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Report of the Special Rapporteur on the
promotion and protection of human rights and
fundamental freedoms while countering
terrorism¹

Mandate Holder

Martin Schenin.

Mandate

The mandate of the Special Rapporteur was established in 2005² as a reaction to the occurrence of violations of human rights and fundamental freedoms in the context of countering terrorism, and various initiatives to strengthen the promotion of human rights adopted by the United Nations, regional organizations, as well as by States. The aim of the mandate is to make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism, including country visits at the request of States, for the provision of advisory services or technical assistance on such matters; to examine alleged violations of human rights and fundamental freedoms while countering terrorism, with special attention to areas not covered by existing mandate holders; and to identify, exchange and promote best practices and ideas.

Activities

- The Special Rapporteur conducted fact-finding missions to South Africa, The United States of America and Israel.
- The Special Rapporteur plans to visit the Philippines and to Spain in the first half of 2008. There are outstanding visit requests to Algeria, Egypt, Malaysia, Pakistan and Tunisia.
- The Special Rapporteur participated in a panel session in London on security, the rule of law, counter-terrorism and human rights. He also participated in a panel discussion on the role of parliaments in balancing national security, human security and individual freedoms. He was represented at a workshop in Geneva on intelligence, accountability, counter-terrorism and human rights.

¹ Written by Rosa Sanz, Intern, ISHR; edited by Michael Ineichen, Geneva Program, ISHR.

² Commission resolution 2005/80.

- The Special Rapporteur convened an expert group meeting in the Netherlands to discuss thematic issues relevant to his mandate.
- In October, the Special Rapporteur presented his report³ to the Third Committee of the General Assembly in New York.⁴ The General Assembly adopted a resolution on 21 November, and will consider the report of the Special Rapporteur in its sixty-third session

Annual report⁵

Scope

- While acknowledging the previous done by the UN system and regional organizations, the report focuses on how economic, social and cultural rights have been neglected in the efforts that various human rights mechanisms have made towards the promotion and protection of human rights in the fight against terrorism.
- The report provides a series of examples that illustrate situations where counter-terrorism measures may have a negative impact on economic, social and cultural rights. It also underlines the important role of the promotion of these rights in the prevention of terrorism.
- In addition to countries visited, the Special Rapporteur made reference to China, Canada, Pakistan, Chile, Colombia, Turkey, the United Kingdom of Great Britain and Northern Ireland, Sri Lanka, Iraq, Afghanistan, Somalia, India, the Philippines, Germany and Australia.

Summary and key conclusions

- Counter-terrorism measures have a direct and indirect impact on the enjoyment of economic, social and cultural rights.
- The Special Rapporteur notes the negative impact of counter-terrorism measures on charity work, where charities have been investigated, shut down, and their assets frozen for being associated with the financing of terrorist groups, often without any evidence.
- The Special Rapporteur is of the opinion that the right to education is The Special Rapporteur is concerned about the tendency to return asylum-seekers or repatriate refugees on the basis of the own national security interests without paying sufficient attention to economic, social and cultural rights for the returnees in their countries of origin.
- The Special Rapporteur is concerned that counter-terrorism laws have been invoked in response to claims and social movements from indigenous peoples.
- Evictions and house demolitions are sometimes used as forms of targeted or collective punishment for residents suspected of supporting terrorist groups. The discrimination behind these acts can lead to additional violation of the most fundamental human rights.
- The social and economic discrimination of vulnerable groups often amount to violations of their human rights. These circumstances may provide favourable conditions for recruitment to terrorist movements.
- The promotion of economic, social and cultural rights can be seen as a means of addressing conditions that can lead to the spread of terrorism and therefore of preventing terrorism. Violation of these rights can hamper the efforts in preventing terrorism. The Special Rapporteur makes especial mention to the right to education as a key right in the sustainable long-term strategies for the prevention of terrorism.
- Insensitive counter-terrorism measures often result in counterproductive effects that undermine the promotion of economic, social and cultural rights in strategies to prevent terrorism.

³ A/62/263

⁴ A/C.3/62/L.47/Rev.1, Sixty-second General Assembly, Third Committee

⁵ A/HRC/6/17, 21 November 2007

Key recommendations

- Instruments for the protection of economic, social and cultural rights should be taken into account when countering terrorism to avoid violations and minimize the negative impact. The Special Rapporteur recommends that the Counter-Terrorism Committee of the Security Council address this to provide guidance to Member States.
- States should not to apply counter-terrorism measures to social movements by indigenous peoples or minority communities claiming recognition and protection of their economic, social and cultural rights.
- States and intergovernmental organizations should share more responsibility in refugee situations, analysing the conditions for the return of refugees and of conditions that may lead to the recruitment of terrorists.
- The Office of the United Nations High Commissioner for Human Rights (OHCHR) should include a new section on treaty body and special procedures practice with regard to economic, social and cultural rights in its digest of jurisprudence on the protection of human rights while countering terrorism.
- The Special Rapporteur recommends that the Committee on Economic, Social and Cultural Rights and other treaty bodies that have economic, social and cultural rights within their mandates develop a systematic practice of addressing counter-terrorism measures by States.

Mission to South Africa⁶

Scope

The mission took place from 16 to 26 April 2007. The main purposes of the visit were to gather first-hand information about counter-terrorism measures and how these affect human rights, and to begin a process of cooperation with the Government. The Special Rapporteur is very grateful for the cooperation of the South African government. However, he also regrets that the authorities were not willing to facilitate ad hoc visits to police detention facilities.

Summary and key conclusions

- Terrorism has not been seen as a major problem in South Africa.
- The Special Rapporteur commends South Africa for the consultative process before the adoption of the Protection of Constitutional Democracy against Terrorist and Related Activities Act (POCDATARA), which entered into force in 2005.
- Article 12 of the law above may threaten the freedom of expression and, in particular, journalists' ability to protect their sources. In addition, the definition of terrorism in POCDATARA may lead to a broad interpretation.
- The Special Rapporteur is concerned over the procedures for listing individuals subjected to sanctions pursuant to Security Council resolution 1267 (1999).
- With regards to the human rights of immigrants in the context of counter-terrorism, the Special Rapporteur is concerned about the lack of legal safeguards for detained immigrants and the application of the principle of non-refoulement. The Immigration Act allows for detention for up to 30 days without mandatory judicial review.

⁶ A/HRC/6/17/Add.2.

- The Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Act is an important step for improving South Africa's accountability for human rights violations in the context of countering-terrorism.

Key recommendations

- He recommends that the Government closely monitor the implementation of POCDATARA and be prepared to amend it if its interpretation could pose a threat to human rights.
- The Special Rapporteur recommends that the Government elaborate more clearly the content of the national procedures for listing individuals subjected to sanctions pursuant to Security Council resolution 1267 (1999).
- The Special Rapporteur recommends the creation of a system to monitor detention of immigrants, the enactment of legislation that provides for mandatory judicial review within 48 hours and the right to legal counsel from the time of apprehension.
- The Special Rapporteur recommends that South Africa include in all its legislation clearly the principle of non-refoulement.

Mission to the United States of America⁷

Scope

The mission took place from 16 to 25 May 2007. The main purpose of the visit was to conduct a fact-finding exercise and a legal assessment of United States law and practice in the fight against terrorism, as well as to identify and disseminate best practice when countering terrorism. However, the Special Rapporteur was disappointed at the lack of collaboration from the Government in allowing access to places of detention to conduct private interviews of detainees or in interacting with the Special Rapporteur in the subject of extraordinary renditions.

Summary and key conclusions

- The Special Rapporteur regrets that a number of important mechanisms for the protection of rights have been removed or obfuscated since the events of 11 September 2001.
- The Special Rapporteur concludes that the international fight against terrorism is not a "war" in the true sense of the word, and reminds the United States that during an armed conflict the State must comply with both international humanitarian law and international human rights law, even when a State acts outside its territory.
- The Special Rapporteur concludes that the categorization of Guantánamo Bay detainees as "unlawful enemy combatants" is a term that has no legal effect.
- The Special Rapporteur considers that the detention of persons for a period of several years without charge undermines the right of fair trial.
- There are serious concerns about the ability of detainees at Guantánamo Bay to seek a judicial determination of their status. All these detainees, as well as detainees in Afghanistan and Iraq, are entitled to the right to judicial review of their detention irrespective of whether they were involved in armed conflict or the status of proceedings against them.
- The Special Rapporteur is pleased by the intention of the United States to close Guantánamo Bay and return detainees to their countries of origin. However, the State's standard on the principle of non-refoulement fails to comply with international law.

⁷ A/HRC/6/17/Add. 3.

- Various aspects relating to the jurisdiction and operation of military commissions raise significant human rights concerns. First, the indistinctive application of the notion of “unlawful enemy combatant” may result in civilians being tried by military tribunals. Second, the commissions would apply criminal law retroactively, which violates article 15 of the ICCPR. Fourth, the Government’s justification for military commissions seems to be incorrect, as ordinary courts can try offences such as terrorism. Finally, there are serious concerns about their independence and impartiality.
- The Special Rapporteur is concerned about allegations on the use of “enhanced interrogation techniques” by the CIA, which would amount to torture and cruel, inhuman or degrading treatment.
- The Special Rapporteur is concerned over “extraordinary renditions” by the CIA, where terrorist suspects are taken to “classified locations” where they can be subjected to indefinite detention and/or interrogation techniques that violate international law. The Special Rapporteur notes that the “extraordinary rendition” of a person to another State for the purpose of interrogation or detention without charge is impermissible under international law.
- The Special Rapporteur notes that the country of origin of individuals or religious affiliation has been used as a proxy for profiling, which can lead to wrongly identifying persons as potential terrorists.
- International human rights law allows interference with privacy where necessary for legitimate purposes and implemented in a proportionate manner. However, the Special Rapporteur is concerned over the State’s surveillance guidelines and procedures and their compliance with international human rights law. Special mention is made to the expansion of the type of private records that are accessible to intelligence agencies in counter terrorism investigations.

Key recommendations

- The Special Rapporteur recommends that the categorization of persons as “unlawful enemy combatants” be abandoned and that those detained under that categorization are released or put on trial. He further recommends that legislative amendments be made to remove the restrictions for Guantánamo Bay detainees to seek full judicial review of their status.
- The Special Rapporteur urges the United States to invite the United Nations High Commissioner for Refugees (UNHCR) to conduct confidential interviews with Guantánamo Bay detainees, in order to determine their qualification as refugees and to recommend their resettlement to other countries.
- The Special Rapporteur recommends the discontinuation of military commissions and the use of ordinary civilian courts to try terrorist suspects.
- The Special Rapporteur urges the United States to ensure that all its officials and agencies comply with international standards with regards to interrogation techniques used.
- The Special Rapporteur urges the Government to ensure that the CIA practice of “extraordinary rendition” is completely discontinued.
- The Special Rapporteur recommends that all States do not use the country of origin of a person for racial or religious profiling.
- The Special Rapporteur recommends that the Government introduce independent mechanisms to ensure that surveillance guidelines and procedures comply with international human rights to avoid violations of privacy rights.

Mission to Israel, including visit to Occupied Palestinian Territory⁸

Scope

The mission took place from 3 to 10 July 2007, and included a visit to the Occupied Palestinian Territory. The main purpose of the visit was to gather first-hand information about counter-terrorism measures and how these affect human rights.

Summary and key conclusions

- The Special Rapporteur has identified incompatibilities of Israel's counter-terrorism law and practice with its human rights obligations.
- Israeli counter-terrorist operations must comply with both international humanitarian law and international human rights law, which are also applicable in the Occupied Palestinian Territory.
- The Special Rapporteur is concerned about the classification of suspected terrorists as “unlawful enemy combatants”, which puts them in a protection gap with respect to international humanitarian law.
- The Special Rapporteur is concerned with the conditions of arrest and detention of Palestinians in the West Bank, and is troubled by reports of the use of interrogation techniques that amount to inhuman and degrading treatment and torture. He is also concerned by the fact that terrorist and security suspects, including civilians, are normally tried before military courts.
- The Special Rapporteur considers that the construction of the “barrier” by Israel is having a negative impact on the human rights of the Palestinian people and constitutes a breach of the international obligations of Israel under both humanitarian law and human rights law.⁹ He considers that the barrier is counterproductive as it contributes to conditions that lead to the recruitment to and spread of terrorism.
- The Special Rapporteur is deeply concerned about the deterioration of the humanitarian situation in Gaza, particularly after the numerous military interventions by the Israel Defense Forces (IDF).
- The Special Rapporteur regrets that the Government of Israel was not willing to share with him existing standing orders concerning searches by the IDF of persons.
- The Special Rapporteur is concerned about the inconsistent and discriminatory enforcement of building laws. Demolition consistently occurs of property owned by Palestinians but rarely with regards to property owned by Israelis.
- The Special Rapporteur is concerned about the broad and vague concept of “legitimate target” applied by Israel and notes the high number of civilian deaths, especially Palestinian children, as a result of Israeli military activity in the Occupied Palestinian Territory.

Key recommendations

- Regarding interrogation techniques, the Special Rapporteur recommends to take urgent steps to ensure full compliance with international obligations. Similarly, guarantees should be provided with regards to arrest and detention, such as access to a lawyer and prompt information of the reasons for detention.
- The Special Rapporteur recommends to Israel to withdraw all Jewish settlements from the Occupied Palestinian Territory and to replace the barrier with a security infrastructure that is accepted by the Palestinians.
- The Special Rapporteur urges Israel to respect the rules of international humanitarian law, including the distinction between civilians and military objectives.

⁸ A/HRC/6/17/Add.4.

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports 2004, 136, para. 137.

- The Special Rapporteur urges Israel to ensure that any demolition of housing is carried out in compliance with international law and is accompanied by adequate reparation.
- The Special Rapporteur recommends the establishment of transparent laws and guidelines on targeted killings, which must be followed by an independent investigation.

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