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**Annual report of the United Nations High Commissioner
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High Commissioner and the Secretary-General**

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

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

Summary

In the present report, submitted in accordance with Human Rights Council resolution 13/26, the United Nations High Commissioner for Human Rights highlights recent developments including the reaffirmation by the General Assembly of the United Nations Global Counter-Terrorism Strategy, activities of the Counter-Terrorism Implementation Task Force, the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism (Counter-Terrorism Committee) and its Executive Directorate, and other developments related to the regulation of private military and security companies.

While recognizing the immense, persistent challenges faced by Member States in combating terrorism and safeguarding the security of individuals within their jurisdiction, the High Commissioner for Human Rights continues to be deeply concerned at the erosion of respect for due process, including the right to a fair trial, in the context of counter-terrorism policies and practices. In the present report, the High Commissioner identifies issues of concern including challenges to human rights and due process guarantees in relation to the Security Council individual sanctions regime, and other practices which impede the right to a fair trial in the context of counter-terrorism, such as the use of intelligence in criminal justice processes.

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I. Introduction

1. In its resolution 13/26 the Human Rights Council welcomed the report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/13/36), as well as the work to implement the mandate given to her by the Commission on Human Rights in its resolution 2005/80 and the General Assembly in its resolution 60/158, and requested the High Commissioner to continue her efforts in this regard.

2. The present report is submitted in accordance with Council resolution 13/26. In it the High Commissioner highlights relevant developments that have taken place since the submission of her last report, notably through initiatives adopted by the General Assembly at its sixty-fifth session, including following the review of the United Nations Global Counter-Terrorism Strategy; recent activities of the Counter-Terrorism Implementation Task Force, the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism (Counter-Terrorism Committee) and its Executive Directorate; and other developments related to the regulation of private military and security companies.

3. While recognizing the immense, persistent challenges faced by Member States in combating terrorism and safeguarding the security of individuals within their jurisdiction, the High Commissioner continues to be deeply concerned at the erosion of respect for due process, including the right to a fair trial, in the context of counter-terrorism policies and practices. In the present report, the High Commissioner identifies issues of concern including ongoing challenges to human rights and due process guarantees in relation to the Security Council individual sanctions regime, as well as other practices which impede the right to a fair trial in the context of counter-terrorism, such as the use of intelligence in criminal justice processes.

II. Recent developments

A. Activities of the General Assembly

4. On 3 September 2010, the General Assembly adopted resolution 64/297.¹ In this resolution, four years after the adoption of the United Nations Global Counter-Terrorism Strategy (the “Global Strategy”)², the General Assembly reaffirmed the Global Strategy and its four pillars, which constitute an ongoing effort, and called upon Member States, the United Nations and other appropriate international, regional and subregional organizations to step up their efforts to implement the Global Strategy in an integrated manner and in all its aspects. The resolution signalled a clear re-endorsement by all Member States that human rights are the fundamental basis of the fight against terrorism, and that human rights and countering terrorism are not conflicting goals but are mutually reinforcing.

5. Through this resolution, the General Assembly also called upon United Nations entities involved in supporting counter-terrorism efforts to continue to facilitate the

¹ This resolution was adopted following General Assembly resolution 62/272 of 5 September 2008, which called for, inter alia, an examination in two years of progress made in the implementation of the Strategy and for consideration to be given to updating it to respond to changes, as also provided for in General Assembly resolution 60/288 of 8 September 2006.

² Resolution 60/288 of 8 September 2006.

promotion and protection of human rights and fundamental freedoms, as well as due process and the rule of law, while countering terrorism. The General Assembly reaffirmed the primary responsibility of Member States to implement the Global Strategy, but also recognized the need to enhance the important role that the United Nations, including the Counter-Terrorism Implementation Task Force, plays in facilitating and promoting coordination and coherence in the implementation of the Global Strategy at the national, regional and global levels and in providing assistance, upon request by Member States, especially in the area of capacity-building.

6. In a resolution adopted on 20 December 2010,³ the General Assembly again reaffirmed 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. It also urged States, inter alia, to safeguard the right to privacy in accordance with international law, and take measures to ensure that interferences with the right to privacy are regulated by law, subject to effective oversight and appropriate redress, including through judicial review or other means. The General Assembly also requested the Counter-Terrorism Implementation Task Force to continue its efforts to ensure that the United Nations can better coordinate and enhance its support to Member States in their efforts to comply with their obligations under international law, including international human rights, refugee and humanitarian law, while countering terrorism, and to encourage each working group of the Task Force to incorporate a human rights perspective into its work. It also encouraged relevant United Nations bodies and entities, in particular those participating in the Task Force, to step up their efforts to ensure respect for international human rights, refugee and humanitarian law, as well as the rule of law, as an element of technical assistance, including in the adoption and implementation of legislative and other measures by States.

B. Activities of the Counter-Terrorism Implementation Task Force

7. The Secretary-General highlighted in his report to the General Assembly that the Counter-Terrorism Implementation Task Force, its working groups and entities should continue to ensure respect for human rights and the rule of law as the fundamental basis for their work in assisting Member States in implementing the Global Strategy (A/65/224, para. 36). Similarly, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism encouraged the Task Force to take into account human rights considerations in all aspects of its work, in line with the Global Strategy, and ensure that each working group incorporates a human rights component and perspective (A/65/258, para. 73). It is also my view that as the key comprehensive framework document at the international level for countering terrorism, the Global Strategy should inform the work and approach of the Counter-Terrorism Implementation Task Force. I encourage the Task Force, its working groups and its initiatives to incorporate a human rights approach to, and address human rights issues and concerns in, their work, in line with the approach mandated by Member States in the Global Strategy and to ensure that the assistance provided by the Task Force to respond to terrorism is both effective and sustainable.

8. The working group on protecting human rights while countering terrorism issued its first two Basic Human Rights Reference Guides: *The Stopping and Searching of Persons* and *Security Infrastructure* in September 2010, and is developing guides on detention in the context of counter-terrorism, the principle of legality in national counter-terrorism

³ See A/65/456/Add.2 (Part II), sect. III, draft resolution XVI.

legislation and the proscription of organizations at the national level. These tools aim to provide guidance on how measures compliant with human rights can be adopted in a number of counter-terrorism areas and will be useful instruments in assisting Member States in strengthening the protection of human rights while countering terrorism. In addition, the working group will organize a series of international meetings, held at the regional level on a rotating basis, which will focus on issues related to the protection of human rights in the context of countering terrorism, with a view to developing recommendations based on international standards. The first meeting will take place in early 2011 in South-East Asia, and will address the issue of the right to a fair trial in the context of countering terrorism.

9. In addition to chairing the working group on protecting human rights while countering terrorism, my Office is an active member of a number of other Task Force working groups and initiatives, including the working group on preventing and resolving conflicts, the Integrated Assistance for Countering Terrorism (I-ACT) Initiative, the working group on countering the use of the Internet for terrorism purposes, the working group on supporting and highlighting victims of terrorism, and the newly founded working group on border management. In all of these working groups, my Office aims to mainstream human rights concerns and issues in the work of the Task Force, as per the framework provided by the Global Strategy. In this context, in January and February 2010, my Office took part in meetings of the working group on countering the use of Internet for terrorist purposes, in Berlin and in Seattle.

10. In its Presidential statement of 27 September 2010 (PRST 2010/19), the Security Council recognized, *inter alia*, the importance of civil society for increasing awareness about the threats of terrorism and more effectively tackling them. Through the Global Strategy, the General Assembly also stressed the need to further encourage non-governmental organizations and civil society to engage, as appropriate, on how to enhance efforts to implement the Strategy.⁴ Further, the Secretary-General has noted that Member States have highlighted the need to engage more closely with civil society and to provide better linkage between the activities of the Task Force and civil society entities.⁵ It is my view that engagement with civil society is a necessary element of any assistance provided to Member States to implement the human rights aspects of the Global Strategy. The Task Force should, as a whole, including under the leadership of the working group on protecting human rights while countering terrorism, step up its engagement with civil society, non-governmental organizations (NGOs) and human rights defenders. Such engagement can inform any assistance provided by the Task Force and its working groups, and lead to a response that is both effective and compliant with international human rights law.

C. Activities of the Security Council Counter-Terrorism Committee and Counter-Terrorism Executive Directorate

11. The Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate continue to take relevant human rights concerns into account in their work programmes focused on the implementation of Security Council resolutions 1373 (2001) and 1624 (2005). Under the chairmanship of Turkey, the Committee has held thematic discussions on issues mentioned in the resolutions, all of which have referred to relevant human rights aspects, such as ensuring respect for the right to seek asylum while denying

⁴ Para. 3 (d) of resolution A/62/288, as reaffirmed in resolution 64/297, para. 6.

⁵ "United Nations Global Counter-Terrorism Strategy: activities of the United Nations system in implementing the Strategy" (A/64/818), para. 19.

safe haven, and including rule of law programmes in recommendations for technical assistance. In addition, the Committee held a discussion on 7 October 2010 that focused entirely on human rights in the context of resolution 1373. These discussions were later presented as briefings to the wider United Nations membership, bringing greater transparency to the Committee's attention to human rights. At a Security Council briefing by chairs of the subsidiary counter-terrorism bodies on 15 November 2010, the Committee chair reiterated that effective counter-terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing.

12. In line with General Assembly resolution 64/168 and Human Rights Council resolution 13/26, the Committee and its Executive Directorate continued to liaise with the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and other human rights entities. The Special Rapporteur briefed the Committee in New York on 28 October 2010, where he addressed issues related to the legal basis of the Security Council's counter-terrorism regime. The Executive Directorate organized a regional workshop for senior law enforcement and prosecution officials from South Asia, with the participation of OHCHR, in Semarang, Indonesia, from 9 to 11 November 2010, including for the purpose of visiting the Jakarta Centre for Law Enforcement Cooperation. It also continued its active participation in the Counter-Terrorism Implementation Task Force working group on the protection of human rights while countering terrorism, chaired by OHCHR.

D. Other developments: regulation of private military and security companies

13. In accordance with the request made by the Human Rights Council in its resolution 10/11 with regard to the elaboration of a possible draft convention on private military and security companies and following regional consultations and meetings with experts, the Working Group on the use of mercenaries as a means of violating human rights and impeding the right of peoples to self-determination presented the full text of the possible draft convention to the Council at its fifteenth session (A/HRC/15/25, annex). The Working Group also presented elements for the possible draft convention to the General Assembly at its sixty-fifth session (A/65/325, annex). As highlighted by the Working Group, the aim of a new binding legal instrument would be to establish minimum international standards for States parties to regulate the activities of the companies and their personnel, and to set up an international oversight mechanism in the form of a committee (*ibid.*, para. 54). The draft convention also proposes that the committee establish and maintain an international register of private military and security companies operating on the international market based on information provided by States parties (*ibid.*, para. 54 (i)).

14. On 1 October 2010, the Human Rights Council adopted resolution 15/26 in which it decided to establish an open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework, including, *inter alia*, the option of elaborating a legally binding instrument, on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability. The Council noted that the open-ended intergovernmental working group should take into consideration the principles, main elements and draft text proposed by the Working Group on the use of mercenaries.

15. In a parallel development, on 9 November 2010, 58 private security companies signed on to the International Code of Conduct for Private Security Service Providers. The Code of Conduct endorses the principles of "respect, protect, remedy" developed by the Special Representative of the Secretary-General on the issue of human rights and

transnational corporations, and welcomed by the Human Rights Council, and affirms the responsibility of signatory companies to respect the human rights of, and fulfil humanitarian responsibilities towards, all those affected by their business activities, including the population of the area in which services are provided. The Code also envisages the establishment of an independent governance and oversight mechanism whose mandate is still to be determined.

III. Issues of concern: due process in the context of counter-terrorism

A. Due process and targeted sanctions⁶

16. The international sanctions regime for individuals linked to Al-Qaida and the Taliban was established by Security Council resolution 1267 (1999) and modified by a series of subsequent resolutions, which together require all States, in connection with any individual or entity associated with Al-Qaida, Osama bin Laden and/or the Taliban as designated by the 1267 Committee, to implement sanctions measures including asset freezes, international travel bans, and arms embargoes.⁷ The Consolidated List maintained by the 1267 Committee differs from other sanctions lists in that it targets individuals and entities that do not necessarily have any links to a State or government.

17. Targeted sanctions are widely recognized as a significant preventive tool for effectively combating terrorism. While the objective of the sanctions imposed under the 1267 regime is preventive, their impact on the individuals and entities targeted is clearly punitive. I have repeatedly expressed my concern over the impact of the listing and de-listing regime established by the Security Council, and of related national procedures for its implementation, on the human rights of those affected and their families. Sanctions imposed under the 1267 regime, including international travel bans and asset freezes, can result in a denial of access by listed individuals to their own property, limitations on their ability to work and restrictions on their ability to travel and may therefore unjustifiably infringe, for example, on the right to freedom of movement, the right to property, and the right to privacy. The reputational cost to those affected as a result of the suggested association with terrorism or terrorist groups is immeasurable. Moreover, as individual listings under the current regime are open-ended in duration, they may result in a sanction measure effectively becoming permanent.

18. The serious potential repercussions of targeted sanctions for the human rights of those affected underline the importance of ensuring that the procedures for the listing and de-listing of individuals and entities comply strictly with due process requirements. Yet the procedures established under the 1267 regime lack the judicial safeguards necessary to meet internationally recognized standards of due process including the right to a fair hearing, the right to judicial review and the right to an effective remedy. The sanctions regime established under resolution 1373 pose similar challenges. Since the 2005 call by the General-Assembly for the Security Council to ensure “fair and transparent procedures” for

⁶ In its resolution 13/26 the Human Rights Council requested the High Commissioner for Human Rights “to contribute further appropriately to the ongoing discussion regarding the efforts of Member States of the United Nations to assure adequate human rights guarantees to ensure fair and clear procedures, in particular with regard to placing on, reviewing and removing individuals and entities from terrorism-related sanctions lists”.

⁷ Security Council resolutions 1333 (2000), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008) and 1904 (2009).

its international sanctions regime of individuals, a number of improvements have been made to the 1267 regime in an effort to address these weaknesses. These include the establishment by the Council of a focal point for de-listing,⁸ the requirement that Member States provide a detailed statement of case prior to listing,⁹ and a requirement that the Committee make accessible a narrative summary of reasons for listing, make further efforts to try to inform the individual of the listing, and conduct a review of all names on the list by 30 June 2010.¹⁰

19. The latest measure towards the improvement of the Security Council's listing and de-listing procedure lies in the adoption on 17 December 2009 of resolution 1904. Through the resolution, the Security Council established an Office of the Ombudsperson to receive requests from individuals and entities seeking removal from the Consolidated List. The General Assembly has recognized the need to continue ensuring that fair and clear procedures under the United Nations terrorism-related sanctions regime are strengthened in order to enhance their efficiency and transparency, and has welcomed and encouraged the ongoing efforts of the Security Council in support of these objectives, including by establishing an Office of the Ombudsperson and continuing to review all the names of individuals and entities in the regime.¹¹ I commend the efforts of the Security Council to improve the sanctions regime through procedural reforms, including the adoption of resolution 1904 and the appointment in July 2010 of the first Ombudsperson, as a significant step towards ensuring fair and clear procedures and preventing further human rights violations.

20. Resolution 1904 provides for a strict timetable for the review procedure once the Office of the Ombudsperson has received a de-listing request, with an initial information-gathering phase which requires the Ombudsperson, *inter alia*, to acknowledge the receipt of the de-listing request; inform the petitioner of the general procedure for processing de-listing requests; answer specific questions from the petitioner about 1267 Committee procedures; and forward the de-listing request to the 1267 Monitoring Team for additional information. The process then involves a two-month period of engagement including the possibility for dialogue between the Ombudsperson, the petitioner and Member States. The Ombudsperson must then submit a comprehensive report to the Committee, which lays out the principal arguments concerning the request and summarizes and, "as appropriate", specifies the sources of, all information. The resolution also states that de-listing petitions not returned to the petitioner will be forwarded to, *inter alia*, relevant United Nations bodies which, in the light of the important human rights issues related to de-listing, I trust will include OHCHR.

21. While the newly-established de-listing procedures represent an important step towards fair and clear procedures, the gulf between the 1267 regime and due process-related requirements in international human rights law and the need for more comprehensive reform remain. There is still no recourse to independent judicial or quasi-judicial review either of a decision to list or denial of a request to de-list. In addition, there is no obligation to publish in full the Ombudsperson's report, nor is the petitioner entitled to know entirely the information available to the Ombudsperson or the Committee. Furthermore, although the powers given to the Ombudsperson include access to some information provided by the petitioner and the Monitoring Team, in practice the Ombudsperson may still depend in large measure on the willingness of individual States to provide the non-redacted information necessary to produce a full analysis of de-listing requests. The decision to de-list will

⁸ Security Council resolution 1730 (2006).

⁹ Security Council resolution 1735 (2006).

¹⁰ Security Council resolution 1822 (2008).

¹¹ See A/65/456/Add.2 (Part II), sect. III, draft resolution XVI.

continue to be taken by the 1267 Committee, which is under no obligation to provide reasons for its decision and the extent to which the reasons will be communicated to the petitioner in practice is unclear. Finally, the Office of the Ombudsperson lacks the authority to grant appropriate relief in cases where human rights are violated, whilst the ability of individuals and entities to challenge their listing and seek relief at national level is constrained by the obligation on Member States to implement Security Council sanctions imposed under Chapter VII.¹²

22. These and other human rights concerns have fuelled challenges to the targeted sanctions regime and implementing measures in regional and national courts by political bodies at regional and national levels, by international human rights treaty bodies and special procedures of the Human Rights Council, and in other forums.¹³ For instance, the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights of the International Commission of Jurists has referred to the “virtually uniform criticism of the system as it presently operates” and noted the difficulties the regime poses for Member States faced with abiding by their obligations to implement sanctions while meeting their domestic and international human rights obligations.¹⁴ While the procedural improvements established under resolution 1904 and the recent appointment and ongoing work of the Ombudsperson are positive and significant developments, they fail to adequately address the structural, due process-related concerns which have prompted these criticisms and challenges.

23. The recent decision of the European General Court in *Kadi v. European Commission* provides practical illustration of these challenges. The Court annulled the European Commission regulation implementing the Security Council resolutions and decisions related to the targeted sanctions regime insofar as it applied to the applicant, Mr. Kadi, on grounds that the regulation violated his right to defence. The Court stated that Mr. Kadi’s right to effective judicial review had been violated due to the lack of proper access to the information and evidence used against him, noting in particular that:

¹² Individual cases have nonetheless been heard in national courts in Belgium, Canada, Germany, Italy, the Netherlands, Pakistan, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America. One example is the decision by the Supreme Court of the United Kingdom in January 2010 which struck down the domestic legislation implementing the 1267 regime in that country (consolidated cases *HMT v. Mohammed Jabar Ahmed and others; Mohammed al-Ghabra and HMT v. Hani El Sayed Sabaei Youssef*).

¹³ See Council of Europe Parliamentary Assembly resolution 1597 which found the 1267 sanctions regime to “violate the fundamental principles of human rights and the rule of law”; Council of Europe, Commissioner for Human Rights, “Arbitrary procedures for terrorist black-listing must now be changed” (2008), available from www.coe.int/t/commissioner/viewpoints/081201_en.asp; Case T-85/09, *Kadi v. European Commission*, European General Court (Seventh Chamber), 30 September 2010; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008; communication No. 1472/2006, *Sayadi and Vinck v. Belgium*, Views adopted by the Human Rights Committee on 22 October 2008. At the national level see the resolution adopted by the Parliament of Switzerland, which provides for notification to the Security Council that the Government of Switzerland will not apply the sanctions required under the 1267 regime against individuals who have not been “brought to justice” after three years of being placed on the Consolidated List; who do not have the right of judicial review of their listing; who have not been charged by any judicial authority; and against whom no new evidence has been produced since being included on the List: *Les fondements de notre ordre juridique court-circuités par l’ONU* (adopted 4 March 2010).

¹⁴ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (Geneva, International Commission of Jurists, 2009), pp. 116–117.

the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee's list requires consensus within the committee. Moreover, the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee's list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which has requested his inclusion on the Sanctions Committee's list).¹⁵

24. The Court stated that the considerations of the earlier decision by the European Court of Justice remain valid despite the creation by the Security Council of a focal point and an Office of the Ombudsperson, as these "cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee". The Court also found an infringement of the applicant's right to property as a result of the general application and duration of the freezing measures.

25. Concerns similar to those addressed by the European General Court also have been raised by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, including in his report to the sixty-fifth session of the General Assembly. While welcoming the adoption of resolution 1904 and related procedural improvements, the Special Rapporteur recommended that the Security Council adopt a widespread reform of its sanctions regime and replace resolutions 1373 (2001), 1624 (2005) and 1267 (1999) (as amended) with a single resolution, not adopted under Chapter VII of the Charter of the United Nations, in order to systematize the States' counter-terrorism measures and reporting duties of States under one framework with explicit human rights provisions, using the Global Strategy as a basis (A/65/258, para. 75).

26. The Security Council has reiterated its commitment "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions" (PRST/2010/19, p. 4) and to review the 1267 sanctions measures "with a view to their possible further strengthening" at latest by mid-2011.¹⁶ Importantly, the Security Council also has expressed its strong support for the Global Strategy, which recognizes respect for human rights and the rule of law as the fundamental basis for the fight against terrorism, and has reaffirmed that Member States "must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law", noting further that "effective counter-terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing and are an essential part of a successful counter-terrorism effort" (PRST/2010/19, p. 2).

27. I welcome the renewed commitment of the Security Council to ensuring that measures for countering terrorism are adopted in compliance with international law and commend in particular its strong support for the Global Strategy. I urge the Security Council in this spirit to explore every avenue of possibility in order to ensure that sanctions imposed against individuals and entities are accompanied by rigorous procedural safeguards

¹⁵ Case T-85/09, *Kadi v. European Commission*, European General Court (Seventh Chamber), 30 September 2010, para. 128.

¹⁶ Security Council resolution 1904.

which guarantee minimum due process standards, for both listing and de-listing decisions. This should include ensuring full support to the office of the newly-established Ombudsperson, as well as monitoring and reviewing its practices as necessary, while developing additional mechanisms to enhance due process protections for listing and de-listing procedures, such as further steps to increase transparency of the listing process and the establishment of clear time limits for listing. It should also include the establishment of an independent, quasi-judicial procedure for review of listing and de-listing decisions. I also urge Member States to ensure that implementation at the national level is done in a manner consistent with their international human rights obligations.

B. Due process and the right to fair trial in the context of counter-terrorism

28. In the Plan of Action under the Global Strategy, States undertake to “make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with ... obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms”.¹⁷ States are under the obligation to ensure that all guarantees of due process are respected when persons who are alleged to have committed terrorism-related offences are arrested, charged, detained and prosecuted. Guaranteeing due process rights, including for individuals suspected of terrorist activity, is also critical for ensuring that anti-terrorism measures are effective, respect the rule of law and are seen to be fair.

29. Due process-related rights for persons accused of acts of terrorism include various interrelated aspects. Article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, which both aim at ensuring the proper administration of justice, set out the bedrock norms applicable in all trials, whether of alleged terrorists or otherwise. Persons charged with criminal offences, including terrorism-related crimes, are entitled to guarantees including: the guarantee of equality of all persons before the courts and tribunals; the right to be presumed innocent; the right to a hearing with due process guarantees, including the right to be tried within a reasonable time and by a competent, independent and impartial court or tribunal; and the right to have a conviction and sentence reviewed by a higher court or tribunal in conformity with international human rights law.¹⁸ Ensuring the right to a fair trial in the context of counter-terrorism necessarily includes the protection of a number of other human rights, such as the absolute prohibition of torture, or cruel, inhuman or degrading treatment or punishment.

30. International humanitarian law provides for substantially similar protections for the trial of persons in the context of armed conflicts.¹⁹ Given that the right to a fair trial is

¹⁷ General Assembly resolution 60/288, annex, chap. IV.

¹⁸ Human Rights Committee general comment 32 (2007) on the right to equality before courts and tribunals and to a fair trial. See also the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/63/223, para. 7). Guidance on the right to fair trial also is reflected in the International Commission of Jurists Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (28 August 2004).

¹⁹ Geneva Convention relative to the Treatment of Prisoners of War, art. 84; Geneva Convention relative to the Protection of Civilian Persons in Time of War, arts. 54, 64-74 and 117-126; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

explicitly guaranteed under international humanitarian law during armed conflict, the Human Rights Committee has stated that the requirements of fair trial in human rights law also must be respected during a state of emergency.²⁰

1. Challenges to due process and the right to a fair trial

31. In their fight against terrorism, some States have adopted measures or conducted activities which infringe on basic standards of fair trial or otherwise limit access to the judicial process. For example, some States have extended the maximum limit of pre-charge detention, limited the possibility of a review of the legality of detention, broadened the kind of evidence that can be withheld from the defence, taken measures that directly impact on the presumption of innocence, made an overly broad use of anonymous witnesses, rendered assistance by counsel extremely difficult, or used evidence such as a confession obtained through physical or undue psychological pressure, including torture or ill-treatment. A number of countries also have established specialized chambers within the ordinary courts, made use of military courts to try civilians, or created special courts to deal with terrorism-related cases, in some cases in a manner that is inconsistent with human rights standards. Exceptional courts such as these often lack independence and impartiality of the judiciary, and do not provide for sufficient guarantees for the accused.

32. I continue to be deeply concerned by policies and practices such as these, and am pleased that the working group on protecting human rights while countering terrorism, which is chaired by my Office, will host an expert symposium in early 2011 specifically to address these and other challenges to the right to a fair trial in the context of counter-terrorism. The objectives of the expert symposium will be: to assess and analyse the obstacles and challenges to implementing the requirements for fair trial as set out in international human rights standards; to identify other key rights to secure the fundamental requirements of a right to a fair trial in the context of counter-terrorism; and to exchange experiences regarding good practices with respect to protection on human rights in this regard. A report on the outcome of the expert symposium will be produced with a view to providing guidance to Member States on how the right to fair trial and other related human rights can best be protected in the context of countering terrorism.

2. Specific challenges: the use of intelligence in the context of criminal justice processes

33. For the purposes of the present report, I wish to highlight some of the specific challenges to due process raised by the increased reliance by States on intelligence information in the context of counter-terrorism, all of which require a more in-depth and comprehensive analysis, and greater attention by the international community. The use of accurate intelligence is indispensable to preventing terrorist acts and bringing individuals suspected of terrorist activity to justice. However, the increased reliance on intelligence for countering terrorism and the advent of “intelligence-led law enforcement” in many countries, particularly in the decade since the terrorist attacks of 11 September 2001, has led to the expansion of intelligence authority, often without adequate consideration for the due process safeguards necessary to protect against abuses.

34. In addition to the challenges to human rights raised by the extension of traditional law enforcement powers and functions to intelligence services, the increased reliance on intelligence has had a deleterious effect on criminal justice in many countries. Policies and practices such as the broad application of the national security or “State secrets” doctrine to

International Armed Conflicts, art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 6.

²⁰ Human Rights Committee general comment 29 (2001) on states of emergency, para. 15.

prevent disclosure of information in the context of criminal trials, the use of secret information as evidence, and the use of anonymous witnesses too often have resulted in a lack of justice for victims of terrorism (for instance where problems associated with intelligence-related evidence result in the dismissal of judicial proceedings against individuals suspected of involvement in terrorist activity), denial of the right to a fair trial for individuals accused of terrorist activity (for instance in cases where a civil proceeding, investigation and/or prosecution is halted on grounds of State secrecy) or both.

35. While the legitimate use of a State secrets privilege – as in cases where it is invoked to exclude specific evidence, the exposure of which would necessarily harm national security – can be critical to considerations of national security, its overly broad application by some States has resulted in a lack of accountability including for serious human rights violations.²¹ Non-disclosure of information and evidence deemed prejudicial to security interests has hampered investigations and prosecutions in relation to the alleged complicity of a number of States in the practice of renditions, for instance. The European Parliament has emphasized the need for accountability in this regard, deeming it necessary to “review by limiting and restrictively defining the exceptions that flow from the notion of ‘State secret’ [...] to avoid abuses and deviations that [...] contradict human rights obligations” and “establish specific mechanisms to allow for access to secret information by parliaments and judges, as well as for the release of the information after a certain period of time”.²²

36. Following on the reports of the Committee on Legal Affairs and Human Rights on secret detentions and illegal transfers of detainees, the Parliamentary Assembly of the Council of Europe has called for the elaboration of guidelines on human rights and the fight against impunity which would “stress that state secrecy and immunities do not prevent effective, independent and impartial investigations into serious human rights violations [...] and that those responsible should be held to account”.²³ The forthcoming Committee report on “Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations” will be an important further step. While some action has been taken by individual Member States of the Council of Europe in follow-up to the recommendations flowing from these investigations, a great deal more is needed in order to combat impunity and ensure accountability, including through investigations and prosecutions at national levels.

37. Serious concerns have been raised in the course of legal proceedings regarding the broad use of State secrecy in several countries.²⁴ For instance, in October 2009 the

²¹ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism also has raised concerns over the increasing use of State-secrecy provisions and public interest immunities by certain States, including Germany, Italy, Poland, Romania, the former Yugoslav Republic of Macedonia, the United Kingdom or the United States “to conceal illegal acts from oversight bodies or judicial authorities, or to protect itself from criticism, embarrassment and – most importantly – liability” (A/HRC/10/3, para. 59).

²² European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)) of 14 February 2007, para. 194, and in particular paras. 202 – 206 on secret services. See also European Parliament resolutions 2006/2027(INI) of 6 July 2006 and 2008/2179(INI) of 19 February 2009. The Parliamentary Assembly of the Council of Europe has also recognized the problems caused by the invocation of State secrecy, and has called on Council of Europe Member State governments to make available to their national parliaments all relevant information held by them on the State’s role in renditions and secret detentions (Parliamentary Assembly resolution 1562, para. 18.1.2).

²³ Recommendation 1876 (2009), para. 2.2.

²⁴ See for example *El Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2005) (No. 1:05cv1417); *aff’d*, 479 F. 3d 296 (4th Cir. 2007). Applications are pending before the European Court of Human Rights against the Government of the former Yugoslav Republic of Macedonia for its role in the

Government of the United States of America introduced a new policy on the use of State secrets in order to “strengthen public confidence” and “provide greater accountability and reliability in the invocation of the state secrets privilege in litigation”, including more rigorous procedures for evaluating assertions of the State secrets privilege.²⁵ The full practical implications of the new policy are not yet clear. Furthermore, State secrecy has continued to be invoked by the Government of the United States in cases since the policy came into effect, including as grounds for dismissal of legal proceedings.²⁶ In Germany, the Constitutional Court ruled in July 2009 that the Government’s refusal to provide testimony and access to information to the Parliamentary Inquiry into alleged cooperation of its intelligence services in renditions was unconstitutional, in the absence of detailed reasons for the non-disclosure, and that a general risk of impeding relations with other States alone without detailed substantiation could not be a basis for refusing Parliament access to the information.²⁷

38. As States rely increasingly on intelligence for counter-terrorism purposes, the importance of intelligence sharing and cooperation among States has become ever more important to national security interests. The increase in the sharing of information between law enforcement and intelligence agencies in different jurisdictions, however, raises risks that the information may have been obtained by illegal means by another State and poses challenges to accountability.

39. Legally obtained evidence enables the criminal justice system to work effectively to counter terrorism, while ensuring respect for human rights protections. Under international human rights law the use of torture and other cruel, inhuman or degrading treatment to elicit information from terrorist suspects is absolutely prohibited, as is the use in legal proceedings of evidence obtained by torture or ill-treatment, whether at home or abroad. States must ensure that the full range of legal and practical safeguards to prevent torture is available, including the right for anyone arrested or detained on criminal charges to be brought promptly before a judge and to be tried within a reasonable amount of time or to be released, and the right to challenge promptly the lawfulness of one’s detention before a court. National legislation should explicitly prohibit the use of evidence obtained by torture or ill-treatment. Evidence obtained in violation of other human rights must not be used in legal proceedings if the violation casts serious doubts on the reliability of the evidence, or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.²⁸ In addition to ensuring domestic safeguards, States must

complainant’s illegal detention and rendition to risk of torture, and before the Inter-American Commission on Human Rights against the United States. See also *Arar v. Ashcroft*, 414 F. Supp. 2d 250, (E.D. N.Y. 2006); and *Binyam Mohamed et al. v. Jeppesen DataPlan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008).

²⁵ United States Department of Justice, memorandum on policies and procedures governing invocation of the State secrets privilege, 23 September 2009. The policy provides that the Department of Justice “will not defend the invocation of the privilege in order to: (i) conceal violations of the law, inefficiency or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information which would not reasonably be expected to cause significant harm to national security”.

²⁶ See for example *Binyam Mohamed et al v. Jeppesen DataPlan, Inc*, United States Court of Appeals for the Ninth Circuit No. 08-15693, 8 September 2010.

²⁷ Available from www.bundesverfassungsgericht.de/entscheidungen/es20090617_2bve000307.html (in German only).

²⁸ Rome Statute of the International Criminal Court, art. 69, para. 7.

ensure that regulatory frameworks are in place to ensure compliance with international human rights law in intelligence cooperation.²⁹

40. Other concerns related to the reliance on intelligence for the purposes of criminal justice include differences in evidentiary standards, as the procedures for the gathering of intelligence are subject generally to lower legal thresholds than those which normally govern the collection of evidence for use in criminal proceedings. In some cases, States bypass criminal law channels by using intelligence warrants to obtain evidence for use in legal proceedings, in particular where the threshold for obtaining a warrant for criminal purposes is not met. At the same time, the reliability of intelligence for purposes of criminal justice is questionable as it may include rumours or hearsay, yet the inherently secretive nature of intelligence means that it may not be subject to testing in the context of criminal legal proceedings.³⁰ Furthermore, the disclosure of intelligence submitted as evidence may be suppressed, thereby denying the right of the accused to review and challenge the evidence. In some cases the suppression of intelligence may lead to dismissal of proceedings altogether and the frustration of otherwise legitimate prosecutions. These practices can be detrimental to human rights and the rule of law, including the right to fair trial for the accused, as well as to the effective prosecution of individuals suspected of terrorist activity.

IV. Conclusions and recommendations

41. **The reaffirmation by the General Assembly of the Global Counter-Terrorism Strategy is a clear re-endorsement by all Member States that respect for human rights for all and the rule of law are the fundamental basis of the fight against terrorism, and that human rights and countering terrorism are mutually reinforcing goals. There can be no security without human rights.**

42. **My Office is committed to its continued contribution to the Counter-Terrorism Implementation Task Force, which plays a crucial role in facilitating and promoting coordination and coherence in the implementation of the Global Strategy at the national, regional and global levels. I urge the Task Force, its working groups and its initiatives to incorporate a human rights approach and address human rights issues and concerns in all aspects of their work, in line with the approach mandated by Member States participating in the Global Strategy, and to ensure that the assistance provided by the Task Force to respond to terrorism is both effective and sustainable.**

43. **The activities of civil society are vital for increasing awareness about the threats of terrorism and more effectively tackling them, and for ensuring respect for human rights and the rule of law. I encourage the Task Force as a whole, including under the leadership of the working group on protecting human rights while countering terrorism, to step up its engagement with civil society, NGOs and human rights defenders. Such engagement can inform any assistance provided by the Task Force**

²⁹ See the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/14/46).

³⁰ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has noted with concern that in different courts “the line between [] strategic intelligence and probative evidence has become blurred to the advantage of different forms of ‘national security imperatives’” and stressed that “[j]udicial approval for a special investigative technique must be given in order to make permissible the use of the fruits of the technique as evidence in court” (A/HRC/10/3, para. 29). He further notes that intelligence collected for use in depriving an individual of his or her liberty must be converted into evidence which can be subject to challenge by the accused in a criminal proceeding (ibid., para. 37).

and its working groups, and lead to a response that is both effective and compliant with international human rights law.

44. I commend the renewed commitment of the Security Council to: ensuring that measures for countering terrorism are adopted in compliance with international law; supporting the Global Strategy; and improving the 1267 sanctions regime through procedural reforms. I urge the Council to continue to explore every avenue of possibility in order to ensure that sanctions imposed against individuals and entities are accompanied by rigorous procedural safeguards which guarantee minimum due process standards, for both listing and de-listing decisions. This should include ensuring full support to the Office of the Ombudsperson, as well as monitoring and reviewing its practices as necessary, while developing additional mechanisms to enhance due process protections for listing and de-listing procedures. It should also include the establishment of an independent, quasi-judicial procedure for review of listing and de-listing decisions. At the national level, Member States must ensure that implementation is done in a manner consistent with their international human rights obligations.

45. Effective criminal justice systems based on respect for human rights and the rule of law, including due process guarantees, continue to be the best means for effectively countering terrorism and ensuring accountability. In line with the Global Strategy, States should make every effort to develop and maintain an effective and rule of law-based national criminal justice system and ensure that individuals suspected of terrorist activity are brought to justice in line with due process guarantees, including the right to a fair trial, in compliance with international human rights law.

46. The use of accurate intelligence is indispensable to preventing terrorist acts and bringing individuals suspected of terrorist activity to justice. However, the collection and use of intelligence must include due process safeguards necessary to protect against abuses and ensure accountability. The challenges to human rights posed by the increased reliance by States on intelligence, including the abuse of the State secrecy doctrine in the context of legal proceedings, the use in legal proceedings of evidence obtained by illegal means, whether at home or abroad, and the use of secret evidence, all require greater attention by the international community. In the meantime States must ensure that regulatory frameworks are in place to guarantee compliance with international human rights law, both domestically and through intelligence cooperation with other States.
