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تعزيز وحماية جميع حقوق الإنسان المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

تقرير المقرر الخاص المعني بتعزيز وحماية حقوق الإنسان والحريات الأساسية في سياق مكافحة الإرهاب، السيد مارتن شاينين

إضافة

البعثة التي قام بها إلى الولايات المتحدة الأمريكية*

* يُعمم موجز تقرير هذه البعثة بجميع اللغات الرسمية. أما التقرير نفسه الوارد في مرفق هذا الموجز فيُعمم باللغة التي قدم بها فقط. وتُعمم حواشي هذا التقرير كما وردت باللغة التي قُدِّمت بها فقط.

موجز

قـــام المقرر الخاص المعني بتعزيز وحماية حقوق الإنسان والحريات الأساسية في سياق مكافحة الإرهاب، الســـيد مارتن شاينين، بزيارة إلى الولايات المتحدة الأمريكية في الفترة من ١٦ إلى ٢٥ أيار/مايو ٢٠٠٧ والتقى خلالهـــا بمســـؤولين حكومـــيين رفيعي المستوى، وأعضاء من الكونغرس وموظفيهم، وأكاديميين ومنظمات غير حكومية، فضلاً عن لجنة البلدان الأمريكية لحقوق الإنسان. وكان الهدف من هذه الزيارة هو القيام بعملية لتقصي الحقـــائق وإجراء تقييم قانوني لقوانين وممارسات الولايات المتحدة في مجال مكافحة الإرهاب، بالقياس إلى معايير القانون الدولي. وهدفت زيارته أيضاً إلى تحديد ونشر أفضل الممارسات في مجال مكافحة الإرهاب.

ويـــنظر الفصـــل الأول مـــن هذا التقرير في الدور الذي تضطلع به الولايات المتحدة في مجال مكافحة الإرهـــاب، ويخلـــص إلى أن عليها مسؤولية خاصة في مجال حماية حقوق الإنسان أثناء مكافحة الإرهاب. ويرى المقرر الخاص أن زيارته إلى الولايات المتحدة خطوة في عملية ترمي إلى استعادة دورها بوصفها مثالاً إيجابياً على حمايـــة حقوق الإنسان، حتى في سياق التصدي للإرهاب. ويشجع المقرر الخاص أيضاً الولايات المتحدة تشجيعاً قوياً على الاضطلاع بدور قوي في الجهود التي تبذلها الأمم المتحدة في مجال التصدي للإرهاب، وتنفيذ استراتيجية الأمم المتحدة العالمية لمكافحة الإرهاب، وعلى دعم هذه الجهود. ويخلص المقرر الخاص إلى أن المعركة الدولية ضد الإرهاب ليست "حرباً" بالمعنى الحقيقي للكلمة، وهو يذكِّر الولايات المتحدة بأنه حتى خلال النزاع المسلح الذي يستدعي تطبيق القانون الإنساني الدولي، يظل قانون حقوق الإنسان الدولي منطبقاً. ويعيد المقرر الخاص تأكيده على أن قانون حقوق الإنسان الدولي ملزِمٌ أيضاً لأية دولة فيما يتعلق بأي شخص يخضع لولايتها، حتى وإن كانت الدولة تتصرف خارج إقليمها.

ويُـــنظر في الفصـــل الثاني في مسألة مراكز الاحتجاز العسكرية. ففي سياق مسألة المحتجزين في خليج غوانتانامو، يخلص المقرر الخاص إلى أن تصنيف المحتجزين بأنهم "محاربون أعداء غير شرعيين" ما هو إلا مُصطلح ملاءَمة ليس لـــه أي أثر قانوني. ويعرب المقرر الخاص عن قلقه البالغ إزاء عدم قدرة المحتجزين عن التماس مراجعة قضـــائية كاملـــة لتحديد وضع المقاتل في حالتهم، الأمر الذي يعتبر بمثابة عدم امتثال للحظر الذي يفرضه العهد الدولي الخاص بالحقوق المدنية والسياسية بشأن الاحتجاز التعسفي، والحق في المراجعة القضائية القادرة على الأمر بـــإطلاق ســـراحهم، والحق في حصولهم على محاكمة عادلة تُجرى خلال وقت معقول. والجدير بالملاحظة أيضاً الاســـتثناء الواضح لحقوقهم في استلام أمر الإحضار بموجب قانون اللجان العسكرية لعام ٢٠٠٦. ويدعو المقرر الخاص إلى العمل الدؤوب والثابت لتحقيق الرغبة التي عبرت عنها الولايات المتحدة بالمضي قدماً نحو إغلاق معتقل خلـــيج غوانـــتانامو. ويذكِّر المقرر الخاص أيضاً الولايات المتحدة وسائر الدول المسؤولة عن احتجاز الأفراد في أفغانســـتان والعراق بأن لأولئك المحتجزين الحق أيضاً في محاكمة عادلة تجري خلال وقت معقول إذا تم الاشتباه بضلوعهم في جريمة ما وإلا إطلاق سراحهم.

وفي الفصل الثالث، ينظر المقرر الخاص في مسألة اللجوء إلى اللجان العسكرية لمحاكمة الإرهابيين المشتبه فيهم. ويحدد المشاكل المتصلة بالاختصاص القضائي فيما يتعلق ببعض الجرائم التي لا تدخل في إطار قوانين الحرب (الإرهـــاب، وتقديم الدعم المادي للأعمال الإرهابية، ومساعدة العدو بصورة غير قانونية، والتجسس، والتآمر) وتستدعي تطبيق القانون الجنائي بعد وقوع الحدث، طالما أن أحكام الجرائم المطبَّقة لم تكن نافذة وقت ارتكاب

هذا السلوك الذي على أساسه قد توجه إلى المحتجزين الاتهامات. ويلاحظ المقرر الخاص أيضاً أن التبرير الحكومي فيما يتعلق باللجان العسكرية غير سليم في الواقع لأن المحاكم العسكرية العادية كانت تملك الولاية القضائية لمحاكمة انتهاكات القوانين في النزاع المسلح منذ عام ١٩١٦ بموجب القانون الموحد للقضاء العسكري، ولأن الصلة بين أحداث ١١ أيلول/سبتمبر ومواطني الولايات المتحدة ستسمح للمحاكم العادية بالفصل في الجرائم الأخرى من قبيل التآمر والإرهاب. وفيما يتعلق بتشكيل اللجان العسكرية وبعملها، فإن المقرر الخاص يتابع النظر في قضايا تتعلق باستقلالية تلك اللجان، واللجوء المحتمل إليها لمحاكمة المدنيين، وغياب مظهر الحياد عنها. ويتناول أيضاً مسائل مختلفة تتعلق باستخدام وتوفر الأدلة لدى المثول أمام اللجان العسكرية، وقدرتها على فرض عقوبة الإعدام، والنتائج المترتبة على التبرئة أو انقضاء مدة العقوبة بعد الإدانة.

ويلتفت الفصل الرابع إلى مسألة استجواب الإرهابيين المشتبه فيهم، مراعياً كلاً من برنامج وكالة الاستخبارات المركزية المتعلق "باستخدام أساليب استجواب قاسية" وأساليب استجواب ترد بإيجاز في الكتاب الميداني المنقح لجيش الولايات المتحدة. ويتحدث المقرر الخاص عن مسألة "تسليم الأفراد بوسائل غير عادية" تُطبق على الإرهابيين المشتبه فيهم، واحتجازهم في "أماكن سرية"، ومساءلة المسؤولين عن إجراء الاستجواب بأساليب تصل إلى التعذيب أو المعاملة القاسية أو اللاإنسانية أو المهينة.

وفي الفصلين الخامس والسادس، ينظر المقرر الخاص في قضايا تتصل بتعاريف الإرهاب بموجب قانون الولايات المتحدة، والمزاعم بعمليات قتل تستهدف الإرهابيين المشتبه فيهم يقوم بها عملاء من الولايات المتحدة، ودفع تعويضات إلى ضحايا الإرهاب، وعملية الوصم، وتوعية المجتمعات المحلية، والهجرة وأوضاع اللاجئين. ويتم بحث مسألة الخصوصية والرقابة في الفصل السابع، بما في ذلك النظر في برنامج الرقابة السرية التي تقوم بها وكالة الاستخبارات المركزية، المسموح بها بموجب أمر تنفيذي صادر عن رئيس الولايات المتحدة، واستخدام مكتب التحقيقات الفيدرالي وغيره من مراكز الاستخبارات رسائل تتعلق بالأمن القومي لتسريع الدخول إلى السجلات الخاصة.

وأخيراً، يكرر المقرر الخاص التأكيد على استنتاجاته ويصوغ توصياته لكي تنظر فيها الحكومة.

Annex

REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM ON HIS VISIT TO THE UNITED STATES OF AMERICA (16-25 MAY 2007)

CONTENTS

	Paragraphs	*Page*
I. INTRODUCTION	1 - 10	6
A. Role of the United States in countering terrorism	3 - 5	6
B. The framework of public international law	6 - 10	7
II. MILITARY DETENTION FACILITIES	11 - 18	9
A. Guantánamo Bay detainees as “unlawful enemy combatants”	11 - 15	9
B. Closure of Guantánamo Bay	16 - 17	11
C. Detainees in Afghanistan and Iraq	18	12
III. THE USE OF MILITARY COMMISSIONS TO TRY TERRORIST SUSPECTS	19 - 32	12
A. Jurisdiction of military commissions	20 - 22	12
B. Composition of military commissions	23 - 25	13
C. Use and availability of evidence	26 - 28	14
D. Equality of arms	29	15
E. Trial of civilians	30	15
F. Death penalty	31	16
G. Consequences of acquittal	32	16
IV. INTERROGATION, RENDITION, AND DETENTION IN SECRET LOCATIONS OF TERRORIST SUSPECTS	33 - 39	16
A. CIA programme of “enhanced interrogation techniques”	33 - 34	16
B. United States Army Field Manual	35	17

CONTENTS (*continued*)

	Paragraphs	*Page*
C. Rendition and detention in "classified locations"	36 - 38	17
D. Accountability of those responsible for conducting interrogation by techniques amounting to torture, or cruel, inhuman or degrading treatment	39	19
V. DEFINITIONS OF TERRORISM, TARGETED KILLINGS, AND VICTIMS OF TERRORISM	40 - 44	19
A. Definitions of terrorism	40 - 41	19
B. Targeted killings	42	20
C. Victims of terrorism	43 - 44	20
VI. PROFILING, COMMUNITY OUTREACH, AND IMMIGRATION AND REFUGEE STATUS	45 - 48	21
A. Profiling	45	21
B. Community outreach	46	21
C. Immigration and refugee status	47 - 48	21
VII. PRIVACY AND SURVEILLANCE, AND FREEDOM OF EXPRESSION	49 - 52	22
A. Privacy and surveillance generally	49	22
B. NSA programme of secret surveillance	50	22
C. National Security Letters	51	23
D. Freedom of expression	52	23
VIII. CONCLUSIONS AND RECOMMENDATIONS	53 - 68	23
A. Conclusions	53	23
B. Recommendations	54 - 68	24

I. INTRODUCTION

1. Pursuant to Commission on Human Rights resolution 2005/80, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Martin Scheinin, conducted an official visit to the United States of America from 16 to 25 May 2007, at the invitation of the Government.[1]

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

A. Role of the United States in countering terrorism

3. In a world community which has adopted global measures to counter terrorism, the United States is a leader. This position carries with it a special responsibility to also take leadership in the protection of human rights while countering terrorism. The example of the United States will have its followers, in good and in bad. The Special Rapporteur has a deep respect for the long traditions in the United States of respect for individual rights, the rule of law, and a strong level of judicial protection. Despite the existence of a tradition in the United States of respect for the rule of law, and the presence of self-correcting mechanisms under the United States Constitution, it is most regretful that a number of important mechanisms for the protection of rights have been removed or obfuscated under law and practice since the events of 11 September, including under the USA PATRIOT Act of 2001, the Detainee Treatment Act of 2005, the Military Commissions Act of 2006, and under Executive Orders and classified programmes.

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[1] The Special Rapporteur conducted his mission assisted by the Office of the High Commissioner for Human Rights and Dr. Alex Conte of the University of Southampton. A draft mission report was sent to the Government on 28 June and extensive comments received on 2 August 2007.

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

5. In September 2006, the General Assembly adopted the first-ever Global Counter-Terrorism Strategy. The Strategy treats human rights as a central part of all aspects of effective global action to counter international terrorism and seeks, in part, to enhance cooperation between the growing number of international and regional bodies, with often overlapping mandates, pertaining to counter-terrorism. The United States has been strategic in the establishment of an international counter-terrorism machinery, including the Counter-Terrorism Committee and the Al-Qaida and Taliban Sanctions Committee of the Security Council. An effective and well coordinated United Nations led effort in countering terrorism will be one of the keys to the successful implementation of the Global Counter-Terrorism Strategy, and the Special Rapporteur strongly encourages continued involvement in and support for this by the United States.[2]

B. The framework of public international law

6. During high-level meetings with Government officials, it was repeated that the United States sees itself as being engaged in an armed conflict with Al-Qaida and the Taliban, commencing prior to the events of 11 September. This position has been reaffirmed by the President of the United States in his Executive Order of 20 July 2007.[3] The Department of Defense described this "war" as continuing until the capabilities of Al-Qaida are so degraded that their conduct can be dealt with through regular law enforcement mechanisms. The United States consequently identifies humanitarian law as the applicable international law to the apprehension, detention and trial of persons detained at Guantánamo Bay. However, these statements do not suggest that any form of terrorism would amount to armed conflict or that the international fight against terrorism would as a whole be governed by the law of armed conflict.

7. The Special Rapporteur reminds the United States of the well-established principle that regardless of issues of classification, international human rights law continues to apply in armed conflict. This is a point made clear, for example, by the Human Rights Committee in its general comment No. 31, and confirmed by the International Court of Justice.[4] As further explained in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied*

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[2] See, Eric Rosand, "Renewing the US-UN Partnership against Terrorism", *United Nations Foundation*, 30 May 2007.

[3] Executive Order of the President of the United States, *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, 20 July 2007, section 1 (a).

[4] See: Human Rights Committee, general comment No. 31 (*Nature of the General Legal Obligation on States parties to the Covenant) (2004)* reprinted in UN Doc. HRI/GEN/1/Rev.8 (2006) at 236, para. 11; and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996), ICJ Rep. 226, at 240 (para. 25).

Palestinian Territories, the International Court stated that "… the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights".[5] The conduct of the United States must therefore comply not only with international humanitarian law, but also with applicable international human rights law.

8. The Human Rights Committee and the International Court of Justice have confirmed as well that human rights, including those enshrined in the International Covenant on Civil and Political Rights (ICCPR), are legally binding upon a State when it acts outside its internationally recognized territory.[6] This means that the United States is obliged to respect and ensure the rights guaranteed by the Covenant binding upon it, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and customary international law - including the absolute prohibition of torture or any other form of cruel, inhuman or degrading treatment - to anyone within its power or effective control, even if not situated within the territory of the United States. The fact that the United States more than 50 years ago, when the ICCPR was being drafted, expressed that it could not be expected to "legislate" for occupied countries[7] was not meant as a justification to engage extraterritorially in outright human rights violations such as arbitrary detention, torture, or other cruel, inhuman or degrading treatment.

9. The Special Rapporteur accepts that the United States was engaged in an international armed conflict from the commencement of "Operation Enduring Freedom", proclaimed as an exercise of self-defence under Article 51 of the Charter of the United Nations, and until the fall of the Taliban regime as the de facto government of Afghanistan. He further accepts in principle that a non-State armed group, including one called a "terrorist organization", if organized as an armed force, is capable of being engaged in a transborder armed conflict, albeit technically a non-international one

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[5] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion* (2004), ICJ Rep. 136, para. 106. Most recently, the Court applied both human rights law and international humanitarian law to the armed conflict between the Congo and Uganda - see: *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits* (2005), ICJ Rep. (paras. 216-220, and 345 (3)).

[6] See: Human Rights Committee, general comment No. 31 para. 10; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion* (2004), ICJ Rep. 136, para. 109. See, also, the report on the Situation of Detainees at Guantánamo Bay (E/CN.4/2006/120), paras. 10 and 11.

[7] As quoted in the combined second and third periodic reports of the United States under the ICCPR, Eleanor Roosevelt, the then United States representative and Chairman of the Commission on Human Rights, defended the inclusion of the double requirement of territory and jurisdiction by stating that "without such an addition the draft Covenant might be construed as obliging the contracting States to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes": see Human Rights Committee, Consideration of Reports Submitted by States parties under article 40 of the Covenant: United States of America, CCPR/C/USA/3, annex I, "Territorial Application of the International Covenant on Civil and Political Rights".

(one which is not between two States). Furthermore, although some acts of terrorism may constitute a threat to international peace and security, this does not mean that any act of terrorism would amount to a threat to peace and security, or would create an armed conflict.[8] These matters must be determined separately and upon the particular circumstances of each case.

10. The Special Rapporteur is aware of the reservations and declarations entered by the United States upon its ratification of the ICCPR and the Convention against Torture. Under international law, reservations that are contrary to the object and purpose of a treaty are impermissible. The relevant treaty bodies - the Human Rights Committee and the Committee against Torture - have in this context requested that the United States withdraw its reservations and declarations.[9] While supporting the competence of the respective treaty bodies to address the permissibility and legal effect of the reservations in question, the Special Rapporteur sees his own mandate as requiring him to address the law and practice of the United States with reference to international treaty standards, without making an assessment of whether its reservations and declarations are permissible. Further, many human rights norms are binding as customary law and even as peremptory norms of international law (jus cogens).

II. MILITARY DETENTION FACILITIES

A. Guantánamo Bay detainees as "unlawful enemy combatants"

11. The persons detained at the military facility at Guantánamo Bay have been categorized by the United States as alien "unlawful enemy combatants", regardless of the circumstances of their capture. The adjective "unlawful" was used together with the noun "combatant" by Allan Rosas, in his treatise *The Legal Status of Prisoners of War* to describe persons who commit hostile acts in international conflicts without authorization to do so under the law of war.[10] "Unprivileged belligerent" would be a synonymous expression. While such persons may not be entitled to prisoner of war status, they nevertheless enjoy certain minimum protections in respect of detention and trial.[11] The Special Rapporteur wishes to make clear that the term "unlawful

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[8] In his separate opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion* (2004), ICJ Rep. 136, for example, Judge Kooijmans expressed doubt as to the accuracy of the Security Council's description in resolutions 1368 (2001) and 1373 (2001) of acts of international terrorism as a threat to international peace and security, without further qualification: at 230 (para. 35).

[9] See: Concluding observations of the Human Rights Committee, United States of America, (CCPR/C/79/Add.50, paras. 278-279, 292); and Conclusions and Recommendations of the Committee against Torture: United States of America, CAT/C/USA/CO/2, para. 40.

[10] Allan Rosas, *The Legal Status of Prisoners of War* (1976, reprinted 2005), p. 305 et seq.

[11] See also the United States Supreme Court ruling in *Hamdan v. Rumsfeld*, 548 U.S. (2006) at 72.

enemy combatant" is a description of convenience, meaningful only in international armed conflicts, and even then only denoting persons taking a direct part in hostilities while not being members of the regular armed forces or of assimilated units.

12. Privileged combatants apprehended during the course of an international armed conflict may be detained as prisoners of war and shall be released at the end of hostilities. This will however not be the case for persons who are held as persons suspected of war crimes. Furthermore, combatants in a non-international armed conflict may be held as security detainees for the duration of the hostilities, but also treated as criminal suspects for their use of violence. While acknowledging the need to ensure that there is no impunity for those who commit war crimes, the Special Rapporteur emphasizes that the chance of ensuring a fair trial diminishes over time. At the end of hostilities, persons captured during international or non-international armed conflict should be released, or tried if suspected of war crimes or other crimes. The Special Rapporteur considers that the detention of persons for a period of several years without charge fundamentally undermines the right of fair trial. The same conclusion applies, of course, to those detainees that never were engaged in an armed conflict. The right of persons to be tried without undue delay, as guaranteed by article 14, paragraph 3 (c), of the ICCPR is particularly relevant to this point, as the prolonged period of detention has placed the United States, by its own inaction, in a position of having to release many of these persons without charge.

13. There are serious concerns about the ability of detainees at Guantánamo Bay to seek a judicial determination of their status, and of their continuing detention. Upon the arrival of a detainee at Guantánamo Bay, a Combatant Status Review Tribunal (CSRT) is convened to determine whether the detainee is an "enemy combatant" and whether that person should continue to be detained. This occurs once only, unless new evidence about the person's status becomes available. Added to this, an Administrative Review Board (ARB) undertakes annual reviews of each detainee's status to confirm whether continued detention is required. If a detainee declines to participate in proceedings before the ARB, he will be provided with the opportunity to be heard and to present information to the Review Board. When classified information is presented at such hearings, the detainee is excluded from proceedings.[12]

14. As confirmed by the Department of Defense, these are administrative processes rather than judicial ones. Detainees are not provided with a lawyer during the course of hearings. Even more problematic is the fact that the decisions of the CSRT and ARB are subject to limited judicial review only. The most that a reviewing court may do is to order reconsideration of a decision, not release. These restrictions result in non-compliance with the ICCPR, which prohibits arbitrary detention (art. 9 (1)), requires court review of any form of detention and entailing a possibility of release (art. 9 (4)), and provides a right to a fair trial within reasonable time for anyone held as a criminal suspect (arts. 9 (3) and 14 (3)). Article 9, paragraph 4, is also relevant to the removal of habeas corpus rights under section 7 of the Military Commissions Act of 2006, which purports to expressly deny the jurisdiction of ordinary courts to hear an application for habeas corpus. The Special Rapporteur reminds that according to the Human Rights Committee,

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[12] See Enclosure 3 to the memorandum on "Implementation of Administrative Review Procedures for Enemy Combatants detained at U.S. Naval Base Guantánamo Bay, Cuba" (14 September 2004), para. 3b.

article 9 (4) cannot be derogated from even during a state of emergency.[13] Hence, the right to judicial review of any form of detention does not depend on whether humanitarian law is also applicable. All Guantánamo Bay detainees are entitled to this right, irrespective of whether they were involved in armed conflict or the status of proceedings against them.

15. Noting that persons brought to Guantánamo Bay under the age of 15 have since been repatriated, the Special Rapporteur is concerned that this does not apply to all persons who were children at the material time of their alleged conduct. It is a matter of concern to the Special Rapporteur whether juvenile Guantánamo Bay detainees have been segregated from adults and accorded treatment appropriate to their age and legal status in accordance with article 10, paragraphs 2 (b) and 3 of the Covenant, and that the Military Commissions Act does not, as it stands, make room for procedural adjustments that will take account of the age of juvenile defendants and the desirability of promoting their rehabilitation. Further, the Special Rapporteur received alarming reports that the young age of some of the detainees was only taken into account by applying interrogation methods that utilized their age-specific phobias and fears.

B. Closure of Guantánamo Bay

16. The Special Rapporteur is encouraged by the announcement of the President of the United States that he wishes to move towards the closure of Guantánamo Bay, and urges continued and determined action to that end. The Special Rapporteur has been advised that between 40 and 80 Guantánamo Bay detainees are expected to be tried by military commissions, and that the United States wishes to return the remaining detainees to their countries of origin or, where necessary, to a surrogate country. He was advised that the Government is conducting negotiations with countries for this purpose.

17. The Special Rapporteur supports initiatives to return detainees to their countries of origin, but also concludes that although the United States has advised that it will not do so in breach of the principle of non-refoulement, the current United States standard applied under this principle fails to comply with international law. While international law (primarily ICCPR, article 7) requires that a person not be returned to a country where there is a "real risk" of torture, or any form of cruel, inhuman or degrading treatment, the United States applies a lower threshold of non-return only where it is "more likely than not" that a person will be subject to torture as narrowly defined by the United States itself. The Special Rapporteur further underlines that diplomatic assurances sought from a receiving State to the effect that a person will not be subjected to torture or cruel, inhuman or degrading treatment do not absolve the duty of the sending State to assess individually the existence of a "real risk". Despite the fact that the United States has not yet abolished the death penalty, he emphasizes that the principle of non-refoulement is also applicable where a person is liable to the imposition of the death penalty in a jurisdiction where the standards of trial fall short of rigorous compliance with article 14 of the ICCPR on the right to a fair trial.[14] The Special Rapporteur emphasizes that the United States has the primary responsibility to resettle any individuals among those detained in Guantánamo Bay who are in need of international protection.

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[13] See Human Rights Committee, general comment No. 29 (2001), para. 11.

[14] See Human Rights Committee, general comment No. 6 (1982), para. 7.

C. Detainees in Afghanistan and Iraq

18. The Special Rapporteur is mindful of the fact that there are in Afghanistan some 700 and in Iraq around 18,000 persons detained under the control of the United States. Some of these detainees appear to be held for reasons related to the fight against terrorism, under a legal status analogous to that at Guantánamo Bay. He reminds the United States and other States responsible for the detention of persons in Afghanistan and Iraq that these detainees also have a right to court review of the lawfulness of their detention.

III. THE USE OF MILITARY COMMISSIONS TO TRY TERRORIST SUSPECTS

19. By Military Order in 2001, the President of the United States established military commissions for the purpose of trying enemy combatants.[15] The Supreme Court ruled in 2006 that military commissions established under the Military Order were unlawful, since they were not established under the express authority of Congress, and that the structure and procedures of the commissions violated both the United States Uniform Code of Military Justice (UCMJ) and the four Geneva Conventions.[16] Congress subsequently enacted the Military Commissions Act of 2006 (MCA), which largely reflects the military commission structure under the 2001 Military Order. The establishment of military commissions is not restricted geographically, permitting any non-United States citizen, including those holding permanent resident status, to be subject to trial by military commission if designated as an enemy combatant. Various aspects relating to the jurisdiction and operation of military commissions raise significant human rights concerns.

A. Jurisdiction of military commissions

20. One of the principal reasons given by the Government for the establishment of military commissions rather than the use of ordinary courts has been that those courts would not have jurisdiction over certain crimes which some detainees are suspected to have committed. Three matters of concern are raised by this position. First, the MCA purports to be a piece of legislation which codifies the laws of war and establishes the jurisdiction of military commissions over war crimes. However, the offences listed in Section 950v (24)-(28) of the Act (terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) go beyond offences under the laws of war. The establishment of these offences, and the way in which they are described, therefore means that the military commissions have been given jurisdiction over offences which do not in fact form part of the laws of war and thus, taken the indistinctive application of the notion of “unlawful enemy combatant”, may result in civilians being tried by military tribunals.

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[15] Military Order, Detention, *Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (13 November 2001), 66 Fed. Reg. 57833.

[16] *Hamdan v. Rumsfeld*, 548 U.S. (2006).

21. The second problem, concerning these same offences, is that to the extent they were not covered by the law applicable at the time of the commission of the actual acts, the military commissions will be applying criminal law retroactively, in breach of ICCPR, article 15, and universally acknowledged general principles of law. Finally, it appears that the Government's justification for military commissions is incorrect as a matter of fact because the nexus between the events of 11 September and United States citizens would allow ordinary courts to try offences such as conspiracy and terrorism. This is borne out by the fact that the bombings of the United States Embassies in Kenya and Tanzania in 1998 were prosecuted by ordinary United States courts, and that Osama bin Laden was indicted for his action in the attacks on the USS Cole by a Grand Jury in 2000. The ability of ordinary courts to hear charges of conspiracy and material support for terrorism is further borne out by the fact that those being prosecuted in *United States v. Padilla and others* in the District Court at Miami were charged with such offences.[17] In contrast, a suspected co-conspirator, who is an alien and currently detained at Guantánamo Bay, is likely to face these charges before a military commission.

22. A separate matter concerning the jurisdiction of military commissions concerns determinations of the CSRT that a person is an "alien unlawful enemy combatant". Section 948 (b) of the MCA specifically precludes military commissions from exercising jurisdiction over lawful enemy combatants, thus restricting the jurisdiction of these tribunals over unlawful enemy combatants. In a decision of the military commission, charges against Omar Khadr were dismissed without prejudice on the basis that determinations of the CSRT were separate to and insufficient for the purposes of proceedings before military commissions. This, combined with the fact that the MCA does not confer upon military commissions the ability to determine an accused person's status, led the commission to conclude that it could not be satisfied that it had initial jurisdiction to try Mr. Khadr.[18]

B. Composition of military commissions

23. As to the composition of military commissions, the Special Rapporteur has serious concerns about their independence and impartiality, their potential use to try civilians, and the lack of appearance of impartiality. As stated by the Human Rights Committee, the right to trial by an independent and impartial tribunal is so central to the due process of law that it is an absolute right that may suffer no exception.[19] In a long line of helpful jurisprudence on the subject, the European

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[17] *United States of America v. Adham Hassoun, Kifah Jayyousi, and Jose Padilla*, United States District Court, Southern District of Florida, case No. 04-60001-CR-COOKE. On 16 August 2007 a federal jury found Mr. Padilla and his co-defendants guilty as charged of conspiracy to commit illegal violent acts outside the United States, conspiracy to provide material support to terrorists and providing material support to terrorists. The case is now pending appeal.

[18] *United States of America v. Omar Ahmed Khadr*, Military Commission Order on Jurisdiction (4 June 2007). The Special Rapporteur is following further developments in this case.

[19] See, for example, *González del Rio v. Peru*, CCPR/C/46/D263/1987, para. 5.2.

Court of Human Rights has spoken of the need for a tribunal to be subjectively free of prejudice or personal bias, as well as having an appearance of impartiality from an objective viewpoint.[20]

24. Whereas, in this regard, military judges in courts martial are appointed from a panel of judges by lottery, judges and members in a military commission are selected for each trial. Furthermore, although the current convening authority is a civilian and former judge, she is employed by the Department of Defense, so that, as a result, the appearance of impartial selection by the convening authority of members of individual commissions is undermined. Moreover, there is no prohibition against the selection of members of a commission who fall within the same chain of command; more junior members of a military commission, despite any advice to the contrary, may be directly or indirectly influenced in their consideration of the facts.

25. The ability of the convening authority to intervene in the conduct of trials before a military commission is also troubling. The plea agreement in the trial of David Hicks, for example, was negotiated between the convening authority and his counsel, without any reference to the prosecuting trial counsel. The involvement of the executive in such matters further adds to an appearance that military commissions are not independent.

C. Use and availability of evidence

26. The use and availability of evidence in proceedings before military commissions is also of concern to the Special Rapporteur. Certain evidence, due to its classified status, may not be disclosed to trial or defence counsel. This is problematic since such evidence may be exculpatory or otherwise beneficial to the defence case. Although this does not create an inequality of arms, since such evidence would not be provided to the prosecution, it has the potential to undermine the presumption of innocence. The protection given to classified information, while understandable, is of particular concern in the context of the security classification of interrogation techniques, as discussed below.

27. The Special Rapporteur is concerned that although evidence which has been obtained by torture is categorically inadmissible, evidence obtained by other forms of coercion may, by determination of the military judge, be admitted into evidence. Three problems arise in this context. The first is that an accused may not be aware of the fact that evidence has been obtained by torture or coercion since the interrogation techniques used to obtain evidence subsequently presented at trial may themselves be classified and thereby outside the knowledge of the accused. A further problem is that the definition of torture for the purpose of proceedings before a military commission is restricted, not catching all forms of coercion that amount to torture or cruel, inhuman or degrading treatment, equally prohibited in non-derogable terms by ICCPR article 7. The final issue of considerable concern is that the prohibition of admission of evidence obtained by torture is limited. Testimony obtained through abusive interrogation techniques that were used prior to the Detainee Act of 2005 may in fact be used if such evidence is found to be “reliable” and its use “in the interests of justice”. There may, however, be no circumstances in which the use of

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[20] See, for example, *Findlay v. United Kingdom*, [1997] ECHR 8, para. 75.

evidence obtained by torture or cruel, inhuman or degrading treatment may be used for the purpose of trying and punishing a person. This is a clear and established principle of international law.[21]

28. This concern is further exacerbated by the preclusion of classified information and the fact that hearsay evidence may be admitted in proceedings before a military commission, in the form of a written summary of the evidence, if it is determined by the military judges to be "reliable" and "probative". The admissibility of such evidence presents problems with the right to fair trial since it does not permit an accused to cross-examine the witness, and thereby undermines the guarantee to examine witnesses under ICCPR article 14, paragraph 3 (f). More importantly, if hearsay evidence was obtained through torture or coercion, and the interrogation techniques applied were themselves classified, an accused will never know whether the evidence was obtained by such methods and should therefore be challenged. It also means that if a military judge determines that hearsay evidence was obtained by coercion (rather than torture) but that the evidence should nevertheless be admitted, a federal judge would be unable to assess whether such a determination is valid, since the defence counsel would, owing to lack of knowledge of the circumstances by which the evidence was obtained, not be able to challenge such a decision. This means that a federal court judge would be unable to review a military judge's determination of whether the hearsay evidence was obtained by torture or coercion and if the evidence is determined to have been obtained by coercion, whether it should have been admitted under the rules established under the Military Commissions Act.

D. Equality of arms

29. The Special Rapporteur is concerned at reports that the distribution of resources is such that military defence counsel are significantly under-resourced as compared to military trial counsel, i.e. the prosecuting party. The disproportionate aggregation of resources is a matter that strikes at the heart of the principle of the equality of arms required in the safeguarding of a fair trial.

E. Trial of civilians

30. In the case of persons who might be categorized by the United States as unlawful enemy combatants but who in fact were not involved as combatants in an armed conflict, the possibility arises that civilians be tried by a military commission. In its general comment No. 13, the Human Rights Committee emphasized that the trying of civilians by military courts should be very exceptional and should only take place under conditions which genuinely afford the full guarantees of a fair hearing stipulated in article 14.[22]

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[21] See, for example: article 15 of the Convention against Torture; and Human Rights Committee general comment No. 7 (1982).

[22] Human Rights Committee, general comment No. 13 (1984). For jurisprudence of the European Court of Human Rights on this point see, for example: *Ocalan v. Turkey* [2005] ECHR 282, (para. 115); and *Incal v. Turkey* [1998] ECHR 48, (para. 75).

F. Death penalty

31. The Special Rapporteur is furthermore concerned at the ability of a military commission to determine charges in respect of which the death penalty may be imposed. It is well established that article 6 of the ICCPR requires that where a State seeks to impose the death penalty, it is obliged to ensure that fair trial rights under article 14 of the ICCPR are rigorously guaranteed.[23] Given that any appeal rights subsequent to conviction are limited to matters of law, coupled with the concerns pertaining to the lack of fair trial guarantees in proceedings before military commissions, the Special Rapporteur concludes that any imposition of the death penalty as a result of a conviction by a military commission is likely to be in violation of article 6.

G. Consequences of acquittal

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

IV. INTERROGATION, RENDITION, AND DETENTION IN SECRET LOCATIONS OF TERRORIST SUSPECTS

A. CIA programme of "enhanced interrogation techniques"

33. As a result of an apparent internal leak from the CIA, the media in the United States learned and published information about "enhanced interrogation techniques" used by the CIA in its interrogation of terrorist suspects and possibly other persons held because of their links with such suspects. Various sources have spoken of techniques involving physical and psychological means of coercion, including stress positions, extreme temperature changes, sleep deprivation, and "waterboarding" (means by which an interrogated person is made to feel as if drowning). With reference to the well-established practice of bodies such as the Human Rights Committee and the Committee against Torture, the Special Rapporteur concludes that these techniques involve conduct that amounts to a breach of the prohibition against torture and any form of cruel, inhuman or degrading treatment. The Special Rapporteur notes that the United States understanding of cruel, inhuman or degrading treatment is what the United States Constitution prohibits as cruel and unusual punishment, not the relevant international standards as such. It is encouraging to see that the July 2007 Executive Order of the President now requires the Director of the CIA to ensure that interrogation practices are "safe for use", based upon professional advice, and that there is

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[23] See, for example, the views of the Human Rights Committee in *Hamilton v. Jamaica*, communication No. 333/1989, *Reid v. Jamaica*, communication No. 353/1988, and *Champagnie and others v. Jamaica*, communication No. 445/1990. See also the Committee's general comment No. 6 (1982).

effective monitoring of the CIA interrogation programmes.[24] Nevertheless, the Executive Order retains the restrictive interpretations of "torture" and "cruel, inhuman, or degrading treatment".[25] The Special Rapporteur again reminds the United States that torture and cruel, inhuman or degrading treatment are equally prohibited in non-derogable terms by ICCPR article 7.

34. In a meeting with the Special Rapporteur, the Acting General Counsel for the CIA refused to engage in any meaningful interaction aimed at clarifying the means of compliance with international standards of methods of interrogation and accountability in respect of possible abuses. Despite repeated requests on the part of the Special Rapporteur, the CIA did not make themselves available to meet again with him. In the light of this lack of cooperation and corroborating evidence from multiple sources, the Special Rapporteur can only conclude that the conduct of his country visit gives further support to the suspicion that the CIA had indeed been involved, and continued to be involved, in the use of enhanced interrogation techniques that violate international law.

B. United States Army Field Manual

35. The Special Rapporteur welcomes the revision of the United States Army Field Manual in September 2006. Although this Manual clearly states that acts of violence or intimidation against detainees is prohibited, and that interrogation techniques must not expose a person to inhumane treatment, there are nevertheless aspects of the revised Manual (when compared to the earlier version) that cause concern. On the positive side, the revised Manual explicitly prohibits the use of waterboarding, something not expressly prohibited before. Nevertheless, a comparison of the two recent versions of the Army Field Manual could leave the impression that the present Manual neither authorizes nor prohibits, during the conduct of an interrogation, to slap a person being questioned, subject a person to extreme changes in temperature falling short of the medical state of hypothermia, isolate a detainee for prolonged periods, make use of stress positions, or subject a person to questioning for periods of up to 40 hours without sleep. The Special Rapporteur concludes that these techniques involve conduct that would amount to a breach of the prohibition against torture and any form of cruel, inhuman or degrading treatment. In order to remove any ambiguity, he expects the Government to make it clear that the enumeration of permitted interrogation techniques in the Manual is exhaustive.

C. Rendition and detention in "classified locations"

36. The Special Rapporteur acknowledges that there are various forms of rendition. The transfer of a person from one jurisdiction to another (or from the custody and control of one State to another) can occur by various means, including: rendition under established extradition rules; removal under immigration law; resettlement under refugee law; or "rendition to justice", where

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[24] Executive Order of the President of the United States, *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, 20 July 2007, section 3 (b) (iii) and 3 (c) (iv).

[25] Ibid., sections 2 (c) and section 3 (b) (i) (A).

a person is outside formal extradition arrangements but is nevertheless handed to another State for the purpose of standing trial in that State. As long as there is full compliance with the obligation of non-refoulement, these mechanisms may be lawful, although it should be noted that the particular circumstances in which a person is "rendered to justice" may involve an unlawful detention. Impermissible under international law is the "extraordinary rendition" of a person to another State for the purpose of interrogation or detention without charge. Rendition in these circumstances also runs the risk of the detained person being made subject to torture or cruel, inhuman or degrading treatment. Detention without charge or for prolonged periods even when charged, also amounts to a violation of articles 9 and 14 of the ICCPR and may constitute enforced disappearance. Furthermore, the removal of a person outside legally prescribed procedures amounts to an unlawful detention in violation of article 9 (1) of the ICCPR, and raises other human rights concerns if a detainee is not given a chance to challenge the transfer.

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

38. In addition, the use by the CIA of civil aircraft for the transportation of persons subjected to extraordinary rendition, whether by contract or by the establishment of airlines controlled by it, is in violation of the Convention on International Civil Aviation. Again due to the refusal of the Acting General Counsel for the CIA to engage in any meaningful interaction, and in the light of corroborating evidence, the Special Rapporteur concludes that his visit supports the suspicion that the CIA has been involved and continues to be involved in the extraordinary rendition of terrorism suspects and possibly other persons. This conclusion is corroborated by the recent findings of the Committee against Torture in the case of *Agiza v. Sweden* and by the Human Rights Committee in *Alzery v. Sweden*, in both of which Sweden was found to have violated its human rights treaty obligations by handing over Mr. Agiza and Mr. Alzery to CIA agents in the course of their rendition to Egypt.[26] The Special Rapporteur also concludes that it is unlikely that the CIA would be able to run a global programme of rendition and detention of terrorist suspects without at least logistical support by the United States military authorities.

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[26] *Agiza v. Sweden*, communication No. 233/2003, CAT/C/34/D/233/2003 (2005); and *Alzery v. Sweden*, communication No. 1416/2006, CCPR/C/88/D/1416/2005.

D. Accountability of those responsible for conducting interrogation by techniques amounting to torture or cruel, inhuman or degrading treatment

39. The Convention against Torture requires States parties to prevent, within their territory, any acts of torture, or cruel, inhuman or degrading treatment.[27] By virtue of the extraterritorial application of the prohibition of such acts, considered earlier in this report, and the obligations under customary international law and Articles 55 and 56 of the Charter of the United Nations, States must also ensure that their officials do not undertake such practices overseas and that they are not complicit in such conduct by other persons.[28] It is thus essential that accountability is borne by those responsible (either directly, or by command responsibility) for conducting or colluding in interrogation techniques amounting to torture or cruel, inhuman or degrading treatment. The Special Rapporteur is troubled by reports indicating that while a number of military persons have been investigated or prosecuted for abuses, this has not happened in the case of CIA agents or persons higher up in the chain of command, and that the Department of Justice has not taken action to initiate prosecution in cases reported to it.

v. DEFINITIONS OF TERRORISM, TARGETED KILLINGS, AND VICTIMS OF TERRORISM

A. Definitions of terrorism

40. Terrorism is referred to within various items of United States legislation. Two particular aspects of this legislation are of concern to the Special Rapporteur. Title 18 of the US Code, in section 2331 (1), defines international terrorism as involving "violent acts or acts dangerous to human life" without making a link to the consequences intended by such acts. Security Council resolution 1566 (2004) describes conduct that is to be suppressed in the fight against terrorism and requires, as one of three cumulative elements, that such conduct is restricted to that which is committed with the intent to cause death or serious bodily injury.[29] The definition of domestic terrorism, under section 2331 (5), equally lacks this link.

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[27] Convention against Torture, articles 2, 4 and 16.

[28] By virtue of Article 56 of the Charter, all members of the United Nations are obliged to take joint and separate action in cooperation with the United Nations for the achievement of the purposes set out in Article 55 of the Charter, including the universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (Article 55 (c)).

[29] Security Council resolution 1566 (2004), para. 3. See, in this regard, the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (E/CN.4/2006/98), chap. III.

41. The USA PATRIOT Act of 2001 is also of concern to the Special Rapporteur, which in its amendment of the Immigration and Nationality Act (INA) concerning persons "engaged in terrorist activities" includes the provision of material support to proscribed entities. While new section 212 (a) (3) (B) (iv) (VI) of the INA provides a list of forms of conduct that can amount to material support, the provision is expressed in terms that are not exclusive and thereby renders the expression "material support" too vague. This lack of precision is particularly problematic for communities, including Muslim ones, which are unable to determine whether the provision of funds by them to what they may believe are charities or humanitarian organizations abroad will be treated as material support to a terrorist entity. The Special Rapporteur observes that any determination of proscribed status of organizations, including purported charities, should be public, transparent, non-retroactive and reasoned.

B. Targeted killings

42. The Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, has reported on communications between himself and the United States concerning allegations of extrajudicial executions of various persons, including those suspected of having committed terrorist acts.[30] Such acts have occurred outside the territory of the United States and outside the context of actual hostilities related to an armed conflict. The Special Rapporteur reiterates that international human rights, including the rights to life and fair trial under articles 6 and 14 of ICCPR, apply extraterritorially to the conduct of State agents. He further emphasizes that while the targeting of a combatant directly participating in hostilities is permitted under the laws of war, there are no circumstances in which the targeting of any other person can be justified.

C. Victims of terrorism

43. The Special Rapporteur is deeply mindful of the tragic events of 11 September 2001, as well as preceding acts of international terrorism against the United States, including the bombing of its Embassies in Kenya and Tanzania. He is also mindful of domestic acts of terrorism, including the Oklahoma City bombing. Addressing the situation of victims of terrorism with appropriate compensation and access to health care and rehabilitation is an important aspect of a comprehensive strategy against terrorism, and should be seen as a matter of best practice. The Special Rapporteur notes with encouragement the establishment, by the United States Government, of a process by which the victims of the terrorist attacks of 11 September have been able to seek compensation.

44. The Special Rapporteur notes with encouragement that following the catastrophic events in New Orleans in 2005, the Department of Homeland Security has taken steps to evaluate and consider the position of persons with disabilities and their care providers during relief efforts, which may also include events following a terrorist attack.

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[30] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, HRC/4/20/Add.1.

VI. PROFILING, COMMUNITY OUTREACH, AND IMMIGRATION AND REFUGEE STATUS

A. Profiling

45. The Special Rapporteur notes with encouragement, and as an element of best practice, that the Secretary of Homeland Security has clearly stated that his department is not, in law or practice, involved in racial or religious profiling. The Special Rapporteur nevertheless notes that the country of origin has been, or may be, used as a proxy for such profiling. It is a significant problem in certain regions of the world that the religious affiliation of persons is wrongly confused with the identification of such persons as potential terrorists.

B. Community outreach

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

C. Immigration and refugee status

47. There are a number of troubling developments in the law and practice of the United States concerning the treatment of immigrants, those applying for visas, and those claiming refugee status. The USA PATRIOT Act of 2001 amended provisions of the Immigration and Nationality Act, expanding the definition of terrorist activity beyond the bounds of conduct which is truly terrorist in nature, in particular in respect of the provision of “material support to terrorist organizations”. The definition captures, for example, the payment of a ransom to have a family member released by a terrorist organization, or the providing of funds to a charity organization which at the time was not classified as a terrorist organization. The PATRIOT Act provides for the mandatory detention of those suspected of such conduct and the refusal of refugee status for such persons. However, the Secretary of Homeland Security has announced a policy of “duress waiver”. The Special Rapporteur is troubled by the lack of transparency and judicial remedies in the application of such a waiver to persons, some of whom may themselves be victims of terrorist conduct.

48. Furthermore, the REAL ID Act of 2005, an enactment which ostensibly aims to prevent the use of false identification and eliminate identity theft, contains provisions concerning the prevention of “terrorists” from obtaining relief from removal. The Act raises the threshold concerning the credibility of asylum claims, and modifies court review possibilities for asylum-seekers, which gives rise to concern regarding the general principle of providing a claimant with the benefit of the doubt as recommended by the United Nations High Commissioner for Refugees and applied by many national jurisdictions in asylum cases.

VII. PRIVACY AND SURVEILLANCE, AND FREEDOM OF EXPRESSION

A. Privacy and surveillance generally

49. The Fourth Amendment to the United States Constitution guarantees the right of US citizens to privacy. International human rights law accommodates interference with privacy where necessary for legitimate purposes and implemented in a proportionate manner. In its 1972 decision in *United States v. United States District Court*, the Supreme Court held that the Fourth Amendment prohibits the surveillance of "US persons" without a warrant, even if this surveillance is carried out for national security reasons.[31] Under United States law, the surveillance of "US persons" (citizens or permanent residents of the United States) can only occur when authorized by the Wiretap Act of 1968 or the Foreign Intelligence Surveillance Act of 1978 (FISA). The PATRIOT Act of 2001 expanded the provisions of FISA so that applications for a surveillance warrant need only establish that foreign intelligence gathering is a significant purpose of the proposed surveillance rather than "the purpose" of surveillance, as previously required under FISA. This regime raises a number of concerns. Firstly, the low threshold in the availability of surveillance warrants leaves open the possibility for interference with privacy where this is not necessary for legitimate purposes. Next is the fact that the Attorney General's guidelines on the availability of surveillance warrants for the investigation of terrorist and related offences, or the gathering of related intelligence, is classified, as are the "minimization procedures" required under Title 50 of the US Code to ensure that the surveillance of US persons is undertaken by the least intrusive means possible. Although the Special Rapporteur has been advised by the Department of Justice that these guidelines and procedures comply with international human rights law, there is no way of assessing the accuracy of this position, nor is there any transparency to guarantee compliance with the dual requirements of article 17 of the ICCPR to not interfere with privacy and to protect against the arbitrary interference with privacy. It is also relevant that the ICCPR obliges States parties to comply with these requirements not only in respect of citizens and permanent residents, but also in respect of all persons within the jurisdiction of the State. It is furthermore troubling that the use of FISA warrants, which have traditionally been treated as an exception to surveillance conducted under the Wiretap Act of 1968, has increased substantially since 11 September. Added to this is the almost universal granting of surveillance warrants by the Foreign Intelligence Security Court, which brings into question whether the Court acts as a genuine judicial check of executive power in this area.

B. NSA programme of secret surveillance

50. The National Security Agency (NSA) operated a programme of secret surveillance without warrant outside the scope of FISA, authorized by an Executive Order of the President. The existence of this programme apparently came to light as a result of an internal leak. Whereas it is a crime under United States law to undertake surveillance without a court order, the NSA surveillance programme was said to have been established under an inherent right of the President to authorize warrantless surveillance under Article II of the United States Constitution. Whether or not this is correct, the use of surveillance techniques without a warrant amounts to an interference with privacy not authorized by a "prescription by law" within the meaning of ICCPR article 17, thus rendering such surveillance

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[31] *United States v. United States District Court*, 407 US 297 (1972).

unlawful within the terms of that article. Following media reports in 2005 exposing the existence of the NSA programme, the President acknowledged the existence of such a programme and stated that NSA surveillance would in the future be carried out under FISA.

C. National Security Letters

51. A further development impacting upon privacy rights was the extended use of National Security Letters, a form of administrative subpoena facilitating expedited access by the Federal Bureau of Investigation and other intelligence agencies to private records. Prior to the PATRIOT Act of 2001, the availability of National Security Letters was restricted to financial records, customer call records and consumer reports, with the requirement that a certifying officer be satisfied that the subject of investigation was acting on behalf of a foreign power. The Act broadened the type of records accessible under National Security Letters and extended the authority to counter-terrorism investigations. The Special Rapporteur is concerned at the weakness of checks and balances in this authority, failing to properly ensure that there is no arbitrary interference with privacy, as required by ICCPR article 17.

D. Freedom of expression

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

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

53. The Special Rapporteur has identified elements of best practice in the United States' fight against terrorism and the compliance of this with human rights and fundamental freedoms, including compensation for victims of terrorism, community outreach, and non-interference with the freedom of the press. He has, in contrast, also identified serious situations of incompatibility between international human rights obligations and the counter-terrorism law and practice of the United States. Such situations include the prohibition against torture, or cruel, inhuman or degrading treatment; the right to life; and the right to a fair trial. He has also identified deficiencies in United States law and practice pertaining to the principle of non-refoulement; the rendition of persons to places of secret detention; the definition of terrorism; non-discrimination; checks in the application of immigration laws; and the obtaining of private records of persons and the unlawful surveillance of persons, including a lack of sufficient balances in that context.

B. Recommendations

54. **The Special Rapporteur has described his visit to the United States as a step in the process of restoring the role of the United States as a positive example for respecting human rights, including in the context of the fight against terrorism, and he hopes that these steps continue to progress. He likewise recommends that the United States take a strong role in the implementation of the United Nations Global Counter-Terrorism Strategy.**

55. **The Special Rapporteur recommends that the categorization of persons as "unlawful enemy combatants" be abandoned. He calls upon the United States to release or to put on trial those persons detained under that categorization. In the case of those suspected of war crimes, the international community has recognized the need to ensure that there is no impunity for such offending, but the Special Rapporteur is gravely concerned about the increasing risks of an unfair trial as time continues to pass, and he therefore urges a determined effort to proceed with and conclude such prosecutions.**

56. **The Special Rapporteur further recommends that legislative amendments be made to remove the denial of habeas corpus rights under the Military Commissions Act 2006 and the restrictions upon the ability of Guantánamo Bay detainees to seek full judicial review of their combatant status, with the authority of the reviewing court to order release.**

57. **Notwithstanding the primary responsibility of the United States to resettle any individuals among those detained in Guantánamo Bay who are in need of international protection, the Special Rapporteur recommends that other States be willing to receive persons currently detained at Guantánamo Bay. The United States and the United Nations High Commissioner for Refugees should work together to establish a joint process by which detainees can be resettled in accordance with international law, including refugee law and the principle of non-refoulement.**

58. **In particular, the Special Rapporteur urges the United States to invite the United Nations High Commissioner for Refugees to conduct confidential individual interviews with the detainees, in order to determine their qualification as refugees and to recommend their resettlement to other countries. He also urges the United States not to require from receiving countries the detention or monitoring of those returned in cases where such measures would not have basis in international and domestic law, and equally urges receiving States not to accept such conditions.**

59. **Due to the various concerns identified in this report pertaining to the composition and operation of military tribunals under the Military Commissions Act of 2006, involving multiple incompatibilities with the ICCPR, the Special Rapporteur recommends that these commissions be disestablished. Wherever possible, ordinary civilian courts should be used to try terrorist suspects.**

60. **In the case of persons charged with war crimes, being those crimes identified in the Rome Statute of the International Criminal Court, such persons may be tried by military courts martial provided that safeguards are in place to check against the exercise of bias or executive interference, including rights of appeal to civilian courts. In any such proceedings,**

the security classification of information should not interfere with the presumption of innocence or the equality of arms, nor should evidence obtained by any form of torture or cruel, inhuman or degrading treatment be admitted in proceedings. The United States should take steps to ensure that any person acquitted of charges is released upon acquittal, or in the case of a person convicted of an offence, that release occurs upon completion of the sentence imposed. The Special Rapporteur further recommends that the imposition of the death penalty be excluded for military tribunals or courts martial.

61. **Gravely concerned at the enhanced interrogation techniques reportedly used by the CIA, the Special Rapporteur urges the United States to ensure that all its officials and agencies comply with international standards, including article 7 of ICCPR, the Convention against Torture and, in the context of an armed conflict, common article 3 of the Geneva Conventions. Noting the United States understanding of cruel, inhuman or degrading punishment, he reminds the Government that there are no circumstances in which cruel, inhuman or degrading treatment may be justified, and recommends that steps be taken to reflect this in its domestic law.**

62. **The Special Rapporteur has concluded that the interrogation techniques identified in this report, which are not explicitly prohibited in the United States Army Field Manual, involve conduct that may amount to a breach of the prohibition against torture and any form of cruel, inhuman or degrading treatment. He recommends that the Manual be revised to expressly state that only enumerated techniques are permissible. As a practice which is not permissible in international law, and one that creates the real risk of torture or other ill-treatment of persons, the Special Rapporteur urges the Government to take transparent steps to ensure that the CIA practice of "extraordinary rendition" is completely discontinued and is not conducted in the future, and that CIA interrogation techniques are regulated in line with the position expressed above in respect of the Army Field Manual.**

63. **The Special Rapporteur also calls on the United States to ensure that all detainees are held in accordance with international human rights standards, including the requirement that all detainees be held in regularized facilities, that they be registered, that they be allowed contact with the outside world (lawyers, International Committee of the Red Cross, where applicable, family), and that any form of detention is subject to accessible and effective court review, which entails the possibility of release.**

64. **The Special Rapporteur urges the Government to restrict definitions of "international terrorism", "domestic terrorism" and "material support to terrorist organizations" in a way that is precise and restricted to the type of conduct identified by the Security Council as conduct to be suppressed in the fight against terrorism. He strongly urges the United States to ensure that it does not participate in the extrajudicial execution of any person, including terrorist suspects.**

65. **The Special Rapporteur recommends that all States, including the United States, do not use the country of origin of a person as a proxy for racial or religious profiling. He further urges all States not to act in a manner which might be seen as advocating the use of race and religion for the identification of persons as terrorists.**

66. **In the context of the compulsory detention of persons suspected of providing material support to terrorist organizations, the Special Rapporteur recommends that a transparent system be established for the application of the "duress waiver" established by the Department of Homeland Security, including the provision of judicial oversight.**

67. **Due to the fact that the United States Attorney General's guidelines on the availability of surveillance warrants under FISA, and the minimization procedures applicable to the surveillance of US persons are classified, the Special Rapporteur recommends that the Government introduce independent mechanisms, preferably involving the judiciary, to ensure that these guidelines and procedures are compliant with both the Constitution and the international obligations of the United States. The Special Rapporteur further urges the Government to extend these, and existing safeguards, to all persons within the jurisdiction and control of the United States, not simply those falling within the definition of "US persons".**

68. **The Special Rapporteur urges the Government to take steps to introduce independent checks and balances upon the authority of the FBI and other intelligence agencies to use National Security Letters.**
