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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**

### **Ten areas of best practices in countering terrorism**

#### *Summary*

The present document is the sixth and last annual report submitted to the Human Rights Council and its predecessor, the Commission on Human Rights, by the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

In chapter II of the report, the Special Rapporteur lists his key activities from 1 August to 10 December 2010. In the main report, contained in chapter III, he presents a compilation of best practice in countering terrorism. The compilation is the outcome of an analysis undertaken by the Special Rapporteur on the basis of his work conducted over almost six years and involving various forms of interaction with multiple stakeholders. In particular, he has taken into account the written submissions received from Governments by 30 November 2010. The full submissions are reproduced in an addendum (A/HRC/16/51/Add.4).

The outcome of the process is the identification of 10 areas of best practice. A best practice is distilled from existing and emerging practices in a broad range of States throughout the world. The compilation also draws upon international treaties, resolutions adopted by international organizations and the jurisprudence of international and regional courts.

The substance of the selected 10 areas of best practice is explained in the commentary, presented separately for each practice.

The concept of “best practice” refers to legal and institutional frameworks that serve to promote and protect human rights, fundamental freedoms and the rule of law in all aspects of counter-terrorism. Best practice refers not only to what is required by

international law, including human rights law, but also includes principles beyond these legally binding obligations. The identification of a best practice is based on three criteria: (a) a credible claim that the practice is an existing or emerging practice, and/or one that is required by, or has been recommended by or within, international organizations, international treaties or the jurisprudence of international, regional or domestic courts; (b) the practice relates to and promotes the effective combating of terrorism; and (c) the practice complies with human rights and/or promotes the enjoyment of human rights and fundamental freedoms.

The aim of the compilation is to identify concrete legal issues and, based on existing and advocated approaches, including recognition of their positive and negative aspects, from this propose 10 concrete models for wider adoption and implementation by Member States.

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## I. Introduction

1. The present report is submitted to the Human Rights Council pursuant to Council resolution 15/15. In the report, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism lists his activities from 1 August to 10 December 2010 and focuses thematically on 10 areas of best practice in countering terrorism.

2. With regard to upcoming country missions, the Special Rapporteur awaits dates or invitations for visits to Algeria, Chile, Malaysia, Pakistan, the Philippines, the Russian Federation and Thailand, and for a follow-up visit to Egypt. The Special Rapporteur has sent visit requests also to Burkina Faso and Nigeria, both partnering countries for the Integrated Assistance for Countering Terrorism initiative of the Counter-terrorism Implementation Task Force. Such fact-finding missions would also allow the Special Rapporteur to contribute to the identification of gaps in the implementation of pillar IV of the Global Counter-Terrorism Strategy.<sup>1</sup>

## II. Activities of the Special Rapporteur

3. On 9 September 2010, the Special Rapporteur participated in the 2010 review of the Global Counter-Terrorism Strategy at the International Peace Institute in New York, where he was a panellist in a discussion organized by the Working Group on Protecting Human Rights while Countering Terrorism of the Counter-terrorism Implementation Task Force.

4. From 10 to 13 September, the Special Rapporteur conducted on-site consultations on the law and practice of Iceland in countering terrorism. He met with representatives of the Ministry of Foreign Affairs, the Ministry of Justice and the national police, as well as with two judges of the Reykjavik District Court. The Special Rapporteur also visited the country's largest prison, Litla-Hraun, and conducted confidential interviews with Icelandic and foreign prisoners.

5. On 16 and 17 September 2010, the Special Rapporteur convened the fifth expert panel meeting in support of his mandate at the European University Institute in Florence, Italy, to discuss thematic issues related to his mandate. The event was co-funded by the Åbo Akademi University Institute for Human Rights through its project to support the mandate of the Special Rapporteur.

6. From 25 to 28 October 2010, the Special Rapporteur was in New York to present his report (A/65/258) to the Third Committee of the General Assembly. The report focused on the question of compliance with human rights by the United Nations when countering terrorism. The Special Rapporteur had formal meetings with the Counter-Terrorism Committee and the Al Qaida and Taliban Sanctions Committee of the Security Council. He met with the Deputy Permanent Representative of Mexico to the United Nations, the Deputy Executive Director of the Counter-Terrorism Executive Directorate, representatives of the Centre on Global Counterterrorism Cooperation and the Assistant Director-General for Communication and Information of the United Nations Educational, Scientific and Cultural Organization. He attended a reception at the General Consulate of Finland and participated in a panel discussion on the Security Council and the rule of law, co-organized by the Permanent Mission of Austria to the United Nations and the Rule of

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<sup>1</sup> General Assembly resolution 60/288, annex.

Law Coordination and Resource Group. He also met with a number of non-governmental organizations and held a press conference.

7. On 27 October 2010, the Special Rapporteur attended the trial against Ahmed Khalfan Ghailani before the United States District Court for the Southern District of New York relating to the terrorist attacks against the embassies of the United States of America in Nairobi and Dar es Salaam of 7 August 1998.

### III. Ten areas of best practice in countering terrorism<sup>2</sup>

8. In the United Nations Global Counter-Terrorism Strategy, reaffirmed most recently by the General Assembly in its resolution 64/297, the States Members of the United Nations recognize that terrorist acts are aimed at the destruction of human rights, fundamental freedoms and democracy.<sup>3</sup> Measures to combat terrorism may also prejudice the enjoyment of – or may violate – human rights and the rule of law. Recognizing that compliance with human rights is necessary to address the long-term conditions conducive to the spread of terrorism, and that effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing goals, the Special Rapporteur identifies 10 areas of best practice in countering terrorism. The compilation is the outcome of analysis undertaken by the Special Rapporteur on the basis of his work during almost six years and involving various forms of interaction with multiple stakeholders.

9. The present document is the sixth and last annual report submitted to the Human Rights Council and its predecessor, the Commission on Human Rights, by the current Special Rapporteur. When establishing and then extending the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Commission and the Council requested the Special Rapporteur to identify, exchange and promote best practices on measures to counter terrorism that respect human rights and fundamental freedoms.<sup>4</sup> In his thematic and country-specific reports, the Special Rapporteur has accordingly sought to identify elements of best practice where appropriate.<sup>5</sup> Drawing on his experience of almost six years, and including reference to existing and emerging practices in a broad range of States throughout the world, and upon international treaties, resolutions of international organizations and the jurisprudence of international and regional courts, the Special Rapporteur takes this opportunity to identify and promote 10 areas of best practice in countering terrorism.

10. In this context, “best practice” refers to legal and institutional frameworks that serve to promote and protect human rights and the rule of law in all aspects of counter-terrorism. Best practice refers not only to what is required by international law, including human rights law, but also includes principles that go beyond these legally binding obligations. The identification of best practice is based upon three criteria: (a) a credible claim that the practice is an existing or emerging practice, and/or one that is required by, or has been recommended by or within, international organizations, international treaties or the

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<sup>2</sup> The Special Rapporteur would like to acknowledge the contribution of Dr. Alex Conte and other members of his informal panel of experts for their assistance in the preparation of the present compilation.

<sup>3</sup> See also the statement by the President of the Security Council of 27 September 2010 (S/PRST/2010/19), second paragraph.

<sup>4</sup> Commission on Human Rights resolution 2005/80, para. 14 (c), and Human Rights Council resolution 6/28, para. 2 (d).

<sup>5</sup> See, for example, A/HRC/6/17/Add.3, para. 43, A/63/233, para. 45, A/HRC/10/3, and A/HRC/13/37, paras. 8-57.

jurisprudence of international, regional or domestic courts; (b) the practice relates to and promotes the effective combating of terrorism; and (c) the practice complies with human rights and/or promotes the enjoyment of human rights and fundamental freedoms.

11. The compilation includes examples of elements of best practice from numerous national laws and institutional models. It is, however, important to note that the citation of specific provisions from national laws or institutional models does not imply a general endorsement of these laws and institutions as best practice in protecting human rights in the context of counter-terrorism. The aim of the compilation is to identify concrete legal issues and – on the basis of existing and advocated approaches, including recognition of their positive and negative aspects – from this propose 10 concrete models for wider adoption and implementation by Member States. The compilation is non-exhaustive in the sense that there are many other issues where compliance with human rights could be addressed and a best practice identified. In advocating the 10 selected best practices in the report, the Special Rapporteur is not suggesting that all Member States should take a uniform approach. Rather, he believes that the 10 best practices should be adopted and implemented in a form that takes into account the fundamental principles of each State’s legal system.

#### **A. Consistency of counter-terrorism law with human rights, humanitarian law and refugee law**

12. Together with the responsibility of States to protect those within their jurisdiction from acts of terrorism, States have an obligation to comply with international law, including human rights law, refugee law and humanitarian law.<sup>6</sup> These legal obligations stem from customary international law, applicable to all States,<sup>7</sup> and international treaties, applicable to States parties.<sup>8</sup> Compliance with all human rights<sup>9</sup> while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensable part of a successful medium- and long-term strategy to combat terrorism. The Global Counter-Terrorism Strategy therefore identifies respect for human rights for all and the rule of law as one of its four pillars and as the fundamental basis of the fight against terrorism (thus applicable to all aspects of the Strategy).<sup>10</sup> In pillar I, the Strategy also recognizes that compliance with human rights is necessary in order to address the long-term conditions conducive to the spread of terrorism, which include lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance.<sup>11</sup> While making it clear that none of these conditions can excuse or justify terrorism, the Strategy represents a clear affirmation by all States Members of the United Nations that effective counter-terrorism measures and the protection of human rights are not conflicting, but rather complementary

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<sup>6</sup> See, for example, Security Council resolutions 1456 (2003), annex, para. 6, and 1624 (2005), para.4; General Assembly resolution 60/288, annex, para. 3; the Statement by the President of the Security Council (footnote 3), para. 12; and A/HRC/16/51/Add.4.

<sup>7</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, (Merits), 1986, ICJ Reports, paras. 172-201.

<sup>8</sup> Vienna Convention on the Law of Treaties, art. 34.

<sup>9</sup> General Assembly resolution 64/168, para. 6 (f).

<sup>10</sup> See also A/60/825, para. 118, and the Stockholm Programme of the European Council, OJEU C115/1 (2010), item 4.5.

<sup>11</sup> Statement by the President of the Security Council of 27 September 2010, op.cit., seventh paragraph. See also paragraph 9, in which the Security Council emphasizes the importance of enhancing dialogue and broadening understanding among civilisations “in an effort to prevent the indiscriminate targeting of different religions and cultures, [which] can help counter the forces that fuel polarization and extremism, and will contribute to strengthening the international fight against terrorism...”.

and mutually reinforcing goals.<sup>12</sup> This also reflects the flexibility of human rights law. Through the careful application of human rights law it is possible to respond effectively to the challenges involved in the countering of terrorism while complying with human rights.<sup>13</sup> There is no need in this process for a balancing between human rights and security, as the proper balance can and must be found within human rights law itself. Law is the balance, not a weight to be measured.

13. To achieve complementarity and mutual reinforcement, the Special Rapporteur identifies 10 areas of best practice applicable to Member States' legislative framework to combat terrorism. The first concerns consistency between counter-terrorism law – whether as separate pieces of legislation or as part of “ordinary” laws, such as the inclusion of terrorism offences within the criminal code of a country – and human rights and refugee law, as well as, when applicable, humanitarian law. Consistency is essential for both existing and future laws. In the case of proposed counter-terrorism law, many States include mechanisms for identifying whether proposed legislation, including on counter-terrorism, complies with human rights law.<sup>14</sup> Because of the potentially profound implications of counter-terrorism legislation, it is also important that Governments seek to ensure the broadest possible political and popular support for counter-terrorism laws through an open and transparent process.<sup>15</sup> In the event of incompatibility of extant counter-terrorism legislation with human rights law, including international human rights, the existence of mechanisms empowering the judiciary to strike down inconsistent legislation or to adopt an interpretation of the legislation that is consistent with human rights is essential.<sup>16</sup> The effectiveness of such mechanisms will rely on the existence and maintenance of a competent, independent, impartial and transparent judiciary.<sup>17</sup>

14. To these ends, the Special Rapporteur formulates the template provisions below concerning the enactment, amendment and interpretation of counter-terrorism laws:

**Practice 1. Model provisions on consistency of counter-terrorism law with human rights and refugee law, and humanitarian law**

All legislation relating to the combating of terrorism is subject to the following guarantees and procedures:

<sup>12</sup> See A/60/825, para. 5; A/HRC/8/13; Statement by the President of the Security Council of 27 September 2010, op.cit., eighth paragraph; the Internal Security Programme and National Counter-Terrorism Strategy of Finland; Switzerland questionnaire response; and the Human Security Act 2007 of the Philippines, sect. 2.

<sup>13</sup> See “Human rights, terrorism and counter-terrorism”, Office of the United Nations High Commissioner for Human Rights (OHCHR), fact sheet No. 32, 2008, p. 12; Handbook on Human Rights Compliance While Countering Terrorism, Center on Global Counterterrorism Cooperation; and the questionnaire responses submitted by Bahrain, Bolivia (Plurinational State of), Canada, Cuba, Finland, Greece, Guyana, Hungary, Jordan, Monaco, Morocco, Norway, Pakistan, Poland, Portugal, Qatar, the Russian Federation, Slovakia, the Sudan, Switzerland, the Syrian Arab Republic, Togo and the United Kingdom of Great Britain and Northern Ireland.

<sup>14</sup> See Canada, Department of Justice Act 1985, sect. 4.1; New Zealand, Bill of Rights Act 1990, sect. 7; and United Kingdom, Human Rights Act 1998, sect. 19; see also questionnaire responses submitted by Finland, Mauritius and Monaco. On the effectiveness of such mechanisms, see Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism*, 2010, pp. 340-343.

<sup>15</sup> See A/HRC/4/26/Add.3, para. 65, A/HRC/6/17/Add.2, para. 20, and A/HRC/16/51/Add.3, para. 37.

<sup>16</sup> Canada, Constitution Act 1982, sect. 52 (questionnaire response).

<sup>17</sup> See International Covenant on Civil and Political Rights, art. 14(1); International Commission of Jurists, Practitioner Guide No 1: International Principles on Independence and Accountability of Judges, Lawyers and Prosecutors, 2007; and questionnaire response submitted by Indonesia.

1. Proposals for new legislation or amendments to existing laws shall include a written statement bringing to the attention of the Legislature any provision in the proposal that appears to be inconsistent with the purposes and provisions of norms of international human rights and refugee law that are binding upon the State.

2. The Legislature shall, through a specialized body or otherwise, review and ensure that any law approved by it conforms to the norms of international human rights and refugee law that are binding upon the State.

3. The judiciary shall be entrusted with ensuring that laws do not breach norms of international human rights and refugee law that are binding upon the State. In discharging this duty, the courts shall apply the techniques available to them under the Constitution, such as:

(a) Adopting an interpretation of the law that is consistent with the purposes and provisions of norms of international human rights and refugee law that are binding upon the State;

(b) Declaring that part of the law is without legal effect;

(c) Declaring that the inconsistent law is to be of no force or effect, either with immediate effect or after a period of time that allows the Government to take remedial steps.

4. If the State is involved, as a party, in an ongoing armed conflict, the above provisions shall apply also to securing compliance with principles and provisions of international humanitarian law, without prejudice to the obligation to comply with international human rights and refugee law.

## **B. Consistency of counter-terrorism practice with human rights, humanitarian law and refugee law**

15. Besides ensuring that counter-terrorism law is consistent with human rights, the conduct of agencies involved in the countering of terrorism must be in compliance with human rights and refugee law, and applicable principles and provisions of international humanitarian law. Where the law relating to terrorism confers discretionary powers upon public agencies, adequate safeguards, including judicial review, must exist for the purpose of ensuring that discretionary powers are not exercised arbitrarily or unreasonably.<sup>18</sup> Checks might also be implemented through internal and external supervision of agencies and public servants, as well as through the adoption and comprehensive implementation of codes of conduct.<sup>19</sup> The counter-terrorism laws of some States expressly recognize the application of the principle of legality, the rule of law and human rights to the countering of terrorism, which should be seen as an essential check on the implementation in practice of the obligation to comply with human rights while countering terrorism.<sup>20</sup> While the

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<sup>18</sup> See E/CN.4/2002/18, annex, paras. 3 (b) and 3 (j); Council of Europe, Guidelines on Human Rights and the Fight against Terrorism, 2002, guideline II; E/CN.4/1985/4, annex, paras. 16, 18; Handbook on Human Rights Compliance, *op.cit.*, condition 3.3; and questionnaire responses submitted by Australia, Bolivia (Plurinational State of), Canada, Finland, Greece, Monaco, Norway and Switzerland.

<sup>19</sup> Questionnaire responses submitted by Australia, Bolivia (Plurinational State of), Bulgaria, Canada, Colombia, Cuba, Finland, Greece, Monaco, Norway, Spain and the former Yugoslav Republic of Macedonia.

<sup>20</sup> Azerbaijan, Law on the Struggle against Terrorism 1999 (as amended in 2005), art. 4. Other countries do not expressly mention these principles in the context of countering terrorism, but provide for more

privatization of counter-terrorist functions, such as security measures at checkpoints, should be avoided, such privatization, where it occurs, should include the same level of accountability as for conduct by State agents.<sup>21</sup>

16. The Special Rapporteur therefore formulates the template provision below concerning the consistency of State and private counter-terrorist conduct with human rights law:

**Practice 2. Model provision on consistency of counter-terrorism practices with human rights and refugee law, and humanitarian law**

In the application and exercise of all functions under the law relating to terrorism, it is unlawful for any person to act in any way that is incompatible with the purposes and provisions of international human rights and refugee law that are binding upon the State. In this regard:

1. The exercise of functions and powers shall be based on clear provisions of law that exhaustively enumerate the powers in question.

2. The exercise of such functions and powers may never violate peremptory or non-derogable norms of international law, nor impair the essence of any human right.

3. Where the exercise of functions and powers involves a restriction upon a human right that is capable of limitation, any such restriction should be to the least intrusive means possible and shall:

(a) Be necessary in a democratic society to pursue a defined legitimate aim, as permitted by international law; and

(b) Be proportionate to the benefit obtained in achieving the legitimate aim in question.

4. If the State is involved, as a party, in an ongoing armed conflict, the above provisions shall apply also to securing compliance with principles and provisions of international humanitarian law, without prejudice to the obligation to comply with international human rights and refugee law.

**C. Normal operation and regular review of counter-terrorism law and practice**

17. To the greatest extent possible, counter-terrorism law and practice must be consistent with the principle of normalcy. Counter-terrorism measures should, to the broadest possible extent, be entrusted to civilian authorities whose functions relate to combating crime and whose performance of counter-terrorism functions is pursuant to ordinary powers.<sup>22</sup> This also applies to the prosecution and trial of terrorist offences, which

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generally applicable provisions to this effect: Canada, Charter of Rights and Freedoms, sect. 1; Finland, Constitution, sect. 22; Monaco, Constitution du 17 décembre 1962, arts. 17-32; Switzerland, Constitution fédérale, arts. 7-36 and 41; questionnaire responses submitted by Australia, Belgium, Cuba, Ethiopia, Georgia, Greece, Guyana, Honduras, Hungary, Jordan, Latvia, Lebanon, Malaysia, Mauritius, Mexico, Morocco, Norway, Pakistan, Poland, Portugal, the Russian Federation, Slovakia, the Syrian Arab Republic and the former Yugoslav Republic of Macedonia. See also E/CN.4/2006/98, para. 70, and A/HRC/4/26/Add.3, paras. 10 and 65.

<sup>21</sup> A/HRC/6/17/Add.4, paras. 38 and 59. See also the Code of Conduct for Private Security Service Providers, signed 9 November 2010.

<sup>22</sup> Questionnaire responses submitted by Australia, Azerbaijan, Belgium, Bolivia (Plurinational State

must generally take place before ordinary courts.<sup>23</sup> If compelling reasons require the establishment for certain authorities of specific powers necessary to combat terrorism, (a) such powers should be contained in stand-alone legislation capable of being recognized as a unique exception to customary legal constraint;<sup>24</sup> (b) the provisions under which such powers are established should be subject to sunset clauses and regular review (see paragraphs 19 and 20 below); and (c) the use of such powers for any purpose other than the combating of terrorism, as properly defined pursuant to practice 7 below, must be prohibited.<sup>25</sup>

18. International and regional human rights instruments allow for the temporary derogation from the full application of certain rights and freedoms in a very limited set of exceptional circumstances.<sup>26</sup> This possibility is restricted to those human rights that are capable of derogation, and where such measures are officially proclaimed and specified.<sup>27</sup> Derogating measures (a) are limited to truly exceptional situations where a genuine threat to the life of the nation exists, which in certain cases may be caused by terrorism;<sup>28</sup> (b) must be strictly required by the exigencies of the situation, so as to be necessary and proportionate, and not capable of being addressed by non-derogating means (including measures that impose limitations upon rights and freedoms pursuant to rights-specific treaty provisions that fall short of derogation);<sup>29</sup> (c) are consistent with other international obligations, including refugee law, international humanitarian law and customary international law on human rights;<sup>30</sup> and (d) do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.<sup>31</sup> Restoration of a state of normalcy, where full respect for the provisions of human rights treaties is again secured, must be the predominant objective of States that have adopted derogating measures.<sup>32</sup>

19. Many States include mechanisms for the regular review of counter-terrorism laws and practices; some States also include “sunset clauses” requiring the renewal of laws or of certain provisions within their counter-terrorism law.<sup>33</sup> The review should include

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of), Bulgaria, Finland, Georgia, Greece, Guyana, Hungary, Japan, Latvia, Lithuania, Monaco, Norway, Poland, Portugal, the Republic of Moldova, the Russian Federation, Slovakia, Slovenia, Switzerland, the former Yugoslav Republic of Macedonia and Togo.

<sup>23</sup> See A/HRC/6/17/Add.3, paras. 14-15, 20-21 and 59; A/HRC/6/17/Add.4, para. 29; A/63/223, para. 45(e); and questionnaire responses submitted by Poland and Slovakia.

<sup>24</sup> David Paccioco, “Constitutional Casualties of September 11: Limiting the Legacy of the Anti-terrorism Act” (2002) 16 *Supreme Court Law Review* (2d) 185, p. 190.

<sup>25</sup> See A/60/370, para. 47; E/CN.4/Sub.2/2005/39, para. 33; Council of Europe, *Guidelines on Human Rights*, op.cit., guideline III(2); Inter-American Commission on Human Rights report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 (2002), paras. 51 and 55.

<sup>26</sup> See International Covenant on Civil and Political Rights, art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15; American Convention on Human Rights, art. 27; and OHCHR, fact sheet No. 32, op.cit., p. 15.

<sup>27</sup> General comment No. 29 (CCPR/C/21/Rev.1/Add.11), paras. 2-16.

<sup>28</sup> *Ibid.*, paras. 2-4; *Lawless v Ireland* (No. 3), 1961, ECHR 2, para. 28; *The Greek Case*, 1969, Yearbook of the European Convention on Human Rights 1, para. 153; *Ireland v United Kingdom*, 1978 European Court of Human Rights 1, para. 207; *Sakik and others v Turkey*, 1978, 2 ECHR 25, para. 39; *Brannigan and McBride v United Kingdom*, 1993, European Court of Human Rights 21, para. 54; see also Conte, op.cit., pp. 528-530 and 545-547.

<sup>29</sup> See general comment No. 29, op.cit., paras. 3-5, and A/HRC/6/17/Add.4, para. 10.

<sup>30</sup> General comment No. 29, op.cit., para. 9.

<sup>31</sup> See *ibid.*, paras. 8 and 13(c); and *A and others v Secretary of State for the Home Department*, 2004, UKHL 56, para. 68.

<sup>32</sup> See general comment No. 29, op.cit., paras. 1 and 2, and A/HRC/6/17/Add.4, para. 10.

<sup>33</sup> Australia, Security Legislation Amendment (Terrorism) Act 2002, sect. 4; Canada, Criminal Code 1985, sect. 83.32; New Zealand, Terrorism Suppression Act 2002, sect. 70; United Kingdom,

(a) annual governmental review of and reporting on the exercise of powers under counter-terrorism laws; (b) annual independent review of the overall operation of counter-terrorism laws; and (c) periodic parliamentary review. To be effective, it is important that independent review mechanisms be based on statutory terms of appointment, linked to the work of relevant parliamentary committees and accompanied by adequate resourcing.<sup>34</sup> Review mechanisms should enable public consultation and should be accompanied by publicly available reports.

20. Regular review and the use of sunset clauses are best practices helping to ensure that special powers relating to the countering of terrorism are effective and continue to be required, and to help avoid the “normalization” or de facto permanent existence of extraordinary measures.<sup>35</sup> Periodic parliamentary review and sunset clauses also enable the Legislature to consider whether the exercise of powers under counter-terrorism laws has been proportionate and thus whether, if they continue, further constraints on the exercise of such powers should be introduced, and/or whether the overall operation of counter-terrorism laws calls for their modification or discontinuance.

21. The Special Rapporteur accordingly formulates the template provisions below as areas of best practice in the fight against terrorism:

### **Practice 3. Model provisions on the principles of normalcy and specificity**

1. To the broadest possible extent, measures against terrorism shall be taken by the civilian authorities entrusted with the functions related to the combating of crime, and in the exercise of their ordinary powers.

2. Unless a state of emergency has been officially declared because terrorism genuinely threatens the life of the nation and requires the adoption of measures that cannot be undertaken through restrictions already permitted under international human rights law, terrorism does not trigger emergency powers.

3. Where the law includes particular provisions that, for a compelling reason, are considered necessary in combating terrorism and entrust certain authorities with specific powers for that reason, the use of such powers for any purpose other than the combating of terrorism, as properly defined pursuant to practice 7, is prohibited.

### **Practice 4. Model provisions on the review of the operation of counter-terrorism law and practice**

1. Where specific counter-terrorism powers have been created pursuant to practice 3 (3), they shall lapse 12 months after their entry into force, unless the Legislature reviews and renews them before that date.

2. The Executive shall appoint a person or body to act as independent reviewer of the application and operation of the law relating to terrorism. The person so appointed shall, at least every 12 months, carry out a review of the operation of the law relating to terrorism and report the findings of such review to the Executive and the Legislature. The report shall contain an opinion on:

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Terrorism Act 2000, sect. 126, and Prevention of Terrorism Act 2005, sect. 14(3). See also questionnaire responses submitted by Belgium, Finland, Georgia, Greece, Lithuania, Malaysia, Mauritius, Norway, Poland, Portugal and the Republic of Moldova.

<sup>34</sup> Clive Walker, “The United Kingdom’s anti-terrorism laws: lessons for Australia” in *Law and Liberty in the War on Terror*, 2007, p. 189.

<sup>35</sup> Kent Roach, “The dangers of a charter-proof and crime-based response to terrorism”, in *Essays on Canada’s Anti-Terrorism Bill*, 2002, p. 137.

(a) The implications of any proposed or recent amendments or additions to the law relating to terrorism, including an opinion on whether these are compatible with international human rights and refugee law that is binding upon the State, as well as, when applicable, principles and provisions of international humanitarian law;

(b) Whether the application in practice of the law relating to terrorism, during the period of review, has been compatible with international human rights and refugee law that is binding upon the State, as well as, when applicable, principles and provisions of international humanitarian law.

#### **D. Effective remedies for violations of human rights**

22. It is vital that those whose rights have been violated by counter-terrorism law and practice have free access to seek effective remedies, including in respect of privatized counter-terrorist functions.<sup>36</sup> It is widely acknowledged that any individual who believes that his or her rights have been infringed must be able to seek redress, and should be able to do so by bringing a complaint to a court or oversight institution, such as an ombudsman, human rights commission or national human rights institution.<sup>37</sup> Remedial provisions should be framed in sufficiently broad terms so as to enable effective remedies to be provided according to the requirements of each particular case, including, for example, release from arbitrary detention, compensation and the exclusion of evidence obtained in violation of human rights. To be effective, remedies should be tailored to ensure that they are both appropriate and just. Although a single remedy might not entirely satisfy this, the aggregate of several remedies may do so.<sup>38</sup>

23. As a minimum safeguard for the provision of effective remedies, the Special Rapporteur formulates the template provision below as a best practice in the fight against terrorism:

##### **Practice 5. Model remedies provision**

Any person whose human rights have been violated in the exercise of counter-terrorism powers or the application of counter-terrorism law has a right to a speedy, effective and enforceable remedy. Courts shall have the ultimate responsibility to ensure that this right is effective.

#### **E. Victims of terrorism**

24. Addressing the rights of the victims of terrorism represents a best practice not just because it assists the victims of terrorism to rebuild their lives, but can also help to reduce tensions in society that might themselves result in conditions conducive to recruitment to terrorism. States are recognizing the need for victims of terrorism to be provided with legal status and with protection of their human rights at all times, including their rights to health,

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<sup>36</sup> See International Covenant on Civil and Political Rights, art. 2(3)(a); General Assembly resolution 64/168, para. 6 (n); Canada, Charter of Rights and Freedoms 1982, sect. 24; and United Kingdom, Human Rights Act, 1998, sect. 8. See also the questionnaire responses submitted by Bolivia (Plurinational State of), Finland, Latvia, Mauritius, Pakistan, Slovakia and Switzerland; and A/HRC/6/17/Add.4, paras. 38 and 59.

<sup>37</sup> A/HRC/14/46, practices 9 and 10, and para. 16.

<sup>38</sup> *Silver v United Kingdom*, 1983, ECHR 5, para. 113 (c).

legal assistance, justice, truth and adequate, effective and prompt reparation.<sup>39</sup> Some countries allow for the proceeds of sale of terrorist property forfeited to the State to be used to compensate victims of terrorism.<sup>40</sup> Supporting the victims of terrorism who have suffered serious violations of their basic rights includes the provision of material, legal and psychological assistance.<sup>41</sup> Bringing the perpetrators of terrorist acts to justice is also vitally important.<sup>42</sup> With the aim of building bridges between adversely affected groups, compensation to victims of counter-terrorism measures, as a potential remedy under practice 5, should be provided equally and through the same institutions and programmes as compensation to victims of terrorism.

25. The Special Rapporteur formulates the template provisions below as a best practice in the fight against terrorism:

#### **Practice 6. Model provisions on reparations and assistance to victims**

1. Damage to natural or legal persons and their property resulting from an act of terrorism or acts committed in the name of countering terrorism shall be compensated through funds from the State budget, in accordance with international human rights law.

2. Natural persons who have suffered physical or other damage or who have suffered violations of their human rights as a result of an act of terrorism or acts committed in the name of countering terrorism shall be provided with additional legal, medical, psychological and other assistance required for their social rehabilitation through funds from the State budget.

### **F. Definition of terrorism**

26. Counter-terrorism laws, policies and practices must be limited to the countering of terrorism, as properly defined. The approach taken by most States is to link terrorist offences to a stand-alone definition of “terrorism”, a “terrorist act”, “terrorist activity” or similar terms. Such definitions are very often also linked to the listing of proscribed organizations (either in conjunction with, or as a supplement to, the Consolidated List of the United Nations); powers of arrest, questioning and investigation; alterations in the rules concerning detention and trial; and administrative measures, such as deportation procedures and the forfeiture of property. The adoption of overly broad definitions of terrorism therefore carries the potential for deliberate misuse of the term – including as a response to claims and social movements of indigenous peoples – as well as unintended human rights

<sup>39</sup> See General Assembly resolutions 60/288, annex, pillar I, and 64/168, para. 6 (n); and the statement by the President of the Security Council of 27 September 2010 (S/PRST/2010/19), tenth paragraph, para. 10. Some States have adopted specific provisions on the rights of victims of terrorism: Azerbaijan, Law on the Struggle against Terrorism 1999 (as amended in 2005), art. 13; Georgia, Law on Combating Terrorism 2007, art. 15. See also the questionnaire responses submitted by Colombia, Ethiopia, Greece, Mexico, Morocco, the Republic of Moldova and Spain. Other States rely on more generally applicable provisions concerning victims of crime: see questionnaire responses submitted by Australia, Bulgaria, Canada, Finland, Hungary, Indonesia, Japan, Latvia, Lithuania, Poland, Portugal, Qatar, Slovakia, Slovenia, Switzerland, the former Yugoslav Republic of Macedonia and the United Kingdom.

<sup>40</sup> Canada, Criminal Code 1985, sect. 83.14 (5.1).

<sup>41</sup> See A/HRC/10/3/Add.2, paras. 44-46 and S/2005/789 (2005), para. 31; Azerbaijan, Law on the Struggle against Terrorism 1999, op.cit., art. 13; Georgia, Law on Combating Terrorism 2007, art. 16.

<sup>42</sup> See General Assembly resolution 64/168, para. 6(n), and E/CN.4/2006/98, para. 66; questionnaire response submitted by Guatemala.

abuses.<sup>43</sup> Failure to restrict counter-terrorism laws and implementing measures to the countering of conduct which is truly terrorist in nature also pose the risk that, where such laws and measures restrict the enjoyment of rights and freedoms, they will offend the principles of necessity and proportionality that govern the permissibility of any restriction on human rights.<sup>44</sup>

27. In the absence of a universally agreed upon, comprehensive and concise definition of terrorism, counter-terrorism laws and policies must be limited to the countering of offences that correspond to the characteristics of conduct to be suppressed in the fight against international terrorism, as identified by the Security Council in its resolution 1566 (2004), paragraph 3.<sup>45</sup> While the international community is concerned with international terrorism, individual States affected by purely domestic forms of terrorism may also legitimately include in their terrorism definitions conduct that corresponds to all elements of a serious crime as defined by the national law, when combined with the other cumulative characteristics of resolution 1566 (2004).<sup>46</sup> Properly defined, “terrorism” and associated offences are also accessible, formulated with precision, non-discriminatory and non-retroactive.<sup>47</sup> Besides the characteristics identified in resolution 1566 (2004), definitions of terrorism often also refer to the motivation of the actors to advance a political, religious or ideological cause.<sup>48</sup> While acts of terrorism are under no circumstances justifiable,<sup>49</sup> and although this is not a conceptual requirement of a definition of terrorism, reference to these motivations can assist in further narrowing the scope of application of the definition of terrorism.

28. The Special Rapporteur takes the view that a definition of terrorism that goes beyond the following would be problematic from a human rights perspective, and therefore formulates the definition of terrorism below as a best practice in the fight against terrorism.

#### **Practice 7. Model definition of terrorism**

Terrorism means an action or attempted action where:

1. The action:
  - (a) Constituted the intentional taking of hostages; or
  - (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
  - (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it;

and

<sup>43</sup> See E/CN.4/2006/98 (2005), para. 27, and E/CN.4/2006/78, para. 44.

<sup>44</sup> E/CN.4/2002/18, annex, para. 4 (b); E/CN.4/Sub.2/2005/39, para. 33; Council of Europe, Guidelines on Human Rights and the Fight against Terrorism, Guideline III(2); E/CN.4/1985/4, annex, paras. 10 and 51; general comment 29, op.cit., paras. 3-5.

<sup>45</sup> See also E/CN.4/2006/98, para. 39.

<sup>46</sup> A/HRC/10/3/Add.2, para. 6.

<sup>47</sup> See International Covenant on Civil and Political Rights, art. 15, General Assembly resolution 63/185, para. 18, and E/CN.4/2006/98, para. 49.

<sup>48</sup> See, for example, the questionnaire responses submitted by Australia, Canada, Malaysia and the United Kingdom.

<sup>49</sup> See, for example, the Declaration on Measures to Eliminate International Terrorism (General Assembly resolution 49/60), para. 1; and Security Council resolutions 1373 (2001), para. 3 (g), and 1566 (2004), para. 3.

2. The action is done or attempted with the intention of:
  - (a) Provoking a state of terror in the general public or a segment of it; or
  - (b) Compelling a Government or international organization to do or abstain from doing something;
 and
- (3) The action corresponds to:
  - (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
  - (b) All elements of a serious crime defined by national law.

### G. Offense of incitement to terrorism

29. The Security Council called for the prohibition of incitement to terrorism in its resolution 1624 (2005) paragraph 1 (a). Some States have taken the view that this does not require the establishment of a separate offence of incitement to terrorism, because incitement is in some countries a party offence and, as such, the incitement to any offence, including terrorism offences, already amounts to an offence. There can be practical difficulties with this approach;<sup>50</sup> the Special Rapporteur notes that article 5 of the Council of Europe Convention on the Prevention of Terrorism requires States parties to criminalize the public provocation to commit acts of terrorism as a specific offence. This is consistent with a proactive approach to the countering of terrorist acts and the prevention of radicalization.<sup>51</sup> It also allows States to ensure that terrorist offences are punishable by custodial sentences heavier than those imposable under national law for similar offences committed without a terrorist intent (that is, offences not undertaken for the purpose of provoking a state of terror or of compelling a Government or international organization to do or abstain from doing something).<sup>52</sup>

30. The Special Rapporteur has previously commended as a best practice the definition of incitement to terrorism in article 5 of the Convention on the Prevention of Terrorism.<sup>53</sup> This definition forms the basis of the model offence in practice 8 below; however, in reaction to the decision of the European Court of Human Rights in *Leroy v France*, and noting that article 12(1) of the Convention requires that the implementation of article 5 respect human rights obligations, particularly the right to freedom of expression, the Special Rapporteur has introduced a slight modification to that definition to refer to conduct that causes an objective danger of a terrorist offence being committed whether or not “expressly” advocating a terrorist offence (rather than the Convention reference to “directly” advocating such an offence).<sup>54</sup> This may cover the situation of using coded

<sup>50</sup> See A/HRC/4/26/Add.3, para. 26, and Conte, op. cit., pp. 450-460.

<sup>51</sup> United Nations Office on Drugs and Crime, Guide for the Legislative Incorporation and Implementation of the Universal Instruments against Terrorism, 2006, para. 250.

<sup>52</sup> See Security Council resolution 1373 (2001), para. 2(e); United Nations Office on Drugs and Crime, Guide, ibid., para. 245; European Union Council Framework Decision on Combating Terrorism (2002/475/JHA), art. 5(2); questionnaire response submitted by Finland; and Georgia, Criminal Code, arts. 12 and 323.

<sup>53</sup> A/HRC/4/26/Add.3, paras. 26-27.

<sup>54</sup> *Leroy v France*, application 36109/03, 2 October 2008.

language, but does not reduce the requirement to prove both a subjective intention to incite as well as an objective danger that a terrorist act will be committed.

31. Thus, in the implementation of article 5 of the Convention on the Prevention of Terrorism, the offence of incitement to terrorism (a) must be limited to the incitement to conduct that is truly terrorist in nature, as properly defined pursuant to practice 7 above; (b) must restrict the freedom of expression no more than is necessary for the protection of national security, public order and safety or public health or morals;<sup>55</sup> (c) must be prescribed by law in precise language, including by avoiding reference to vague terms such as “glorifying” or “promoting” terrorism;<sup>56</sup> (d) must include an actual (objective) risk that the act incited will be committed;<sup>57</sup> (e) should expressly refer to two elements of intent, namely intent to communicate a message and intent that this message incite the commission of a terrorist act;<sup>58</sup> and (f) should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to “unlawful” incitement to terrorism.<sup>59</sup>

32. The Special Rapporteur formulates the model offence of incitement to terrorism below as a best practice in the fight against terrorism:

**Practice 8. Model offence of incitement to terrorism**

It is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.

## H. Listing of terrorist entities

33. States take different approaches to the designation of, and criminalization of conduct linked to, terrorist groups. Many countries include a mechanism by which entities that are listed in the Consolidated List of the United Nations are also automatically listed by the domestic law of the country.<sup>60</sup> The Special Rapporteur has on several occasions expressed the view that, as long as there is no independent review of listings at the level of the United Nations, there must be access to domestic judicial review of any domestic implementing measures pertaining to persons on the Consolidated List.<sup>61</sup> Even with the enhanced procedures for listing at the level of the United Nations, and the appointment of an Ombudsperson, the Special Rapporteur remains concerned about procedural inadequacies

<sup>55</sup> International Covenant on Civil and Political Rights, art. 19 (3).

<sup>56</sup> See fact sheet No. 32, op. cit., p. 28, and the joint declaration of the Special Rapporteur on freedom of opinion and expression, the Organization for Security and Cooperation in Europe Representative on Freedom of the Media and the Organization of American States Special Rapporteur on freedom of expression, 21 December 2005.

<sup>57</sup> A/61/267, para. 28; Johannesburg Principles on National Security, Freedom of Expression and Access to Information (E/CN.4/1996/39, annex), principle 6.

<sup>58</sup> A/61/267, para. 30.

<sup>59</sup> Council of Europe, Explanatory report to the Council of Europe Convention on the Prevention of Terrorism, paras. 81-83.

<sup>60</sup> Australia, Charter of the United Nations Act, 1945, sect.18 (1), combined with associated regulations; Canada, United National Al-Qaida and Taliban Regulations, 1999.

<sup>61</sup> See A/61/267, paras. 9-41, A/HRC/4/26/Add.3, para. 20, A/HRC/6/17/Add.2, para. 72, and A/63/223, paras. 16 and 45 (a).

of the listing and delisting process for the Consolidated List.<sup>62</sup> Taking the view that the imposition by the Security Council of sanctions on individuals and entities under the current system exceeds the powers conferred on the Council under Chapter VII of the Charter of the United Nations, the Special Rapporteur has called for the replacement of the current terrorist listing regime under resolution 1267 (1999) with a system whereby the United Nations and the Security Council would continue to be involved through, inter alia, assistance and advice, while the actual listing of individuals would be done by Member States, accompanied by adequate procedural guarantees.<sup>63</sup>

34. Some countries also provide mechanisms for the listing of additional groups as terrorist entities. In a number of these countries, this possibility is correctly restricted to individuals or entities that have as one of their purposes or activities the facilitating or carrying out of terrorist acts,<sup>64</sup> as properly defined, and is accompanied by the following safeguards: (a) the need to establish, on reasonable grounds, that the entity has knowingly carried out or participated in or facilitated a terrorist act; (b) procedures allowing the entity to apply for removal from such a list, together with rights of appeal or judicial review and an ability to make a fresh application for removal in the event of a material change of circumstances or the emergence of new evidence relevant to the listing; (c) periodic review of the list to determine whether reasonable grounds remain for entities to be listed; and (d) mechanisms allowing claims of mistaken identity to be dealt with speedily and making compensation available for persons wrongly affected.<sup>65</sup> An individual or entity subject to designation as terrorist, whether as a result of listing on the Consolidated List of the United Nations or through a domestic procedure for similar listing, must be informed of that fact and of the measures taken as a consequence of listing, and is entitled to know the case against him, her or it, and be able to be heard within a reasonable time by the relevant decision-making body.<sup>66</sup>

35. The Special Rapporteur identifies the elements below of a best practice concerning the listing of terrorist entities:

#### **Practice 9. Core elements of best practice in the listing of terrorist entities**

Irrespective of the continued existence of the practice of the Security Council to list individuals or entities as terrorist, the implementation of any sanctions against individuals or entities listed as terrorist shall comply with the following minimum safeguards:

1. Sanctions against the individual or entity are based on reasonable grounds to believe that the individual or entity has knowingly carried out, participated in or facilitated a terrorist act (as properly defined pursuant to practice 7 above);
2. The listed individual or entity is promptly informed of the listing and its factual grounds, the consequences of such listing and the matters in items 3 to 6 below;
3. The listed individual or entity has the right to apply for de-listing or non-implementation of the sanctions, and has a right to court review of the decision resulting

<sup>62</sup> A/65/258, paras. 55-58. See also *Kadi v European Commission* (No 2), case T85-09, 30 September 2010.

<sup>63</sup> A/65/258, paras. 70 and 75(b).

<sup>64</sup> Australia, Criminal Code Act 1985, sect. 102.1(1); Canada, Criminal Code 1985, sect. 83.05(1). CF. the designation of organizations using the much vaguer notion of organizations “concerned with” terrorism under section 3(4) of the Terrorism Act 2000 of the United Kingdom.

<sup>65</sup> Australia, Charter of the United Nations Act, 1945, sect. 25; Belgium, arrêté royale du 28 décembre 2006; Canada, Criminal Code 1985, sects. 83.05 and 83.07. See also the questionnaire response submitted by Canada.

<sup>66</sup> See A/HRC/4/88, paras. 17-22, A/HRC/4/26/Add.2, para. 90 (e), and A/63/223, paras. 16 and 45 (a).

from such application, with due process rights applying to such review, including disclosure of the case against him, her or it, and such rules concerning the burden of proof that are commensurate with the severity of the sanctions;

4. The listed individual or entity has the right to make a fresh application for de-listing or lifting of sanctions in the event of a material change of circumstances or the emergence of new evidence relevant to the listing;

5. The listing of an individual or entity, and the sanctions resulting from it, lapse automatically after 12 months, unless renewed through a determination that meets the requirements of items 1 to 3 above; and

6. Compensation is available for persons and entities wrongly affected, including third parties.

## I. Arrest and interrogation of terrorist suspects

36. The arrest, detention, interrogation and subsequent treatment of terrorist suspects may involve, and has in the past involved, the violation of several human rights and fundamental freedoms. One of the most insidious forms of violation in counter-terrorism operations has been the use of secret or unacknowledged detention,<sup>67</sup> which is prohibited under international law by human rights and humanitarian law norms that may not be derogated from under any circumstances.<sup>68</sup> Persons arrested or detained must be given the benefit of legal assistance of their choosing, and informed of that right.<sup>69</sup> Only for genuine reasons of national security may the person's choice of lawyer be restricted and, in any case, there may never be interference with the right to independent, experienced, competent and effective counsel.<sup>70</sup>

37. The prohibition against torture or any other form of cruel, inhuman or degrading treatment is absolute and non-derogable and applies to the treatment of any person within the power or effective control of a State, even when not situated within the territory of the State.<sup>71</sup> In no circumstances whatsoever is such treatment justified, and States must take measures to effectively prevent, detect and, if detected, prosecute those responsible for all instances of such treatment.<sup>72</sup> Measures should include, but not be limited to, the permanent video recording of all interrogation rooms by means that cannot be switched off or erased. Information obtained through torture or other cruel, inhuman or degrading treatment or punishment, wherever that has occurred, may never be used in any proceedings.<sup>73</sup>

38. States must remain vigilant against all practices that erode the absolute prohibition against torture in the context of counter-terrorism measures, including by ensuring that non-nationals arrested as terrorist suspects enjoy the right of *non-refoulement* and are not

<sup>67</sup> For a definition of secret detention, see the joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42), para. 8.

<sup>68</sup> Ibid, paras. 60-86; A/HRC/6/17/Add.3, paras. 36-37.

<sup>69</sup> See Basic Principles on the Role of Lawyers, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, Principles 1 and 5; and CCPR/C/79/Add.74, para. 28.

<sup>70</sup> Basic Principles, *ibid.*, Principle 6.

<sup>71</sup> See International Covenant on Civil and Political Rights art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, advisory opinion, ICJ Reports 2004, para. 109; A/HRC/6/17/Add.3, paras. 8 and 38, and Add.4, para. 9.

<sup>72</sup> Convention against Torture, art. 2; A/HRC/6/17/Add.3, para. 39; A/HRC/6/17/Add.4, para. 18.

<sup>73</sup> Convention against Torture, art. 15; A/HRC/6/17/Add.3, paras. 27-28.

expelled or otherwise removed to a country or area if the foreseeable consequence of that measure is the person's exposure to a real risk of torture or other cruel, inhuman or degrading treatment or punishment.<sup>74</sup>

**Practice 10. Core elements of best practice in the arrest and interrogation of terrorist suspects**

1. Any form of secret or unacknowledged detention is prohibited.
2. Every person has the right to contact a lawyer of his or her choice from the moment of arrest or detention. The scope of such choice may be restricted for genuine reasons of national security.
3. Any form of torture or other cruel, inhuman or degrading treatment or punishment is prohibited. Compliance with this prohibition shall be effectively monitored.
4. Information obtained through torture or other cruel, inhuman or degrading treatment or punishment, anywhere in the world, shall not be used in any proceedings and shall never be solicited or condoned.
5. Anyone arrested as a terrorist suspect who would face a real risk of torture or other cruel, inhuman or degrading treatment or punishment shall enjoy the right of *non-refoulement*, and may not be extradited, expelled or otherwise formally or informally removed to a country or area if the foreseeable consequence of that measure is the person's exposure to such a risk.

## IV. Conclusion

39. **In the present compilation of 10 areas of best practice in countering terrorism, the Special Rapporteur has sought primarily to identify legislative models that he considers appropriate for the effective countering of terrorism in full compliance with human rights. Beyond such models, best practices could also be identified in other forms, such as training programmes, the allocation of resources and, above all, the adoption of national counter-terrorism strategies. Such strategies need to go beyond good laws and require a comprehensive approach, rooted in human rights and addressing also conditions conducive to the spread of terrorism, in line with the Global Counter-Terrorism Strategy adopted by the General Assembly.**

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<sup>74</sup> See statement by the United Nations High Commissioner for Human Rights on Human Rights Day 2006, DS-S-TER(2006)003; A/HRC/6/17/Add.3, para. 17; and A/60/316, para. 51.

## Annex

### Ten areas of best practice in countering terrorism

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism advocates the following 10 best practices in countering terrorism as concrete models for wider adoption and implementation by Member States.

#### **Practice 1. Model provisions on consistency of counter-terrorism law with human rights and refugee law, and humanitarian law**

All legislation relating to the combating of terrorism is subject to the following guarantees and procedures:

1. Proposals for new legislation or amendments to existing laws, shall include a written statement bringing to the attention of the Legislature any provision in the proposal that appears to be inconsistent with the purposes and provisions of norms of international human rights and refugee law that are binding upon the State.

2. The Legislature shall, through a specialized body or otherwise, review and ensure that any law approved by it conforms to the norms of international human rights and refugee law that are binding upon the State.

3. The judiciary shall be entrusted with ensuring that laws do not breach norms of international human rights and refugee law that are binding upon the State. In discharging this duty, the courts shall apply the techniques available to them under the Constitution, such as:

(a) Adopting an interpretation of the law that is consistent with the purposes and provisions of norms of international human rights and refugee law that are binding upon the State;

(b) Declaring that part of the law is without legal effect;

(c) Declaring that the inconsistent law is to be of no force or effect, either with immediate effect or after a period of time that allows the Government to take remedial steps.

4. If the State is involved, as a party, in an ongoing armed conflict, the above provision shall apply also to securing compliance with principles and provisions of international humanitarian law, without prejudice to the obligation to comply with international human rights and refugee law.

#### **Practice 2. Model provision on consistency of counter-terrorism practices with human rights and refugee law, and humanitarian law**

In the application and exercise of all functions under the law relating to terrorism, it is unlawful for any person to act in any way that is incompatible with the purposes and provisions of international human rights and refugee law that are binding upon the State. In this regard:

1. The exercise of functions and powers shall be based on clear provisions of the law that exhaustively enumerate the powers in question.

2. The exercise of such functions and powers may never violate peremptory or non-derogable norms of international law, nor impair the essence of any human right.

3. Where the exercise of functions and powers involves a restriction upon a human right that is capable of limitation, any such restriction should be to the least intrusive means possible and shall:

(a) Be necessary in a democratic society to pursue a defined legitimate aim, as permitted by international law; and

(b) Be proportionate to the benefit obtained in achieving the legitimate aim in question.

(4) If the State is involved, as a party, in an ongoing armed conflict, the above provisions shall apply also to securing compliance with principles and provisions of international humanitarian law, without prejudice to the obligation to comply with international human rights and refugee law.

### **Practice 3. Model provisions on the principles of normalcy and specificity**

1. To the broadest possible extent, measures against terrorism shall be taken by the civilian authorities entrusted with the functions related to the combating of crime, and in the exercise of their ordinary powers.

2. Unless a state of emergency has been officially declared because terrorism genuinely threatens the life of the nation and requires the adoption of measures that cannot be undertaken through restrictions already permitted under international human rights law, terrorism does not trigger emergency powers.

3. Where the law includes particular provisions that, for a compelling reason, are considered necessary in combating terrorism and entrust certain authorities with specific powers for that reason, the use of such powers for any purpose other than the combating of terrorism, as properly defined pursuant to practice 7, is prohibited.

### **Practice 4. Model provisions on the review of the operation of counter-terrorism law and practice**

1. Where specific counter-terrorism powers have been created pursuant to practice 3 (3), they shall lapse 12 months after their entry into force, unless the Legislature reviews and renews them before that date.

2. The Executive shall appoint a person or body to act as independent reviewer of the application and operation of the law relating to terrorism. The person so appointed shall, at least every 12 months, carry out a review of the operation of the law relating to terrorism and report the findings of such review to the Executive and the Legislature. The report shall contain an opinion on:

(a) The implications of any proposed or recent amendments or additions to the law relating to terrorism, including an opinion on whether these are compatible with international human rights and refugee law that is binding upon the State, as well as, when applicable, principles and provisions of international humanitarian law;

(b) Whether the application in practice of the law relating to terrorism, during the period of review, has been compatible with international human rights and refugee law that is binding upon the State, as well as, when applicable, principles and provisions of international humanitarian law.

### **Practice 5. Model remedies provision**

Any person whose human rights have been violated in the exercise of counter-terrorism powers or the application of counter-terrorism law has a right to a speedy, effective and enforceable remedy. Courts shall have the ultimate responsibility to ensure that this right is effective.

### **Practice 6. Model provisions on reparations and assistance to victims**

1. Damage to natural or legal persons and their property resulting from an act of terrorism or acts committed in the name of countering terrorism shall be compensated through funds from the State budget, in accordance with international human rights law.

2. Natural persons who have suffered physical or other damage, or who have suffered violations of their human rights as a result of an act of terrorism or acts committed in the name of countering terrorism shall be provided with additional legal, medical, psychological and other assistance required for their social rehabilitation through funds from the State budget.

### **Practice 7. Model definition of terrorism**

Terrorism means an action or attempted action where:

1. The action:

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it;

and

2. the action is done or attempted with the intention of:

- (a) Provoking a state of terror in the general public or a segment of it; or
- (b) Compelling a Government or international organization to do or abstain from doing something;

and

3. The action corresponds to:

- (a) the definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
- (b) All elements of a serious crime defined by national law.

### **Practice 8. Model offence of incitement to terrorism**

It is an offence to intentionally and unlawfully distribute, or otherwise make available, a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.

**Practice 9. Core elements of best practice in the listing of terrorist entities**

Irrespective of the continued existence of the practice of the Security Council to list individuals or entities as terrorist, the implementation of any sanctions against individuals or entities listed as terrorist shall comply with the following minimum safeguards:

1. Sanctions against the individual or entity are based on reasonable grounds to believe that the individual or entity has knowingly carried out, participated in or facilitated a terrorist act (as properly defined pursuant to practice 7 above);
2. The listed individual or entity is promptly informed of the listing and its factual grounds, the consequences of such listing, and the matters in items 3 to 6 below;
3. The listed individual or entity has the right to apply for de-listing or non-implementation of the sanctions, and has a right to court review of the decision resulting from such application, with due process rights applying to such review including disclosure of the case against him, her or it, and such rules concerning the burden of proof that are commensurate with the severity of the sanctions;
4. The listed individual or entity has the right to make a fresh application for de-listing or lifting of sanctions in the event of a material change of circumstances or the emergence of new evidence relevant to the listing;
5. The listing of an individual or entity, and the sanctions resulting from it, lapse automatically after 12 months, unless renewed through a determination that meets the requirements of items 1 to 3 above; and
6. Compensation is available for persons and entities wrongly affected, including third parties.

**Practice 10. Core elements of best practice in arrest and interrogation of terrorist suspects**

1. Any form of secret or unacknowledged detention is prohibited.
  2. Every person has the right to contact a lawyer of his or her choice from the moment of arrest or detention. The scope of such choice may be restricted for genuine reasons of national security.
  3. Any form of torture or other cruel, inhuman or degrading treatment or punishment is prohibited. Compliance with this prohibition shall be effectively monitored.
  4. Information obtained through torture or other cruel, inhuman or degrading treatment or punishment, anywhere in the world, shall not be used in any proceedings, and shall never be solicited or condoned.
  5. Anyone arrested as a terrorist suspect who would face a real risk of torture or other cruel, inhuman or degrading treatment or punishment shall enjoy the right of *non-refoulement*, and may not be extradited, expelled or otherwise formally or informally removed to a country or area if the foreseeable consequence of that measure is the person's exposure to such a risk.
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