subject to numerous restraints and controls. The counter-terrorist operation regime under the 2006 Law imposes virtually the same restrictions und rights and freedoms as under a state of emergency, without, however, proclaiming it. Whereas the state of emergency may only be introduced for a short period, i.e. a maximum of 30 days in the entire country and a maximum of 60 days in parts of the country, with any extension being subject to a complicated procedure, the 2006 Law does not specify or limit the "period of conducting" of a counter-terrorist operation (article 11).

189. It follows from the above considerations that the provisions of the 2006 Law amount to a *de facto* state of emergency situation. In this context, the Special Rapporteur expressed his utmost concern at the blanket power vested in the executive body in charge of security. This cannot be mitigated by the fact that the 2006 Law, in article 2, paragraph 13, calls for the adequacy of measures applied with respect to the terrorist danger. In this connection, it should also be noted that the 2006 Law is lacking appropriate references to provisions of the Criminal Procedure Code with their safeguards involved.

190. While the Special Rapporteur noted with satisfaction that article 11 of the 2006 Law establishes a partial safeguard against arbitrariness by requiring immediate announcement of a decision to establish a counter-terrorist operation regime, indicating the area, measures and restrictions involved, and also a decision to terminate the regime, more substantive safeguards against possibly serious human rights abuses need to be introduced immediately in the 2006 Law. Most important, in this respect, would be safeguards against arbitrary arrest or detention, as contained in article 9, paragraphs 3 and 4, of the ICCPR, i.e. the right to be brought promptly before a judge and the entitlement to trial within a reasonable amount of time or release as well as the right to challenge without delay the lawfulness of one's detention before a court. As the Human Rights Committee confirmed in its General Comment 29 of 2001, the latter 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. It is in this connection that the Special Rapporteur appealed to the Government to seriously reconsider the provision contained in article 100, paragraph 2, of the Criminal Procedure Code, read in conjunction with articles 97 and 99 of the Criminal Procedure Code, which prescribes that a terrorist suspect may be detained for up to 30 days without being charged and the subsequent lack of judicial review of the detention during this period.

191. Furthermore, with a view to the broad discretion left to the official in charge of counter-terrorism operations in the implementation of the 2006 Law, clear requirements of suitability, necessity and proportionality of the measures taken must be introduced in the law. In addition, effective internal and external oversight mechanisms need to be established.

Particularly important, in this respect, would be a parliamentary control over the initiation and termination of a counter-terrorist action regime. Furthermore, the legislature should have a say with respect to the rights that may be derogated from and the safeguards that should accompany those derogations.

192. Article 22 of the 2006 Law prescribes that any infliction of damage against a person who has committed a terrorist action, which occurred in the course of suppressing a terrorist act, is lawful. Furthermore, article 18, paragraph 3, of the 2006 Law stipulates that no compensation should be granted for such damage.

193. While the Special Rapporteur acknowledged that the State has the duty and responsibility to take appropriate measures to prevent and counter terrorist acts, it should be noted that rights of a person who is suspected of having committed a terrorist act must not be entirely nullified. In light of the principle of the presumption of innocence, set out in article 49, paragraph 1, of the Constitution and article 14, paragraph 2, of the ICCPR, the State must not strip such person completely off his or her rights and freedoms. This right is protected at all times, as confirmed by Human Rights Committee in paragraph 16 of its General Comment 29 of 2001.

194. The provisions contained in articles 18 and 22 of the 2006 Law may lead to impunity for any violations of human rights of a suspected terrorist in counter-terrorism operation. For example, pursuant to article 22 of the 2006 Law in its current wording, cases of excessive use of force against a suspected terrorist would also be declared as lawful.

195. Article 247, paragraph 5, of the Criminal Procedure Code (introduced by the 'Federal Law on Amendments to Certain Legislative Acts of the Russian Federation in connection with the Adoption of the Federal Law on the Ratification of the Council of Europe Convention on the Prevention of Terrorism and the Federal Law No. 35-FZ on counteraction against terrorism') allows – in exceptional cases – for aggravated crimes for the prosecution and trial *in absentia* if the defendant is outside the Russian Federation or in hiding, provided that the same case involving the same terrorist suspect is not tried by a foreign court. It should be noted that these provisions do not specify the term "exceptional".

196. In this connection, the Special Rapporteur reminded the Government that trials *in absentia* appear problematic in respect of the Constitution of the Russian Federation, including the following constitutional provisions: article 23, paragraph 3 (principle of adversarity), article 24 (right to acquaint oneself with materials affecting one's rights and liberties), article 45 (right to self-defense) and article 47 (right to a jury-trial). This concern cannot be mitigated by the fact that article 247, paragraph 6, of the Criminal Procedure Code requires the mandatory presence of a defence counsel representing the defendant in such case. The Special Rapporteur urges the Government to take appropriate steps to ensure that all laws are indeed in accordance with the Constitution. In fact, article 1 of the 2006 Law clearly states, "[t]he legal basis of counteraction against terrorism shall be the Constitution of the Russian Federation […]".

197. The Special Rapporteur noted with interest article 18, paragraph 1, first sentence, and paragraph 2, as well as article 19 of the 2006 Law dealing with compensation to and social rehabilitation for victims of terrorism. In this context, the Special Rapporteur would be grateful if the Government could provide him with substantive detailed information on the relevant procedures guiding compensation and rehabilitation.

198. In summary, while the Special Rapporteur reaffirmed 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, he is seriously concerned that the above-mentioned provisions of the 2006 Law and related provisions of the Criminal Code and Criminal Procedure Code are not in accordance with international human rights standards. The Special Rapporteur urged the executive and legislative branches of government in the Russian Federation to consider and initiate amendments to the 2006 Law and related provisions of the Criminal Code and Criminal Procedure Code in order to prevent human rights violations.

B. Reply from the Government

199. On 21 April 2008 the Government replied to the Special Rapporteur's correspondence regarding the provisions of Federal Counter-Terrorism Act No. 35-FZ of 6 March 2006, as amended on 27 July 2006.

200. The Special Rapporteur makes no allowance for certain particularities of Russian law in his enquiry. He categorizes Federal Counter-Terrorism Act No. 35-FZ of 6 March 2006, as amended on 27 July 2006 (hereinafter referred to as the "2006 Act"), as criminal and criminal-procedure legislation, extending the principle of legality in criminal law to it. He also asserts that the 2006 Act lacks appropriate references to the Code of Criminal Procedure of the Russian Federation and that the regulations governing counterterrorism operations in fact amount to measures taken in a state of emergency. He alleged that article 15 of the 1966 International Covenant on Civil and Political Rights "enshrines the principle of legality in criminal law", whereas the article actually pertains to the retroactivity of criminal law.

201. Furthermore, the Special Rapporteur argued for the reconsideration of "certain aspects of the laws" on the basis of three conditions which he has formulated and which, in his view, reveal the specificity of terrorist crimes in Russia. The term "terrorist crimes" has, however, never been used in Russian domestic legislation and, when the definition of an act of terrorism was drawn up in 2006, the Federal Assembly decided not to include intent to cause fear among the population, which did not correspond to its specific nature.

202. The Constitution of the Russian Federation and the universally recognized principles and standards of international law establish the legal basis for countering terrorism. Relevant international legislative instruments include: the European Convention on the Suppression of Terrorism of 27 January 1977 (ratified on 7 August 2000 by Federal Act No. 121-FZ); the Shanghai Convention on Combating Terrorism, Separatism and Extremism (ratified on 10 January 2003 by Federal Act No. 3-FZ); and the Council of Europe Convention on the Prevention of Terrorism of 16 May 2005 (ratified on 20 April 2006 by Federal Act No. 56-FZ).

203. To ratify the above-mentioned international instruments, the Russian Federation had to transpose them into domestic criminal and criminal-procedure law and amend existing counterterrorism legislation. Accordingly, a new chapter 15.1 on "Confiscation of property" and article 205.2 entitled "Public calls to commit terrorist acts or public justification of terrorism" were added to the Criminal Code by Federal Act No. 153-FZ of 27 July 2006 amending certain legislative acts of the Russian Federation in connection with the adoption of the Federal Council of Europe Convention on the Prevention of Terrorism (Ratification) Act and the Federal Counter-Terrorism Act. Amendments were made to article 247 of the Code of Criminal

Procedure (Participation of the defendant), pursuant to which serious or particularly serious crimes can - in exceptional cases - be tried in absentia where the defendant is outside the Russian Federation and/or fails to appear in court, provided that he or she has not been prosecuted on the territory of a foreign State for the same criminal offence.

204. The Special Rapporteur's one-sided approach to the matter in question can be seen in his analysis of the 2006 Act, which does not take into account the context to the above-mentioned Federal Council of Europe Convention on the Prevention of Terrorism (Ratification) Act, Federal Act amending certain legislative acts of the Russian Federation in connection with the adoption of the Federal Council of Europe Convention on the Prevention of Terrorism (Ratification) Act, Federal Counter-Terrorism Act, Presidential decree No. 116 of 15 February 2006 on counterterrorism measures and other laws and regulations which form the basis of domestic anti-terrorism law.

205. The Special Rapporteur's methodological errors prevent him from reaching conclusions of any real value to the Federal Assembly. Observations on the issues raised by the Special Rapporteur can be found below.

206. On the definition of terrorism. In dealing with such a complex phenomenon, the Federal Assembly has sensibly concluded that it is short-sighted to regard terrorism simply as isolated criminal acts, as was the case under Russian legislation until recently. As unlawful force - the use of which should be prevented whatever its purposes or social context - lies at the root of terrorism as a whole and terrorist acts in particular, the system of counterterrorism measures should focus on creating an effective mechanism for the relevant bodies' efforts to suppress manifestations of terrorism, but should not stop there. It should cover all areas of the efforts to counter terrorism and should target the initial, planning and execution stages of terrorism; in other words, it should suppress the use of unlawful force, related ideologies and the exponents of those ideologies.

207. This approach is based on United Nations Security Council resolution 1624 (2005), which first identified efforts to combat terrorist ideology and the advocacy and glorification of terrorism as fundamental tasks of international anti-terrorist cooperation. This approach was also taken into account by the Federal Assembly when drawing up the definition of terrorism.

208. The unlawful nature of the very ideology of terrorism is actually recognized by article 5 of the 2005 Council of Europe Convention on the Prevention of Terrorism, which defines "public provocation to commit a terrorist offence" as the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

209. On the regulations governing counterterrorism operations. The regulations governing counterterrorism operations (but not the regulations governing states of emergency, with which the Special Rapporteur confuses them) are lawful by virtue of the following:

- The provisions of article 29, part 2, of the 1948 Universal Declaration of Human Rights; article 4 of the 1966 International Covenant on Economic, Civil and Political Rights; article 12, part 3, article 18, part 3, article 19, part 3, and article 21 of the 1966

International Covenant on Civil and Political Rights; article 15 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms; article 2, part 3, of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms; article 13 of the 2005 Council of Europe Convention on the Prevention of Terrorism; and article 55, part 3, of the Constitution of the Russian Federation, which stipulate that restrictions can be placed on the rights and freedoms of the individual and the citizen by means of federal laws only to the extent necessary to protect the foundations of the constitutional order and the morals, health and rights and lawful interests of other persons, and to defend the country and State security.

- The rules and regulations established on the basis of the above and relating to the national borders of the Russian Federation in the territorial entities to which access is restricted, as well as epidemiological, public health, veterinary and other arrangements under administrative law which provide for the restriction of human rights and freedoms.

- The principle of the indivisibility and interdependence of economic, social, cultural, civil and political rights embodied in United Nations General Assembly resolution 41/117 of 4 December 1986 and reflected in the position of the Constitutional Court of the Russian Federation.

- Constitutional Court decision No. 10-P of 31 July 1995 on the constitutionality of Presidential decree No. 2137 of 30 November 1994 concerning arrangements for restoring constitutional legality and the rule of law in the Chechen Republic and of other laws and regulations, in which it is indicated that: (1) it does not follow from the Constitution that national integrity and constitutional order in extraordinary situations may be ensured solely by imposing a state of emergency or martial law (paragraph 4 of the preamble to the decision); (2) the provisions of article 55, part 3, and article 56 of the Constitution of the Russian Federation require systemic interpretation (paragraph 3 of the operative part of the decision).

- The fact that the regulations governing the counterterrorism operation zone were first established as separate arrangements by the 1998 Federal Act to combat terrorism and confirmed by the 2006 Counter-Terrorism Act.

210. Also of note is Constitutional Court ruling No. 195-O of 13 June 2006, declining to hear a complaint from the Commissioner for Human Rights in the Russian Federation that the constitutional rights of Mr. Konstantin Aleksandrovich Ivukov had been violated by article 3.9, part 2, of the Code of Administrative Offences. In the ruling, which was handed down after the 2006 Act had been adopted, the Court confirmed that the application of administrative detention for violations of the regulations governing a state of emergency or a counter-terrorist operations zone does not breach article 22, part 2, of the Constitution.

211. On the lawful infliction of damage. Under article 29, part 2, of the 1948 Universal Declaration of Human Rights, in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. That

provision is further developed in for example, article 2, part 2, of the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, which establishes that deprivation of life shall not be regarded as inflicted in contravention of the right to life when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, in action lawfully taken for the purpose of quelling a riot or insurrection. Articles 18 and 22 of the 2006 Act specifically refer to persons suspected of participating in terrorist acts or committing such acts, i.e. persons caught in the act at the scene of a violent offence which is a terrorist act under article 205 of the Criminal Code.

212. Articles 18 and 22 of the 2006 Act are consistent with the provisions of the relevant international legal instruments, as they are linked to articles 38 and 39 of the Criminal Code, which establish the lawfulness of inflicting damage, where absolutely necessary, when arresting offenders.

213. On trials in absentia. As is asserted in the communication, trial in absentia does not fully comply with those provisions of the Constitution that enshrine the human and civil right to protection of one's rights and freedoms, the right to a trial and the adversarial principle. Under article 55, part 3, of the Constitution, human and civil rights and freedoms may be restricted by a federal law only to the extent necessary to protect the foundations of the constitutional order or the morality, health and rights and lawful interests of other persons, or to defend the country and national security. An example of one such restriction is conviction in absentia, which is covered by article 247 of the Code of Criminal Procedure.

214. Conviction in absentia is known to the international community and is applied in various countries, including the United States of America, the United Kingdom, France, Germany, Kazakhstan and Italy. For example, proceedings were brought against Osama bin Laden in June 2000 in accordance with rule 43 of the Federal Rules of Criminal Procedure of the United States.

215. In this context, European Court of Human Rights judgement No. 56581/00 of 10 November 2004, "Sejdovic v. Italy", is extremely revealing, as it expresses the legal position of the Court on conviction in absentia. In particular, in relation to the violation of article 46 of the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the Court held that the violation it had found had originated in a systemic problem connected with the malfunctioning of Italian legislation and practice caused by the lack of an effective mechanism to secure the right of persons convicted in absentia - where they had not been informed effectively of the proceedings against them and had not unequivocally waived their right to appear at their trial - to obtain a fresh determination of the merits of the charge against them by a court which had heard them in accordance with the requirements of article 6 of the Convention. The Court accordingly held that the respondent State had to secure the right in question, through appropriate measures, to the applicant and to other persons in a similar position.

216. On compensation and social rehabilitation of victims of terrorism. In the Russian Federation, articles 18 and 19 of the 2006 Act provide for measures for the legal protection of and social security for victims of terrorist acts.

217. The social rehabilitation process for victims of terrorist acts and persons who have participated in the campaign against terrorism is established by Government decision No. 6 of 12 January 2007 approving the rules concerning the social rehabilitation of victims of terrorist acts and persons participating in the campaign against terrorism.

218. Social rehabilitation includes psychological, medical and vocational rehabilitation, as well as legal aid and assistance in finding work and accommodation. Rehabilitation is aimed at helping victims adapt to and integrate into society.

219. The 2006 Act also provides for social-security measures for persons participating in the campaign against terrorism. In particular, Government decision No. 105 of 21 February 2008 on compensation for damage to the life and health of persons participating in the campaign against terrorism sets forth the procedure applicable to the legal arrangements for making a one-off payment to such persons or, in the case of their death, members of their family and/or dependants.

220. Consequently, in applying United Nations General Assembly resolution ES-10/15 of 20 July 2004, which lays down that all States have the duty to take actions in conformity with international law and international humanitarian law to counter deadly acts of violence against their civilian population in order to protect the lives of their citizens, the Russian Federation adopted anti-terrorism legislation in 2006 which allows for effective measures to be taken to better protect its citizens from the threat of terrorism. Thus, while 257 terrorist acts were committed in 2005 (prior to the adoption of the 2006 Act), there were only 112 committed in 2006 and 48 in 2007.

Spain

A. Press statement by the Special Rapporteur

221. From 7 to 14 May 2008, the Special Rapporteur conducted an official country visit to Spain, at the invitation of the Government (see mission report A/HRC/3/10/Add.2). On 14 May 2008, the Special Rapporteur issued his preliminary findings during a press conference in Madrid.

222. The Special Rapporteur conducted an eight-day mission to Spain. The purpose of the mission, conducted at the invitation of the Spanish Government from 7 to 14 May 2008, was to undertake a fact-finding exercise and a legal assessment of Spain's law and practice in the fight against terrorism, measured against international law, and considering the impact of counter-terrorism laws, policies and practices, including issues regarding investigation, detention, arrest and trial of terrorist suspects, the rights of victims of terrorism and persons negatively impacted by counter-terrorism measures. His approach to country visits is also aimed at identifying and disseminating best practice in the countering of terrorism. Following this visit, a full report, which will become publicly available, will be prepared and submitted to the Human Rights Council, a subsidiary body of the UN General Assembly. The Special Rapporteur met with the Minister for Foreign Affairs, Mr. Miguel Angel Moratinos Cuyaubé and the Minister of Justice, Mr. Mariano Ferndández Bermejo. The Special Rapporteur had meetings on a specialist level with the Ministry of Foreign Affairs, Ministry of Interior, Ministry of Justice, the Ministry of Defence, the Presidency of the Government, the Ombudsman, members of Parliament and

members of the Judiciary, including the President of the Supreme Court who also serves as the President of the General Council of the Judiciary and the President of the Audiencia Nacional. The Special Rapporteur visited the Soto del Real detention facility, where he was able to conduct confidential interviews with detainees suspected of terrorist crimes, and the Audiencia Nacional where he observed ongoing judicial proceedings. In the Basque Autonomous Community, Mr. Scheinin visited San Sebastián, Bilbao and Vitoria-Gasteiz, and met with Mr Juan José Ibarretxe, the President of the Government of the Basque Autonomous Community, as well as the Councillor of Justice, the Councillor of the Interior, the Ombudsman, the Human Rights Director and the delegate of the Spanish Central Government. He also visited the Basque Parliament. Both in Madrid and in the Basque Country he met with lawyers, academics, victims of terrorism and non-governmental organisations.

223. Terrorist threats in Spain. The Special Rapporteur is mindful of the tragic incidents of domestic and international terrorism that have had devastating effects in Spain. The long history of ETA (Euskadi Ta Askatasuna) terrorism primarily in the Basque Country, and the bomb attacks in Madrid on 11 March 2004 are graphic illustrations of the inexcusable nature of terrorist violence. During his visit, the Special Rapporteur was moved by his meetings with victims of terrorism and their families, as well as by an exhibition at the Basque Parliament dedicated to victims of terrorism. The Special Rapporteur is mindful of the dark pages of Spanish history when the state itself during the Franco dictatorship resorted to methods that can be classified as terrorism, or when the Grupos Antiterroristas de Liberación (GAL) in the aftermath of the turn to democracy resorted to methods of terrorism in the name of countering terrorism. In the view of the Special Rapporteur, acts of terrorism, including those by ETA, amount to the destruction of human rights. For nearly four decades Spain has struggled with the terrorist activities carried out by ETA, whose proclaimed political goal is self-determination for the Basque Country, a goal that is advocated also by political parties or other organizations that have nothing to do with terrorism. The Spanish Government has fought ETA terrorism through both law enforcement and judicial operations, which have, to a great extent, weakened the impact of the organization. ETA however, is still considered an ongoing threat, which affects not only the Basque Country, but the entire nation. After efforts to initiate a peace process between the Spanish central authorities and ETA broke down in 2007, the organization has returned to violent activities and announced its responsibility for 11 attacks during the four first months of 2008, including the death of one person. Spanish authorities told the Special Rapporteur that not only is the military branch of the organization perceived as a serious terrorist threat, but that the fight against ETA necessarily has to include all of its network, including political, social and grassroots organizations as well as media enterprises. The Special Rapporteur was informed that activities by such organizations are perceived as being closely linked to ETA, as they are promoting the goals of the terrorist organization through the provision of financial and material support as well as by altering the public order through violent demonstrations and threats against persons not agreeing with ETA's aims or means. Since the beginning of the 1990s, and in particular following the tragic events of 11 March 2004, Spain has strengthened its efforts against international terrorism. Due to repeated references to Spain by Al-Qaida leaders during last years and the development of what was described to the Special Rapporteur as self-radicalized Islamist terrorist cells inside Spain, their threat is perceived as constituting an ongoing danger. In addition Spanish authorities give regard to radical cells linked to Al-Qaida that operate outside the Spanish territory, mainly in Morocco and Algeria. The Special

Rapporteur notes that, in general, Spanish authorities do not link the threat of international terrorism to illegal or legal immigration, while remaining aware of the risk that terrorist organizations may take advantage of immigrant communities as a ground for recruitment.

224. Spain's international role. Within the United Nations and elsewhere Spain has an important role in the global fight against terrorism. The Madrid Summit of 2005 and its contribution towards the General Assembly's 2006 Global Counter-Terrorism Strategy as well as the initiative Alliance of Civilizations represent important phases in that process. On the international level Spain has endorsed the imperative of respecting human rights while fighting against terrorism, both as an end in itself and as a key factor for the efficiency of action against terrorism. The Special Rapporteur identifies Spain's active role on the international level a best practice and calls upon Spain to maintain that role, including through initiatives for further improvements of the UN terrorist listing and delisting procedures to bring them into line with human rights and due process.

225. Definitions of terrorist crimes. Many of the meetings during the visit focused on how terrorist crimes are defined in Spanish statutory law and judicial practice. Referring to his earlier work in the issue (see, in particular E/CN.4/2006/98), the Special Rapporteur once again emphasizes that the successful fight against terrorism requires strict adherence to the requirement of legality enshrined in article 15 of the International Covenant on Civil and Political Rights (ICCPR), so that all elements of the crime are in explicit and precise terms encapsulated in legal definitions of terrorist crimes. Underlining the centrality of deadly or otherwise serious physical violence against members of the general population or segments of it as a defining element of terrorist crimes, the Special Rapporteur warns against broad and vague definitions that ultimately undermine the strong moral message inherent in strict definitions based on the inexcusable nature of every single act of terrorism. Legitimately, and in compliance with international and European treaties against terrorism, Spain has criminalized not only terrorist violence itself but also associated crimes such as the financing of terrorism or incitement to terrorism. After a careful examination of the law and evolving practice of defining terrorist crimes in Spain, the Special Rapporteur highlights at the end of his country visit two preliminary conclusions:

(a) Article 571 of the Penal Code, defining the objective elements of terrorist crimes, is in the Special Rapporteur's view based on a proper understanding of the phenomenon of terrorism and of the requirement of legality.

(b) Other provisions of the relevant section of the Penal Code (articles 572-580), including the reference to "any other crime" in article 574, the notion of "collaboration" in article 576 and the amended provision of article 577 on street violence, however, carry the risk of a "slippery slope", i.e. the gradual broadening of the notion of terrorism to acts that do not amount to, and do not have sufficient connection to, acts of serious violence against members of the general population. The Special Rapporteur calls the attention of Spanish authorities to the latter finding, especially because of the existence of multiple factors that in the context of Spain highlight the risk of a "slippery slope": the classification of crimes as terrorist ones triggers the application of incommunicado detention, replaces the jurisdiction of the territorial criminal court by the jurisdiction of the Audiencia Nacional, a specialized court with nationwide jurisdiction, and results in aggravated penalties and often also modifications in the rules related to the serving of sentences. As many recent high-profile prosecutions are pending before the Audiencia Nacional or subject to review by the Supreme Court, the Special Rapporteur will not at this stage

comment upon the application of articles 571-580 of the Penal Code in these cases. However, he is aware of vocal criticism against a trend of broadening the scope of practical application of these provisions by the Audiencia Nacional. Mindful of the double risk of such a trend resulting both in compromising the requirement of legality enshrined in ICCPR article 15 and undermining the legitimacy and hence efficiency of the fight against terrorism, the Special Rapporteur calls upon the Spanish Government to initiate a process of independent expert review over the adequacy of the current definitions. In his final report on the country visit, to be prepared in consultation with the Spanish authorities, the Special Rapporteur will make proposals concerning the methodology of such a process of expert review and offer his own detailed comments on the existing definitions under Spanish law.

226. The framework of human rights law. None of the authorities the Special Rapporteur met with made any reference to arguments that would deny or reduce the applicability of international human rights law in respect of counter-terrorism measures by Spain. In particular, no reference was made to the existence of an armed conflict or a state of emergency as excuses that might result in derogation from human rights law. Furthermore, both national police authorities (the National Police and the Civil Guard) explicitly excluded the use of a necessity defence or analogous arguments as justification for the use of methods of interrogation that by way of exception would depart from Spanish law or international standards. The Special Rapporteur underlines the importance of an unconditional commitment by all authorities to the principle that terrorism must be combated within the framework of the law, including human rights law. The Special Rapporteur appreciates the assurances given by his interlocutors that Spain is currently not engaged outside its national territory in any activities that would violate human rights, and does not allow the use of its territory for such acts. However, it was acknowledged that Spanish consular and intelligence authorities in 2002 were present in the interrogations of a number of persons detained in Guantánamo Bay, including one Spanish national and one Moroccan legally residing in Spain. Subsequently two persons were brought to trial in Spain. In this regard the Special Rapporteur welcomes the recent decision by the Audiencia Nacional to dismiss the charges as any information obtained in Guantánamo interrogations is inadmissible as evidence in any type of judicial proceedings. The Special Rapporteur also received information related to Spain's involvement in the CIA programme of extraordinary renditions and is aware of a judicial investigation that is underway as to the use of Spanish airports in the transfer of terrorist suspects. The authorities informed the Special Rapporteur that such flights had in fact landed at Spanish civilian airports in 2004, stating that no evidence of human rights violations had been established in relation to these incidents. The Special Rapporteur stresses the obligation of the state to conduct proper and thorough investigations into the case and awaits with interest the results of the judicial investigation in the matter. He recalls that the practice of extraordinary renditions on its own amounts to a human rights violation as arbitrary detention, enforced disappearance or inhuman, cruel or degrading treatment.

227. Prohibition against torture and other forms of inhuman, cruel or degrading treatment. The Special Rapporteur calls for increased vigilance in implementing Spain's commitment to the eradication of torture. Mindful of the widespread use of torture and other forms of cruel, inhuman or degrading treatment by authorities during the Franco dictatorship, the Special Rapporteur expresses his concern over the fact that allegations of torture or other forms of ill-treatment continue to be made by terrorism suspects and do not systematically result in rapid and thorough independent investigations. The Special Rapporteur sees this situation as

delegitimizing the Government's fight against terrorism among those segments of Spanish society that would most need to be convinced of the genuineness of the central Government's dedication to zero tolerance of torture. Against this assessment, the Special Rapporteur identifies further measures against torture or ill-treatment as a priority in the improvement of Spain's framework of counter-terrorism. During the visit the Special Rapporteur was informed of recent positive developments, such as the so-called "Garzon protocol", applicable in cases where the detainee is held in incommunicado detention. The protocol encompasses a system of oversight through constant video-surveillance of police detention facilities and interrogation rooms, examinations by forensic doctors of the detainee's own choice as well as the possibility to receive visits by family members. The Special Rapporteur welcomes these measures but is aware, however, that the protocol has not yet been systematically implemented. It is applied only through judicial decision in an individual case and hence, by definition, in many cases not from the moment of arrest. Further, only some of the Audiencia Nacional judges apply the protocol. As an element of best practice, the Special Rapporteur learned that incommunicado detention has been practically eradicated in cases where the Basque autonomous police forces detain terrorism suspects and apply more advanced protocols adopted by the relevant Basque authorities. The Special Rapporteur calls for the complete eradication of the institution of incommunicado detention. This step, proposed, inter alia, by the Human Rights Committee in 1996 (CCPR/C/79/Add.61) and the Special Rapporteur on Torture in 2003 (E/CN.4/2004/56/Add.2) would strengthen the credibility of counter-terrorism measures by the law enforcement bodies as a whole and would at the same time further assure that those falsely accused of ill-treatment of terrorism suspects could be cleared.

228. Measures related to the Madrid 2004 bombings and international terrorism. The Special Rapporteur welcomes the statements by his interlocutors that the terrorist acts of 11 March 2004 have not resulted in xenophobic reactions among the Spanish population. However, the Special Rapporteur was informed by lawyers and NGOs of incidents of inappropriate treatment of Muslim detainees, including disrespect for their religious beliefs and practices. The penitentiary authorities admitted to the Special Rapporteur that such instances of improper conduct by prison officials have occurred, and assured that authorities are aware of the counterproductive consequences of any discrimination or unprofessional behaviour. The Special Rapporteur welcomes and encourages the willingness of the Government to initiate human rights training within the penitentiary system. The Special Rapporteur received detailed information on the practical challenges of organizing the multi-accused trial concerning the March 2004 Madrid bombings. While being mindful of the fact that appeals are still pending, the Special Rapporteur notes that many features of the trial phase could serve as best practice in organizing the criminal trial of a major act of international terrorism. Despite this highly pertinent information concerning the actual M-11 trial, the Special Rapporteur is mindful of particular difficulties encountered by the defence in the preparation of the trial. It was preceded by months or years of pre-trial detention during which time court-appointed lawyers were in practice unable to provide any assistance to their clients due to a number of factors: the secrecy of the investigation, the dispersal of the detainees to different parts of the country, the inadequacy of compensation of travel costs and the unavailability of independent interpretation services as part of the legal aid system for meetings between lawyer and client. The Special Rapporteur was provided with statistics compiled by the penitentiary authorities according to which 120 persons in pre-trial detention or serving their sentences are categorized as "Al-Qaida". Having met with two persons

in this category during his visit to the Soto del Real detention facility, the Special Rapporteur calls for the reconsideration of such a classification. During his visit to Spain the Special Rapporteur learned about a case concerning a Chechen possibly facing extradition to Russia for crimes of terrorism. While the Special Rapporteur acknowledges that formal assurances have played a useful role in respect of the death penalty where the executive authorities of the receiving country can commit themselves to not asking for capital punishment and their compliance with the assurances will be controlled through a public trial, there is widespread agreement that diplomatic assurances do not work in respect of the risk of torture or other ill-treatment. The Special Rapporteur notes with surprise that Audiencia Nacional appears to have combined traditional death penalty assurances in the pending case with the condition that the UN Committee Against Torture will be able to send a delegation to visit him. Mindful of the fact that CAT does not conduct such visits and of the inadequacy of assurances in respect of the risk of torture, the Special Rapporteur proposes that the Government seeks a new judicial opinion if it wishes to pursue the extradition of the individual in question.

229. The right to review by a higher court. All persons convicted of a crime have, pursuant to article 14, paragraph 5, of the ICCPR, a right to have their conviction and sentence reviewed by a higher court. According to established Human Rights Committee case law under this provision, cassation review by a higher instance, limited to issues of law, is not sufficient for compliance with the ICCPR. Because of terrorism cases in Spain are heard exclusively by a single court, the Audiencia Nacional, and the role of the Supreme Court is traditionally limited to issues of law, the existing mechanisms of review by a higher court appear to suffer from a structural deficiency. The Special Rapporteur is mindful of judicial and legislative measures taken by Spanish authorities to reach compliance with ICCPR article 14 (5). Nevertheless, he wishes to point out that the problem remains valid in respect of major pending terrorism-related cases with dozens of accused or convicted persons. The Special Rapporteur requests the Spanish Government to give consideration to the possibility of including terrorism crimes in the jurisdiction of ordinary courts, instead of a single central specialized court (Audiencia Nacional). This would correspond to the principle of normalcy and address terrorism as a crime, rather than an emergency calling for departure from standard procedures. The Special Rapporteur believes that transferring jurisdiction for terrorism crimes to ordinary courts with territorial jurisdiction would enhance the legitimacy of Spain's fight against terrorism and add to its efficiency.

230. Victims of terrorism. Mindful of the fact that terrorist attacks cause widespread suffering and grievances throughout the society, the Special Rapporteur notes that Spanish authorities have undertaken a number of legislative and administrative measures in order to properly address, through material, legal and psychological assistance, the situation faced by victims of terrorism, including victims of violent attacks carried out by ETA, victims of international terrorist acts and victims of GAL in the 1980s. Proper consideration given to those who individually, or collectively, have suffered harm, is an essential measure in order to further good community relations. Spanish authorities highlighted that annual ceremonies are organized to pay tribute to the victims of the Madrid bombings of 2004. The Special Rapporteur stresses the highly important value of human rights education and the fostering of tolerance and solidarity within the society as a means of avoiding conditions conducive to the spread of terrorism.

231. Acknowledgements. The Special Rapporteur appreciates the cooperation of the Government of Spain. He also thanks all his interlocutors for sharing their insights and ideas.

Sri Lanka

A. Communication sent to the Government

232. On 28 September 2007, the Special Rapporteur sent a communication to the Government of Sri Lanka regarding the "**Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006**" promulgated by the President on 6 December 2006 and to the "**Emergency (Miscellaneous provisions and powers) Regulation No.1 of 2005**" promulgated by the President on 13 August 2005. The Special Rapporteur highlighted four areas of concern relating to this legislation. According to information the Special Rapporteur has received:

233. The Emergency Regulations of terrorist acts contain a broad definition of terrorism and terrorist acts (Regulations 6, 7 and 20) and lack compliance with the principle of legality. The principle of legality in criminal law, enshrined in article 15 of the International Covenant of Civil and Political Rights (ICCPR), to which Sri Lanka is a party to, is non-derogable in times of public emergency and 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.

234. In the Special Rapporteur's view, terrorist crimes need to be defined in precise terms and primarily through 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. The definition of terrorism in Regulation 20 does not meet this requirement as it defines terrorism through the unlawfulness of the conduct rather than through the use of violence against persons.

235. It appears that the broad definition of terrorism contained in Regulation 20 allows for the possible criminalisation as terrorist offences of a range of unlawful conducts that should not been understood as terrorist activities. By way of example, the "destruction or damage to property" committed during a demonstration of teachers or civil servants asking for a change in certain policies of the government or for new laws (new educational policies or legislation for example) could be included in the definition of terrorism. This broad definition could therefore have a negative impact on certain activities of civil society and could violate important human rights such as the rights to freedom of expression, assembly and association.

236. Under the Emergency Regulations "no person shall engage in any transaction in any manner whatsoever" with any "person, group or group of persons" acting in contravention of regulations 6 and 7, even if they have no knowledge or intention that their acts contribute to help allegedly terrorists (Regulation 8). In certain circumstances such as the furtherance of peace, it is provided that a "Competent Authority" appointed by the President, could approve "either unconditionally or subject to stipulated conditions" a "lawful transaction". People aggrieved by a decision taken by this Authority is entitled to appeal against such decision to an "Appeals Tribunal" composed of the Secretaries to the Ministries of Defence, Nation Building, Plan Implementation and Justice. The Tribunal can affirm, vary or rescind conditionally or unconditionally the decision (Regulation 18).

237. This provision presents many concerns especially in regard to humanitarian activities undertaken by national and international organisations working in Sri Lanka. Regulation 8 is drafted in a very broad language allowing for the possible criminalisation of a range of legitimate activities of civil society. Moreover, the appointment by the President of a "Competent Authority" gives this Authority the discretionary power over the activities of civil society organizations. At the same time, this discretionary power gives the Government excessive control over civil society organizations which is incompatible with the freedom of expression and association as well as other freedoms that are necessary for the independence and autonomy of such organizations.

238. In addition, the "Appeals Tribunal" does not meet the criteria of independence and impartiality required by international instruments and represents a departure from the principle of separation of powers as well as an interference of government into the judicial sphere. According to article 14 (1) of the ICCPR, in the determination of the rights and obligations of an individual in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

239. Regulation 19 provides that "no action or suit shall lie against any Public Servant" or any other person specifically authorized by the Government to take action in terms of the Regulations "provided that such person has acted in good faith and in the discharge of his official duties".

240. This provision bans any legal proceedings to government officials who may commit unlawful acts while implementing the regulations if they act in good faith. When States engage in counter terrorism measures it is possible that significant violations of human rights such as arbitrary detention or torture may be committed by officials. Governments have the obligation under international law to investigate and prosecute violations of human rights and international humanitarian law. This wide immunity clause does not comply with the international obligations of Sri Lanka and could lead to situations of impunity. Investigations and prosecutions should always take place regardless to bona fides. Only an independent and impartial tribunal should be the one to examine if the official has acted in good faith during the discharge of his official duties.

241. According to Provision 19 of the Emergency Regulations of 2005, the detention of a person without charge can be extended up to 12 months. The vaguely worded regulations allow for the detention of any person "acting in any manner prejudicial to the national security or to the maintenance of public order or to the maintenance of essential services". Since there is no legal requirement for the Secretary to the Ministry of Defence to specify the period of detention, this provision may result in arbitrary arrests and detention of suspects, often not connected to terrorist acts, up to one year.

242. Finally, the Special Rapporteur also reminded the Government that the United Nations General Assembly Resolution 59/191, in paragraph 1 stresses that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law."

243. In summary, the Special Rapporteur is concerned that the Emergency Regulations are not in accordance with international human rights and humanitarian law standards. In this regard, the

Special Rapporteur would ask the Government to bring to the attention of relevant governmental and parliamentary bodies that in my opinion this legislation needs to be significantly amended. The Special Rapporteur took this opportunity to make the following suggestions: 1. To ensure that the Emergency Regulations contain a revised definition of terrorism and terrorist acts, limiting the scope of criminalisation to acts of deadly or otherwise grave violence against members of the general population. In this regard the Special Rapporteur drew the attention of the Government to his first report to the Commission on Human Rights (E/CN.4/2006/98) in particular paragraphs 26-50, which deal with the issue of defining terrorism and may help to ensure that the fundamental human rights standards of legality set forth in Article 15 of the ICCPR are respected. 2. To ensure that Regulation 8 is modified in order to guarantee the respect of human rights of Sri Lankan population as well as the independence of civil society and humanitarian organizations. 3. To ensure that any "Appeal Tribunal" meets the international criteria of independence, impartiality and transparent and fair procedures. 4. To ensure that all violations of human rights and humanitarian law committed while countering terrorism are investigated and prosecuted, and that only an independent and impartial tribunal could determine if officials act in good faith and in the discharge of his official duties or not. 5. To ensure that all powers to detain persons for reasons related to terrorism or national security comply with international standards, including those enshrined in article 9 of the International Covenant on Civil and Political Rights, such as the prohibition against arbitrary arrest, the requirement of informing the detained person of the reasons for arrest, the speedy appearance before a court of anyone arrested as suspected of a crime and the right of anyone detained on other grounds to have the lawfulness of the detention reviewed by a court without delay.

244. On 14 March 2008, 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, and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, sent a communication regarding the case of Mr. N. **Jasikaren**, a former journalist with the Tamil language bi-monthly "*Sariniher*" and journalist with the web news service "*Outreachsl.com*" and owner of the Outreach Multimedia and E-Kwality Graphics, a printing press; Ms. **Valarmathi Jasikaren**, his wife; Mr. **J.S. Tissanaygam**, journalist with the "*Sunday Times*" and the "*Daily Mirror*" and chief editor of the "*Northeastern – Herald*" an English-language regional newspaper and "*Outreachsl.com*"; Mr. **K. Wijayasinghe**, a freelance journalist, who writes for the weekly newspaper "*Ravaya*", the daily "*Mawbima*" and "*Outreachsl.com*"; Mr. **Udayen**, a video editor for "*Outreachsl.com*"; and Mr. **A.G. Lasantha Ranga**, a video journalist for "*Outreachsl.com*". According to information received:

> Mr. N. Jasikaren was arrested by the Terrorist Investigation Department (TID) (a special police division that reports directly to the Secretary of the Ministry of Defence) at his office on the evening of 6 March 2008; during his arrest, his laptop and printed materials were seized by the TID. Mr. Jasikaren is being held at the TID offices in Colombo. Mr. Jasikaren's wife, Valarmathi Jasikaren, a marketing officer with Maharaja Broadcasting, was arrested on 6 March at their home on the same day.
>
> Mr. Jasikaren was assaulted by TID officers. Valarmathi Jasikaren suffers from a liver disease and underwent surgery a few weeks ago, and there is no indication that she has access to her medication in custody.

J.S. Tissanaygam and K. Wijayasinghe were arrested by TID officers on 7 March at 11:30 a.m. when they went to TID offices to inquire about the arrests of Mr. Jasikaren and his wife. Mr. Tissanaygam was detained incommunicado until late in the evening of 7 March, when his family was informed of his whereabouts. Both men are being detained at the TID offices in Colombo. Mr. Tissanaygam and Mr. Wijayasinghe's wives were allowed to visit them.

Udayen was arrested at his home on 7 March. He was detained incommunicado until midnight and he is being held at the TID offices in Colombo.

A.G. Lasantha Ranga was requested to report to the TID offices before 3 p.m. on 8 March. He has been detained since then at the TID offices in Colombo. Mr. Ranga's wife visited him on 10 March. Mr. Ranga was threatened by TID officers in front of her, stating that if Mr. Ranga had seen how Jasikaren and Tissanayagam were tortured "he would die on the spot". TID officers told her that she should not visit her husband with a lawyer.

A seventh person, Mr. Siva Sivakumar, journalist and spokesperson for the Free Media Movement and chief editor of the Tamil-language newspapers "*Sarinher*" and "*Adhavan*", was also arrested on 8 March 2008. He was, however, released after a detention period of 12 hours during which a statement was taken from him. TID officers had gone to his home on the evening of 7 March to arrest him, but took his cousin into custody instead as he was absent. TID officers informed Mr. Sivakumar's relatives that his cousin would be released when he presents himself to TID offices, which he did in the morning of 8 March.

With regard to the above persons who have been arrested, detention orders have reportedly been prepared pursuant to Regulation 21 of the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006. However, to date none of the accused have seen the detention order. It is also not clear if it was the Secretary of the Ministry of Defence or a Deputy Inspector General (DIG) of the police who issued detention orders in this case. If detention orders have been issued, the detainees must be brought before a magistrate at least once every 30 days, but this is only to verify that the person is still being detained. Magistrates have no power to question, cancel or renew a detention order. Only the person issuing the detention order - the Secretary of Defence or the DIG - can renew, amend or cancel it.

With regard to the cases of Mr. Jasikaren and his wife, TID officials have issued receipts acknowledging their arrests and citing as a reason aiding and abetting terrorist activities. No information has yet been given concerning the reason for the detention of the remaining persons and their arrests and detention have not yet been acknowledged by the TID. However, a few weeks before the arrests, authorities proclaimed that some websites reporting on human rights violations were a hindrance to the ongoing war.

All meetings with relatives were held in the presence of TID officers. None of the above cited persons were allowed access to legal counsel.

245. The Special Rapporteurs referred the Government to the International Covenant on Civil and Political Rights, to which the Government is a party, and in particular Article 9 (4), which requires that "Anyone who is deprived of his liberty by arrest or detention shall be entitled to

take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.", and Article 14 (1), which requires that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

246. Please indicate the legal basis for the arrest and detention of the aforementioned persons and how these measures are compatible with applicable international human rights norms and standards as stipulated, inter alia, in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In particular, please explain on what legal and factual grounds all or some of the persons mentioned where arrested by the Terrorist Investigations Department (TID).

B. Reply from the Government

247. As of 31 January 2009, there had been no response to the Special Rapporteur's correspondence.

C. Observations

248. In January 2009 the Special Rapporteur received an update that Mr. Tissainayagam, his wife Ms. V. Valamathy and Mr. V. Jasiharan and continue to be held in detention and the criminal charges are still outstanding. The trial of Mr. Tissainayagam is ongoing.

Sudan

A. Communication sent to the Government

249. On 11 August 2008, the Special Rapporteur, jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the situation of human rights in the Sudan, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a communication regarding the **death sentences imposed against 30 men** convicted on charges connected to the attack on Omdurman on 10 May 2008 led by the Justice and Equality Movement. According to the information we have received:

> **Kamal Mohamed Sabun**, **Musa Hamid Osman Katar**, **Yunis Abdallah Al Nedif Bahar El Deen**, a national of Chad, **Musa Adam Hassan Omar**, **Bahar El Deen Beshir Idriss**, **Bushara Abdullah Eissa**, **Ibrahim Al Nur Zakaria**, **Shumu Osman Ishaq Gibril**, **Fadul Hussain Rezeg Allah**, **Mohamed Arabi Ismail Ahmed**, **Mahmoud Abaker Mursal Yahia**, **Bushara Eissa Mohamed Salih**, **Mohamed Adam Abdallah Mohamed**, **Mohamed Hashim Ali Abdu**, **Haitham Adam Ali Adam**, **Awad Mohamed Hussein**, **Adam Abdallah**, **Haroun Abdelgadir**, **Mohamed Mansour Eissa**, **Osman Rabeh Mursal**, **Adam Mohamed Eissa Adam**, **Ibrahim Abaker Hashim**, **Mohamed Sharif Abdallah Suleiman**, **Mahmoud Adam**, **Adam Al Nour Abdelrahman Osman**, **Bashir Adam Mohamed Saleh**, **Abubaker Ibrahim Breima**, **Abdallah Adam Ibrahim Al Duma**, **Ibrahim Ali Rashid**, **Bashir Adam Sanusi Hashim** and **Mustafa Adam Sabun** were arrested in the days following the Justice and Equality Movement (JEM)

attack on Omdurman on 10 May 2008. Following their apprehension, they were held without access to the outside world for over one month and were not given access to lawyers until after the trial proceedings opened.

As of 18 June 2008, these 30 men and other defendants were presented before newly created counter-terrorism courts in greater Khartoum. Five special courts were created in early June in response to the attack on Omdurman and these 30 men and other defendants were brought before three of these special courts. Observers noticed that the defendants looked tired and appeared to be in pain. The defendants complained that they were subjected to torture or ill-treatment, but the court did not investigate these allegations and refused to grant requests by the defendants' lawyers for independent medical examinations.

On 29 and 31 July 2008, the courts announced their verdicts. They sentenced the 30 above named defendants to death, acquitted one, and ordered the transfer of four minors, to a detention facility where more than 90 children captured after the attacks are being held. One of those sentenced to death, Mahmood Adam Zariba, is reportedly a minor of 16 years of age, whose age was not determined by a medical examination. The 30 defendants were found guilty of a range of criminal charges defined in the 1991 Criminal Act, the 2001 Counter-Terrorism Act and the 1986 Arms, Ammunitions and Explosives Act. The charges included terrorist acts, participation in a terrorist criminal organization (respectively sections 5 and 6 of the Counter-Terrorism Act), as well as criminal conspiracy, waging war against the state and sedition (respectively sections 24, 51 and 63 of the Criminal Act).

In reaching their verdicts, the courts relied as evidence primarily on confessions by the defendants which the defendants said they were forced to make under torture and ill-treatment and which they retracted in court. The court made reference to the Sudanese Evidence Act which permits the admission to judicial proceedings of statements obtained by unlawful means. The court also relied on the testimonies by children who have been detained since the attacks and who stated in court that they recognized the defendants as having been among the attackers.

250. The Special Rapporteurs understand that judgments in respect of 28 further defendants are expected to be announced shortly, and that charges may be brought against others currently held without charge or trial.

251. In this respect, the Special Rapporteurs drew the attention of the Government to paragraph 12 of General Assembly Resolution A/RES/61/153 of 14 February 2007, which "reminds all States that prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and dignity of the person". Prolonged incommunicado detention furthermore negates the abovementioned guarantees of the right to a fair trial, such as being assisted by a lawyer and having adequate facilities to prepare one's defence.

252. The Special Rapporteurs recalled that Commission on Human Rights resolution 2005/39 urges States to ensure that any statement which is established to have been made as a result of torture shall not be invoked in any proceedings, except against a person accused of torture as

evidence that the statement was made. In addition to being a crucial fair trial guarantee, this principle is also an essential aspect of the non-derogable right to physical and mental integrity set forth, inter alia, in Article 7 of the International Covenant on Civil and Political Rights. Reports that the court refused requests by the defence lawyers for medical examination of the defendants and then relied on their self-incriminating statements made during incommunicado detention and, allegedly, under torture would appear to suggest a particularly serious violation of these principles of international law.

253. The Special Rapporteurs are also concerned by reports that the procedures of the special counter-terrorism courts are determined by the Chief Justice. The Special Rapporteurs received information that the procedural rules of these courts may override existing laws, dispensing with certain guarantees contained in the Sudanese Criminal Procedure Code. For example, under the courts' rules of procedure defendants may only appeal the verdict once.

254. It is the Special Rapporteurs' understanding that the 30 men were apprehended, charged and convicted in connection with the attack by hundreds of armed fighters of the Justice and Equality Movement on Omdurman, which could be seen as part of the ongoing armed conflict between the Government and this rebel armed group in Darfur. In this context, the question of the applicability of international humanitarian law to the proceedings against the thirty men arises.

255. In this respect the Special Rapporteurs would like to bring to the Government's attention that under Geneva Convention III and other international humanitarian law and international human rights norms applicable in all types of armed conflict all who are detained or tried are protected by certain fundamental guarantees. Common Article 3 to the four Geneva Conventions of 1949 and Article 6 of Additional Protocol II to the Geneva Conventions, relating to the protection of victims of non-international armed conflicts (Additional Protocol II), which the Government acceded to in 2006, prohibit the passing of sentences and the carrying out of sentences without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees. This prohibition is also reflected in a rule of customary law stating that "no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees" (Rule 100 of the Customary Rules of International Humanitarian Law identified in the study of the International Committee of the Red Cross).

256. Please provide information as to how the principle that any statement which is established to have been made as a result of torture shall not be invoked in any proceedings, except against a person accused of torture as evidence that the statement was made, is implemented in the Sudan? What steps should judges take under Sudanese law when confronted with allegations by defendants that they have been compelled to make confessions? Please provide details regarding the defendants' access to legal counsel before the trial and their possibility to communicate in private with counsel during the trial. Please explain what specific acts the defendants were found guilty of beyond participation in an armed uprising. Which acts the defendants engaged in were found by the court to constitute "terrorist acts" for the purposes of Articles 5 and 6 of the 2001 Counter-Terrorism Act? Please provide the exact wording of the provisions that form the legal basis of the arrest, detention, conviction and sentencing of these defendants.

257. On 24 September 2008, the Special Rapporteur, jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the independence of

judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a communication regarding the **death sentences imposed by counter-terrorism courts in greater Khartoum against 20 additional men** on 17 and 20 August 2008. The men were convicted on charges connected to the attack on Omdurman on 10 May 2008 led by the Justice and Equality Movement. According to the information the Special Rapporteurs have received:

> On 17 August 2008, a counter-terrorism court in Khartoum found **Abdelaziz Al Nour Aousher Fedail**, **Al Sadig Mohamed Jaber Al Dar Adam**, **Al Taib Abdelkarim Idris Adam**, **Bashir Adam Aousher Fedail**, **Hamid Hassan Hamid Ahmed**, **Malik Adam Ahmed Mohamed**, **Mohamed Bahar Ali Hamadeen**, and **Tag Al Deen Mahmoud Abdurahman Ali** guilty on a range of offences under the 1991 Criminal Act, the 1986 Arms, Ammunitions and Explosives Act an and the 2001 Counter-Terrorism Act and sentenced them to death. On 20 August 2008, a counter-terrorism court sitting in Omdurman sentenced another twelve men to death on similar charges: **Azrag Daldoum Adam**, **Yahia Fadel Abaker Adam**, **Musa Abdallah Ali Shugar**, **Mohamed Abaker Naser Hussein**, **Ibrahim Saleh Ali, Idriss Omar Mohamed Ahmed**, **Mahjoub Suleiman Adam**, **Naser Jibreel Adam**, **Abdallah Mursal Tour**, **Adam Ibrahim Nur Mohamed**, **James Bol Francis**, and **Adam Suleiman Abaker**. The court also acquitted four defendants in this trial and referred four defendants to be tried by juvenile offender courts.

258. The allegations the Special Rapporteurs received with regard to the detention and trial of the persons named above are very similar to those brought to the Government's attention on 11 August 2008 in relation to another 30 persons sentenced to death on 29 and 31 July 2008. They were arrested in the days following the Justice and Equality Movement (JEM) attack on Omdurman on 10 May 2008. Following their apprehension, they were held without access to the outside world by the National Intelligence and Security Service (NISS). It would appear that they were not given access to lawyers until after the trial proceedings opened. In reaching their verdicts, the Khartoum and Omdurman counter-terrorism courts appear to have relied primarily on confessions by the defendants as evidence. Most of the defendants said they were forced to make these confessions under torture and ill-treatment and retracted them in court. No investigations were opened to investigate these allegations.

259. One of the defendants sentenced to death by the Khartoum counter-terrorism court on 17 August 2008 is a minor. Al Sadig Mohamed Jaber Al Dar Adam is 17 years old and the court accepted his birth certificate as valid documentation of his age. It found, however, that since Al Sadig Mohamed Jaber Al Dar Adam was found guilty of hiraba, or brigandage (Article 167 of the Criminal Act), a hudud offence, he could nevertheless be sentenced to death. Article 27(2) of the Sudanese Criminal Act allows the death penalty to be applied for hudud crimes regardless of age.

260. The Special Rapporteurs reminded the Government that in capital punishment cases the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in Article 14 of the International Covenant on Civil and Political Rights, to which Sudan is a party and which (pursuant to article 27(3) of Sudan's Interim National Constitution) is "an integral part" of the constitutional Bill of Rights, admits of no exception. Relevant to the case at hand,

these guarantees include the right to "have adequate time and facilities for the preparation of [one's] defence and to communicate with counsel of [one's] own choosing" and the right not to be compelled to confess guilt.

261. With regard to the right to "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" (Article 14(3)(b) of the Covenant), the Human Rights Committee has observed that "[i]n cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings." (General Comment no. 32, CCPR/C/GC/32, para. 38). If it was confirmed that the 20 defendants sentenced to death were only able to speak to their lawyers when their trials began after more than a month of detention, this would negate the possibility of a fair trial.

262. The Special Rapporteurs are also concerned by reports that the procedures of the special counter-terrorism courts are determined by the Chief Justice. The Special Rapporteurs received information that the procedural rules of these courts may override existing laws, dispensing with certain guarantees contained in the Sudanese Criminal Procedure Code. For example, under the courts' rules of procedure defendants may only appeal the verdict once.

263. It is the Special Rapporteurs' understanding that the 20 prisoners sentenced to death were apprehended, charged and convicted in connection with the JEM attack on Omdurman, which could be seen as part of the ongoing armed conflict between your Government and this rebel armed group in Darfur. In this context, the question of the applicability of international humanitarian law to the proceedings arises. In the Special Rapporteurs' communication to the Government of 11 August 2008, to which they refer in this respect, they drew the Government's attention to the norms of international humanitarian law protecting persons apprehended and detained in the course of an armed conflict. These norms provide that no such detainee may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees, including assistance by counsel and the prohibition of moral or physical coercion exerted in order to induce him to admit guilt.

264. To sum up, both in human rights law and under international humanitarian law, only the full respect for stringent due process guarantees distinguishes capital punishment, applied in conformity with international law, from a summary execution which violates the most fundamental human right. The Special Rapporteurs therefore urge the Government to take all necessary steps to ensure that the rights under international law of the twenty prisoners named above are fully respected. Considering the irreversible nature of the death penalty, this can only mean that the death penalty is not executed until all concerns the Special Rapporteurs have raised are dispelled in their entirety, or the above named men are given a new trial or released.

265. Finally, the Special Rapporteurs expressed their particular concern with regard to reports that one of the defendants sentenced to death on 17 August 2008, Al Sadig Mohamed Jaber Al Dar Adam, is only 17 years old.

266. The Special Rapporteurs drew the attention of the Government to the fact that Article 37(a) of the Convention on the Rights of the Child, to which Sudan is a Party, expressly provides that capital punishment shall not be imposed for offences committed by persons below eighteen years

of age. In addition, Article 6(5) of the International Covenant on Civil and Political Rights, to which Sudan is a Party as well, provides that the death penalty shall not be imposed for crimes committed by persons below eighteen years of age.

267. According to the information the Special Rapporteurs received, the court accepted that Al Sadig Mohamed Jaber Al Dar Adam was a minor but sentenced him to death in spite of his age on the ground that the offences he was found guilty of included a hudud offence (brigandage). This would be in accordance with Article 36(2) of the Interim National Constitution and Article 27 of the 1991 Criminal Act, which prohibit the death penalty for offences committed by minors when it would be imposed as ta'azir penalty, but allow it for qisas and hudud offences. In this regard, the Special Rapporteurs must stress that, for the purposes of the Government's obligation under international law, the distinction between hudud, ta'azir and qisas offences is immaterial. Article 37(a) of the Convention on the Rights of the Child and Article 6(5) of the International Covenant on Civil and Political Rights apply – and bind the Government – irrespective of this distinction in the law of the Sudan.

268. Please explain the current situation of the prisoners who were found to be minors by the counter-terrorism courts and whose re-trial by juvenile courts was ordered by the counter-terrorism courts. Where are they currently detained? Does your Government intend to bring them to trial? Do they have legal counsel defending them and does such legal counsel have access to them? Is it accurate that there are other children apprehended after the JEM attack and not charged who are still held at a detention facility near Al Jeili? Please explain the appeals and other challenges against the judgment and sentence open to the defendants sentenced by counter-terrorism courts on 17 and 20 August 2008, including ex gratia proceedings. Please explain what specific acts the defendants were found guilty of beyond participation in an armed uprising. Which acts the defendants engaged in were found by the court to constitute "terrorist acts" for the purposes of Articles 5 and 6 of the 2001 Counter-Terrorism Act?

B. Reply from the Government

269. As of 31 January 2009, there had been no response to the Special Rapporteur's correspondence.

Sweden

A. Communication sent to the Government

270. On 16 January 2008, the Special Rapporteur, jointly with the Special Rapporteur on the question of torture, sent a communication to the Government advising that they have been approached by third parties in the case of **Adel Abdul Hakim**, an ethnic Uyghur from China, who they understand is already physically present in Sweden. In relation to the specific case of Mr. Hakim and to the resettlement of other Guantanamo Bay detainees, in appropriate cases, we the Special Rapporteurs would like to encourage the practice of other countries to facilitate resettlement, including direct participation in the process by being a receiver country in order to create a resettlement framework in conformity with human rights.

271. To further encourage and support the process of third party resettlement in cases where persons were originally detained for terrorism related reasons but subsequently no criminal

charges were initiated, and particularly where there is a real risk of torture, or of any form of cruel, inhuman or degrading treatment if returned to the country of origin the Special Rapporteurs would like to draw the Government's attention to two reports by the Special Rapporteur on human rights and counter-terrorism: a thematic report on refugees and asylum in the context of countering terrorism (A/62/263, paras. 54-64 and 83) considered by the General Assembly and a mission report to the USA (A/6/17/Add.3, paras. 16-17 and 57) considered by the Human Rights Council and a report of the Special Rapporteur on torture on his country visit to China (E/CN.4/2006/6/Add.6). These reports can be found on the Special Procedures website: http://www2.ohchr.org/english/bodies/chr/special/index.htm. The Special Rapporteurs wish to express our interest in the case of Mr. Hakim and their availability for consultation in the issue of granting him the right to reside in Sweden.

B. Communication from the Government

272. As of 31 January 2009, there had been no response to the Special Rapporteur's correspondence.

C. Observations

273. The Special Rapporteur received updated information that Mr. Hakim's appeal regarding his asylum claim was heard on 21 January 2009. On 18 February 2009 the Swedish Migration Court of Stockholm granted his appeal to reside in Sweden ruling that he was exceptionally deserving of humanitarian protection in Sweden.

Thailand

A. Communications sent to the Government

274. On 13 November 2007, the Special Rapporteur sent a communication to the Government regarding the draft '**Internal Security Act**', described, in part, as a measure against terrorism. According to information received by the Special Rapporteur, the draft 'Internal Security Act' (ISA) was approved in principle by the National Legislative Council on 8 November 2007. Afterwards, a 24-member committee was set up to complete vetting of the draft law within seven days. In this connection, the Special Rapporteur would like to draw the Government's attention to several main substantive areas of concern relating to the draft provisions. In the Special Rapporteur's view these aspects of the draft Act are incompatible with international standards and may, if applied, lead to serious human rights violations.

275. Section 14 prescribes that this draft Act should be applicable if a matter arises that "affects internal security but which does not yet require the declaration of a state of emergency" and may "persist for a long time". Thus, the draft explicitly specifies that the Act should be applicable in situations that do not amount to a state of emergency. As a result, the Act would have a scope of application that is ill-defined and relates neither to a situation of normalcy nor to a state of emergency. Furthermore, the terms "affects internal security" is overly broad and could also be applied in minor circumstances that affect order and security in Thailand. Likewise, the term "persist for a long time" is a vague term, in particular with a view to the significant human rights restrictions that can be imposed as a consequence of the Act. Therefore, both terms raise concerns as to legal certainty.

276. Furthermore, section 17 vests the power in the director of the Internal Security Operations Command (ISOC) to issue orders for "government officials to implement any action, or withhold the implementation of any action" to prevent, suppress, stop or rectify any situation that affects internal security as designated under article 14. Two main concerns should be raised in this context. First, the powers given to ISOC, such as the responsibility for commanding government officials, would put the civilian administration under military command. Among other international bodies, the General Assembly has consistently called upon states to strengthen the rule of law by ensuring that the military remains accountable to a democratically elected civilian government (see e.g. resolution 56/96 "Promoting and consolidating democracy" of 4 December 2000, para. 1 (c) (ix). Second, given its broad wording, section 17 may be used as a blanket power overriding important constitutional safeguards for the protection of human rights. In this context, it should be noted that freedom of expression, assembly, association and movement can be restricted according to section 17. This provision, however, omits specifying appropriate limits applicable to such restrictions. It should be enshrined in the Act that such measures may only be taken when they are considered necessary, suitable and proportionate in the individual case ensuring that they are strictly required by the exigencies of the actual situation. Furthermore, the clause does not specify a time frame for such significant restrictions to apply.

277. Under section 18, the director of the Internal Security Operations Command and any official designated by the director shall be "an investigating officer according to the Code of Procedure for Criminal Investigation". While not proclaiming the state of emergency, this provision therefore enables the ISOC director to undertake criminal investigations, thus replacing the investigation authorities as designated under constitutional provisions. Furthermore, it is not clear whether significant safeguards, as enshrined in constitutional provisions and in the Criminal Procedure Code, such as the principles of judicial oversight and due process, apply in this context.

278. Section 19 vests the power in the ISOC director to send a person suspected of an offense to undergo training at a designated place for a period not exceeding six months "in place of court proceedings". According to article 9, para. 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, para. 3, of the ICCPR, anyone arrested or detained on a criminal charge shall be brought promptly before a judge and shall be entitled to trial within a reasonable time, or release. The right to challenge the lawfulness of one's detention before a court is provided by article 9, para. 4, of the ICCPR. The Human Rights Committee confirmed in its General Comment 29 of 2001 that this right is protected at all times. 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. Moreover, section 19 of the Act contradicts article 14 of the International Covenant on Civil and Political Rights (ICCPR) which prescribes in its para. 1 (2) "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Empowering the ISOC director to send persons to undergo "training" deprives these individuals of their rights under the above mentioned articles of the ICCPR. Moreover, safeguards under the criminal justice system may be completely circumvented by this provision. Furthermore,

section 19 does not specify where and under whose authority (military or civilian) it such training will be conducted. Thus, significant human rights violations such as arbitrary and incommunicado detention in undisclosed or inaccessible places may occur.

279. Section 22 states that actions under the ISA are not subject to the law on administrative procedures and the law on the establishment of the Administrative Court. Given that the Administrative Court is the main body addressing human rights violations committed by state officials in Thailand, the removal of this jurisdiction may lead to a complete denial of responsibility while in official function and even impunity. It should be noted that the concerns outlined above may gravely endanger the principle of the separation of powers in general and the independence of the judiciary in particular.

280. Finally, the draft Act does not specify the composition of the ISOC. Given the above mentioned broad powers of the ISOC, this omission is of grave concern. This concern is not mitigated by the fact that under section 9 of the draft Act an Internal Security Operations Board is given the power to oversee, consult and make proposals to the ISOC with respect to actions taken according to the Act. Since this Board is mainly composed of governmental and law enforcement officials, the requirement of democratic accountability is not complied with.

281. In summary, while the Special Rapporteur affirmed 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, he was seriously concerned that many provisions of the draft "Internal Security Act" are not in accordance with international human rights standards as well as national constitutional and other legal provisions. He urged the executive and legislative branches of government in Thailand to reconsider the draft 'Internal Security Act' and called upon both branches to allow for further debate and consider a complete overhaul of this draft due to concerns that the implementation of this law could have a significant negative impact on human rights in the country.

282. On 20 May 2008, the Special Rapporteur sent a communication to the Government of Thailand regarding the **Emergency Decree on Government Administration in States of Emergencies (the Decree)**, enacted on 15 July 2005 reportedly by a decision of the Prime Minister without being submitted to the Parliament. The Decree allows the Prime Minister to declare a state of emergency, inter alia in situations resulting from an offence relating to terrorism (Section 4) and a "serious state of emergency" where an emergency situation involves terrorism (Section 11). On the basis of this Decree, a state of emergency was declared in three southern provinces. In the Special Rapporteur's opinion, this Decree raises five substantive issues of concern.

283. The Special Rapporteur's first concern related to the definition of a "state of emergency" and of a "serious state of emergency" in Sections 4 and 11 of the Decree. Section 4 of the Decree describes a state of emergency as "a situation which affects or may affect public order or endangers the security of the State or may cause the country or any part of the country to fall into a state of acute difficulty or a situation resulting from an offence relating to terrorism under the Penal Code, armed conflict or war" pursuant to which it is necessary to enact emergency measures to "preserve the monarchy, the democratic system of government under the constitutional monarchy, national independence, the interests of the nation, compliance with the law, the safety of the people, the peaceful way of life of the people, the protection of rights,

liberties and public order or public interest, or the aversion or provision of remedy for damages arising from urgent and severe public calamity". Section 11 gives power to the Prime Minister, upon the approval of the Council of Ministers, to declare a serious state of emergency, where a situation involves "use of force, harm to life, body or property, or there are reasonable grounds to believe that there exist acts of violence which affect the security of the State, the safety of life or property of the State or person (…)".

284. Article 4 of the International Covenant on Civil and Political Rights (ICCPR), to which Thailand is a party, states that derogations from the Covenant are permissible only in times of public emergency which threaten the life of a nation. It is my opinion that the definitions contained in the Decree are overly broad and vague, and may therefore allow for the declaration of a state of emergency in cases which do not amount to a threat to the life of the nation, and which should therefore be dealt with under the ordinary legal framework, without derogating from the ICCPR. The Human Rights Committee has noted the exceptional and temporary nature of the measures derogating from the Covenant which must be limited to the extent strictly required by the exigencies of the situation (Human Rights Committee, general comment 29, para. 2-4), and has highlighted the importance of ensuring that courts monitor compliance with article 4 of the Covenant (CCPR/C/79/Add.76, para. 38 and CCPR/C/79/Add.56, para. 13). The Special Rapporteur recommended that the Decree be amended to narrow the scope of application of a "state of emergency" and a "serious state of emergency" to encompass only those situations which are covered by Article 4 of the ICCPR. In addition, the decree should provide for parliamentary control over the initiation and termination of a state of emergency, the enumeration of rights that may be derogated from and the safeguards that should accompany those derogations to ensure that the principles of proportionality and necessity are respected, as well as for judicial control to review the compliance of a declaration of a state of emergency, and any measures taken pursuant to it, with Article 4 of the ICCPR.

285. The second area of concern was the overly broad and vague definitions contained in the emergency decree, in particular those defining the powers granted to those allowed to take measures under the Decree. By way of example, Section 7 refers to "competent officials" to perform a range of duties under the Act, without defining them and Section 11 defines the additional powers granted under the Act in cases of "serious states of emergency" in a way which appears to provide unlimited powers to the Prime Minister, including to "issue a notification not to perform any act or to perform an act to the extent that this is necessary for maintaining the security of the State, the safety of the country or the safety of the people".

286. The principle of legality in criminal law, enshrined in article 15 of the ICCPR and made non-derogable in times of public emergency, 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. In my opinion, the above-mentioned provisions are overly broad and vague and at variance with Article 15 of the ICCPR, to which Thailand is a party. In addition, the Human rights Committee was concerned, in relation to the Decree, that it does not explicitly specify, or place sufficient limits, on the derogations from the rights protected by the Covenant that may be made in emergencies and does not guarantee full implementation of article 4 of the Covenant (CCPR/CO/84/THA, para. 13).

287. The third series of concerns related to the issue of arrest and detention. Section 11(1) states that a "competent official" may have the "power of arrest and detention of a person suspected of having a role in causing the emergency situation, or being an instigator, making the propagation, a supporter of such act or concealing relevant information relating to the act which caused the state of emergency, provided that this should be done to the extent that is necessary to prevent such a person from committing an act or participating in the commission of any act which may cause a serious situation (…)". In addition, while Section 12 provides that "in arresting and detaining suspected persons under Section 11(1), the competent official shall apply for leave of the court", it is unclear whether the individual must be physically brought before the Court and what elements the judicial authority has at its disposal to review the legality of the detention. This provision allows for detention for seven days, with possible extensions up to a maximum of 30 days. Finally, this section notes that the suspected persons shall be detained in a designated place which is not a police station, detention centre, penal institution or prison.

288. According to article 9 (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 (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 (4) of the ICCPR. The Human Rights Committee confirmed in its General Comment 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. The Commission on Human Rights, in its Resolution 2005/39 of 19 April 2005 (Torture and other cruel, inhuman or degrading treatment or punishment) reminded all States that: "9. (…) prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and the dignity of the person". This statement highlights the importance of procedural safeguards, such as access to counsel, effective judicial review of any form of detention, and personal appearance before a judge, for the protection of the rights enshrined in articles 7 and 10 of the ICCPR. Finally, the Human Rights Committee noted, in relation to the length of detention under the Decree that detention without external safeguards beyond 48 hours should be prohibited (CCPR/CO/84/THA, para. 13).

289. The Special Rapporteur was concerned that the grounds for arrest and detention, which may lead to the preventive arrest and detention of individuals who have a very remote link to the security situation, the absence of limitation regarding who the "competent official" might be, the length of detention under the emergency decree and the use of unofficial places of detention are at variance with Article 9 of the ICCPR. In particular, the Special Rapporteur has received information regarding continued enforced disappearances in the south, which is a very serious concern.

290. The Special Rapporteur therefore urged the Government to review these provisions and to set up adequate standards against possible serious human rights abuses, including against arbitrary arrest or detention, such as the right to be brought promptly before a judge and the entitlement to trial within a reasonable amount of time or release as well as the right to challenge

without delay the lawfulness of one's detention before a court. In addition, the Special Rapporteur recommended that the period of detention in the law be brought in line with the recommendation of the Human Rights Committee and that detentions take place solely in recognized places of detention.

291. The fourth concern relates to the immunity from prosecution granted by section 17 of the Decree, which states that "a competent official and a person having identical powers and duties as a competent official under this Decree shall not be subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act, provided that such act is performed in good faith, is non-discriminatory and is not unreasonable in the circumstances exceeding the extent of necessity, but does not preclude the right of a victim to seek compensation from a government agency under the law on liability for wrongful acts of officials".

292. While the Special Rapporteur welcomed the inclusion of the right for a victim to seek compensation, he is concerned that this provision provides blanket immunity from criminal, civil and administrative prosecution for authorities exercising powers under the emergency decree. The Human Rights Committee was also especially concerned that the Decree provides that officials enforcing the state of emergency to be exempt from legal and disciplinary actions, thus exacerbating the problem of impunity (CCPR/CO/84/THA, para. 13). The Special Rapporteur received information according to which this clause has effectively reinforced an existing status quo in which officials are not prosecuted for human rights violations.

293. The Special Rapporteur recalled that in General Comment 31, the Human Rights Committee noted that Article 2, paragraph 3, required that States Parties must ensure that individuals also have accessible and effective remedies to vindicate rights arising out of the covenant (CCPR/C/21/Rev.1/Add.13, para. 15) and that States Parties must ensure that those responsible are brought to justice. Failure to do so could in and of itself give rise to a separate breach of the Covenant, especially regarding violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killing and enforced disappearance as the problem of impunity for these violations, may well be an important contributing element in the recurrence of the violations (ibid, para. 18). The Special Rapporteur urged the Government to repeal this provision.

294. The fifth concern relates to Section 9 of the Decree, which allows the Prime Minister to issue regulations to "prohibit any person from leaving a dwelling place during the prescribed period (…)", "prohibit the assembly or gathering of persons at any place or any conduct which may incite or lead to unrest, "prohibit the publication, distribution or dissemination of letters, print materials or any means of communication containing texts which may instigate fear amongst the people or is intended to distort information (…)".

295. The Human Rights Committee noted its concern at the impact of the Decree on Government Administration in States of Emergency which imposes serious restrictions on media freedom (CCPR/CO/84/THA, para. 18). Due to their extensive scope of application, the Special Rapporteur is concerned that these provisions carry with them significant restrictions on fundamental freedoms, in particular the right to freedom of expression, association, assembly

and movement, and recommend that the Government amend them to limit their scope, and ensure parliamentary and judicial review, to ensure that the principles of necessity and proportionality are respected.

296. On 11 November 2008 the Special Rapporteur requested an official visit to Thailand.

B. Communication from the Government

297. On 15 February 2008, the Government replied to the Special Rapporteur's correspondence of 13 November 2007 and advised that during the months of November and December 2007, the said ISA draft had gone through various revisions and changes by NLA Committee members, taking into account the concerns expressed by various stakeholders, the civil society and international organizations. On 20 December 2007, the then NLA approved the Internal Security Act with 105 votes in favour, eight against and two abstentions. The general objectives of the said Act are to prevent threats to internal security, issue early warnings to the public about potential security threats and provide remedies to the affected population. According to the said Act, the Internal Security Operation Command (ISOC) will be under civilian command and the ISOC Committee will be chaired by the Prime Minister. With regard to some of your specific concerns in the initial draft of the said Act, many issues have been overtaken by subsequent developments and have already been addressed by the NLA Committee members such as the deletion of Article 22.

298. The Government provided some general information on Thailand's Internal Security Act. Thailand remains fully committed to the promotion and protection of human rights and fundamental freedoms of her people. Nevertheless, in coping with the increasing challenges of unconventional threats to security in the present era, the Royal Thai Government, like many other governments from both developing and developed nations, has worked hard to maintain a delicate balance between guaranteeing internal security for its citizens and upholding human rights principles. Thailand's Internal Security Act is aimed at addressing such new non-traditional threats that are complex and require a proper authority to solve security problems in an effective and efficient manner. In brief, the said Act has been created to prevent threats to internal security, issue early warnings to the public about potential security threats and provide remedies to the affected population. On 20 December 2007, the then National Legislative Assembly (NLA) of Thailand (before the general election on 23 December 2007) approved the Internal Security Act with 105 votes in favour, eight against and two abstentions. The said legislation had previously been revised by NLA Committee members from its initial draft, taking into serious consideration the concerns expressed by the civil society and various international organizations. The Government also made specific references to some provisions of the Internal Security Act.

299. The Structure of the Internal Security Operation Command (ISOC): Article 5 of the said Act inscribes the Prime Minister, as Head of Government, to hold the position of ISOC Director. Under Article 9, the ISOC Committee is chaired by the Prime Minister or the assigned Deputy Prime Minister and includes, among others, the Permanent Secretary of the Ministry of Foreign Affairs of Thailand. Therefore, ISOC would be under civilian command.

300. The participation and involvement of people from various sectors in ISOC: Under Article 9 (3/1), an advisory group of ISOC will be set up taking into account the participation

and involvement of people from a wide range of sectors comprising, at least, eminent persons or experts having experience in political science, public administration, law, science and technology, rights and freedom protection, problem solving through peaceful means, national security maintenance and media. The advisory group is required to recommend approaches to problem solution or threat prevention as well as provide needed advice asked by the ISOC Committee.

301. Controlling and Monitoring the Use of Power by ISOC: The Internal Security Act contains articles that instruct the Cabinet and the National Parliament to closely control and monitor the use of power by ISOC. For instance, Article 14 stipulates that any use of power by the ISOC to prevent, suppress, suspend, prohibit and solve or mitigate situations affecting internal security has to seek a Cabinet approval before implementation. In addition, the Cabinet needs to set a specific area and time period in which the ISOC can use such assigned power and announce this information to the public. Once the situation has ceased or is capable of being solved by the power and duties of normal responsible authorities, the Prime Minister must announce publicly that the assigned use of power by ISOC is no longer enforced. The Prime Minister must then report the result to both Houses of Representatives and the Senate at the earliest opportunity. Article 17, specifies that the issuance of any regulations, such as prohibitions to enter or leave any area, to carry any weapon out of residence, to use any road, or to implement or not implement any instrument or electronic equipment in order to prevent any danger to life and people's property, should not create any inappropriate difficulties for citizens. Moreover, such prohibitions should receive Cabinet approval.

302. Remedies for any damage: Article 19 prescribes that if the utilization of the ISOC's power causes any damages to innocent citizens, the ISOC should arrange to provide appropriate remedies or compensation to the affected people according to the criteria and conditions set up by the Cabinet.

303. Judicial issues: The Internal Security Act also allows for the usage of reconciliatory justice or rehabilitation measures. For example, Article 19 indicates that if there is a case of any convicted person who turns himself/herself to any official in charge or if any investigating officer finds that such convicted person has committed an offense from wrong judgment and if an attorney files this case to the Court, the Court may issue an order for the said convicted person to be sent to the ISOC Director to receive training in a specified place for no more than 6 months and follow any other required conditions of the Court instead of serving his/her sentence. However, such a procedure has to be accepted by the said convicted person. Article 21 (2) provides that the prosecution of any case as a result of regulations, announcements, instructions or use of power by an officer in charge is subject to the judicial power of the Court of Justice. The said Internal Security Act has already deleted Article 22 which is related to the issue of "impunity".

Turkey

A. Communication sent to the Government

304. On 27 November 2007, the Special Rapporteur sent a communication to the Government of Turkey regarding a case against the **Democratic Society Party**, opened by the state prosecutor. The prosecutor has reportedly instituted proceedings to close down this political

party and to expel its eight parliamentarians to lose their Member of Parliament status. The case is going to be decided by the Constitutional Court. According to the information received, the grounds for closing down the party are related to allegations that it would be taking "instructions" from the imprisoned leader of the Kurdistan Workers Party (PKK) A. Öcalan and that its expressed political positions would represent allegiance with a terrorist organization (PKK) and its leader A. Öcalan.

305. While being conscious of the fact that States' obligation to protect and promote human rights requires them to take effective measures to combat terrorism, the Special Rapporteur underlined that General Assembly resolution 59/191, in its paragraph 1, stresses that: "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law", as do Security Council resolutions 1456 (2003) and 1624 (2005) in paragraphs 6 and 4 respectively. Article 22 of the International Covenant on Civil and Political Rights, which provides for the right to freedom of association with others, is part of these obligations. Article 22 allows for no restrictions "other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others". Furthermore, the Special Rapporteur referred the Government to the right to participate in the conduct of public affairs, enshrined in article 25 of the International Covenant on Civil and Political Rights, which emphasizes that every citizen shall have this right without unreasonable restrictions.

306. In this connection, the Special Rapporteur drew the attention of the Government to paragraphs 26 to 33 of his report on the visit to Turkey (A/HRC/4/26/Add.2) as well as paragraphs 9 to 28 of my report to the General Assembly in 2006 (A/61/267).

307. The Special Rapporteur underlined the importance of the rights enshrined in articles 22 and 25 of the International Covenant on Civil and Political Rights in a democratic society and the need to define terrorism through the choice of inexcusable tactics of violence against innocent bystanders. In the Special Rapporteur's view, sharing common political goals with a terrorist organization does not transform a political party to a terrorist organization. Quite on the contrary, the choice of peaceful and political methods to further its freely chosen aims demonstrates that a political party is not a terrorist organization.

308. What is the status of the proceedings against the Democratic Society Party? Does the Government have a position in respect of the prosecutor's case and will the Government express that position in public and to the Constitutional Court? In light of the importance of Article 25 of the International Covenant on Civil and Political Rights and its pivotal role in a democratic society, please indicate whether the case against the Democratic Society Party gives rise to the Government initiating amendments to the legislation.

309. On 3 December 2008, the Special Rapporteur sent a communication to the Government of Turkey regarding information received on 13 November 2008 that **six children** will face trial in the Diyarbakir Criminal Court on charges of propaganda for a terrorist organization and of terrorist crimes committed through the throwing of stones and Molotov cocktails on the police during a demonstration. The Prosecutor of the court has asked for a prison penalty of 23 years for the accused, who are reported to be 13-14 years old.

310. In connection with the information referred to above, the Special Rapporteur takes the view that each criminal justice system should adequately take into account the special needs and protections required when dealing with minor offenders, including those suspected of terrorism. This is so in order to avoid the risk of negatively influencing children's reintegration in society, or even being counter-productive to the effect of pushing young persons into the ranks of terrorist organizations. He recalls relevant articles of the International Covenant on Civil and Political rights (ICCPR) and UN Convention on the Rights of the Child (CRC), both of which Turkey is a party to.

B. Reply from the Government

311. On 28 December 2007, the Government of Turkey sent a reply to the Special Rapporteur's correspondence advising that the Chief Prosecutor of the Court of Cassation has indeed filed an indictment against DTP [Democratic Society Party "Demokratik Toplum Partisi", DTP], which has been submitted to the Constitutional Court. The case is underway. Therefore, in accordance with the universal principle of the independence of the judiciary, it would not be possible to express an opinion with respect to an ongoing case as such.

United Kingdom of Great Britain and Northern Ireland

A. Communication sent to the Government

312. On 11 March 2008, the Special Rapporteur sent a communication to the Government regarding **Counter-Terrorism Bill 2007-08** (henceforth the Bill) which was recently introduced before the House of Commons. In this connection, the Special Rapporteur would like to draw the Government's attention to the following main area of continuing concern.

313. According to Schedule 1 of the Bill, which amends section 41 of the Terrorism Act 2000, powers are conferred upon the Secretary of State to temporarily authorize 42 days of pre-charge detention ('reserve power'). This authorization requires first a joint advice from the director of public prosecution and the chief police officer of England and Wales, Scotland or Northern Ireland that an extension beyond 28 days be necessary in a particular terrorism investigation. Schedule 1 also provides that the Secretary of State is required to lay before Parliament a statement on the authorization of an extended pre-charge detention, which requires approval by both Houses within 30 days.

314. As the Government will recall, in the Special Rapporteur's letter of 21 June 2006 (see A/HRC/4/26/Add.1, para. 63), he expressed concern at the extension of the length of detention without charge for up to 28 days for terrorist suspects. His main pre-occupation in this respect was that such period is too long unless there is regular judicial review of all aspects of the detention, including the reasons for it and any arguments the detainee may wish to present to contest them. In addition, the Special Rapporteur asked the Government to ensure that there is a possibility for judicial review of the necessity of the detention more often than once per week.

315. While the Special Rapporteur noted the assurances of the Government, as contained in the letter of 27 July 2006, that the right of habeas corpus remains unaffected by the extension of pre-charge detention, he remains concerned about the limited scope of judicial review during ongoing pre-charge detention.

316. According to section 41 (3) of the Terrorism Act 2000, after 48 hours, a judicial warrant is required to keep a suspected terrorist in detention without charge. The Special Rapporteur noted from your letter of 27 July 2006 that applications for warrants to extend extension beyond 48 hours may be made for periods of seven days at a time and up to a maximum period of 28 days from the time of the arrest. Furthermore, the Government informed the Special Rapporteur that a judicial authority can only issue a warrant if satisfied that there are reasonable grounds to believe that the further extension is necessary to obtain relevant evidence whether by questioning or otherwise or to preserve relevant evidence, and that the investigation in connection with which the person is detained is being conducted diligently and expeditiously (Schedule 8, paragraph 32 of the Terrorism Act 2000).

317. According to the proposed provisions of the Bill, warrants authorizing a detention beyond the 14-day period to up to 42 days can only be made by a senior judge. According to paragraph 43 (1) of the Bill in conjunction with Schedule 8, paragraphs 31 and 33, of the Terrorism Act 2000, suspects have the right to be notified of the application of a warrant of extended detention and the right to make presentations to the judge. There is, however, the possibility for the judge to exclude the detainee or his representative from any part of the hearing. No reasons for such exclusion are contained in the provisions.

318. An effective judicial review during the on-going detention would not only require the court to examine the compliance with the requirements, as set out in Schedule 8, paragraph 32 of the Terrorism Act 2000. Most importantly, the reasonableness of the suspicion grounding the detention and the legitimacy of the purpose pursued by continued detention need to be examined. In the Special Rapporteur's view, the applicable judicial safeguards, as contained in Schedule 8 of the Terrorism Act 2000, do not satisfy these criteria. Therefore, and taking into account the limited scope of separate habeas corpus review, the Special Rapporteur is concerned that an individual, detained as terrorist suspect under these provisions, will lack an actual possibility of release by judicial decision.

319. Furthermore, in the Special Rapporteur's opinion, the fact that the suspect has not been informed of his/her charges, and as a consequence may not be well aware of the evidence against him/her, may in practice prevent the suspect from contesting in a well-founded manner the lawfulness of his/her continued detention, the more if absent during the hearing. In this context, the Special Rapporteur would like to refer to article 9 paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR), which prescribes that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". The Special Rapporteur sees this principle as a pre-requisite to the full enjoyment of the right under article 9 paragraph 4 of the ICCPR, according to which any person subject to arrest or detention has the right to challenge without delay the lawfulness of one's detention before a court. The Human Rights Committee confirmed in its General Comment 29 of 2001 that the right to court review over the lawfulness of any form of detention is protected at all times, including during a state of emergency.

320. As a consequence, the Special Rapporteur is of the view that the scope of judicial review, as contained in Schedule 8 of the Terrorism Act 2000, needs to be broadened so as to secure the right to contest the substantive grounds of detention and a real possibility of release. Furthermore, the Special Rapporteur remains of the opinion that judicial review of the necessity of the detention should be conducted more often than once per week.

321. It is with great regret that the Special Rapporteur had to observe that the proposed provision on the temporary extension of pre-charge detention to 42 days, if approved and implemented, may amount to a *de facto* state of emergency power, without, however, requiring that the situation is "threatening of the life of the nation", as prescribed in article 4 paragraph 1 of the ICCPR.

322. Furthermore, it is the Special Rapporteur's view that the inclusion of provisions on a mechanism of parliamentary oversight, i.e. authorization by the legislature of extended pre-charge detention, may end up undermining the potentials of an effective judicial review in individual cases. Safeguards against the deprivation of liberty, and particularly against arbitrary arrest and detention, have explicitly been conferred upon the judicial branch in order to prevent any political influence to be exerted. It remains also questionable whether the legislative branch is well equipped to consider individual cases, in particular in light of the fact that this procedure may prejudice any criminal proceedings that might result from the investigation. Furthermore, by the time both Houses express views on whether the extended detention will be authorized, the maximum period of 42 days may have already expired.

323. Finally, the Special Rapporteur fears that the proposed provision of an extended 42 days of pre-charge detention, if adopted and implemented, will prompt other Member States to simply copy this period without, however, reflecting on the importance of effective judicial review. In the Special Rapporteur's view, the United Kingdom of Great Britain and Northern Ireland, with its long-standing history of effective protection of human rights, should not been seen as a country encouraging other Member States to lower the respective key standards. The Special Rapporteur therefore urged for further debate in relation to the aspects mentioned above in order to assure full compliance with international human rights standards.

324. On 9 June 2008, the Special Rapporteur sent a communication to the Government of the United Kingdom of Great Britain and Northern Ireland referring to the Special Rapporteur's earlier correspondence and consultations with the Government, and in particular his letter of 11 March 2008 and the response of 24 April 2008. The Special Rapporteur appreciated the response by the Government and was grateful for its cooperation and invitation for further consultations and expressed his willingness to engage in such consultations. The Special Rapporteur nevertheless expressed his position in a matter that requires immediate attention. The Special Rapporteur understands that the House of Commons is scheduled to vote on the **Counter-Terrorism Bill 2007-08** (hereafter the Bill) on the 11 June 2008. While the Special Rapporteur welcomed the consideration of amendments of 3 June 2008, he appealed to the Government to withdraw the Bill or to postpone a definitive decision on it.

325. There were two reasons for this request. Firstly, despite the ongoing dialogue the Special Rapporteur believes that in order to secure compliance with international human rights standards the scope of judicial review, as contained in Schedule 8 of the Terrorism Act 2000, needs to be broadened so as to secure the right to contest the substantive grounds of detention and a real possibility of release. In this regard, the Special Rapporteur referred to the International Covenant on Civil and Political Rights, Article 9, paragraph 4.

326. Secondly, the Special Rapporteur's interaction with other governments and civil society actors in various parts of the world gives rise to a strong concern that the proposed power in the extension of pre-charge detention to 42 days, if adopted and implemented will prompt other

states to simply copy either the provision or the detail of 42 days into their own counter-terrorism laws without reflecting on the importance of effective judicial review. In the Special Rapporteur's view, the United Kingdom of Great Britain and Northern Ireland, with its long-standing history of effective protection of human rights, should not take any measures that would in fact encourage other states to lower the respective key standards regarding detention and judicial review over it in the context of countering terrorism.

B. Reply from the Government

327. On 24 April 2008 the Government replied to the Special Rapporteur's correspondence of 11 March 2008, as follows:

328. The current pre-charge detention legislation: As you know, the existing UK legislation that governs the detention of terrorist suspects is contained in Schedule 8 to the Terrorism Act 2000. Anyone arrested under section 41 of the Terrorism Act 2000 can be detained by the police for 48 hours after which an application for a warrant of further detention needs to be made to a designated district judge. The legislation therefore provides that the detention of any person beyond 48 hours must be approved by a judge and that any period of further detention is limited to a maximum of 7 days at a time. The permanent maximum limit of pre-charge detention is 14 days with the 28-day limit needing to be agreed annually by Parliament. The Crown Prosecution Service (CPS) is responsible for making all applications for extensions between 14 and 28 days. The CPS will only make an application for continued detention if considers that it is necessary and appropriate to do so. Extension hearings are closed to the public and media but are attended by the judge, police, the CPS and (subject to the judge's right to exclude them from any part of the hearing) detained person and their legal representative. For applications beyond 14 days, the application must be heard by a High Court judge. Applications for continued detention are usually strenuously contested and consideration can last many hours. The investigating officer may be questioned by the defence solicitor. The judge may issue a warrant of further detention only if he is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary to obtain or preserve relevant evidence and that the investigation is being conducted diligently and expeditiously. If the judge is not satisfied that further detention is necessary then the suspect would need to be released.

329. Extension of the pre-charge detention to a maximum of 42 days: The proposal in Schedule 1 to the Counter-Terrorism Bill would enable the pre-charge detention period to be increased beyond 28 days in future if there is a clear and exceptional need to do so. The higher limit could only remain in force for a strictly limited period of time of 60 days. We believe a reserve power to extend the pre-charge detention limit to 42 days in future is needed for 2 reasons. First, the need to intervene early in some terrorist investigations and second, the growing scale and complexity of terrorist investigations. In much police work, the investigation takes place after a crime has been committed. In such cases there will often be a victim, possible suspects, witnesses to the crime and forensic material from the crime scene. The police will investigate the crime and arrest the suspect when they already have a considerable amount of admissible evidence and only a few days may be needed to question the suspect before a decision is taken on whether to charge them for an offence. Terrorism cases are different. Because of the severe consequences of a terrorist attack, the police and Security Service need to

intervene before it takes place. Critically, they may need to intervene at a very early stage in an investigation - before they have had the opportunity to gather any admissible evidence and on the basis of limited intelligence about who and what is involved.

330. That is why UK legislation has since 2000 provided specific powers of arrest and detention in relation to terrorism. The second factor that needs to be taken into account, is the growing scale and complexity of terrorist investigations. Since 2000 it has become clear that the plots which the police are involved in investigating are growing in size (in terms of numbers of suspects involved, amount of material that needs to be analysed and the number of international connections involved) and complexity (in particular in relation to the use of computer technology). To illustrate how the nature and scale of terrorism has changed, it might be useful to provide some examples. In 2001 the police investigated the last major IRA case, in which they had to analyse the content of one computer and a handful of floppy disks. The suspects used their own names and their activities were confined to the Republic of Ireland and the UK. In 2004, the police and the Security Services had to investigate Dhiren Barot, the key conspirator in an Al-Qaeda operation in this country. This case lead to the seizure of some 270 computers, 2000 computer discs and a total of 8224 exhibits. There were seven co-conspirators and during the investigation police carried out enquiries in the USA, Malaysia, Philippines, Indonesia, France, Spain and Sweden. In another very recent case, 30 addresses were searched within two hours of the start of the arrest phase of the operation. 400 computers and 8000 computer discs were seized with over 25,000 exhibits in total. This trend towards larger and more complex operations has meant that the police have had to hold a small number of suspects for the full 28 days in recent cases. Although there has not yet been a case where more than 28 days has been needed, the trend suggests that this might not remain the position in future.

331. To address this future risk the Government is legislating to provide a reserve power which will enable a higher limit of 42 days to be made available in future where there is an exceptional need for it. If Parliament agrees to the proposal to legislate on a contingency basis, then the reserve power could only be brought into force in certain circumstances set out in statute. The Home Secretary could only make the higher limit available after receiving a joint report from the Director of Public Prosecutions and the police setting out their reasonable grounds for believing that more than 28 days will be required to obtain, preserve or examine relevant evidence and stating that the investigation is being carried out diligently and expeditiously. If the Home Secretary was satisfied that there was an exceptional operational requirement to make the higher limit available (and made an order making the power available) he/she would be required to make a written statement to Parliament within 2 days of making the order or as soon as practicable. The written statement would need to state that the Home Secretary considers that the need for the higher limit was urgent and that it was ECHR compliant. The Home Secretary's decision to make the higher limit available could be subject to judicial review. The Home Secretary would have no role in deciding on the detention of individual suspects which would continue to be approved by a judge and there would be the extra safeguard that the application for an extension beyond 28 days would require the approval of the DPP. A judge could approve the continued detention of a suspect only if he was satisfied that there were reasonable grounds for believing that further detention was necessary to obtain relevant evidence or to preserve relevant evidence, and that the investigation in connection with which the person was detained was being conducted diligently and expeditiously. If this test is not met, then the person would be released. The higher limit would cease to be available after a maximum of 60 days. In order to remain in force for the full 60 days, the Home Secretary's decision to make the higher limit

available would need to be debated and approved by both Houses of Parliament within 30 days of it coming into force. If either House of Parliament did not approve the Home Secretary's decision, the reserve power would cease to be available at midnight on the day of the debate. When the reserve power ceases to be available, all those detained under the power would need to be released immediately. The independent reviewer of terrorism legislation would report within 6 months of the reserve power ceasing to be available. A parliamentary debate would take place on this report which would cover whether individual suspects were held in accordance with requirements governing detention, whether proper procedures were followed for applications for detention beyond 28 days and on the Home Secretary's decision to make the higher limit available. The Government hopes that with the above explanation, that the Special Rapporteur will concur, that the mechanisms of oversight in place mean that the legislation would be fully compliant with the requirement in Article 9(3) of the ICCPR that such a person be "brought promptly before a judge or other officer authorised by law to exercise judicial power".

332. Reasonableness of suspicion: In relation to your point about the reasonableness of the suspicion grounding the detention and the legitimacy of the purpose for continued detention, paragraph 32 of Schedule 8 to the Terrorism Act 2000 sets out the grounds of which the judge must be satisfied before granting further detention. It states that a judicial authority may issue a warrant of further detention if there are reasonable grounds for believing that further detention is necessary to obtain relevant evidence or to preserve relevant evidence and that the investigation is being conducted diligently and expeditiously. If the judge is not satisfied that there are reasonable grounds for believing further detention is necessary, then he can refuse the application for extended detention.

333. Exclusion of a suspect: You ask under what circumstances a detainee or his representative may be excluded from a hearing of an extension application. There is a power under paragraph 33 of Schedule 8 to the 2000 Act for the judicial authority or judge hearing the application to exclude the detainee and his legal representative from any part of the hearing. This power is used to exclude those persons from any 'closed' part of the application, where the applicant is relying on information which they reasonably believe would be harmful in one of a specified number of ways if disclosed to the detainee (set out in paragraph 34 of Schedule 8). These include hindering the gathering of evidence of terrorism offences, making the apprehension or prosecution of a terrorist suspect more difficult or making the prevention of an act of terrorism more difficult. However, the detainee and his legal representative are allowed to participate in the open part of the proceedings where the information presented to the court in support of the case for extension does not present such issues.

334. Parliamentary Oversight: We accept that it is vital not to prejudice future prosecutions but it is also important that the higher limit is subject to parliamentary scrutiny. Therefore, in order for the higher limit to remain in force for the full 60 days, the Home Secretary's decision to make it available would need to be debated and approved by both Houses of Parliament within 30 days of it becoming available. However, it is not a matter for Parliament to discuss individual cases. In the Home Secretary's report to Parliament the legislation makes clear that the report must not give the name of the detained person or contain any material that might prejudice a prosecution. There would therefore be no political involvement in the act of the detention of terrorist suspects.

335. Informing suspects about charges: In response to your concern about the suspect not being informed about charges, it should be noted that the detained arrangements for the detention of terrorist suspects before charge are set out in statutory codes. These codes state that when a person is arrested, or further arrested, they should be informed at the time, or as soon after as practicable, that they are under arrest and the grounds for their arrest. It further states that a detained person should be provided with sufficient information to understand why they have been deprived of their liberty and the reason for their arrest. They should also be informed of the reason why arrest was necessary. However, in cases where arrest is based on sensitive information, it may not be possible to provide any more information than that an individual has been arrested on suspicion of being involved in the commission, preparation or instigation of an act of terrorism. The same codes governing the detention of suspects would apply to any person held under the reserve power.

336. State of emergency: We do not accept your suggestion that the proposed power amounts to a de facto state of emergency power without the requirement of proclaiming that there is a state of emergency in accordance with Article 4(1) of the ICCPR. The proposal allows for a temporary extension of the existing period of pre-charge detention by a further two weeks if there is an exceptional need. Your suggestion implies that our proposals derogate from our obligations under the Covenant. As explained above, we are confident that the safeguards in the proposal and in particular the requirement for judicial approval of detention at least every 7 days mean that the proposal is entirely compliant with our ICCPR (and ECHR) obligations. Finally, it should be noted that there has not been a case where the detention of a terrorist suspect being held under the existing maximum period of pre-charge detention has been found to be incompatible or unlawful. The UK believes that the extension of the period of pre-charge detention from 14 to 28 days in the Terrorism Act 2006, and the proposal in the Counter-Terrorism Bill enabling a temporary extension to the pre-charge detention limit in terrorist cases from the current 28 days to 42 days, are compatible with the requirements of the ICCPR. The Government is committed to ensuring that our existing and proposed counter-terrorism legislation is fully compliant with our obligations under international law and agreements and take care to ensure all states are aware of the great importance we place on complying with our international obligations.

337. On 28 October 2008, the Government sent a further letter to the Special Rapporteur, offering the following comments and responses:

338. Definition of terrorism: We believe that the current definition of terrorism that is contained in the Terrorism Act 2000 is both comprehensive and effective and there is no evidence that the broadness of the definition has caused problems in the way it has operated. As Lord Carlile of Berriew, the Independent Reviewer of Terrorism, said in his report on the definition of terrorism, which was published in March 2007, “the current definition in the Terrorism Act 2000 is consistent with international comparators and treaties, and is useful and broadly fit for purpose”. You will wish to be aware that we are seeking to make a minor amendment to the definition of terrorism in the Counter-Terrorism Bill. This will add the word “racial” to the list of motivations included in the existing definition. We already believe that racially motivated terrorism is covered (because it will also be either ideologically or politically motivated) and therefore this change is purely for clarification.

339. The current pre-charge detention legislation: As you may be aware, the existing UK legislation that governs the detention of terrorist suspects is contained in Schedule 8 to the Terrorism Act 2000. Anyone arrested under section 41 of the Terrorism Act 2000 can be detained by the police for 48 hours after which an application for a warrant of further detention needs to be made to a designated district judge. The legislation therefore provides that the detention of any person beyond 48 hours must be approved by a judge and that any period of further detention is limited to a maximum of 7 days at a time. The permanent maximum limit of pre-charge detention is 14 days with the 28-day limit needing to be agreed annually by Parliament. The Crown Prosecution Service (CPS) is responsible for making all applications for extensions between 14 and 28 days. The CPS will only make an application for continued detention if considers that it is necessary and appropriate to do so. Extension hearings are closed to the public and media but are attended by the judge, police, the CPS and (subject to the judge's right to exclude them from any part of the hearing) detained person and their legal representative. For applications beyond 14 days, the application must be heard by a High Court judge. Applications for continued detention are usually strenuously contested and consideration can last many hours. The investigating officer may be questioned by the defence solicitor. The judge may issue a warrant of further detention only if he is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary to obtain, preserve or analyse relevant evidence and that the investigation is being conducted diligently and expeditiously. If the judge is not satisfied as to either of these conditions then the suspect would need to be released.

340. Extension of the pre-charge detention to a maximum of 42 days: As you will be aware, the proposal to enable the pre-charge detention period to be increased to 42 days in future has now been removed from the Counter-Terrorism Bill. The maximum limit for pre-charge detention will therefore remain at 28 days (subject to this limit being agreed annually by Parliament).

341. Informing suspects about charges: In response to your concern about the suspect not being informed about charges, it should be noted that the detailed arrangements for the detention of terrorist suspects before charge are set out in statutory codes. These codes state that when a person is arrested, or further arrested, they should be informed at the time, or as soon alter as practicable, that they are under arrest and the grounds for their arrest. It further states that a detained person should be provided with sufficient information to understand why they have been deprived of their liberty and the reason for their arrest. They should also be informed of the reason why arrest was necessary. However, in cases where arrest is based on sensitive information, it mat' not be possible to provide any more information than that an individual has been arrested on suspicion of being involved in the commission, preparation or instigation of an act of terrorism. The same codes governing the detention of suspects would apply to any person held under the reserve power.

342. State of emergency: We do not accept your suggestion that any increase in the pre-charge detention limit beyond 28 days would have amounted to a de facto state of emergency power without the requirement of proclaiming that there is a state of emergency in accordance with Article 4(1) of the ICCPR. The proposal allowed for a temporary extension of the existing period of pre-charge detention by a further two weeks if there is an exceptional need. Your suggestion implies that our proposals would have derogated from our obligations under the Covenant.

We are confident that the safeguards that were included in the proposal and in particular the requirement for judicial approval of detention at least every 7 days meant that the proposal was entirely compliant with our ICCPR (and ECHR) obligations.

343. Right to privacy: We share the view that State activity that impacts on a person's privacy should be lawful and not arbitrary. It was in that light that the Government passed the Human Rights Act that enshrines into UK law the right to respect for private and family life; a right that may only be interfered with in accordance with the law and where it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others and where it is proportionate. This approach is entirely in accordance with Article 17 of the International Covenant on Civil and Political Rights. Furthermore, investigative techniques used by UK public authorities that might infringe upon a person's privacy are governed by the Regulation of Investigatory Powers Act 2000. This legislation specifies in detail the precise circumstances in which the interference with privacy may take place. What information the intelligence and security agencies may obtain or disclose - whether or not it has come about by an infringement of privacy - is regulated by the agency's governing legislation, that is, either the Security Service Act 1989 or Intelligence Services Act 1994. There is also the Data Protection Act that regulates the general collection, use, storage and disclosure of personal information. The taking of fingerprints and samples is generally governed by the Police and Criminal Evidence Act (and its Northern Ireland equivalent). The proposals in Part I of the Bill are set within this existing statutory framework. When considered from this viewpoint, one can see that there are strong safeguards in place to prevent any unlawful or arbitrary interference with the right to privacy.

344. Post-charge questioning: Post charge questioning of terrorist suspects is accompanied by a vide range of safeguards in primary legislation and compulsory codes of practice. The legislative safeguards include a requirement for authorisation of questioning by a police officer of at least the rank of superintendent (for the first 24 hour period) and subsequent authorisation by a Justice of the Peace up to a maximum of 5 days before a further application to a Justice of the Peace would need to be made. The Justice of the Peace could only authorise further questioning if they are satisfied that it is necessary in the interests of justice and that the police are conducting their investigation diligently and expeditiously. Post-charge questioning must also be video- recorded. The Parliamentary Assembly of the Council of Europe codes further protect the rights of the suspect; for example they include an entitlement to legal representation during all questioning. If the questioning of a suspect alter charge was deemed by a court during a subsequent trial to be oppressive then the court could refuse to admit any evidence obtained under provisions in sections 76 and 78 of the Police and Criminal Evidence Act 1984. Therefore we believe that the post charge questioning provisions are compatible with Article 14 of International Covenant on Civil and Political Rights.

345. Coroners' inquests: You will be aware that the provisions on coroners' inquests have now been removed from the Counter-Terrorism Bill so that they can be considered as part of future legislation dealing with more general reform of the coronial system.

C. Press statement by the Special Rapporteur

346. On 10 June 2008, the Special Rapporteur issued the following press statement expressing concern over the UK counter-terrorism Bill.

347. The Special Rapporteur is concerned that the adoption of the Counter-Terrorism Bill in the United Kingdom could set a negative precedent for upholding human rights in the context of countering terrorism. The House of Commons is scheduled to vote on the Bill on 11 June 2008 which, despite recent amendments, contains a key provision to extend pre-charge detention of terrorist suspects to 42 days. The United Kingdom has a long standing history of effective human rights protection, however I am concerned that this Counter-Terrorism Bill, if adopted, could prompt other states to copy the provision into their own counter-terrorism legislation, without reflecting on the importance of effective judicial review. The Bill lowers key standards regarding detention in the context of countering terrorism. In particular, the Special Rapporteur believes the scope of judicial review needs to be broadened so as to secure the right of the accused to contest the substantive grounds of detention, and a real possibility of release. I welcome the ongoing dialogue between the Government and my mandate regarding the potential impact of these measures on human rights, but I appeal to the Government to withdraw the Bill or to postpone taking a definitive decision on it.

D. Observations

348. 11 June 2008 the Bill passed the House of Commons. However, on 26 November 2008 provisions of the Bill that related to the extension of pre-charge detention were defeated in the House of Lords.

United States of America

A. Communication sent to the Government

349. On 25 February 2008, 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 communication regarding the situation of six non-US citizens currently detained at the military detention facility at Guantanamo Bay, Mr. **Khalid Sheikh Mohammad**, Mr. **Mohammad al-Qahtani**, Mr. **Ramzi bin al-Shibh**, Mr. **Ali Abd al-Aziz Ali (a.k.a. Ammar al-Baluchi)**, Mr. **Mustafa Ahmed al-Hawsawi**, and Mr. **Walid bin Attash (a.k.a. Khallad)**. The Special Rapporteurs were informed that, pursuant to the Military Commissions Act of 2006 (MCA), all six will shortly be brought before military commissions on charges of conspiracy, murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the law of war, terrorism and providing material support for terrorism.

350. It is long overdue for Guantanamo Bay detainees allegedly responsible for or involved in the 9/11 attacks in the United States to be finally charged and prosecuted. However, in the Special Rapporteurs' view, the commissions established under the MCA lack the legal competence and procedural guarantees to conduct fair trials in accordance with international legal standards. This case highlights a number of concerns that have already been raised in the USA mission report of the Special Rapporteur on human rights and counter terrorism

(A/HRC/6/17/Add.3) regarding the jurisdiction and composition of the military commissions, the use of evidence, the imposition of the death penalty for certain offences and shortcomings in securing a fair trial.

351. Firstly, there is a jurisdictional issue related to the MCA and the intention to try these six detainees before military commissions rather than courts. Among the charges that are awaiting the approval of the convening authority for the military commissions are the charges of terrorism, conspiracy and providing material support for terrorism that go beyond offences under the laws of war. This combined with the notion of "unlawful enemy combatant" may result in some of these detainees who are actually civilians being tried by military commissions. Another concern regarding the offences of terrorism, conspiracy, and providing material support for terrorism is that, to the extent they were not covered by the law applicable at the time of the commission of the actual acts and thus fall under the jurisdiction of US federal courts, the military commissions will be applying criminal law retroactively, in breach of article 15 of the International Covenant on Civil and Political Rights (ICCPR) and universally acknowledged general principles of law.

352. Secondly, the Special Rapporteurs are concerned that, owing to their composition, the military commissions may lack independence and impartiality or the appearance thereof. The convening authority selects individual commission members for each trial and thus the appearance of an impartial selection is undermined. There is also the possibility of chains of command existing between members of the same commission which is a matter of concern. The ability of the convening authority to determine what charges will be referred to the military commissions and to have the authority to intervene during the negotiation of potential plea agreements is a serious concern as it gives a role to the executive to interfere before and during the proceedings.

353. On the issue of the use of the evidence, the Special Rapporteurs are concerned about allegations that some, or even all, of the six detainees have been subjected to highly abusive interrogation techniques that may have amounted to torture, or to cruel, inhuman or degrading treatment, equally prohibited under the non-derogable guarantees provided by article 7 of the ICCPR and under article 15 of the Convention against Torture. The domestic law definition of torture for the purpose of the proceedings before the military commission is restricted, not catching all forms of coercion that amount to torture or cruel, inhuman or degrading treatment equally prohibited under the non-derogable terms of the above named articles.

354. On 5 February 2008 Central Intelligence Agency Director-General Michael Hayden advised Congress that Mr. Khalid Sheikh Mohammad had been subjected to "waterboarding". There is reportedly other evidence contained in interrogation logs that may confirm that some, or perhaps all, of the six detainees were subjected to abusive interrogation techniques, including stress positions and sleep deprivation. An even more worrying point is that the wording of the MCA allows testimony obtained through abusive interrogation techniques that were used prior to the Detainee Act of 2005 if such evidence is found to be "reliable" and its use "in the interests of justice". This is contrary to the clear and well established principle of international law that excludes the use of evidence obtained by torture or cruel, inhuman or degrading treatment for the purpose of trying and punishing a person.

355. The Special Rapporteurs are further concerned about the use of evidence based on classified information and by the admission of hearsay evidence in proceedings before military commissions, in the form of a written summary of the evidence, if the military judges consider it to be "reliable" and "probative". The admissibility of such evidence presents serious problems with regard to the right to fair trial since the accused is not secured the possibility of cross-examination of witnesses, as foreseen under article 14, paragraph 3 (e) of the ICCPR. If hearsay evidence was obtained through torture or coercion in respect of other persons and the interrogation techniques applied were themselves classified, the defendant would not know whether the evidence was obtained by such methods and therefore should be subject to a legal challenge.

356. Against this background the Special Rapporteurs wish to express our strong concern regarding the intention of the Government to request the death penalty regarding the six detainees on grounds of conspiracy and murder. The Special Rapporteurs consider that the proceedings governed by the MCA seriously undermine the right to a fair trial provided under article 14 of the ICCPR. Furthermore, the right to appeal is limited to matters of law. Thus, in the context of fair trial concerns this means that the imposition of the death penalty, in the event of a conviction or convictions by the military commission in this case, is likely to be in violation of Article 6 of the ICCPR.

357. The Special Rapporteurs would also like to draw the Government's attention to article 15 of the Convention against Torture which provides that, "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." Furthermore, in paragraph 4 of Resolution 2005/39, the Commission on Human Rights has urged States to ensure that statements which are established to have been made under torture are not admitted as evidence.

358. As the Government is well aware, when the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism had the opportunity to observe hearings under the MCA at Guantanamo Bay in early December 2007, his observation of the actual proceedings and the institutional setting of the commissions provided further support to the concerns identified above. Despite the good intentions of the military judge, the hearings demonstrated a number of obstacles including the difficulty to call witnesses by the defence contrary to fair trial principles.

359. As a result of the various concerns raised in this letter pertaining to the military commissions the Special Rapporteurs urge the Government to repeal the Military Commissions Act of 2006 owing to its incompatibility with numerous articles of the ICCPR and to dissolve the commissions. The Special Rapporteurs further request that the case concerning these six detainees and any future cases of terrorist suspects be referred to competent courts established by law in conformity with international legal standards.

360. On 1 July 2008, the Special Rapporteur, jointly with the Special Rapporteur on the independence of judges and lawyers, sent a communication to the Government concerning allegations related to **trials taking place in Afghanistan of detainees previously held in custody in the U.S. administered Bagram Theatre Internment Facility (BTIF),** as well as

detainees repatriated from Guantánamo Bay Naval Base facilities to Afghanistan. The Special Rapporteurs have also addressed a similar letter to the Government of Afghanistan.

361. According to the information received, some of the individuals formerly detained by the United States Government at Guantánamo Bay and Bagram have been, and continue to be, transferred to the Afghan National Detention Facility (ANDF) where they await prosecution.

362. This system of detention and transfer of detainees would seem to allow for prolonged detention in BTIF custody, and the prosecution and conviction of detainees without due consideration to legal requirements. Based on the information received, in the Special Rapporteurs' opinion, the system of detention and transfer of detainees fails to comply with fair trial international standards including the right to court review over any form of detention, the presumption of innocence, the right to defence and access to legal counsel and the right to be tried without undue delay as laid down in Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), which provides, inter alia, that "anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and should be promptly informed of any charges against him" and that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". According to the information received, many detainees, prior transfer to the ANDF were under United States custody without charge for several years. In addition, to date, trials of ANDF detainees lack many basic due process of law guarantees, including access to a lawyer while under investigation and adequate time and facilities for the preparation of the defence.

363. With respect to trials and the evidence before the prosecution, the information the Special Rapporteurs received suggests that the United States Government provides the Afghan prosecution that investigates national security cases, with supposedly general and declassified versions of the Detainee Assessment Branch Reports of Investigation (ROIs), which typically state the date of capture, the capturing force and the detainee's alleged actions. These ROIs then form the basis of the Afghan Government's prosecution charges. However, this is done without any examination of individual witnesses or statements in the court dossier—sworn or unsworn, often United States personnel or officials involved in the capture and/or interrogation of the detainee. To date an estimated number of 303 detainees have been transferred from United States custody to the Government of Afghanistan. The National Directorate for Security has investigated some 201 cases. The situation of the other 102 detainees is not clear regarding the grounds for their detention, and concerning some of them having been detained for several months.

364. Furthermore, it was brought to the Special Rapporteurs' attention that the default status for these detainees transferred to the ANDF is that of pre-trial detention until a judicial decision regarding their cases are taken. The Special Rapporteurs are concerned over the potential negative effects of the prolonged pre charge detention in Guantanamo Bay and BITF that may compromise the ability of the Government of Afghanistan to ensure a fair trial for these persons.

365. Moreover, the trials are conducted based on the in-court reading of investigative summaries prepared by United States and Afghan officials which do not respect the principle of equality of the parties before the court. The use of evidence in this way, and the fact that the convictions can be based on it, may violate international standards, including the prohibited use of evidence obtained under torture and other cruel, inhuman or degrading treatment or

punishment. The Afghan Constitution explicitly prohibits the introduction, as evidence, of statements obtained "by means of compulsion" and "recognizes a confession as voluntary only if taken before a judge." The Special Rapporteurs urged the Government to assure full compliance with the Afghan criminal procedure code and international fair trial standards included in the Universal Declaration of Human Rights (UDHR) and the ICCPR, including by requiring in-court witness testimony, and by allowing the defendant to challenge the evidence through cross-examination. The Special Rapporteurs called on the Government to ensure that trials are conducted in accordance with international fair trial standards, as laid down in the UDHR and ICCPR. The Special Rapporteurs expressed their concern regarding the above mentioned issues and referred to Articles 7, 25, 27(2), and 31 of the Afghan Constitution.

B. Reply from the Government

366. On 11 April 2008, the Government of the United States of America responded to a joint communication sent on 18 December 2006 by the Special Rapporteur and the Special Rapporteur on the question of torture, (see A/HRC/4/26/Add.1, para. 69), regarding the situation of Bensayah Belkacem, Hadj Boudellaa, Saber Lahmar, Mustafa Ait idir, Boumediene Lakhdar, and Mohamed Nechle, six Algerian nationals who are currently detained at Guantanamo Bay. The United States detained these individuals under the laws of war as enemy combatants in the ongoing armed conflict with al Qaida and the Taliban. Like all Guantanamo detainees, these individuals received a Combatant Status Review Tribunal (CSRT). The Tribunal determined that these Algerian nationals are enemy combatants and the detainees are entitled to challenge that determination in the U.S. federal courts. Each enemy combatant also receives an annual review to determine whether the United States needs to continue detention in order to manage the threat they pose. An Administrative Review Board (ARB) conducts this review, and to date, ARB's have determined all six detainees should remain in U.S. custody. In the annex to its 2005 report to the Committee Against Torture, the United States explained in extensive detail the process whereby individuals at Guantanamo Bay are captured, held, and released, as well as a description of conditions and treatment at the detention facility. The report reaffirms that U.S. officials from all government agencies are prohibited from engaging in torture, at all times, and in all places. All U.S. officials, wherever they may be, are also prohibited from engaging in cruel, inhuman or degrading treatment or punishment against any person in U.S. custody, as defined by our obligations under the Convention Against Torture. The above-referenced materials are available at http://www.state.gov/g/drl/rls/45738.

C. Press statement by the Special Rapporteur

367. On 22 December 2008, the Special Rapporteur, together with the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; jointly issued the following press statement:

368. The UN experts welcome the announcement by President-elect Barack Obama to close the Guantanamo Bay detention centre and to strengthen the fight against torture. Following his election in November, Mr. Obama declared that both these undertakings are part of his efforts "to regain America's moral stature in the world". The experts state that "The regime applied at Guantanamo Bay neither allowed the guilty to be condemned nor secured that the innocent be

released." It also opened the door for serious human rights violations. In addition to being illegal, detention there was ineffective in criminal procedure terms. Similar severe abuses also occur at places of secret detention. Thus, with the same emphasis, the experts urge that all secret detention places be closed and that persons detained therein be given due process. The experts further emphasize that "moving forward with closing Guantanamo is a strong symbol that will help to repair the image of the country after damage by what was widely perceived as attempts at legitimizing the practice of torture under certain circumstances. At the same time they urge that in closing the Guantanamo Bay detention center and secret facilities, the U.S. government fully respect its international human rights obligations, notably the principle of non-refoulement that prohibits removing persons to countries where they would be at risk of torture, and not to transfer individuals to third countries for continued detention at its behest (proxy detention). The experts also stressed that those detainees facing criminal charges must be provided fair trials before courts that afford all essential judicial guarantees. They emphatically reject any proposals that Guantanamo detainees could through new legislation be subjected to administrative detention, as this would only prolong their arbitrary detention. In this context, the experts call on third countries to facilitate the closure through their full cooperation in resettling those Guantanamo detainees that cannot be sent back to their countries of origin. The UN experts particularly welcome the recent announcement of Portugal to accept detainees and support its call to other States to follow. The experts strongly support the commitment expressed by President-elect Obama which, in addition to restoring the moral stature of the United States in the world, will allow a dark chapter in the country's history to be closed and to advance in the protection of human rights.

D. Observations

369. The Special Rapporteur takes note of the Executive Orders issued on 22 January 2009 regarding individuals detained at Guantanamo Bay, closure of the detention facilities and detention and interrogation policies.

Uzbekistan

A. Reply from the Government

370. On 9 January 2008, the Government sent a letter to the Office of the High Commissioner for Human Rights in Geneva, in response to a previous communication jointly sent on 21 October 2005 by the Special Rapporteur, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the question of torture (See E/CN.4/2006/98/Add.1, para. 26) regarding judgements pronounced by the Tashkent Regional Criminal Court on 13 August 2007.

371. Rasulzhon Raimdzhanovich Pirmatov was found guilty and sentenced, under article 97, paragraph 2 (a) and (f), of the Criminal Code of the Republic of Uzbekistan ("Aggravated premeditated killing of two or more persons in the course of mass public disorder") to 18 years' deprivation of liberty; under article 155, paragraph 3 (a) and (b), of the Code ("Terrorism resulting in the death of a person and having other grievous consequences") to 17 years; under article 159, paragraph 3 (b), of the Code ("Crime against the constitutional order of the Republic of Uzbekistan committed by an organized group") to 8 years; under article 161 of the

Code (“Sabotage”) to 15 years; under article 242, paragraph 2, of the Code (“Establishment, leadership or membership of an organized armed group”) to 14 years; under article 244 of the Code (“Organization of public disorder, accompanied by the use of force against persons, riotous behaviour and arson”) to 12 years; and, under article 247, paragraph 3 (a) and (c) (“Unlawful acquisition by force of firearms, ammunition or explosive substances by an organized group with intent to rob”) to 14 years’ deprivation of liberty. Pursuant to article 59 of the Code, which provides for the partial cumulation of sentences, he was finally sentenced to 20 years’ deprivation of freedom to be served in general-regime penal colonies.

372. Zhakhongir Yuldashevich Maksudov was found guilty and sentenced, under article 97, paragraph 2 (a) and (f), of the Criminal Code of the Republic of Uzbekistan (“Aggravated premeditated killing of two or more persons in the course of mass public disorder”) to 10 years’ deprivation of liberty, pursuant to article 57 of the Criminal Code, which provides for the mitigation of sentences; under article 155, paragraph 3 (a) and (b) of the Code (“Terrorism resulting in the death of a person and having other grievous consequences”), to 10 years, pursuant to article 57; under article 159, paragraph 3 (b) (“Crime against the constitutional order of the Republic of Uzbekistan committed by an organized group”), to 5 years; under article 161 (“Sabotage”), to 10 years; under article 242, paragraph 2 (“Establishment, leadership or membership of an organized armed group”), to 10 years; under article 244 (“Organization of public disorder, accompanied by the use of force against persons, riotous behaviour and arson”), to 10 years; and under article 247, paragraph 3 (a) and (c) (“Unlawful acquisition by force of firearms, ammunition or explosive substances by an organized group with intent to rob”), to 10 years. Pursuant to article 59 of the Criminal Code, which provides for the partial cumulation of sentences, he was finally sentenced to 11 years’ deprivation of liberty to be served in general-regime penal colonies.

373. Odilzhon Mashrabzhanovich Rakhimov was found guilty and sentenced under article 97, paragraph 2 (a) and (f), of the Criminal Code of the Republic of Uzbekistan (“Aggravated premeditated killing of two or more persons in the course of mass public disorder”) to 11 years’ deprivation of liberty, pursuant to article 57 of the Code, which provides for the mitigation of sentences; under article 155, paragraph 3 (a) and (b) of the Code (“Terrorism resulting in the death of a person and having other grievous consequences”), to 12 years, pursuant to article 57 of the Code; under article 159, paragraph 3 (b), of the Code (“Crime against the constitutional order of the Republic of Uzbekistan committed by an organized group”) to 6 years; under article 161 of the Code (“Sabotage”) to 11 years; under article 242, paragraph 2, of the Code (“Establishment, leadership or membership of an organized armed group”) to 10 years; under article 244 of the Code (“Organization of public disorder, accompanied by the use of force against persons, riotous behaviour and arson”) to 10 years; and, under article 247, paragraph 3 (a) and (c) of the Code (“Unlawful acquisition by force of firearms, ammunition or explosive substances by an organized group with intent to rob”), to 10 years’ deprivation of liberty. Pursuant to article 59 of the Code, which provides for the partial cumulation of sentences, he was finally sentenced to 13 years’ deprivation of liberty to be served in general-regime penal colonies.

374. Faezbek Komilzhanovich Tadzhikhalilov was found guilty and sentenced, under article 97, paragraph 2 (a) and (f), of the Criminal Code of the Republic of Uzbekistan (“Aggravated premeditated killing of two or more persons in the course of mass public disorder”), to 2 years’ punitive work, pursuant to article 57 of the Code, which provides for the mitigation of sentences,

with 20 per cent deduction of earnings to be paid to the State; under article 155, paragraph 3 (a) and (b) of the Code ("Terrorism resulting in the death of a person and having other grievous consequences"), to 2 years' punitive work, pursuant to article 57 of the Code, with 20 per cent deduction of earnings to be paid to the State; under article 159, paragraph 3 (b) of the Code ("Crime against the constitutional order of the Republic of Uzbekistan committed by an organized group"), to 2 years' punitive work, pursuant to article 57 of the Code, with 20 per cent deduction of earnings to be paid to the State; under article 161 of the Code ("Sabotage"), to 2 years' punitive work, pursuant to article 57 of the Code, with 20 per cent deduction of earnings to be paid to the State; under article 242, paragraph 2, of the Code ("Establishment, leadership or membership of an organized armed group"), to 2 years' punitive work, pursuant to article 57 of the Code, with deduction of 20 per cent of earnings to be paid to the State; under article 244 of the Code ("Organization of public disorder, accompanied by the use of force against persons, riotous behaviour and arson"), to 2 years' punitive work, pursuant to article 57 of the Code, with 20 per cent deduction of earnings to be paid to the State; and, under article 247, paragraph 3 (a) and (c), of the Code ("Unlawful acquisition by force of firearms, ammunition or explosive substances by an organized group with intent to rob"), to 2 years' punitive work, pursuant to article 57 of the Code, with 20 per cent deduction of earnings to be paid to the State. Pursuant to article 59 of the Code, which provides for the partial cumulation of sentences, he was finally sentenced to 3 years' punitive work, with 30 per cent deduction of earnings to be paid to the State. In accordance with article 61 of the Criminal Code, the sentence was deemed to have been served, the preventive measure was rescinded and Tadzhikhalilov was released from custody in the courtroom.

375. During the course of the trial, the prisoners under sentence openly acknowledged their guilt, gave detailed evidence on the substance of the charges and replied to the questions put by the prosecutor, defence lawyers, victims and civil claimants. No appeal was made or objection lodged against the sentences, which have entered into legal force and are currently being served.

376. Ekub Tashbaev was found guilty by the Andijan Regional Criminal Court on 27 November 2006 under article 222, paragraph 2 (c) of the Criminal Code ("Escape from places of confinement by a group of individuals") and sentenced to 6 years' deprivation of liberty. This sentence was set aside by the Court on 25 October 2007 and, in accordance with article 60 of the Criminal Code relating to sentencing for multiple offences, he was finally sentenced to 17 years' deprivation of liberty. During the course of the trial proceedings, the convicted man, Ekub Tashbaev, partially admitted his guilt, gave evidence on the substance of the charges, replied to all the questions by the prosecutor and the defence and lodged no complaint against the court's decision. The sentence has entered into legal force and is currently being served.
