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**Special Rapporteur on the promotion and protection of
human rights and fundamental freedoms while countering
terrorism, Ben Emmerson**

Addendum - Follow-up report to country missions

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I. Introduction

1. This document contains letters sent by the current and previous Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson and Martin Scheinin, relating to the follow-up measures to the recommendations made after visits to Egypt; Israel, including the visit to occupied Palestinian territories; Spain; Turkey and the United States of America. The report equally contains the replies received from Governments to those letters up to 15 June 2012.

II. Follow-up to missions

A. Follow-up to missions to Egypt¹

Letter to the Government

2. On 29 July 2011, the former Special Rapporteur sent the following letter to the Government of Egypt.

3. I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism pursuant to Human Rights Council resolution A/HRC/RES/15/15 of 7 October 2010, and in the spirit of our dialogue developed with your Excellency's former Government since my fact-finding mission to Egypt held from 17 to 21 April 2009 (A/HRC/13/37/Add.2).

4. In light of a number of developments that have taken place since the conduct of my visit, including the recommendations issued in March 2010 following the Universal Periodic Review of Egypt,² and the report of the OHCHR mission to Egypt between 27 March and 4 April 2011,³ I wish to follow up with your Excellency's Government on a selected number of issues that I elaborated on in my mission report on the legal and institutional counter-terrorism framework and practice in your country. In the following I therefore take the opportunity to address some of the recent developments reported to me that have taken place at the national level.

5. During my visit and in the Human Rights Council report related to that visit, I urged the Government of Egypt to lift the state of emergency and repeal the Emergency law, including all decrees under it, with a view to restoring the rule of law and full compliance with human rights, including the International Covenant on Civil and Political Rights (ICCPR). As an essential step in this direction, I recommended that article 179 of the Egyptian Constitution would be revised (A/HRC/13/37/Add.2, para. 49). I welcome therefore the new constitutional declaration of Egypt's Supreme Council of the Armed Forces (SCAF) of 30 March, which abolished article 179.⁴

¹ A/HRC/13/37/Add.2.

² Report of the working group on the Universal Periodic Review, Egypt, A/HRC/14/17.

³ Office of the United Nations High Commissioner for Human Rights, Report of the OHCHR Mission to Egypt, 27 March - 4 April 2011, available at http://www.ohchr.org/Documents/Countries/EG/OHCHR_Mission_toEgypt27March_4April.pdf

⁴ Constitutional Declaration, available at http://www.cabinet.gov.eg/AboutEgypt/ConstitutionalDeclaration_e.pdf.

6. At the time of my visit, the previous Government was committed to enact a new anti-terrorism law in order to lift the state of emergency that has been in force, almost continuously, for more than 50 years. In May 2010, the Emergency law was again renewed however. The presidential decree renewing the measure states in article 2 that enforcement “will be limited to cases of combating the dangers of terrorism and its finance and the purchase, export and trafficking in narcotics.” Promises to lift the state of emergency have been made since 2005, and the SCAF and Prime Minister Essam Sharaf have reiterated these promises this year, stipulating that the state of emergency would be lifted before the parliamentary elections would take place in November. While the SCAF has the responsibility to maintain law and order in Egypt, it is not clear in which cases it is still applying articles 3 (1) and (5) of the Emergency Law, which permit restrictions on the freedom of persons to assembly, movement, residence and passage in certain places or times; the arrest and detention of suspects or those representing a danger to public security and order; and the search of persons and places without regard for provisions of the Code of Criminal Procedure. In this context, I am concerned about consistent reports that members of the military have allegedly arrested, detained and even ill-treated innocent protesters in the aftermath of the revolution.

7. In my mission report, I stressed my deep concern about the jurisdiction over terrorism cases by military courts and Emergency Supreme State Security Courts (A/HRC/13/37/Add.2, paras. 32 *et seq.*). This concern is still valid since I learned about the referral of the case of 48 defendants of the Imbaba events, in which sectarian clashes between Copts and Muslims led to the death of 15 people and 242 injured, to the Supreme State Security Court. The fact that judgments pronounced in first instance by this Supreme State Security Court are not subject to appeal, and become final after the ratification of the President, is not sufficient to reach compliance with article 14 (5) of the ICCPR. I am further concerned by admissions of the Government that at least 10.000 civilians have been convicted on the basis of the emergency law by military courts since former President Mubarak resigned on 11 February 2011, often on the basis of their participation in protests which were suppressed by the military. The trial of civilians in military and Emergency Supreme State Security Courts raises concerns about the impartial and independent administration of justice and furthermore does not comply with the right to have a conviction and sentence fully reviewed by a higher court. I urge your Excellency’s Government to ensure that all these cases are tried in strict compliance with each of the guarantees as spelled out in article 14 of the ICCPR, including the stipulation in article 14 (3) (d) that a suspect has to be able to defend himself in person or through legal assistance of his own choosing.

8. My concerns with the Emergency law also relate to its use as a basis for other laws, which are not compatible with international human rights standards. In April 2011, Law 34/2011 entered into force, which provides for punishment with imprisonment or a fine for all those who during the state of emergency call for demonstrations, strikes, sit-ins, or gatherings, or participate in any of the above, leading to the impediment or the obstruction of any of the state institutions or public authorities from performing their role. The law also penalizes incitement, calls, writings, or any other public advertisements for a protest or strike with imprisonment. The vaguely drafted law undermines the right to strike as guaranteed under article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to peaceful assembly under article 21 of the ICCPR. I was made aware that in June 2011 five workers from the Ministry of Petroleum were brought to trial under the new law. The five were charged with carrying out a sit-in protest in front of the oil ministry, along with about 200 colleagues, and were sentenced to suspended prison sentences of one year. I fail to see how punishing a peaceful protest outside a ministry is necessary or proportionate to counter terrorism or drug-related offences. The adoption of this law does not seem to take into account the recommendation of my mission report,

which stated that any counter-terrorism measure that results in the restriction of human rights, in particular pertaining to peaceful assembly and association, be brought into compliance with the requirements of necessity and proportionality and applied in accordance with clearly defined legal criteria (A/HRC/13/37/Add.2, para. 52).

9. I urged the Government of Egypt in my mission report to abolish any legal provisions, including article 3 (1) of the Emergency law, allowing for administrative detention and to take effective measures to release or bring to trial all detainees currently subjected to that regime (A/HRC/13/37/Add.2, para. 53). The former Government has said in 2010 that “hundreds” of administrative detainees were released in accordance with the presidential decree amending the Emergency Law in May 2010, including detainees held in connection with bomb attacks at Taba in 2004, but disclosed no details about those who continued to be detained. On 11 June 2010, Mufid Shehab, Minister of Human Rights and Parliamentary Affairs, specified before the Human Rights Council that about 453 detainees had been released. On 12 March 2011, the new Minister of Interior announced that 1,659 administrative detainees had been released since early February, but there is no information available as to what the criteria were to release these people, and how many people are still being detained.

10. In the overwhelming majority of cases the State Security Intelligence (SSI) was responsible for administrative detention, which was often unacknowledged and accompanied by practices of torture. These human rights violations by the SSI were widespread and of a systemic nature. When protesters stormed the headquarters of the SSI in Nasr City in the beginning of March 2011, they did not only find thousands of burned or shredded records, but also torture devices and secret underground prison cells whose existence the Egyptian Government had vehemently denied. I note that all administrative branches and offices of the State Security Investigation Service (SSI) were dissolved on 15 March 2011 and that its head, General Hassan Abd al-Rahman, was arrested, and currently faces an investigation into the ordering of killings of anti-government protestors. Another 47 SSI officers appeared to have been detained on suspicion of destroying incriminating evidence. However, in order to truly eradicate the culture of impunity at the SSI, investigations into the actions of the SSI should go beyond issues of involvement related to the violence against the protesters during the revolution. In this context, I reiterate my earlier recommendation that the Government of Egypt should establish an independent investigatory body to promptly and thoroughly clarify all elements that indicate its collaboration and extended reception of persons subjected to “extraordinary renditions” carried out within this programme (A/HRC/13/37/Add.2, para. 59).

11. The SSI has been replaced by a new “National Security Agency” (NSA), which, according to statements made by the Minister of Interior, will now be mainly responsible only for investigating terrorism. It has to be noted that lessons should be learned from the past in order to avoid that this new agency becomes, again, a state within the state. Firstly, since the SSI could arrest, detain, torture and kill with impunity under the shield of the Emergency Law, it is of utmost importance that this law is immediately abolished in Egypt. The success of any reform of the security apparatus is dependent on this measure. Secondly, a new agency needs to be established on the basis of a clear and precise law, which outlines the mandate and powers of this agency. Element of good practices in this context can be found in my 2010 report “Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism” (A/HRC/14/46). Last but not least, to eradicate the culture of human rights abuses and impunity committed by Egypt’s security forces, including the military and the General Intelligence Services (*Mukhabarat al-‘Amma*) measures need to be taken to ensure truth, justice and reparation for victims of human rights violations by these forces. I agree with the OHCHR mission that “there is a need for a comprehensive approach to transitional justice with regard to all serious recent and past

human rights violations, and for the organization of national consultations on transitional justice so as to identify the most appropriate options.”⁵

12. Finally, and in connection with the issues elaborated above, I would be grateful if your Excellency’s Government could provide me with detailed substantive information on the following matters, and any other matters that your Excellency’s Government deems appropriate in following up on my recommendations in my country visit report, at your earliest convenience, but no later than 29 August 2011:

1. Could your Excellency’s Government provide me with statistics concerning the use of the administrative detention regime on terrorist suspects, including as regards the particular acts for which the detainees in question are being held?
2. How many convictions of civilians in military courts relate to the fight against terrorism?
3. What steps has your Excellency’s Government taken to hold SSI officials and military officers accountable for acts of torture, arbitrary detention, extrajudicial killings and other human rights violations?
4. What steps have been taken in particular to investigate the death of Mr. al-Sayyid Bilal, who was found dead after being summoned to the SSI facility in Alexandria after the bombings at the Two Saints Church in Alexandria in January 2011?
5. Is there a vetting system put in place for the integration of former SSI officials in the police force and the new state security force?
6. What steps are taken to preserve the archives of the State Security Intelligence?
7. Which steps are taken to guarantee that no evidence of human rights abuses, including evidence of unlawful killings, is tampered with or destroyed and that investigations into all killings follow the methods set out in the UN Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions?
8. What is the present status of the proposed anti-terrorism law?
9. When does Egypt plan to revise its national legislation so as to ensure that the definition of torture in the Criminal Code is in full compliance with international human rights norms, in particular with the Convention against Torture?
10. Which steps is your Excellency’s Government taking to ratify the Rome Statute of the International Criminal Court; the International Convention for the Protection of All Persons from Enforced Disappearance and the Optional Protocol to the Convention against Torture?
11. Will your Excellency’s Government create an independent oversight mechanism as to hold security forces and all law enforcement officials to account for human rights violations?

13. As my own term as Special Rapporteur is coming to an end, I want to thank your Excellency’s Government for its cooperation so far and to express the wish that this cooperation will continue with my successor. With reference to earlier exchanges, I hope

⁵ Office of the United Nations High Commissioner for Human Rights, Report of the OHCHR Mission to Egypt, 27 March - 4 April 2011, p.10.

that your Excellency's Government will invite my successor into the country, including in follow up on my mission report and to visit places of detention under the Standard Terms of Reference for Fact-finding Missions of Special Procedures (E/CN.4/1998/45). Any responses to the questions presented above will be included in a forthcoming report to the Human Rights Council.

Reply from the Government

14. As at 6 June 2012, no reply from the Government has been received by the Special Rapporteur.

B. Follow-up to mission to Israel, including visit to the occupied Palestinian territories⁶

Letter to the Government

15. On 1 May 2012, the Special Rapporteur sent the following letter to the Government of Israel.

16. I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism pursuant to Human Rights Council resolution 19/19, and in the spirit of the constructive dialogue developed between my predecessor, Mr. Martin Scheinin, and your Excellency's Government since his fact-finding mission to Israel, including a visit to the occupied Palestinian territories (oPt), conducted from 3 to 10 July 2007 (A/HRC/6/17/Add.4).

17. In light of a number of developments that have taken place since that visit both in Israel, including the oPt, and at United Nations level, including the recommendations issued in January 2009 following the Universal Periodic Review (UPR) of Israel,⁷ and the adoption of the respective concluding observations on Israel by the Committee on the Elimination of Racial Discrimination in March 2012,⁸ the Human Rights Committee in July 2010,⁹ the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in March 2010,¹⁰ and the Committee against Torture in June 2009,¹¹ I wish to follow up with your Excellency's Government on a selected number of issues that were elaborated on in the mission report on the legal and institutional counter-terrorism framework and practice in your country. I therefore take the opportunity to address some of the recent developments reported to me that have taken place at the national level.

18. Since the country visit of my predecessor, your Excellency's Government has made efforts to address some of the issues in relation to the promotion and protection of human rights noted then in his report.

Definition of terrorism and related issues

19. In the report, it was recommended to your Excellency's Government that Israel, in the development of its counter-terrorism legislation, ensure that definitions of terrorism and

⁶ A/HRC/6/17/Add.4.

⁷ Report of the working group on the Universal Periodic Review, Israel, A/HRC/10/76.

⁸ CERD/C/ISR/CO/14-16.

⁹ CCPR/C/ISR/CO/3.

¹⁰ CRC/C/OPAC/ISR/CO/1.

¹¹ CAT/C/ISR/CO/4.

security suspects are precise and limited to the countering of terrorism and the maintenance of national security, respectively. Definitions surrounding the countering of terrorism should be restricted to the suppression and criminalization of acts of deadly or otherwise serious physical violence against civilians, i.e., members of the general population or segments of it, or the taking of hostages, coupled with the cumulative conditions identified by the Security Council in its resolution 1566 (2004). All legislation, regulations and military orders must comply with the requirements of the principle of legality with regard to accessibility, precision and non-retroactivity. Having achieved those requirements, the enactment by the Knesset of this new legislation should be accompanied by a repeal or revocation of all current counter-terrorism legislation, regulations and military orders. My predecessor further recommended that the Incarceration of Unlawful Combatants Law be repealed, without replacement (A/HRC/6/17/Add.4, para. 55).

20. Since then, the Human Rights Committee, in its concluding observations, has equally recommended that Israel should ensure that its definitions of terrorism and security suspects be precise and limited to countering terrorism and the maintenance of national security and are in full conformity with the International Covenant on Civil and Political Rights (CCPR/C/ISR/CO/3/CRP.1, para. 13). Referring to the report of my predecessor, the concluding observations by the Committee on the Rights of the Child also urged your Excellency's Government to ensure that any definition of terrorist crimes is brought in line with international standards and norms (CRC/OPAC/ISR/CO/1, para. 35 (d)). The report of the Working Group on the UPR of Israel also contains recommendations in the context of countering terrorism and human rights, including a recommendation that Israel intensify its efforts to ensure that human rights are fully respected in the fight against terrorism and that the country redouble its efforts to guarantee the protection of human rights and fundamental freedoms in the fight against terrorism, paying particular attention to the recommendations made by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on this subject (A/HRC/10/76, para. 100.30).

21. I am encouraged by the efforts of your Excellency's Government to review its terrorism legislation and to provide for a comprehensive counter-terrorism legislation on the basis of the Counter-terrorism Memorandum Bill published by the Ministry of Justice on 21 April 2010, and the Memorandum Bill with a view to revoking parts of the 1945 Defense (Emergency) Regulations published by the Ministry of Justice on 27 February 2012. With respect to the Counter-terrorism memorandum Bill, while I am not in a position to review the Bill in its entirety due to linguistic constraints, I am concerned by reports that I have received that it includes an overly-broad definition of terrorism and related crimes. It is reported that the definition of a "terrorist organization", for example, might apply to organizations which do not carry out terrorist acts *per se*, but are seen to promote other organizations that are terrorist in nature through specific humanitarian activities. Coupled with the increase of prison sentences for crimes that are defined as terrorist crimes in the Bill in comparison to "ordinary" criminal acts as prescribed by the Penal Law of Israel, and broad and vague definitions of new ancillary offences of terrorism such as publicly supporting a terrorist organization, attempting to recruit members, inciting terrorist acts, failure to prevent a terrorist act, threatening to perpetrate a terrorist act, or training or providing instructions to perpetrate a terrorist act, this might give rise to concerns in relation to the principle of legality as enshrined in article 15 of the International Covenant on Civil and Political Rights and other rights and freedoms such as the right to freedom of opinion and expression or freedom of association, as protected by articles 19 and 22 of the International Covenant on Civil and Political Rights. I would further like to register my concerns about reports received that the Bill would introduce a rule of reversed burden of proof on a person that was once determined to be a member of a terrorist organization to prove that membership has ceased. I would also like to highlight my concerns about reports

that the Memorandum Bill concerning the partial revocation of the 1945 Defense (Emergency) Regulations contains a provision to the effect that, if adopted, it would make the revocation of the relevant provisions of the 1945 Defense (Emergency) Regulations conditional upon the entry into force of the provisions of the Counter-terrorism Memorandum Bill. This could be interpreted as a move to discourage the Israeli High Court of Justice from striking down as unconstitutional, once it enters into force, the Counter-terrorism Memorandum Bill, or parts of it that cover the same subject matter, as this would mean that the provisions of the 1945 Defense (Emergency) Regulations, which are immune against judicial scrutiny because they predate the Israeli constitutional provisions contained in the Basic Law: Human Dignity and Liberty, regained legal force.

22. My understanding is that the Counter-terrorism Memorandum Bill was presented, on 27 March 2011, to the Ministerial Committee for Legislation, and approved by this Committee, but that this approval was appealed by three Ministers (as members of this Committee) on 22 June 2011. I am informed that the complete Bill was officially published on 27 July 2011 and passed the first reading in the Knesset on 3 August 2011; and subsequently transferred for deliberations in the Constitution and Law Committee.

23. As regards the Incarceration of Unlawful Combatants Law, I share the concerns of the Human Rights Committee at its continued application and declaration of conformity with the Basic Law by Israel's Supreme Court (CCPR/C/ISR/CO/3/CRP.1, para. 13), recently by its decision Administrative Detention Appeal 3133/11 in the case of *Sarsak v. State of Israel*, and reiterate my recommendation, to repeal the Law without replacement, alongside the one of the Human Rights Committee (CCPR/C/ISR/CO/3/CRP.1, *ibid.*) and the Committee against Torture (CAT/C/ISR/CO/4/Add.1, para. 17).

Interrogation methods

24. In the country mission report, my predecessor welcomed the decision of the Israeli Supreme Court, sitting as the High Court of Justice, in *Public Committee against Torture in Israel v. The State of Israel*, HCJ 5100/94, determined regarding interrogation techniques by the Israeli Security Agency (ISA) but recommended that urgent steps be taken by your Excellency's Government to ensure full compliance with that decision and associated international obligations. Since the proper application of the necessity defence under article 34 (11) of the Penal Law cannot validate conduct amounting to torture or cruel, inhuman or degrading treatment, it was further recommended that steps be taken to establish mechanisms by which victims of such conduct are provided with an effective remedy. Given the concerns that my predecessor had with the independence of the ISA complaints inspector, the non-derogable and peremptory nature of the prohibitions, and the apparent lack of understanding by ISA officers of the parameters of the necessity defence, it was further recommended that all complaints of torture or cruel, inhuman or degrading treatment be referred to the Attorney General's office for immediate actions to be taken against the individual interrogator, and that only the courts may pronounce on the applicability and effect of the necessity defence (A/HRC/6/17/Add.4, para. 56).

25. The Committee against Torture, in its most recent concluding observations on Israel, reiterated its previous recommendation that your Excellency's Government completely remove necessity as a possible justification for the crime of torture (CAT/C/ISR/CO/4, para. 14), after having established that the 'necessity defense' exception may still arise in cases of 'ticking bombs,' i.e., interrogation of terrorist suspects or persons otherwise holding information about potential terrorist attacks, despite the abovementioned decision of the Israeli Supreme Court (*ibid.*). Furthermore, concerned by numerous, ongoing and consistent allegations of the use of methods applied by Israeli security officials that were prohibited by the abovementioned September 1999 ruling of the Israeli Supreme Court, and that are alleged to take place before, during and after interrogations, the Committee recommended that Israel should ensure that interrogation methods contrary to the

Convention against Torture not be utilized under any circumstances and that all allegations of torture and ill-treatment be promptly and effectively investigated and perpetrators prosecuted and, if applicable, appropriate penalties be imposed. The Committee further reiterated that, according to the Convention against Torture, “no exceptional circumstances” including security or war or threat to security of the State justifies torture (CAT/C/ISR/CO/4, para. 19). Moreover, the Committee recommended that your Excellency’s Government duly investigate all allegations of torture and ill-treatment by creating a fully independent and impartial mechanism outside the ISA based on data that none of the over 600 complaints of ill-treatment by ISA interrogators received by the Inspector of Complaints between 2001 and 2008 had resulted in a criminal investigation, and that out of 550 examinations of torture allegations initiated by the GSS inspector between 2002 and 2007, only 4 resulted in disciplinary measures and none in prosecution (CAT/C/ISR/CO/4, para. 21), as explained in the report of my predecessor (A/HRC/6/17/Add.4, para. 19).

26. I am very concerned about reports I have received alleging that the decision of the Supreme Court of 1999 is not fully complied with by the General Security Service (GSS) in the interrogation of security suspects. There are allegations that there is still a permit system in place based on GSS “necessity interrogations regulations” by which the authorization of the use of “special means” in interrogation is given by the Head of the GSS, although both the use of physical means during the course of interrogations and such regulations have been prohibited by the Supreme Court.

27. I note the Committee against Torture’s assessment that according to non-governmental organizations the decline in the number of complaints of torture and ill-treatment submitted was allegedly due to a sense of futility based on the absence of indictments and a sense of *de facto* impunity (CAT/C/ISR/CO/4, para. 21). I also note the information and statistics provided by your Excellency’s Government to the Committee pursuant to its follow up procedure on examinations by the Inspector for Complaints against ISA interrogators which indicate that none of the examinations opened during the years 2006 – 2009 resulted in the submission of criminal charges. I note that your Government attributes this to the fact that all interrogations had been conducted according to law and procedures, and no ill-treatment or torture took place during the interrogations (CAT/C/ISR/CO/4/Add.1, paras. 23 – 29).

28. While welcoming the modification of certain procedures and interrogation techniques as a result of some investigations (*ibid.*) as a very first step in the right direction, I regret that it would appear that your Excellency’s Government has not taken steps to separate the investigations into complaints directed against ISA and GSS interrogators in the security and counter-terrorism context. I reiterate the non-derogable and peremptory nature of the prohibition of torture and urge your Excellency’s Government to give serious consideration to providing for courts of law as the proper venue for the examination of complaints during a criminal trial. The ratification as soon as possible of the Optional Protocol on the Convention against Torture (OPCAT) would further strengthen the independent monitoring of the conduct of Israel’s security agencies.

Arrest and detention of security suspects, including children in the military court system

29. With regard to arrest and detention, it was recommended in the report of my predecessor that Israel take steps to ensure that all persons are informed of the reasons for their detention at the time of their arrest and the amendment of the Criminal Procedures (Non-Resident Detainee Suspected of Security Offense) (Temporary Provision) Law 2006 to ensure that security suspects are provided with immediate and continued access to legal counsel and, where appropriate, family visits. In the context of administrative detention, it

was recommended that the terms “security of the area” and “public security”, currently under Military Order 1229, be defined with precision, and that steps be taken, such as the establishment of a panel of security-cleared counsel, to ensure that representations are able to be made to the district court on behalf of a detainee upon the making or extension of administrative detention orders. Furthermore, my predecessor urged that the practice of military or other courts authorizing administrative detention on the basis of evidence available neither to the detainee nor counsel be discontinued as incompatible with article 14 (1) of the International Covenant on Civil and Political Rights (A/HRC/6/17/Add.4, para. 57). He further urged your Excellency’s Government to ensure that counter-terrorism law and practice are never used as a pretext for preventing or undermining the development of democracy in Palestinian territory. He specifically recommended that the detention or imprisonment of a child be used as a measure of last resort, that solitary confinement never be used by prison authorities as a means of coercion or punishment of children, and that all facilities in which children are detained provide educational care appropriate to the age of each child (A/HRC/6/17/Add.4, para. 58).

30. Since the publication of the report, and based on continuing concerns it had in this respect, the Human Rights Committee recommended to your Excellency’s Government that any person arrested or detained on a criminal charge, including persons suspected of security-related offences, has immediate access to a lawyer, for example by introducing a regime of Special Advocates with access to all evidence, including classified evidence, as well as immediate access to a judge (CCPR/C/ISR/CO/3/CRP.1, para. 13). The Committee also recommended that your Excellency’s Government should refrain from using administrative detention, in particular for children, and ensure that detainees’ rights to fair trial are upheld at all times (*ibid.*, para. 7). The recommendations of the Committee against Torture are also relevant in this regard. In its concluding observations the Committee called on Israel to examine its legislation and policies in order to ensure that all detainees, without exception, are promptly brought before a judge and have prompt access to a lawyer. The Committee also emphasized that detainees should have prompt access to an independent doctor and family member, as these are important means for the protection of suspects, offering added safeguards against torture and ill-treatment and should always be guaranteed to persons accused of security offenses (CAT/C/ISR/CO/4/Add.1, para. 15). Based on similar concerns the Committee on the Elimination of Racial Discrimination also has recently recommended that Israel should ensure equal access to justice for all persons residing in territories under the State party’s effective control, and urged Israel to end its current practice of administrative detention since it was operated in a discriminatory manner and thus constitutes arbitrary detention under international human rights law (CERD/C/ISR/CO/14-16, para. 27).

31. I regret that despite the recommendation of my predecessor (A/HRC/6/17/Add.4, para. 57) it is the intention of your Excellency’s Government to include, in its revised anti-terror legislation, provisions based on the Criminal Procedures (Non-Resident Detainee Suspected of Security Offence) (Temporary Provision) Law 2006. These provisions allow for significant pre-trial delays before providing access to a lawyer, as well as for decisions on the extension of detention to be taken, in exceptional circumstances, in the absence of a suspect (cf. CCPR/C/ISR/CO/3/CRP.1, para. 13). It is further regrettable that the validity of the Law itself, which was supposed to be of a temporary nature, pending the completion of the enactment of the new anti-terrorism legislation, was extended until 31 December 2012. It contains a modified provision of its article 5, which enables courts to conduct detention hearings *in absentia* for suspects charged with security offences, in substantially the same terms as the provision that was struck down by the Supreme Court of Israel on proportionality grounds.

32. It is my understanding that there have not been any amendments to Military Order 1229, which in my view lacks precision in relation to the terms “security of the area” and

“public security” used as a basis for administrative detention orders. In addition, the military “Order on Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651) 5770-2009” of 1 November 2009, which entered into force on 2 May 2010, as amended by the amendments promulgated by the Israeli Defense Force Military Commander on 2 February 2012, purporting to consolidate relevant Military Orders issued in the West Bank on issues such as detention, criminal and criminal procedure law, and administrative orders, still provides for pre-indictment detention by a military commander for up to three months, if approved by a military judge and a military appeals judge, on the basis of “reasonable grounds to believe that reasons of regional security or public security” without defining the terms “regional security” or “public security”. Although judicial review within 96 hours of the administrative detention order is foreseen in the Security Provisions, and the previous maximum period of detention was lowered from six to three months by the amendments of February 2012, I am concerned about the still excessive length of permissive pre-charge detention periods, and the fact that the judge may deviate from rules of evidence, which includes the possibility of accepting evidence in the absence of the detainee or his/her representative or without disclosing it to them, if the judge is convinced that disclosing the evidence to the detainee or his representative may harm regional security or public security. I understand that such decisions can be made in the absence of the detainee and his/her legal representative. This is in conflict with several guarantees contained in articles 9 and 14 of the International Covenant on Civil and Political Rights.

33. According to the statistics provided by the Israeli Defence Force and the Israeli Prison Service, at the end of March 2012, Israeli authorities were holding a total of 4,386 Palestinian prisoners and detainees, including 1 detainee under the Incarceration of Unlawful Combatants Law and 320 administrative detainees. I am particularly concerned about reports I have received that your Excellency’s Government continues to detain Palestinian minors from the age of 12, mainly on security related grounds and that certain of these children have alleged that they have been beaten, kicked, verbally abused or threatened upon arrest or in detention and that many claim to have confessed during typically coercive interrogations. In addition, solitary confinement of minors is still reported. I share the particular concern expressed by the Committee on the Elimination of Racial Discrimination in its recent concluding observations concerning Israel that there has been an increase in the number of arrests and in the detention of children and in the undermining of their judicial guarantees. I also share the Committee’s concern about the maintenance of an administrative detentions system for Palestinian children and adults alike based on evidence that is kept secret for security reasons (CERD/C/ISR/CO/14-16, para. 27).

34. The report of the High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1 also reports on the ongoing violations in this respect (A/HRC/16/71, para. 48). In two of its Opinions, the Working Group on Arbitrary Detention considered the detention of Palestinians who were minors at the time of their arrests, and were served with several consecutive administrative detention orders approved by a military court under Military Orders No. 378 and 1591 on the basis of secret evidence. The Working Group considered these actions to amount to arbitrary detention on a number of grounds (Opinions No. 5/2010 and 9/2010 – A/HRC/16/47/Add.1).

35. At the end of November 2011, there were reportedly 33 juvenile detainees under the age of 16 and 126 detainees in the age bracket of 16 to 18 in various Israeli Prison Service detention facilities, including detainees detained inside Israel in violation of article 76 of the Fourth Geneva Convention. I regret the decision of the Supreme Court of Israel sitting as the High Court of Justice of 28 March 2010 in the case of *Yesh Din et al v. Commander of the Military Forces in the West Bank*, which approved this general policy since both the decision and the policy are incompatible with international customary law and because they

infringe the right of the concerned Palestinian detainees to respect for their family life due to the travel restrictions imposed on residents of the West Bank.

36. I concur with the recommendation in the concluding observations of the Committee on the Rights of the Child concerning Israel, namely that it should never hold criminal proceedings against children in military courts and should never subject children to administrative detention (CRC/C/OPAC/ISR/CO/1, para. 35). I fail to see how the creation of a juvenile military court in September 2009 has contributed to any improvement in the situation when there appear to be few substantive differences between adult and juvenile military courts. According to reports I have received, in 2009 the rate prison terms imposed on Palestinian juveniles by military courts was 83 per cent compared to 6.5 per cent in the Israeli civilian juvenile justice system. While again I do not make a judgement as to the impartiality of individual military judges, the fact remains that military courts have an appearance of a lack of independence and impartiality, which on its own brings into question the fairness of trials (cf. A/HRC/6/17/Add.4, para. 29) and other proceedings especially when applied to minors.

Construction of a barrier and Jewish settlements in the oPt and its impact on the Palestinian people

37. My predecessor noted, in his country mission report, the negative impact of the barrier on the enjoyment of human rights by the Palestinian people, and the continuing deterioration in the socio-economic conditions of many parts of the West Bank attributable to it. He noted these deleterious effects notwithstanding the correlation between the construction of the barrier and the reduction in the number of successful terrorist attacks against Israeli civilians (A/HRC/6/17/Add.4, para. 31). He was also troubled by the approach of the Supreme Court of Israel, which rejected the outcome of the Advisory Opinion of the International Court of Justice (ICJ),¹² and instead accepted the legitimacy and continued construction of the barrier on the basis of military necessity and the need to secure the safety of Israeli settlements in the West Bank. He acknowledged that decisions of the Supreme Court had addressed the exact route of the barrier and often ordered changes to it, but had failed to address the legality of Israeli settlements in the West Bank (A/HRC/6/17/Add.4, para. 34). Given the illegality under international law of the existence and continued development of Jewish settlements in the oPt, my predecessor recommended in his report, that a decision be made immediately to withdraw all such settlements and to replace the still unfinished barrier, extending deep into Palestinian territory, with a security infrastructure that, by its geographical position, respects the Green Line or is otherwise accepted by the Palestinians. During the process of implementing such a decision, my predecessor recommended urgent action to ensure that the permits regime, the administration of checkpoints, and all other associated measures in the oPt do not have a disproportionate impact on the enjoyment of civil, cultural, economic, political and social rights in the territory. It was also recommended that security measures be civilianized through means other than their privatization (A/HRC/6/17/Add.4, para. 59).

38. I am concerned about the reports I continue to receive about the expansion of Israeli settlements in the oPt and the ongoing construction of the barrier in the West Bank, which both continue to have a devastating effect on the life of Palestinians living in the oPt as is evidenced by numerous reports published since the mission to Israel, including the oPt, in July 2007. Two reports from the Office for the Coordination of Humanitarian Affairs – occupied Palestinian territory (OCHA/oPt) and the World Health Organization's West

¹² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, I.C.J. Reports 2004.

Bank & Gaza Office from July 2010¹³ and from OCHA/oPt from July 2011¹⁴ illustrate the concerns that have already been expressed in my predecessor's report that the barrier has counterproductive effects by contributing to conditions that are conducive to the recruitment to terrorism (A/HRC/6/17/Add.4, para. 43). The continued construction of the barrier that will run to 85% inside the West Bank once completed, rather than along the Green Line, coupled with its associated gate and permit regime, impact on the lives of the Palestinian people, especially in rural areas where agricultural practice has been severely curtailed and livelihoods and access to work, education, and health, including emergency medical treatment, undermined. It is striking that more than 90 per cent of applications of Palestinians for "visitor" permits to enter their land situated in the Closed Area or "Seam Zone" (i.e. the area between the Green Line and the barrier) in the northern West Bank between 2006 and 2009 were said to have been rejected due to a failure to prove "connection to the land" rather than due to security concerns, according to data of the Israeli State Attorney.¹⁵ The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, stressed similar concerns upon conclusion of her visit on official mission to Israel and the oPt between 30 January and 12 February 2012.¹⁶

39. It is therefore with great regret that I have learned about a series of decisions of the Supreme Court of Israel sitting as the High Court of Justice rejecting legal challenges against the barrier and the accompanying gates and permit regime. I am aware that on occasion the Court has ordered the Government to modify the route of the barrier in order to reduce the impact on the affected people. A recent decision of 22 August 2011 concerned a petition of the village of Voluja, whose Northern part is situated within the municipality of Jerusalem, whereas its Southern part lies within the West Bank. I understand that the village petitioned against the proposed route of the barrier on the ground that it will cut through the village. They also petitioned against the seizure of land ordered by the Israeli Defence Forces' (IDF) military commander in the West Bank for its construction. Reportedly, the Court accepted the planned route of the barrier following modifications made by the State as striking a proportionate balance between the security concerns of Israel and the harm caused to the village and its people. In another decision of 5 April 2011, the Court rejected a petition to revoke the permit regime, whilst ordering your Excellency's Government to introduce some adjustments to the system, including the provisions permitting the passage of permanent residents through any available access point along the barrier, and provisions expanding the grounds for the granting of "visitor" or resident permits and setting a reasonable time frame for the processing of application.

Use of force in counter-terrorism operations, including targeted killings

40. As the underlying premise of this decision runs counter to the Advisory Opinion of the ICJ, for the reasons outlined above and in the mission report of my predecessor, I call on your Excellency's Government to halt the construction of the barrier, dismantle the sections already completed, and repeal the gate and permit regime in compliance with the ICJ Advisory Opinion, General Assembly¹⁷ and Human Rights Council resolutions¹⁸ and recommendations by the Human Rights Committee (CCPR/ISR/CO/3, para. 16), and the

¹³ http://www.ochaopt.org/documents/ocha_opt_special_focus_july_2010_english.pdf.

¹⁴ http://www.ochaopt.org/documents/ocha_opt_barrier_update_july_2011_english.pdf.

¹⁵ http://www.ochaopt.org/documents/ocha_opt_barrier_update_july_2011_english.pdf, p. 8.

¹⁶ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11815&LangID=E>.

¹⁷ A/RES/ES-10/15 of 20 July 2004.

¹⁸ E.g. A/HRC/RES/16/31.

Committee on the Elimination of Racial Discrimination (CERD/C/ISR/CO/14-16, para. 24).

41. In relation to operations of IDF, my predecessor recommended to your Excellency's Government to respect the rules of international humanitarian law, including the fundamental requirement of distinguishing between civilians and military objectives when resorting to the use of force. This is a binding obligation on your Excellency's Government irrespective of whether Israel is responding to an armed attack from Gaza, Lebanon or elsewhere and whether or not it classifies the attack as an act of terrorism (A/HRC/6/17/Add.4, para. 60). While acknowledging that military necessity may dictate the deliberate killing of enemy combatants during an armed conflict, it was further recommended that transparent laws and guidelines on the practice of targeted killings be established, and that they be strictly limited to persons directly participating in hostilities and as a means of last resort after all possible measures to apprehend the person have been taken. All such killings must be followed by a thorough and independent investigation as to the accuracy of the identification of the target, whether alternative means were available, and whether the action was undertaken in a manner ensuring that no civilian casualties were caused. The result of such investigations should be made public and, where violations of law are established, adequate reparation made (A/HRC/6/17/Add.4, para. 62).

42. I am concerned about the conclusions of the United Nations Fact Finding Mission on the Gaza Conflict¹⁹ (the Fact-Finding Mission) from 27 December 2008 to 18 January 2009, which, among other things, found that "[i]n a number of cases Israel failed to take feasible precautions [...] to avoid or minimize incidental loss of civilian life ..." (*ibid.*, para. 1919), and "[f]ound numerous instances of deliberate attacks on civilians [...] in violation of the fundamental international humanitarian law principle of distinction, resulting in deaths and serious injuries." (*ibid.*, para. 1921). The incidents cited include the use of Palestinians by Israeli armed forces as "human shields" in violation of international humanitarian law and the right to life as protected by article 6 ICCPR (*ibid.*, para. 1925). According to the information at my disposal, this resulted in the deaths of 764 Palestinians in the Gaza strip who were not taking part in the hostilities.

43. According to the Human Rights Committee, at the time of the adoption of its concluding observations on Israel, there had only been limited independent and credible investigations into alleged violations of international humanitarian law and international human rights law by your Excellency's Government, and few indictments or convictions.²⁰ The Committee of Independent Experts, established by the Human Rights Council by resolution 13/9 to follow up the conclusions of the Fact-Finding Mission, raised concerns in its first report about the operation of Israel's military investigations system. Specifically, the Committee concluded that the dual role of the Military Advocate General (MAG) in providing legal advice to the IDF with respect to the planning and execution of "Operation Cast Lead" and at the same time having responsibility for the conduct of all prosecutions of alleged misconduct by IDF soldiers during the operations in Gaza, gives rise to a clear conflict of interest. This is particularly so in light of the Fact-Finding Mission's provisional view that those who designed, planned, ordered and oversaw the operation were complicit in violations of international humanitarian law and international human rights law. The mere fact of this allegation by a body appointed by the UN bears on whether the MAG can be regarded as independent and impartial in performing its role of investigating these serious allegations.²¹ In its second report, the Committee found that Israel had initiated investigations into 400 allegations of operational misconduct, of which, however, only

¹⁹ A/HRC/12/48.

²⁰ CCPR/ISR/CO/3/CRP.1, para. 9.

²¹ A/HRC/15/50, para. 91.

three had lead to disciplinary actions and only one to the laying of criminal charges against an Israeli soldier.²²

44. While regretting the lack of thorough investigations, I welcome that your Excellency's Government has, to an extent, implemented the recommendation of the Fact-Finding Mission contained in paragraph 1972 (c) of its report,²³ that Israel should initiate a review of the rules of engagement, standard operating procedures, open fire regulations and other guidance for military and security personnel, as reported by the Secretary-General.²⁴

45. As far as targeted killings are concerned, according to the information at my disposal a total of 254 Palestinians have been the object of targeted killings by Israeli security forces since September 2000, 21 of whom were killed since "Operation Cast Lead". Mindful of the shortcomings that my predecessor has identified in the judgement of the Supreme Court of Israel concerning the issue of the legality of targeted killings (A/HRC/6/17/Add.4, paras. 51 – 52), with which I concur, I am particularly concerned about allegations received, albeit reportedly denied by your Excellency's Government, that Israeli forces are alleged to have conducted targeted killings in violation of the Supreme Court's requirements after the mission of my predecessor.²⁵ Against this background I sustain the concluding observations of the Human Rights Committee that Israel "should end its practice of extrajudicial executions of individuals suspected of involvement in terrorist activities. The State party should ensure that all its agents uphold the principle of proportionality in their responses to terrorist threats and activities. It should further ensure that utmost care is used to protect every civilian's right to life, including civilians in the Gaza Strip. The State party should exhaust all measures to arrest and detain a person suspected of involvement in terrorist activities before resorting to the use of deadly force. The State party should further establish an independent body to promptly and thoroughly investigate complaints about disproportionate use of force."²⁶

Demolition of housing and destruction of property as a means of combating terrorism

46. Despite the recommendation of my predecessor to ensure that any demolition of housing or other destruction of private property conducted as a measure aimed at combating or preventing terrorism must be carried out in strict compliance with international law and must be accompanied by adequate reparation, and his recommendation that your Excellency's Government exercise extreme caution in resorting to such measures due to their high emotional impact and their potentially counterproductive effects in a sustainable fight against terrorism (A/HRC/6/17/Add.4, para. 61), three Treaty Bodies have been satisfied that such practices have continued in the oPt without compensation since my country mission, and have urged your Excellency's Government to cease them²⁷ According to the High Commissioner for Human Rights, forced evictions and demolition of Palestinian structures have increased recently so that approximately 1,300 Palestinians, including 700 children, were forcibly displaced or otherwise negatively affected (A/HRC/16/71, para. 30).

47. I would, therefore, in connection with the issues elaborated, be grateful if your Excellency's Government could provide me with detailed substantive information on the following matters, and any other matters that your Excellency's Government deems

²² A/HRC/16/24, para. 78.

²³ A/HRC/12/48.

²⁴ A/HRC/15/51, para. 35; A/HRC/18/49, paras. 36 and 37.

²⁵ A/HRC/14/24/Add.6, para. 16.

²⁶ CCPR/C/ISR/CO/3, para. 10.

²⁷ CEDAW/C/ISR/CO/5, paras. 28 and 29; CCPR/C/ISR/CO/3, para. 17; and CAT/C/ISR/CO/4, para. 33, respectively.

appropriate in following up on the recommendations in my predecessor's country visit report, at your earliest convenience, but no later than 31 May 2012:

1. In view of the Counter-terrorism Memorandum Bill and the Memorandum Bill concerning the partial revocation of the 1945 Defense (Emergency) Regulations pending before the Knesset please provide detailed information on what steps your Excellency's Government has taken to bring Israel's anti-terrorism legislation fully into compliance with applicable international human rights norms and standards? In particular, how would a determination of membership in a terrorist organization be made should the Counter-terrorism Memorandum Bill be enacted into law? I would appreciate receiving the text of the Bills in its present state from your Excellency's Government in the English language, if possible, and offer the advice and assistance of my mandate to verify the compliance of its provisions with applicable international human rights instruments.
2. Is your Excellency's Government considering repealing the Incarceration of Unlawful Combatants Law without replacement?
3. Please provide updated statistics on the handling of ISA related complaints and corresponding statistics on the handling and outcome of GSS related complaints of torture and ill-treatment.
4. What steps is your Excellency's Government taking to establish mechanisms outside of the respective security agencies against which complaints are directed by which victims of interrogation methods applied in the counter-terrorism context and amounting to torture or other forms of ill-treatment are provided with an effective remedy?
5. What plans does your Excellency's Government have to ratify OPCAT?
6. What steps is your Excellency's Government undertaking to ensure that security detainees enjoy all rights and guarantees enshrined in applicable international human rights instruments, particularly in articles 7, 9 and 14 of the International Covenant on Civil and Political Rights, the Convention against Torture, and articles 37 and 40 of the Convention on the Rights of the Child in view of minors?
7. What measures is your Excellency's Government taking to comply with its international legal obligations in relation to the construction of the barrier and its associated gates and permit regime as mentioned in the Advisory Opinion of the International Court of Justice of 9 July 2004?
8. Please provide detailed information on the outcome of the review carried out by your Excellency's Government of the rules of engagement, standard operating procedures, open fire regulations and other guidance for military and security personnel, in the context of the use of force in counter-terrorism measures and explain whether they are in compliance with international law norms and standards with a view to the assessments made by my predecessor in his country mission report.
9. Please provide updated information on the steps taken by your Excellency's Government to implement the recommendations of the United Nations Fact Finding Mission on the Gaza Conflict in relation to independent and credible investigations into alleged violations of international humanitarian law and international human rights law in the context of countering terrorism.
10. In relation to the alleged targeted killings of terrorist suspects, I would like to receive information on the rules of international law that your Excellency's Government considers to govern its determination that people be targeted and the

basis for a determination to kill rather than capture; clarity as to which treaty instruments or customary norms are considered to apply to target and kill individuals, including terrorist suspects; the legal basis, your Excellency's Government invokes to determine the targeted individual to be a combatant or a civilian directly participating in hostilities; whether your Excellency's Government considers its determination to be governed by the law applicable to the use of inter-State force and the international law doctrine of self-defense, and whether self-defense is invoked in addition or as an alternate to international humanitarian law and international human rights law.

11. What steps is your Excellency's Government taking in order to prevent violations of applicable international humanitarian and human rights law, in particular, articles 53 of the Fourth Geneva Convention, 43 of the Hague Regulations, and 11 (1) of the International Covenant on Economic, Social and Cultural Rights, when resorting to the demolition of Palestinian structures?

48. My intention is to report on my correspondence with your Excellency's Government in a forthcoming report to the Human Rights Council.

C. Follow-up to mission to Spain²⁸

Comunicación al Gobierno

49. El 26 de abril 2011 el antiguo Relator Especial dirigió la siguiente comunicación al Gobierno de España.

50. My intention is to report on my correspondence with your Excellency's Government in a forthcoming report to the Human Rights Council.

51. Tengo el honor de dirigirle esta carta en mi capacidad de Relator Especial para la promoción y protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo de acuerdo con la resolución 15/15 del Consejo de los Derechos Humanos con fecha del 7 de octubre del 2010 y dentro del espíritu de diálogo constructivo establecido con el Gobierno de su Excelencia desde mi misión de investigación a España del 7 al 15 de mayo del año 2008 (A/HRC/10/3/Add.2).

52. A la luz del desarrollo de una serie de acontecimientos que han tenido lugar desde mi visita, incluyendo la adopción de Observaciones Finales sobre España por el Comité de los Derechos Humanos en el año 2008 y las recomendaciones adoptadas en abril del mismo año como resultado de la Revisión Periódica Universal sobre España²⁹, desearía continuar el desarrollo del dialogo con el Gobierno de su Excelencia sobre una selección de temas que ya elaboré en el informe de mi misión que atañen el marco legal e institucional, así como la aplicación, de las medidas contra el terrorismo en su país. A continuación, quisiera aprovechar la oportunidad de comentarle mi opinión sobre el desarrollo de los recientes hechos acontecidos a nivel nacional que han llegado a mi conocimiento.

53. Durante mi visita y en el subsiguiente informe elaborado, por el Consejo de Derechos Humanos, tras ella, expresé mi profunda preocupación por el texto legislativo de la Ley de Enjuiciamiento Criminal español (LEC) que permite el uso de la detención en

²⁸ A/HRC/10/3/Add.2.

²⁹ Informe del grupo de trabajo de la Revisión Periódica Universal, España, A/HRC/15/6 y A/HRC/15/6/Add.1.

régimen de incomunicación durante cinco días consecutivos bajo custodia policial cuando existen sospechas de delitos de terrorismo. Descubrí que, durante dicho periodo de detención, a los sospechosos detenidos no se le permitía hablar en privado con sus propios abogados ni ser atendidos por un médico de su elección y por tanto, hice la recomendación de la erradicación total de este excepcional régimen de detención.³⁰ Soy consciente de las medidas de regulación y salvaguarda así como de las medidas administrativas que se han establecido para que el régimen de incomunicación solo sea aplicado en casos excepcionales acordes al artículo 509.1 de la LEC y para garantizar el respeto de los derechos fundamentales de los detenidos por parte de funcionarios policiales. Sin embargo, existen indicios de que dichos mecanismos no se están aplicando de manera consecuente y de que, en los casos de sospechosos de terrorismo, de acuerdo con estadísticas realizadas en el período 2000-2007, éstos han sido sujetos de manera sistemática a este régimen excepcional de detención (en más de un 90% de los casos) incluso cuando, subsecuentemente, han sido puestos en libertad por la policía antes de su comparecencia ante un juez.³¹ También comparto las preocupaciones expresadas recientemente por el Comité Europeo para la prevención de la tortura y de las Penas o Tratos Inhumanos o Degradantes (CPT), publicadas en su reciente y detallado informe tras su visita a España, elaborado sobre el régimen de detención incomunicada, donde se incluían las deficiencias relacionadas con la notificación de custodia, acceso a un abogado o a un médico, procedimientos de interrogación, registros de custodia, información de los derechos y la situación legal, aplicación del régimen a menores así como el escrutinio judicial correspondiente por parte de la Audiencia Nacional sobre los sospechosos de delitos de terrorismo a los que se aplica el régimen de incomunicación.³² En lo concerniente a la videovigilancia de los detenidos en régimen de incomunicación³³, si se aplicara sistemáticamente, tendría en mi opinión el potencial para convertirse en una medida eficaz de prevención de un comportamiento inapropiado de los funcionarios policiales y de acusaciones infundadas por parte de los detenidos. Sin embargo, la eficacia de esta medida depende exclusivamente de su instalación e uso continuado en todas y cada una de las instalaciones utilizadas para los interrogatorios y combinada con la supervisión apropiada de las celdas de detención, bajo control exclusivo del detenido en lo referente al derecho de su privacidad, o utilizada para grabar todo movimiento de entrada y salida de la celda, durante el período íntegro de la detención. Adicionalmente, las grabaciones obtenidas deberían encontrarse a disposición de los abogados y de las instituciones pertinentes de supervisión en el caso de necesidad de verificación de los hechos y deberían establecerse las garantías apropiadas para el correcto funcionamiento de esta medida. Las deficiencias de este sistema, especialmente si son debidas a la falta de cooperación por parte de las autoridades policiales, ponen en serio peligro la credibilidad de esta salvaguarda. En este sentido, me siento negativamente sorprendido al recibir informes concernientes a la negación, con fecha del 16 de abril del 2010, por parte del Departamento del Interior del País Vasco, de proporcionar las videograbaciones de la detención incomunicada de varios sospechosos de delitos de terrorismo a principios del mes de febrero del 2010³⁴, al Defensor

³⁰ Véase también las Observaciones Finales del Comité de los Derechos Humanos sobre España, CCPR/C/ESP/CO/5, párrafo 14 y Observaciones Finales del Comité contra la Tortura en España, a 9 de diciembre de 2009, CAT/C/ESP/CO&5, párrafo 12.

³¹ Véase el Estudio sobre el sistema de garantías en el ámbito de la detención incomunicada y propuestas de mejora, Informe del 17 de enero del 2011 por el Defensor del Pueblo del País Vasco, pags. 17-18.

³² Informe para el Gobierno Español sobre la visita realizada por CPT del 19 de diciembre al 1 de octubre del año 2007, Estrasburgo, a 25 de marzo del 2011, CPT/Inf (2011) 11.

³³ Véase, como ejemplo, la medida 97, Plan Nacional de Derechos Humanos, aprobado el 12 de diciembre del 2008 por el Gobierno Español.

³⁴ Juzgado Central de Instrucción no. 6 de la Audiencia Nacional, Diligencias previas 112/2008.

del Pueblo del País Vasco, lo cual impidió a éste la realización de su función supervisora de la eficacia de los mecanismos reguladores de prevención de dicha situación.³⁵ En el momento en el que se presentó la denuncia y se abrió una investigación judicial, el material audiovisual pertinente ya había sido destruido.

54. Un tema relacionado, también citado en el informe de mi misión, son las continuas denuncias por parte de detenidos en régimen de incomunicación de haber sufrido torturas u otros tratos y penas crueles, inhumanos o degradantes prohibidos expresamente por el CPT, mientras se encontraban bajo custodia policial. En el año 2008, el Comité de Derechos Humanos, en sus Observaciones Finales sobre España, en concordancia con mis descubrimientos y declaraciones previas por parte de las Naciones Unidas así como otras instituciones internacionales cuya función incluye un mandato de monitorización del cumplimiento de las obligaciones del respeto de los derechos humanos, hizo notar la ausencia de una “estrategia integral o de medidas adecuadas para erradicar esta situación de una vez por todas”.³⁶ En este respecto, soy consciente de la reciente condena, emitida por la Audiencia Provincial de Gipuzkoa, de cuatro miembros de la Guardia Civil por torturas cometidas a Igor Portu y Mattin Sarasola,³⁷ de cuyo caso ya tuve conocimiento en mi visita a España. También celebro el hecho de que la Audiencia enfatizara que la circunstancia de que ambos hombres hubieran sido condenados por graves delitos de terrorismo no desacreditaba sus denuncias de malos tratos. Sin embargo, las alegaciones que se me presentaron en mi visita, en relación a la ausencia de los mecanismos apropiados que hacen posible una eficaz y completa investigación de las denuncias de tortura de los detenidos en régimen de incomunicación sospechosos de delitos de terrorismo, han sido corroboradas por recientes informaciones.³⁸ Así mismo ha llegado a mi conocimiento el hecho de que, de acuerdo con recientes estadísticas sobre las denuncias relacionadas con torturas u otros maltratos presentadas en el informe anual de la Fiscalía General del año 2008, una cantidad sorprendentemente elevada de estas denuncias fueron desestimadas sin llegar a juicio. El CPT, en su informe previamente mencionado, concluye con la siguiente afirmación: “En la situación actual, las autoridades (españolas) pueden experimentar dificultades a la hora de negar de forma convincente las alegaciones de maltrato presentadas por personas a las que se les ha aplicado el régimen de incomunicación así como cumplir con su obligación de llevar a cabo una investigación eficaz de dichas alegaciones”.³⁹

55. Considero que la promoción de definiciones estrictas y precisamente formuladas de los delitos de terrorismo es un aspecto importante de mi mandato como Relator Especial en el campo de los derechos humanos y de la lucha contra el terrorismo. Desde mi punto de vista, la aplicación de la legislación antiterrorista debería estar restringida a aquellos delitos que sobrepasen un cierto umbral de violencia, como establece la Resolución 1566 (2004) del Consejo de Seguridad y como elaboré en mi reciente informe sobre prácticas idóneas en la lucha contra el terrorismo (A/HRC/16/51). He identificado en la legislación española algunas medidas antiterroristas de formulación vaga así como los riesgos inherentes de la vaguedad de dichas redacciones a la hora de garantizar el pleno disfrute de los derechos humanos relacionados con la libertad de expresión y asociación así como el derecho de

³⁵ Resolución de Ararteko, del 15 de junio del 2010, por la que concluye su intervención con una queja por maltrato a personas detenidas en régimen de incomunicación por parte de la Ertzaintza.

³⁶ Observaciones Finales del Comité de Derechos Humanos sobre España, CCPR/C/ESP/CO/5, párrafo 13.

³⁷ Audiencia Provincial de Guipuzcoa, Juzgado de Instrucción num. 1 de Donostia, rollo penal num. 1054/10, sentencia del 30 de diciembre.

³⁸ En este respecto, véase, por ejemplo, la sentencia del 18 de octubre del 2010, sala primera, Tribunal Constitucional y la sentencia del 28 septiembre del 2010, Tribunal Europeo de Derechos Humanos, San Argimiro Isasa contra España (Caso num. 2507/07).

³⁹ CPT/Inf (2011) 1, parr. 51.

asamblea pacífica. Específicamente, los artículos 515 y 516 del Código Penal español (CP) en los que se penaliza a las organizaciones terroristas y la pertenencia a tales organizaciones pero no proporcionan una definición precisa y clara de dichos conceptos. Ha llamado mi atención el hecho de que la organización terrorista ETA ha sido a menudo considerada, tanto a nivel político como judicial, como una red formada por diferentes frentes con diferentes funciones donde todos promueven los objetivos de la organización terrorista, incluyendo aquellas acciones pacíficas que no tenían una conexión directa con la ejecución de acciones terroristas. Aunque me encuentro decididamente a favor de la reforma de la legislación penal antiterrorista que, en mi opinión, no cumple con los requisitos establecidos por los principios de legalidad, quisiera expresar mi apoyo a la Audiencia Nacional en su sentencia del 12 de abril del 2010 referente al periódico Euskaldunon Egunkaria, en cuyo caso específico rechaza firmemente la credibilidad probatoria de la supuesta “omnipresencia” de ETA en diferentes ámbitos sociales y absuelve a los cinco acusados del delito de pertenencia a una organización terrorista. También celebro el hecho de que la Audiencia cuestionara especialmente el cierre del periódico como medida precautoria y reconociera los efectos ulteriores que dicha medida tiene en el ejercicio y disfrute de los derechos fundamentales que caracterizan a una sociedad democrática.⁴⁰

56. Durante mi misión a España, así como en otras ocasiones, he tenido la oportunidad de profundizar mi conocimiento de la legislación penal concerniente a la criminalización del delito de glorificación o apología del terrorismo y los riesgos inherentes de dicha legislación, particularmente en lo relacionado con el disfrute y ejercicio de la libertad de expresión y opinión. Con respecto a este delito específico, como se encuentra dispuesto en el Artículo 578 del Código Penal español, entiendo que, durante el año 2010 fueron iniciados, por la Fiscalía de la Audiencia Nacional, 400 procedimientos relacionados específicamente con la muestra pública de símbolos o imágenes de convictos por terrorismo. Aunque, en principio, pueda admitir que el llamado discurso simbólico, que incluye las imágenes, pueda ser sujeto de enjuiciamiento criminal, soy de la opinión de que, para poder establecer específicamente el delito de glorificación del terrorismo, el ministerio fiscal tendría que probar tanto la intención de incitar a la comisión de un delito grave como el riesgo objetivo y real de que alguien, subsecuentemente, por efecto de esta incitación sea capaz de cometer delito de tal naturaleza. En referencia a la exposición pública, por parte de los familiares, de fotografías de los presos convictos por terrorismo y pertenencia a la organización terrorista ETA, soy de la opinión de que se debería adoptar la presunción de motivos de carácter humanitarios y con la intención de crear simpatía como base para tales expresiones y no deberían ser percibidos como una posible incitación a la violencia. Soy consciente de la sentencia de la Audiencia Nacional con fecha del 8 de octubre del 2010, en cuyo caso la Audiencia no consideró que la muestra de fotografías de presos de ETA por sus familiares supusiera un delito de glorificación del terrorismo ya que la intención de glorificar o justificar los delitos cometidos por tales convictos o humillar a las víctimas, no pudo ser probada. Sin embargo, sigo preocupado por el hecho de que ni el artículo 578 del CP sobre el delito de glorificación del terrorismo ni la interpretación realizada por la Audiencia Nacional o el Tribunal Supremo español⁴¹ pueden enmarcarse dentro de los requisitos citados anteriormente.

57. Tras la conclusión de un número de casos judiciales basados en las disposiciones de la Ley Orgánica de los Partidos Políticos 6/2002 (LOPP), que regulan la disolución de partidos políticos que abogan el uso de la violencia y tienen conexión con una organización terrorista, varios partidos políticos vascos han sido declarados ilegales por ser considerados

⁴⁰ Audiencia Nacional, Sala de lo penal, Sección primera, sentencia núm. 27/2010.

⁴¹ Sentencia del Tribunal Supremo del 3 de marzo del 2010.

complementos de ETA. Consecuentemente, se les ha prohibido a miembros de estos partidos, el poder presentarse como candidatos a elecciones, tanto a nivel nacional como europeo. El último desarrollo de este contexto concierne a los procedimientos judiciales y a la decisión de impedir la inscripción en el Registro de Partidos Políticos (RPP) del recientemente creado partido político Sortu basándose en los artículos 5.6, 12.1 y 12.3 de la anteriormente mencionada ley, debido a que, supuestamente, constituye una continuación de Herri Batasuna y Batasuna que fueron declaradas ilegales por el Tribunal Supremo en marzo del 2003.⁴² En el informe de mi visita a España expresé mis dudas con respecto a la amplia formulación del texto de las disposiciones de la Ley orgánica y quise señalar el hecho de que su redacción podía ser interpretada de forma que podría incluir cualquier partido político que quisiera, a través de medios políticos pacíficos, alcanzar objetivos similares a aquellos asociados a grupos terroristas. Ha llegado a mi conocimiento, sin embargo, que el Tribunal Supremo, en su jurisprudencia con respecto a esta cuestión específica, ha desarrollado unos criterios definidos que se han de tener en cuenta a la hora de evaluar la legalidad de las nuevas formaciones políticas establecidas por antiguos miembros de partidos disueltos con anterioridad. De acuerdo con la argumentación del Tribunal, tales formaciones no deben constituir una continuación o sucesión de un partido que haya sido previamente declarado ilegal. Sin embargo, cuando existen indicaciones substanciales de que se da esta situación, el principio de *onus probandi* (carga o responsabilidad de prueba) recae sobre los promotores de la nueva organización política, quienes, mediante una clara y expresa condena y rechazo de la violencia desarrollada por ETA, deben demostrar que tales indicaciones carecen de fundamento.⁴³ En este aspecto, he de señalar que los estatutos de Sortu, además de formular de forma explícita y clara su intención de romper con el pasado, expresan su rechazo a la violencia terrorista y sus perpetradores así como una intención explícita de contribuir a la definitiva desaparición y cese de cualquier forma de violencia, en particular aquella cometida por ETA. Adicionalmente, estos principios fueron hechos públicos el 7 de febrero del presente año con ocasión del anuncio de su constitución como partido político.

58. Con estos antecedentes, me sorprende el razonamiento del Tribunal Supremo en su decisión de declarar inadmisibles el registro del partido político Sortu en el RPP en base a la argumentación de que representa una continuación o sucesión de la organización política Batasuna declarada anteriormente ilegal y aprobada su disolución. Según mi información, el artículo 12.3 de la LOPP establece que: “en particular, corresponderá a la Sala sentenciadora, previa audiencia de los interesados, declarar la improcedencia de la continuidad o sucesión de un partido disuelto a la que se refiere el párrafo b) del apartado 1, teniendo en cuenta que para determinar la conexión y la similitud sustancial de ambos partidos políticos, de su estructura, organización y funcionamiento, de las personas que los componen, rigen, presentan o administran, de la procedencia de los medios de financiación o materiales, o de cualesquiera otras circunstancias relevantes que, como su disposición a apoyar la violencia o el terrorismo, permitan considerar dicha continuidad o sucesión en contraste con los datos y documentos obrantes en el proceso en el que se decretó la ilegalización y disolución”. Sin embargo, en este caso específico, el Tribunal, en lo referente a la existencia de los hechos considerados como constituyentes directos probatorios, tomó la posición de considerar innecesario un exhaustivo análisis de los criterios enumerados en el artículo 12.3 de la LOPP para probar la sucesión a través de medios fraudulentos de Batasuna por parte de Sortu. En mi opinión, sí es necesario el pleno cumplimiento de criterios estrictos, de acuerdo con los principios de legalidad, a la hora de la limitación del derecho de participación política para poder respetar los estándares

⁴² Tribunal Supremo, Sala Especial del artículo 61, sentencia del 27 de Marzo del 2003.

⁴³ Tribunal Supremo, Auto del 22 de mayo del 2007.

internacionales que regulan los derechos humanos fundamentales en el marco de una sociedad democrática. Adicionalmente, considero que la promoción de la tolerancia con todas las expresiones políticas radicales, si existen personas o grupos de personas que desean fundar partidos políticos con tales opiniones, incluyendo a la llamada “izquierda abertzale”, y mientras que no inciten a la violencia, es esencial a la hora de evitar una aún mayor polarización política y contribuye de forma importante como un elemento de reconciliación social en el País Vasco.

59. Para finalizar, y en relación con los asuntos elaborados en esta carta, le agradecería mucho que el Gobierno de su Excelencia pudiera proporcionarme información detallada y sustancial sobre los asuntos enunciados a continuación, así como sobre cualquier otro asunto que el Gobierno de su Excelencia considere relevante a la aplicación de mis recomendaciones incluidas en el informe de mi misión a su país, con la mayor celeridad que le sea posible pero no más tarde de 27 de mayo 2011:

1.- ¿Qué medidas se han tomado para rectificar los artículos 520 bis, 527 y 509 de la Ley de enjuiciamiento criminal, en particular en lo concerniente a la abolición del régimen de incomunicación y sobre el derecho efectivo del detenido de comunicarse en privado con un abogado de su elección, así como el poder ser examinado por un médico también de su elección?

2.- Le agradecería que me proporcionara las estadísticas disponibles sobre el uso del régimen de detención incomunicada de los sospechosos de terrorismo, incluyendo así mismo las causas específicas por las que los sospechosos han sido detenidos.

3.- ¿Qué medidas se han establecido para asegurar que la vigilancia por circuito cerrado de televisión (CCTV) sea instalada y usada de forma sistemática en todas las instalaciones, incluyendo las celdas de retención individual y de interrogatorio, asignadas para el uso del régimen de incomunicación?

4.- ¿Cual es el período de conservación del material audiovisual de documentación de los detenidos en régimen de incomunicación? ¿Quiénes están autorizados a su obtención y qué criterios regulan la disposición de dicho material?

5.- ¿Cuales son los criterios establecidos para la criminalización del delito de glorificación estipulados en el artículo 578 del Código Penal?

6.- ¿Cuales son las condiciones legales bajo las cuales se les permite a antiguos miembros de partidos políticos disueltos, registrar un nuevo partido político que rechace el uso de la violencia pero promueva una agenda política similar a aquellos partidos que han sido anteriormente declarados ilegales? ¿Están estos criterios actualmente definidos según la ley correspondiente de forma que sean compatibles con los requisitos de legalidad?

60. Quisiera comunicarle mi intención de informar de los resultados de esta correspondencia con el Gobierno de su Excelencia en un próximo informe ante el Consejo de Derechos Humanos.

Respuesta del Gobierno

61. El antiguo Relator Especial recibió la siguiente respuesta del Gobierno de España con fecha de 1 de Junio 2012.

62. En respuesta a su carta de 26 de abril de 2011, por la que solicitaba información detallada en seguimiento al informe sobre la visita que realizó a mi país en mayo de 2008, tengo el agrado de informarle de lo siguiente :

Detención incomunicada

63. Buena parte de las preocupaciones expresadas por Usted se refieren a la existencia en el ordenamiento jurídico español de un régimen de detención incomunicada.

(i) Su carta cuestiona la previsión de que el incomunicado sea asistido por un abogado de oficio. Esta cuestión, en los mismos términos, se suscitó ante el Tribunal Constitucional Español que, en su STC196/1987, de 11 de diciembre, afirmó:

- Que la asistencia letrada cumple una función distinta en la fase de detención y en la fase del juicio. Mientras que en el juicio tiene especial importancia la confianza que al acusado le inspire su Letrado, siendo esencial su libre elección. En la fase de detención, la presencia, del abogado tiene por finalidad asegurar que los derechos constitucionales del detenido sean respetados, que no sufra coacción o trato incompatible con su dignidad y con su libertad de declaración y que tenga el debido asesoramiento técnico sobre la conducta a observar en los interrogatorios, incluida la de guardar silencio.
- Que las declaraciones del detenido ante la policía en principio carecen por sí mismas de valor probatorio y subrayó que "una vez concluido el período de incomunicación, de breve duración por imperativo legal, el detenido recupera el derecho a elegir Abogado de su confianza".

64. Por estas razones, el Tribunal Constitucional declaró que la asistencia al detenido por el abogado de oficio garantizaba sus derechos de manera equivalente al Letrado de libre designación.

65. Además, en España existen plenas garantías de formación y especialización del abogado de oficio en la atención al detenido. El sistema legal español garantiza el acceso rápido y eficaz del detenido a un abogado (artículo 17.3 de la Constitución y artículo 520 de la Ley de Enjuiciamiento Criminal). Tan pronto como el funcionario policial practica un arresto, está obligado a solicitar la presencia del abogado de la elección del detenido o del Colegio de Abogados para que designe uno del turno de oficio. Si el funcionario no cumple con esta obligación puede ser objeto de sanción penal y disciplinaria. Durante las ocho horas que, como máximo, establece la ley para que dicho abogado efectúe su comparecencia en dependencias policiales, no se le pueden hacer preguntas al detenido, ni practicar con él mismo diligencia alguna. Desde el mismo momento del arresto, se informa al detenido de que tiene derecho a guardar silencio y a un reconocimiento médico. La situación de incomunicación en dependencias policiales por decisión judicial, no priva al detenido de este derecho a la asistencia letrada, de forma que en todas las declaraciones que preste ante la policía judicial y en las diligencias de reconocimiento de identidad estará presente el abogado

66. Los trabajos en curso para la reforma de la Ley de Enjuiciamiento Criminal inciden sobre esta cuestión, en aplicación del Plan de Derechos Humanos del Gobierno de España, de 12 de diciembre de 2008, sobre el que ya hemos informado en repetidas ocasiones, tanto al Sr. Scheinin como ante diversos Comités de protección de los derechos humanos. En particular, los trabajos, en aplicación de la medida 97 b del mencionado Plan introducen la recomendación de los organismos de derechos humanos de grabar, en vídeo u otro soporte audiovisual, todo el tiempo de permanencia en dependencias policiales del detenido sometido a régimen de incomunicación (véase también respuesta a la pregunta 3).

(ii) Por lo que respecta a la otra cuestión que le preocupa cabe recordar que nuestro sistema legal vigente no reconoce el derecho del detenido a la asistencia por un médico de su elección, ni en el régimen ordinario ni en el régimen de incomunicación, sino que atribuye específicamente a los Médicos Forenses la asistencia o vigilancia facultativa de los detenidos, lesionados o enfermos, que sé hallen bajo la jurisdicción de los jueces y magistrados. El sistema vigente se asienta en la imparcialidad y pericia de la asistencia

médica que proporciona el Médico Forense, como institución adscrita a la Administración de Justicia y por tanto especialmente vinculada e imbuida de la imparcialidad de los Juzgados o Tribunales instructores o enjuiciadores a los que están adscritos.

67. En todo caso, la ley prevé también la posibilidad de que, en caso de urgencia, el detenido sea atendido por otro facultativo del Sistema Público de Salud e incluso por médico de una Entidad privada. Igualmente, como plus garantista de asistencia médica al detenido, la Autoridad Judicial tiene competencia para estimar, en cada caso concreto, si existe la necesidad de que sean dos o más facultativos los que asistan al detenido.

68. Los trabajos, en curso para la reforma de la Ley de Enjuiciamiento Criminal también inciden sobre esta cuestión, en aplicación de la medida 97 c del Plan de Derechos Humanos del Gobierno de España. Dichos trabajos introducen en particular la posibilidad de que el detenido sometido a régimen de incomunicación pueda ser reconocido, además de por el forense, por otro médico adscrito al sistema público de salud, y que éste pueda ser designado por el titular del Mecanismo Nacional de Prevención de la Tortura (que España ha nombrado en aplicación del Protocolo Facultativo a la Convención contra la Tortura-OPCAT).

69. Le agradecería que me proporcionara las estadísticas disponibles sobre el uso del régimen de detención incomunicada de los sospechosos de terrorismo, incluyendo las causas específicas por las que los sospechosos han sido detenidos.

70. El régimen de incomunicación es en España absolutamente excepcional en su aplicación, como lo demuestra el hecho de que, entre 2007 y 2010, la incomunicación afectó a un porcentaje inferior al 0,035% del total de personas detenidas en España en esos años.

71. Por lo que se refiere a la aplicación del régimen de incomunicación a las personas detenidas por delitos de terrorismo o pertenencia a banda armada, en el mismo periodo 2007-2010 se detuvo a un total de 930 personas por estos delitos, siendo incomunicadas 461, lo que representa el 49,6 % de los mismos.

72. ¿Qué medidas se han establecido para asegurar que la vigilancia por circuito cerrado de televisión sea instalada y usada de forma sistemática en todas las instalaciones, incluyendo las celdas de retención individual y de interrogatorio asignadas para el uso del régimen de incomunicación?

73. En cumplimiento de las recomendaciones formuladas por los organismos internacionales de defensa de los derechos humanos, incluido ese Relator Especial, el Plan de Derechos Humanos del Gobierno de España incluyó la siguiente medida (número 97 b):

74. "Se abordarán las medidas normativas y técnicas necesarias para dar cumplimiento a la recomendación de los organismos de. derechos humanos de grabar, en vídeo u otro soporte audiovisual, todo el tiempo de permanencia en dependencias policiales del detenido sometido a régimen de incomunicación".

75. A día de hoy, las Fuerzas y Cuerpos de Seguridad del Estado están dando puntual cumplimiento a todas las resoluciones judiciales (normalmente de la Audiencia Nacional) por las que se acuerda la grabación en vídeo de los detenidos sometidos a régimen de incomunicación. Para ello, se les ha dotado, de los medios técnicos necesarios, tales como un avanzado sistema de grabación de las zonas comunes y salas para práctica de diligencias (declaraciones, reconocimientos, desprecinto de efectos intervenidos) de la Comisaría General de Información en Madrid, así como unidades portátiles de grabación para su utilización por la Guardia Civil.

76. En cuanto a la instalación de videocámaras en todos los centros de detención de las FCSE, se están instalando cámaras en las zonas comunes de los centros de detención

estando ya cubierto un porcentaje superior al 90% de los centros del CNP y un 65% de los centros de GC. Las Policía autónomas Vasca y Catalana también disponen de videocámaras en sus instalaciones para la prevención de malos tratos a los detenidos.

77. ¿Cuál es el periodo de conservación del material audiovisual de documentación de los detenidos en régimen de incomunicación?, ¿quiénes están autorizados a su obtención y qué criterios regulan la disposición de dicho material?

78. La videograbación de la estancia en dependencias policiales de las personas detenidas en régimen de incomunicación debe ser autorizada mediante Auto de la Audiencia Nacional. Los archivos de vídeo obtenidos se almacenan en las dependencias policiales a disposición exclusiva de dicha autoridad judicial, por el tiempo que el juez considere oportuno, correspondiendo al mismo ordenar su destrucción.

Art.-578 CP (delito de enaltecimiento)

79. El delito de enaltecimiento del terrorismo fue introducido en el Código penal por L. O. 7/2000, de 22 de Diciembre de 2000.

80. En dicho artículo, conviven dos figuras delictivas claramente diferenciadas, cuya acción típica y elementos que las vertebran son claramente distintos: a) el enaltecimiento o justificación del terrorismo o sus autores y b) la realización de actos en desprecio, descrédito o humillación de las víctimas de delitos terroristas.

81. En el segundo de los casos, la justificación material del merecimiento de pena reside en la exigencia indiscutible de cierre a la impunidad de las conductas en ofensa o menosprecio de las víctimas del terrorismo, lo que aparece como una exigencia indiscutible. En este caso, con la doctrina de Sala Segunda del Tribunal Supremo -vgr. SST149/2007 de 26 de Febrero (RJ 2007,948) , 585/2007 de 20 de Junio (RJ 2007, 3440) ó 539/2008 de 23 de Septiembre (RJ 2008, 5597), que los elementos que vertebran el enaltecimiento son los siguientes:

^{1º} La existencia de unas acciones o palabras por las que se enaltece o justifica. Enaltecer equivale a ensalzar o hacer elogios, alabar las cualidades o méritos de alguien o de algo. Justificar quiere aquí decir que se hace aparecer como acciones lícitas y legítimas aquello, que solo es un comportamiento criminal.

^{2º} El objeto de tal ensalzamiento o justificación puede ser alguno de estos dos:

a) Cualquiera de las conductas definidas como delitos de terrorismo.

b) Cualquiera de las personas que hayan participado en la ejecución de tales comportamientos. Interesa decir aquí que no es necesario identificar a una o a varias de tales personas. Puede cometerse también ensalzando a un colectivo de autores o copartícipes en esta clase de actos delictivos.

^{3º} Tal acción de enaltecer o justificar ha de realizarse por cualquier medio de expresión pública o difusión, como puede, ser un periódico o un acto público con numerosa concurrencia.

82. Características del delito son el tratarse de un comportamiento activo, que excluye la comisión por omisión, tanto propia como impropia, siendo un delito de mera actividad y carente de resultado, material, y de naturaleza esencialmente dolosa o intencional. Ahora bien, cabe resaltar que se aplica el art. 578 sólo cuando ya existe lesión del bien jurídico protegido con la acción de enaltecimiento.

83. A fin de evitar que el tipo penal de la exaltación, en la doble modalidad del crimen o de sus autores, pueda adentrarse en la zona delicada de la sanción de opiniones, por deleznable que puedan ser consideradas, y, lo que es más delicado, pueda entrar en conflicto con derechos de rango constitucional como son los derechos de libertad

ideológica y de opinión y expresión, la labor judicial examina, caso por caso, tanto las concretas frases o expresiones producidas así como la ocasión y el escenario en el que fueron pronunciadas. En definitiva, todas las circunstancias concurrentes son examinadas para determinar si está dentro del ámbito del tipo penal o extramuros de él, jugando el principio favor libertatis necesariamente en los casos de duda ante la naturaleza constitucional de los derechos, de libertad de expresión e ideológica que podrían quedar afectados por el tipo penal.

84. Por tanto, el bien jurídico protegido se sitúa en la interdicción de lo que el Tribunal Europeo de Derecho Humanos -vgr. SSTEDH de 8 de Julio de 1999 (TEDH 1999,28) , Sürek vs Turquía, 4 de Diciembre de 2003 (TEDH 2003, 81) , Müslüm vs Turquía- y también nuestro Tribunal Constitucional -STC 235/2007 de 7- de Noviembre (RTC 2007, 235)- califica como el discurso del odio, es decir la alabanza o justificación de acciones terroristas que no cabe incluir dentro de ía cobertura otorgada por el derecho a la libertad de exposición o ideológica, en la medida que el terrorismo constituye la más grave vulneración de los derechos humanos de aquella Comunidad que lo sufre.

Partidos políticos

85. Desde las primeras sentencias del Tribunal Supremo y del Tribunal Constitucional dictadas en aplicación de la Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos (en adelante LOPP) quedó claro que la declaración de ilegalidad de un partido político no suponía la privación del derecho de sufragio pasivo de los antiguos miembros del partido ilegalizado y disuelto. Por tanto, nada les impide integrar una formación política, que actué totalmente desvinculada de las causas que determinaron la ilegalización del partido político.

86. También desde el primer momento quedó claro que la causa de ilegalización de un partido político no estaba en relación con su ideología sino con sus actividades. Así, ya en la primera sentencia del Tribunal Constitucional 48/2003, de 12 de marzo, se lee que, desde el respeto de los esenciales principios de convivencia, "cualquier proyecto es compatible con la Constitución, siempre y cuando no se defienda a través de una actividad que vulnere los principios democráticos o los derechos fundamentales. La Constitución es un marco de coincidencias suficientemente amplio como para que dentro de él quepan opciones políticas de muy diferente signo". Sin embargo, "la existencia de un partido que con su actividad colabore, o apoye la violencia terrorista, pone en peligro la subsistencia del orden pluralista proclamado por la Constitución; y, frente á ese peligro, no parece que pueda aplicarse otra sanción reparadora del orden jurídico perturbado que la disolución" (STC 48/2003).

87. La defensa de una determinada ideología nunca ha sido obstáculo para concurrir a unas elecciones, tampoco la ideología sostenida por la llamada "izquierda abertzale". Esta afirmación se demuestra desde que un partido político con una ideología muy similar a Batasuna, pero claramente desvinculado de ETA, como es Axalar, viene concurriendo sin ningún problema a los diversos procesos electorales. Recuérdese que en el documento del partido "ARALAR, LÍNEA IDEOLÓGICA", éste se define como "un partido abertzale e independentista de izquierdas. El objetivo de su actividad política es la creación de la República Federal de Euskal Herriá", que incluye "el municipio euskaldun de Eskiula bajo administración bearnesa en Iparralde" -nombre del País Vasco francés-. Tampoco puede desconocerse que existen partidos políticos que concurren a las elecciones defendiendo la separación de partes del territorio español [Ezquerria Republicana de Catalunya o Solidaritat Catalana per la Independencia].

88. Pero es que además, en relación con la "izquierda abertzale", la STC 126/2009, de 21 de mayo, recuerda que está "absolutamente vedado en un proceso doctoral y en cualesquiera otros de nuestro ordenamiento" llevar la "fiscalización judicial al terreno de la ideología y las convicciones personales", añadiendo que "la «izquierda abertzale» como expresión ideológica no ha sido proscrita de nuestro ordenamiento ni podría llegar a serlo

sin quiebra del principio pluralista y de los derechos fundamentales a él conexos y que las ideologías son en el ordenamiento constitucional española absolutamente libres y deben encontrar en el poder público la primera garantía de su indemnidad, a la que no pueden aspirar, sin embargo, quienes se sirven para su promoción y defensa de medios ilícitos o violentos y se sirven de la intimidación terrorista para la consecución de sus fines. En definitiva, son esos medios y no las ideas o los objetivos políticos pacíficamente perseguidos a los que está destinada la reacción del poder público en defensa del marco de convivencia pacífica diseñado por el constituyente para que en él tengan cabida todas las ideas (STC 99/2004, de 27 de mayo, F. 18, con cita de las SSTC 48/2003, de 12 de marzo, 85/2003, de 8 de mayo, y 5/2004 y 6/2004, de 16 de enero)".

89. De hecho, en las elecciones al parlamento europeo de 2009 se presentó la coalición electoral "Iniciativa Internacionalista-La Solidaridad entre los Pueblos", respecto de la que existían fuertes indicios de estar instrumentalizada por el complejo ETA-Batasuna. Aun así, nuestro Tribunal Constitucional, en el máximo respeto del derecho de sufragio pasivo, entendió que no existía prueba suficiente de vinculación de esa coalición con la organización terrorista. Lo mismo ha ocurrido en las elecciones locales, forales y autonómicas de 2011 a las que ha concurrido la coalición electoral BILDU sobre la que pesaban importantes elementos probatorios que la vinculaban al complejo ETA-Batasuna. Nuevamente el Tribunal Constitucional, en sentencia 62/2011, de 5 de mayo, con un criterio extremadamente garantista, consideró insuficientes las pruebas existentes contra BILDU para impedir a la coalición concurrir a esas elecciones.

90. El TEDH se ha pronunciado en varias ocasiones sobre el escrupuloso respeto a los derechos humanos de los procesos judiciales de ilegalización de formaciones políticas seguidos en España. Así lo avalan las tres sentencias de 30 de junio de 2009, en los asuntos "Batasuna y Herri Batasuna contra España", "Etxeberria, Barrena Arza, Nafa-rrroako Autodeterminazio Bilgunea y Aiarako y otros contra España", y "Herritarren Zerren-da contra España", respectivamente, y sentencia de 7 de diciembre de 2010, asunto "ANV contra España". En ellas el TEDH declaró que no había existido vulneración de derecho alguno, dado que los partidos ilegalizados emplearon "métodos" incompatibles con los "principios democráticos fundamentales". El Tribunal consideró acreditada la vinculación entre los partidos políticos y la banda terrorista ETA, vínculos que; "pueden ser considerados objetivamente como una amenaza para la democracia".

91. En definitiva, no se ilegaliza ningún partido por su ideología, sino por servir de instrumento a una banda terrorista.

92. Por último, el Gobierno de España no quisiera desaprovechar esta oportunidad para aclarar un par de cuestiones.

93. Por una parte, en su carta, el Relator afirma que "las alegaciones que se me presentaron en mi visita, en relación a la ausencia de los mecanismos apropiados que hacen posible una eficaz y completa investigación de las denuncias de tortura de los detenidos en régimen de incomunicación sospechosos de delitos de terrorismo, han sido corroboradas por recientes informaciones", citando dos resoluciones judiciales a pie de página.

94. Al respecto, se considera oportuno realizar determinadas aclaraciones. En primer lugar, debe indicarse que los hechos a los que se refieren esas informaciones son anteriores a su visita a España (año 2005, en el caso de la Sentencia del Tribunal Constitucional de 18 de octubre de 2010; y año 2002, en el caso San Argimiro Isasa c. España) y, por tanto, sin que en dicho momento fueran aplicables las garantías adicionales puestas en marcha para garantizar los derechos de los detenidos en régimen de incomunicación (segundo examen médico forense, "protocolo Garzón", etc.). De otro lado, la sentencia del Tribunal Constitucional, que ordena continuar las investigaciones penales de un caso de alegados malos tratos durante la detención en régimen de incomunicación, pone de manifiesto

precisamente lo contrario que se afirma en su escrito: que en España están funcionando correctamente los mecanismos jurisdiccionales y de protección de los derechos fundamentales en la lucha contra la tortura y los malos tratos, al corregir los errores que se aprecian en las instancias judiciales inferiores. Se llama la atención sobre el hecho de que la sentencia del Tribunal Constitucional de 18 de octubre es continuadora de las dictadas por el mismo Tribunal con posterioridad a su visita a España: STC 63/2008, de 26 de mayo, STC 69/2008, de 23 de junio, 107/2008, de 22 de septiembre, 123/2008, de 20 de octubre y 40/2010, de 19 de julio., en las que se ordena extremar todas las posibilidades de investigación judicial de las denuncias de malos tratos y torturas. En cuanto a la sentencia del Tribunal Europeo de Derechos Humanos, asunto San Argimiro, como se ha adelantado, se trata de un supuesto ocurrido hace bastante tiempo, en el año 2002, en el que el Tribunal aprecia que debieran haberse desarrollado investigaciones penales más amplias. Ahora bien, esa doctrina del TEDH es precisamente la que el Tribunal Constitucional viene aplicando rigurosamente desde el año 2008, incluso con cita de la doctrina del TEDH, ordenando la continuación de las investigaciones penales.

95. Por otra parte, por lo que se refiere a la referencia contenida en su carta sobre las grabaciones realizadas por el Departamento de Interior del Gobierno Vasco, ha de manifestarse que, en la actualidad, la Policía Autónoma Vasca (Ertzaintza) procede a la video grabación de toda persona detenida en régimen de incomunicación, conservando las grabaciones a disposición de la autoridad judicial competente durante un plazo de tres meses. Transcurrido dicho plazo, de no mediar petición de las autoridades judiciales para su conservación por un plazo mayor, se procede a su destrucción por razones de proporcionalidad y protección de datos.

96. Durante el plazo de tres meses, cualquier operador de derechos humanos legitimado dispone de acceso a la visualización de las imágenes. Según informa el citado Departamento de Interior, la Defensoría Autonómica Vasca (Ararteko) accedió a la visualización de video grabaciones de un operativo antiterrorista desarrollado por la Ertzaintza en el mes de agosto de 2010, en dos visitas realizadas en las propias dependencias policiales en el mes de octubre del mismo año, durante más de nueve horas. También una Delegación del Mecanismo Nacional de Prevención de la Tortura visitó in situ las dependencias policiales en el transcurso del referido operativo antiterrorista, conversando privadamente con los detenidos y visualizando las video grabaciones que estimaron oportunas. Ninguna de estas Instituciones independientes de defensa de los derechos fundamentales ha puesto de manifiesto que el plazo de conservación de las grabaciones deba ser ampliado? Parece más que proporcionado entender que cualquier denuncia de malos tratos o torturas producidas durante el período de incomunicación será comunicada a las autoridades judiciales en el plazo de tres meses.

97. Agradeciéndole de antemano su atención, aprovecho esta ocasión para saludarle atentamente.

D. Follow-up to mission to Turkey⁴⁴

Letter to the Government

98. On 27 June 2011, the former Special Rapporteur sent the following letter to the Government of Turkey.

99. I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering

⁴⁴ A/HRC/4/26/Add.2.

terrorism pursuant to Human Rights Council resolution A/HRC/RES/15/15 of 7 October 2010, and in the spirit of our constructive dialogue developed with your Excellency's Government since my fact-finding mission to Turkey held 16 to 23 February 2006 (A/HRC/4/26/Add.2).

100. In light of a number of developments that have taken place since my visit both in Turkey and at United Nations level, including the recommendations issued in June 2010 following the Universal Periodic Review (UPR) of Turkey,⁴⁵ and the adoption of the respective Concluding observations on Turkey by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in October 2009⁴⁶ and the Committee against Torture in November 2010⁴⁷, I wish to follow up with your Excellency's Government on a selected number of issues that I elaborated on in my mission report on the legal and institutional counter-terrorism framework and practice in your country. I believe this letter comes timely in view of the general elections held in your country on 12 June 2011. In the following I therefore take the opportunity to address some of the recent developments reported to me that have taken place at the national level.

101. Since my country visit, your Excellency's Government has made efforts to address some of the issues in relation to the promotion and protection of human rights noted then in my report. Reforms have been carried out in the face of political difficulties, and in the light of these circumstances the reforms deserve praise, albeit many issues remain to be addressed. The political situation has however also led to regrettable delays, and many envisaged constitutional amendments aiming at the protection of human rights going beyond the reforms noted in my report on the mission (*ibid.*, paragraph 10) are still outstanding.

Definition of terrorism and related issues

102. In my report, I recommended the definition of terrorist crimes be brought in line with international norms and standards, notably the principle of legality as required by article 15 of the International Covenant on Civil and Political Rights (A/HRC/4/26/Add.2, paragraph 90 a) and regretted that some of the provisions of the Anti-Terror Act of 1991 appeared to have been retained in the Bill tabled by the Government in April 2006 (*ibid.*, paragraph 10). I note that the Anti-Terror Act was amended in June 2006 and in July 2010 (through the "Law Amending the Anti-Terror Law and other Laws"- Law No. 6008), and welcome the commitment of your Excellency's Government to continuously review its anti-terrorism legislation evidenced by these reforms. I reiterate my concerns, however, that the broad and vague definition of terrorism contained in article 1 of the Anti-Terror Act was not amended.

103. Referring to my report, the Committee on the Rights of the Child, in said Concluding observations of 2009 (CRC/C/OPAC/TUR/CO/1, para. 19 (b)), and the Working Group on Arbitrary Detention in the report on its mission to Turkey (A/HRC/4/40/Add.5, para. 101) also recommended that Turkey ensure the conformity of any domestic definition of terrorist crimes with international norms and standards. The report of the UPR Working Group contains a recommendation to revise or abolish the Anti-Terror Law (A/HRC/15/13, para. 102.39), which your Excellency's Government considers to be under the process of implementation (A/HRC/15/13/Add.1, para. 78). However, the

⁴⁵ Report of the working group on the Universal Periodic Review, Turkey, A/HRC/15/13 and A/HRC/15/13/Add.1

⁴⁶ CRC/C/OPAC/TUR/CO/1.

⁴⁷ CAT/C/TUR/CO/3.

“specific law of amendment” of July 2010 referred to in this document by your Excellency’s Government (*ibid.*) would appear not to govern an amendment of the definition of terrorist crimes in Turkish anti-terror legislation as such, but to relate to legislative amendments to the effect that children will henceforth stand trial for terrorism-related offences in the juvenile justice system only.

Juvenile justice in the context of counter-terrorism

104. I have received allegations that hundreds of children have been prosecuted, during the years of 2006 to 2010 for “membership in an armed organization”, which is an offence entailing criminal punishment under the Penal Code and simultaneously under the Anti-Terror Law, or for “propaganda for a terrorist organization” pursuant to the Anti-Terror Law alone. Scores of juveniles between the age of 15 and 18 years have been convicted as adults to prison sentences by Serious Felony Courts, whose jurisdiction was established following amendments to the Anti-Terror Law in July 2006.

105. On 5 December 2008, I sent a communication to your Excellency’s Government regarding information received on six children who were to face trial in the Diyarbakir Criminal Court on charges of propaganda for a terrorist organization and of other terrorist crimes allegedly committed by throwing of stones and Molotov cocktails on the police during a demonstration. The Prosecutor of the court asked for a prison sentence of 23 years for the accused, who were reported to be 13-14 years old at the time (A/HRC/10/3/Add.1, para. 309). Your Excellency’s Government replied to this communication by letter dated 25 February 2009. On 12 October 2009 I sent a joint communication regarding minors M. E., M. Z. Y., A. N., and H. H. A., all Turkish citizens of Kurdish ethnicity, which detailed issues around the application of anti-terror legislation to juveniles of 15 and 16 years of age and the lacking investigation of alleged torture and ill-treatment in these cases (A/HRC/13/37/Add.1, para. 98).

106. Reportedly, as at June 2010, there were still 206 children detained in Turkey, convicted of or standing trial for terrorist-related offences, according to the then Minister of Justice. I note the amendments to the Anti-Terror Law of July 2010 to the effect, *inter alia*, that minors will henceforth stand trial only in juvenile courts or adult courts acting as juvenile courts, that children participating in demonstrations will not be charged for “committing crimes on behalf of a terrorist organization” under the Anti-Terror Law anymore under the notion of “propaganda crimes” or for resisting police dispersal of demonstrations, and that juveniles will not receive aggravated criminal penalties.⁴⁸ These amendments, in my view, have the potential of opening the path for the release of the detained children and closing the door for the prosecution of child demonstrators as members of an armed organization on the basis of participation in public protests.

107. However, the amendments to article 2/2 of the Anti-Terror Law would appear to be limited only to children who are alleged to have committed “propaganda crimes” or resisted the dispersal of demonstrations by the police, and do not exclude the possibility of the continuance of pressing charges against minors under the Penal Code’s article 220/6 – punishing persons as members of an organization qualified as terrorist who commit a crime on behalf of such organization without being a member – and article 314/2 and 3 – punishing membership in an armed organization.⁴⁹

108. I therefore call upon your Excellency’s Government to continue with its efforts to comply with applicable international human rights norms and standards to ensure that the

⁴⁸ Human Rights Watch, *Protesting as a Terrorist Offence*, November 2010, pp. 29 *et seq.* See also Amnesty International, *All Children Have Rights*, 2010.

⁴⁹ Human Rights Watch, *ibid.*

Anti-Terrorist Act not be used for prosecution of any children as adults in Serious Felony Courts, where those over 15 years of age now may face life imprisonment contrary to the Convention on the Rights of the Child, on grounds such as the presence or participation in demonstrations. I further call upon your Excellency's Government to ensure that claims of torture and ill-treatment against them be brought before independent and effective investigating bodies (CRC/C/OPAC/TUR/CO/1, paras. 18 and 19). The 70 complaints reported to have been lodged after the 2006 events in Diyarbakir were processed slowly and while children were held in custody for several years, the overall image was one of prevailing impunity for cases of alleged ill-treatment.

109. I would also like to recall the recommendation contained in the report of the UPR Working Group (A/HRC/15/13), which enjoys the support of your Excellency's Government, that Turkey apply the standards of the Convention on the Rights of the Child to all cases that involve the investigation, the prosecution and the deprivation of liberty of children, especially in the context of the enforcement of anti-terror laws (A/HRC/15/13, para. 100.87). The report of the Working Group on Arbitrary Detention on its mission to Turkey (A/HRC/4/40/Add.5,) and the Committee on the Rights of the Child (CRC/C/OPAC/TUR/CO/1, para. 19 (c) explicitly recommended the use of deprivation of liberty only as a last resort in the juvenile justice system.

Criminal procedures for suspects of terrorism and detention safeguards

110. In my mission report (A/HRC/4/26/Add.2, para. 20), I furthermore drew the attention to detention safeguards under the Anti-Terror Law and the Penal Code. Concerns were also voiced in the report of the Working Group on Arbitrary Detention, which, although praising impressive progress in detention safeguards overall, noted a great reluctance on the part of the authorities to fully extend the beneficial effects of the relevant reforms to persons accused of terrorism, recommending the lifting of the limitation on the number of defence counsel in terrorism cases (A/HRC/4/40/Add.5, para. 102).

111. While the longer allowed detention period for terrorism suspects under the Code of Penal Procedure still continues to apply, the June 2006 amendments to the Anti-Terror Law provide that only one family member will be informed of detention, the suspect may only have access to one lawyer, and the right to see the lawyer may be restricted on request of the prosecutor and a court decision, albeit no statements can be taken during such time. Access to documents pertaining to the case may equally be restricted by court decision, upon request by the prosecutor, and a right of enforcement to monitor communication between the suspect and the lawyer may be accorded through the same procedure if there are findings indicating communication with members of a terrorist organization. Such weakening of procedural safeguards raises serious concerns. The amendment also provides for legal assistance for personnel that have taken part in counter-terrorism operations in cases where the legality of their actions could be challenged. At the same time there have been reports that, particularly in the South-East of the country, suspects have not had access to court-appointed lawyers to the same degree as in the rest of the country.

112. I am also concerned about reports that I have received about the practice of courts blocking the disclosure of evidence to the accused and defence lawyers, including in cases brought under anti-terrorism legislation. Such secrecy decisions are made by judges under article 153 of the Code of Criminal Procedure invoking the risk that disclosure would jeopardise the aims of the investigation, compromise the ability of defence lawyers to challenge the legitimacy of an order to detain the accused and, further, may compromise the right to defence under article 14, para. 3, of the International Covenant on Civil and Political Rights.

113. As regards allegations of torture during detention, which in the past often has been linked to presumed terror-cases, it has been a positive development that evidence obtained

through such means is no longer considered admissible in trials, albeit this prohibition has reportedly not been applied in cases where the alleged torture occurred at an earlier period of time.

114. Concerning other developments regarding the detention regime for terrorist suspects since 2006, the 2005 changes to the relevant legislation have been followed up by a series of circulars which oblige prosecutors to control and monitor detention and the taking of statements. While such monitoring is important, there is also a need to ensure independent monitoring as envisaged by the Optional Protocol to the Convention against Torture (OPCAT), which should in my view be ratified as early as possible. I note that Turkey has signed the OPCAT in September 2005 and has indicated in the context of its UPR that the ratification process is expected to be completed soon (A/HRC/15/13/Add.1, para. 2).

115. In view of combating torture and ill-treatment during detention, another important set of issues to address are the reported shortcomings around medical examinations, where both the confidentiality and the quality has been lacking at times resulting in concerns expressed by the Committee against Torture (CAT/C/TUR/CO/3, para. 11), particularly with enforcement officials occasionally having been present, even in the absence of a request to this effect from the medical personnel in charge. For similar reasons, reforms of the Forensic Medicine Institute and introduction of a possibility of independent forensic expertise are of utmost importance.

Freedom of expression, association and assembly

Proscription of organizations

116. In my mission report, I noted the use of the Anti-Terror Law for the prosecution for acts related to the right to freedom of expression, association and peaceful assembly (A/HRC/4/26/Add.2, paras. 18 and 30). Since my mission to Turkey, I have received information that indicates that challenges remain. Despite the April 2008 amendments to the crime of “denigration of the Turkish nation” (previously “Turkishness”) as per article 301 of the Penal Code, and concerning its application, there still appear to be significant limitations to the expression of non-violent opinion that have their root in law. I consider as the fundamental problem the broad definition of terrorism and the lack of specific criteria for qualifying organizations as terrorist and membership thereof. Consequently, the report of the UPR Working Group also highlights restrictions to freedom of association and freedom of expression arising from the application of the Anti-Terror Act, the Penal Code and other laws, and contains recommendations, including amending or abolishing article 301 of the Penal Code (A/HRC/15/13, paras. 102.17, 102.18, 102.23, and 102.39).

117. With the broad and vague definition of terrorism that I criticised in 2006 (A/HRC/4/26/Add.2, para. 14) still in place, there remain broadly framed “organization cases”, such as the so-called “KCK/TM” (“Union of Kurdistan Communities/Turkey Assembly) case that since April 2009 has involved detention of members of the pro-Kurdish “Peace and Democracy Party” (“BDP” – formerly “Democratic Society Party” – “DTP”), including several leading Kurdish politicians and elected mayors, and members of trade unions “Confederation of Public Workers’ Union” (“KESK”) and “Eğitimsen” for alleged membership in the outlawed “Kurdistan Workers’ Party” (“PKK”). The recent commencement of the hearings before the Diyarbakır Serious Felony Court will also be a test of the discriminatory power of the broad and vague definition of terrorism in the Anti-Terror Law.

118. In relation to this case, on 7 January 2010, I addressed a joint communication to your Excellency’s Government regarding Mr. Muharrem Erbey and the Human Rights Association (IHD). This appeal was based on information that Mr. Erbey and other Kurdish opposition members, journalists and civil society activists had been arrested at the behest of

the Diyarbakir Chief Public Prosecution Office and the Anti-Terrorism Branch of the Police, and that the premises of the IHD in Diyarbakir had been raided by the Police, with documents including archives on cases of enforced disappearance and torture confiscated. While membership in the allegedly “PKK”-related “KCK” was cited as grounds for arrest, claims were made that the charges against Mr. Erbey could have been linked to his work for human rights and minority protection. Clarification was sought from your Excellency’s Government on, inter alia, how it is established whether an organization is illegal, and whether there were any procedures in place to appeal such a designation. In your Excellency’s Government’s reply of 4 April 2011, it was stressed that the basis of the arrest was an investigation into the terrorist organisation “KCK”. However, I note that there was no reply to the pertinent question about how an organisation is qualified as terrorist and what the procedure for appealing such a designation is.

119. Similarly, the case of Mr. Hasan Anlar, Ms. Filiz Kalayci, Mr. Halil Ibrahim Vargün and Mr. Murat Vargün of IHD, who were detained for “aiding an illegal organization”, prompted me to send a joint communication to your Excellency’s Government on 15 May 2009, asking for a full definition of an “illegal organisation”. Unfortunately, your Excellency’s Government’s response dated 16 July 2009 did not sufficiently address this question. The letter of 11 April 2007 (A/HRC/6/17/Add.1, para. 104) in response to my letter of 24 July 2006, requesting clarification about the definition of terrorism and organisational membership, regrettably, did not sufficiently address the personal material link to violence against innocent bystanders that an acceptable definition of terrorism would require. The designation as terrorist organisation and the appeal procedure against such designation remain unclear, thereby also rendering the notion of membership in a terrorist organisation lack distinctive force.

120. Furthermore, I have received reports about security forces videotaping activities of associations in the South-East of the country, and legal action taken against associations working on issues of importance for the Kurdish population, such as the investigation against the Istanbul branch of the Human Rights Association and cases opened against associations for promoting Kurdish language and culture, such as the April 2006 closure of the Kurd-Der association in Diyarbakır. In addition, considering the importance and scale of the problems of Internally Displaced Persons (IDPs) in Turkey noted in my report of 2006 (A/HRC/4/26/Add.2, paras. 34 to 45), it is particularly worrying that an association working on internal migration related problems, namely Göç-Der, in Diyarbakır was reportedly closed and its leadership prosecuted.

121. Removing indeterminacy of legislation such as articles 215, 216, 217 and 220 of the Penal Code that have been used to prosecute journalists writing about Kurdish issues will also be of importance. Similarly, I have received allegations that article 288 of the Law on Influencing the Conduct of a Fair Trial has been used to hamper reporting about the Ergenekon case. To be clear, I commend the Government for its courageous steps in combating impunity through the Ergenekon case and related prosecutions. That said, by letter of 23 June 2010, I, jointly with other mandate holders of Special Procedures, expressed concern about the broad application of the notion of terrorism around issues protected by the right to freedom of opinion and expression and the prosecution of journalists and publicists under the Anti-Terror Act and in particular its article 7, prohibiting “spreading propaganda relating to a terrorist organization”, citing in particular the cases of Mr. Irfan Aktan, Ms. Merve Erol, Mr. Filiz Kocali, Mr. Ramazan Pekgoz, Mr. Ziya Cicekci, and Mr. Mehmet Guler, and noting the need to both show intent to incite to terrorism and to show an objective danger that one or more terrorist acts would be carried out as a consequence. The 2006 amendments to the Anti-Terror Law do still, after the June 2009 modifications by the Constitutional Court, allow suspension of periodicals under the broad criteria in the law, and such suspensions have reportedly happened in a number of cases since 2006.

Combating impunity

122. In my report (A/HRC/4/26/Add.2, paras. 2, 46 et seq.) I highlighted concerns about impunity for acts of extrajudicial killings and torture undertaken in the course of countering terrorism. Impunity was also a cause for concern in the report of the UPR Working Group, which contained recommendations to combat it (A/HRC/15/13, paras. 100.44, 100.47, and 100.70). In its Concluding observations, the Committee against Torture also voiced concerns about the lack of steps regarding the implementation of my recommendations contained in the report on my mission to Turkey and about numerous, ongoing and consistent allegations concerning the use of torture and recommended that Turkey take immediate measures to end impunity for such acts, including the immediate establishment of effective and impartial mechanisms to conduct effective, prompt and independent investigations, and ensure that perpetrators of torture are prosecuted under articles 94 (“torture”) and 95 (“aggravated torture”) of the Penal Code (CAT/C/TUR/CO/3, para. 7).

123. In terms of extra-judicial killings, I expressed concern in my report (A/HRC/4/26/Add.2, para. 46) about the killing of 12-year old unarmed Uğur Kaymaz and his father Ahmet Kaymaz in Mardin, and the case of a bombing of a bookshop in Şemdinli regarding which there were allegations that members of the security forces had been involved. The former case reportedly ended in an acquittal in June 2009, and the latter case was reportedly intervened into publicly by the senior military leadership, leading to the dismissal of the prosecutor on short notice and transfer of the case to the Van Military Court, with the suspects released pending trial. In later stages, investigation of any organizational link was reportedly terminated. After jurisdictional issues were resolved in the aftermath of certain legislative changes, the case was again reopened at the civilian Special Powers Van 3rd Serious Felony Court, which has ordered the re-arrest of the accused. The possibility that organizational links and chain of command responsibility could now be better pursued is a welcome development, as the case raises serious concerns about methods of counter-terrorism operations, independent judicial control of such methods and the pursuit of chain of command responsibility in such cases.

124. In view of ending impunity and strengthening the protection of the right to life and the prohibition of torture and ill-treatment in Turkey, legislative measures and mechanisms for independent control will be in a key position. Yet I note that there are some encouraging recent developments in terms of prosecution of acts of human rights violations in this area conducted in the course of counter-terrorism activities. Most importantly, the case against Colonel Cemal Temizöz et al. in the Diyarbakır Serious Felony Court and the reported indictment from July 2009 in this case indicates that the activities of security forces in the East and South-East of the country during the 1990ies can entail court scrutiny and that units such as the alleged “JITEM”, about whose existence Turkish authorities were ambiguous during my visit (A/HRC/4/26/Add.2, para. 52), could be within the scope of future court judgements.

125. Apart from this case, there is a reported large number of indictments that have direct relevance to my mandate, such as those in the Ergenekon case against alleged coup plotters. Investigations started in 2007. A series of indictments including on charges of forming a terrorist organizations followed, the first in July 2008, and the case was merged with another related to the attack on the Council of State from 2006 and other cases such as the case of the Zirve publishing house. The fourth indictment increased the number of defendants to more than 500 with more than 100 military officers. While the proceedings can be considered as groundbreaking and having the potential of shedding light on and bringing to justice serious past human rights abuses committed as part of counter-terrorism operations, it is also important that an overly broad definition of terrorism is not allowed to weaken the case. Other important cases are the indictments in the Sledgehammer case in July 2010, relating to alleged coup plans in 2003, the Cage plan indictment from March

2010, relating to alleged coup plans in 2009, and a related indictment from April 2010 relating to the alleged coup plan from 2009 entitled Action Plan against Reactionarism (2009). More recent additional cases of the same kind are still being investigated and include recent evidence obtained through an operation at a navy base.

126. According to documents submitted as evidence in these cases and statements by Government officials and members of security forces involved in the investigation of the cases, there have been allegations of links between entities conducting counter-terrorism operations allegedly outside of the law on the one hand, and elements within other organizations against which terror charges have been brought on the other, including the “Revolutionary Headquarters” (Devrimci Karargah Örgütü), “Turkish Hizbullah”, the “PKK”, “Hizb-ut Tahrir”, the “Organization of the Turkish Revenge Union” (Türk İntikam Birliği Teşkilatı) and Al Qaeda. Were these links to be proven in court, they would highlight troubling aspects of counter-terrorism operations, and thorough investigations into such possible links would therefore be important for addressing impunity for crimes committed in the course of such operations, including support to terrorism arising from such operations.

127. It is therefore of utmost importance that these cases are conducted with close attention to procedural safeguards, so as not to put in peril landmark steps towards ending impunity. Procedural concerns have in particular been raised around prolonged pre-trial detention, leaks through media of private communications and evidence, and the scope of prosecution for membership in organizations. The last issue can clearly be addressed through amendments to the Anti-Terror Law so as to make its criteria more discriminating, thus fending off criticism that journalists are also targeted through the case. In a joint communication dated 6 April 2011, I have expressed concern about the arrests and detention of journalists Mr. Ahmet Şık and Mr. Nedim Şener in the context of these cases. I also note the recent changes of judges and prosecutors in the Sledgehammer and Ergenekon cases and the April 2011 public statement of the General Staff criticising courts for the arrest of military personnel in the Sledgehammer case. I believe that by addressing issues potentially impacting the legitimacy and continuation of the process, the lasting legacy of these cases would be a sense of impunity ended through justice.

Furthering economic, social and cultural rights as a means of preventing terrorism

128. In my report, I also assessed counter-terrorism measures against the criteria enshrined in international human rights instruments, including non-discrimination and economic, social and cultural rights, and concluded that full respects for these rights helps eliminating the risk that individuals make the morally inexcusable decision to resort to acts of terrorism. I also made related recommendations (A/HRC/4/26/Add.2, paras. 49-70, 92 (c) and (d)). Whereas there can be no justification for terrorism under any circumstances, the role of a functioning system of protection of minorities and combating discrimination are a key to the creation of conditions in which terrorist organisations are unable to recruit members. Many steps have reportedly been taken since my mission to strengthen some of the rights of citizens speaking languages other than Turkish, and such reforms will no doubt be a key to ending violence. Changing back some village names to their traditional non-Turkish ones, also when such village names include letters not part of the Turkish alphabet, have been encouraging steps towards reconciliation. Similarly, the reported increased prevalence of cultural events in Kurdish, and the opening of post-graduate education in Kurdish at the Artuklu University in Mardin have been positive steps. However, as I noted in 2006, there still appear to be no systems in place ensuring that non-Turkish speakers be integrated in education (cf. A/HRC/4/26/Add.2, para. 69), and statements of high-level Government representatives indicate that such changes are not to be expected soon. I wish to stress the need to review this policy.

129. The use of languages other than Turkish by prisoners in their private communications has however reportedly been facilitated. Similarly, interpretation is often provided in courts, but there also seems to be some lack of consistent application in this field as I also noted in the joint communication to your Excellency's Government dated 27 April 2011 concerning the situation of Mr. Muharrem Erbey, Mr. Arslan Mr. Arslan Özdemir, Ms. Roza Erdede, and Ms. Vetha Aydin. Another recent case has been reported to me regarding terror-suspect Mr. Emrah Bana before the 11th Serious Felony Court of Istanbul, which has allegedly restricted the right of the accused to use Kurdish in court.

130. Access to the media in one's own language is along with legislation on minority protection and non-discrimination important as measures to counter terrorism with respect for human rights and fundamental freedoms. Such access to media in one's own language has reportedly been improved notably through the introduction of full day broadcast in Kurdish on State TV through amendments to Law No 2954, the launch of the Kurdish-language TV channel TRT 6 in January 2009, the removal of prohibitive restrictions to private broadcasting in languages other than Turkish and the subsequent increase in private radio and TV broadcasters. Yet, along with other restrictions affecting media reporting about Kurdish issues, these broadcasts have reportedly been monitored closely, as several cases of prosecution in relation to Gün TV in Diyarbakir indicate. DTP mayors sending a letter to the Danish Government asking Roj TV not to be closed were reportedly prosecuted and sentenced.

131. In my mission report, I also drew attention to the socio-economical disparities fuelling conflict and hampering return to normal conditions (A/HRC/4/26/Add.2, para. 8), thus potentially weakening measures to counter terrorism that respect human rights and fundamental freedoms. The increased regional investment announced by your Excellency's Government in May 2008 are a sign to the better, but a broad scope of measures will still be needed to end regional economic disparities. The improvements in trade with neighbouring countries have also had positive impact on the regional economy, but conflict around the border with Iraq has at times perturbed such developments, particularly through the establishment of temporary security zones in the region.

132. While ratifying the revised European Social Charter is a positive step, some reservations to international human rights instruments in fields that are of importance for a functioning regime of minority protection and in turn for effective counter-terrorism remain in force. The report of the UPR Working Group (A/HRC/15/13) also includes recommendations to strengthen anti-discrimination laws and minority protection. I therefore encourage your Excellency's Government to ratify the UNESCO Convention against Discrimination in Education, which would also improve the anti-discrimination framework. Similarly, I invite your Excellency's Government to review reservations to currently binding human rights treaties in view of strengthening the rights framework that would be part of the new strategy to combat terrorism. Reservations to article 27 of the International Covenant on Civil and Political Rights, articles 17, 29 and 30 of the Convention on the Rights of the Child, and article 13 (3) and 13 (4) of the International Covenant on Economic, Social and Cultural Rights could be lifted along with the adoption of treaties to improve minority protection and the prohibition against discrimination. Lowering the 10% threshold for Parliamentary elections would also be an important step for enhanced participation of minority representatives in political affairs.

Measures to support victims and the right to return

Displacement and measures taken to address its consequences

133. In 2006, I drew attention (A/HRC/4/26/Add.2, paras. 34 - 45) to the continuing obstacles to redressing the situation of Internally Displaced Persons (IDP) in the context of countering terrorism, and the need to systematically address their socio-economic situation,

including addressing economic obstacles to return and phasing out of the Village Guard system, which reportedly has stopped IDPs from returning.

134. Regarding the scope of internal displacement-related problems in Turkey, I have received new information, according to which the Institute of Population Studies of the Hacettepe University in a study from December 2006 found that the number of IDPs was higher than had previously been reported, ranging between 950,000 and 1.2 million. While there still appears to be no comprehensive plan or Government body dealing with the situation of IDPs, I have been informed about pilot work carried out in Van, which is an encouraging step that needs to be taken further. While some increased investment has been made into the region and some restrictions to the use of pastures have reportedly been lifted, and the Law on the De-mining of the Turkish-Syrian Border from 2009 has been adopted as a step towards de-mining the area, the current main obstacles to return appear to relate to economic circumstances, underdeveloped infrastructure, continuing conflict and related to that, landmines and the village guard system. Despite my recommendation that the village guard system as hampering the right to return be phased out according to a clear plan with benchmarks and time limits needs (A/HRC/4/26/Add. 2, para. 38), the system has been continued through legislation in May 2007 on new recruitment of village guards.

135. In my report (A/HRC/4/26/Add.2, para. 39) I also reminded your Excellency's Government that repatriation of refugees should be a viable option also for this segment of the population of the South-East and East. The process that reportedly started in 2009, involving planned returns from the Maxmur refugee camp and other locations, is an encouraging step. Ensuring the return of recognized refugees also forms a central part of conflict resolution.

Compensation

136. The economic possibilities to return appear to have also been hampered by the slow processing of compensation claims under the Law on Compensation and Losses Resulting from Terrorist Acts and inconsistencies in the application of the law, albeit I welcome the information provided by your Excellency's Government in its letter of 31 May 2007, informing me about an extension of the deadline for compensation claims. I pointed to the fact that the law does not address moral damages and that it should not become an alternative to addressing impunity (A/HRC/4/26/Add.2, para. 44).

137. Considering the importance of justice and adequate living conditions as measures to combat terrorism in a way that respects human rights and fundamental freedoms, I commend efforts to address social and economic seclusion at current locations of IDPs, processing remaining claims consistently and rapidly and continuing investigations into crimes committed as part of counter-terrorism activities. Steps taken in this direction are highly commendable and together with dialogue, socio-economic improvements, strengthening of the human rights framework, and dismantling the village guard system, will constitute important milestones in the resolution of conflicts and disparities that foster terrorism. The steps towards normalization taken in lifting the State of Emergency should also be followed up by a general policy of normalization of conditions in the region, including the least possible use of different kinds of security zones with conditions resembling State of Emergency, such as the ones established since 2007 in some border regions. A recent decision by the Malatya Regional Administrative Court reported to me, annulling a temporary security zone as not fulfilling the legal requirements for introduction of such measures, is a positive step towards diminishing the use of emergency measures.

Human rights monitoring

138. Domestic independent human rights monitoring would similarly be a step towards eradicating violations of human rights, which may occur in the context of counter-terrorism

operations. The report of the UPR Working Group (A/HRC/15/13, paras. 100.9, 100.13-100.24) not only contains recommendations regarding a national human rights institution in accordance with the Paris Principles, but also incorporating the views of civil society. The efforts undertaken by your Excellency's Government since 2006 to establish the office of the Ombudsman have been laudable, and the constitutional amendment in 2010 to overcome the impact of the Constitutional Court annulment of the Ombudsman law are to be welcomed. Similarly, the introduction through this amendment of the right to individual complaint to the Constitutional Court could prove to be important, if the Court assumes the envisaged role in view of strengthening the rights of individuals. The proposed Law on the Establishment of a Monitoring Commission on Security Forces could also lead to better investigation of complaints against such forces. The Improved Transparency of Penal Institutions and Detention Houses Monitoring Boards will also have a positive effect in this regard.

139. The Parliamentary Human Rights Committee and its subcommittees have carried out an important role in view of monitoring human rights violations, while other institutions, such as the Human Rights Presidency, the District Human Rights Boards and the non-operational Prime Minister Human Rights Board have allegedly not been able to fulfil the role of independent monitoring bodies.

Judicial and institutional reforms

140. Changes in the institutional structures around counter-terrorism activities over the past years and some new adopted strategies give rise to hope for further improvement. Some important institutional changes are the lessening role of the army in setting policies around handling of the domestic conflicts and counter-terrorism, through the changes to the functions of the National Security Council so as to increase the role of civilian decision-making, and abolishing the secret Protocol on Security, Public Order and Assistance Units (EMASYA) which had allowed military operations without civilian authorization, and changes to border protection enforcement. Improved proficiency and standards of policing are also welcomed steps, along with geographical clarifications to the powers of police and the Gendarmerie, but these changes need to be followed up by increasing civilian control of the Gendarmerie and ensuring that the concept of "national security" is defined by civilian authorities.

141. Other important institutional reforms have been the judicial reforms through the Government's Judicial Reform Strategy, and amendments to the Military Criminal Code and Constitution in 2006, the Code of Criminal Procedure in 2009 and the Constitution in 2010. Through such changes civilians are no longer tried in military courts in peacetime, except in jointly committed crimes, and military personnel are tried in civilian courts for crimes that are not associated with military affairs.

142. Regarding the ongoing efforts to end the conflict in South-East of Turkey in the short term through new strategies, the Special Rapporteur is encouraged by statements of high Government officials that democratic reforms are at the core of combating terrorism, statements insisting on zero tolerance for torture and ill-treatment along with a pronounced preference for a strategy to combat terrorism "based on compassion with the people of the region" rather than "harsh measures." The plan to implement the new strategy with special operations police officers trained in legally correct methods of policing, thereby replacing earlier military responses, is highly laudable, but could also require review of the tools available to the Under-secretariat for Public Order and Security.

143. I wish to encourage your Excellency's Government to move forward in its plans for reforms to create a rights framework for ending terrorism and in finding a solution to the three decade long conflict.

144. I would, therefore, in connection with the issues elaborated above, be grateful if your Excellency's Government could provide me with detailed substantive information on the following matters, and any other matters that your Excellency's Government deems appropriate in following up on my recommendations in my country visit report, at your earliest convenience, but no later than 27 July 2011:

1. What further steps does your Excellency's Government envisage to review, and amend, Turkey's anti-terrorism legislation, in order to bring it fully into compliance with applicable international human rights norms and standards?
2. What practical impact on the administration of juvenile justice have the amendments to the Anti-Terror Act in July 2010 had in terms of compliance with the Convention on the Rights of the Child and other international human rights norms and standards, particularly with a view to excluding the prosecution of child demonstrators as members of an armed organization on the grounds of their participation or actions in public protests?
3. What plans are there to address internal displacement and the return of refugees in the case of an end to the conflict?
4. What measures are planned to phase out the village guard system?
5. What measures are envisaged to improve the possibilities of a functioning civil society to organize in associations and political parties in order to advance opinions around the rights framework underlying the new counter-terrorism strategy, including minority rights and rights of political participation?
6. What plans does your Excellency's Government have to improve protection of minorities and minority languages?
7. Are further institutional and legal changes planned as part of the new strategy to combat terrorism through non-military means?
8. What plans are in place to complete institutional changes to use specifically trained law enforcement rather than military in counter-terrorism operations?
9. What plans does your Excellency's Government have to end the use of temporary security zones and other measures of extraordinary controls?
10. In the light of current court cases with important implications for ending impunity for different bodies involved in illicit counter-terrorism operations, what further measures is your Excellency's Government envisaging to combat impunity for past and future human rights violations in the course of counter-terrorism operations?

145. My intention is to report on my correspondence with your Excellency's Government in a forthcoming report to the Human Rights Council.

Reply from the Government

146. The Special Rapporteur received the following first reply dated 6 January 2012 together with an information sheet from the Government of Turkey.

147. With reference to the letter of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Martin Scheinin dated 27 June 2011, the Permanent Mission of the Republic of Turkey wishes to submit the following information regarding the questions referred to in the said letter.

148. Turkey has been implementing a multidimensional and comprehensive strategy in the fight against terrorism. In this strategy, security measures are complemented by social,

economic and cultural dimensions. This approach is also an important part of the professional training of our security forces. The Democratic Opening process is an indispensable element of this comprehensive strategy.

149. While various countries, including those having highest democratic standards, resorted to restrictive measures after September 11 2001, Turkey, contrary to this global trend, made a paradigm shift in the fight against terrorism and brought the human dimension to the forefront. We are conducting this fight with full respect for the rule of law and human rights.

150. In the period ahead, we will continue addressing the terror problem in a comprehensive manner. These efforts will reach an all new level soon, in the form of a debate around a new constitution. This will inevitably have a significant and positive bearing on some critical aspects of the matter.

INFORMATION SHEET

151. The assessments made by TNP on the claims and questions in the letter written by the Special reporter on the Protection of Human Rights in Counter-Terrorism are presented below;

A. ASSESSMENTS MADE ON THE CLAIMS:

1) That the definition of terror was made very comprehensively and ambiguously, that the amendments made in July 2010 was considered positively and that the definition of terror was not still in line with international standards.

A single definition based on a common understanding has not yet been made. Differences in the approaches of the countries are the leading factors making this definition harder.

Turkey is of the belief that terror acts cannot be justified by any reasons. Turkey is against all sorts of terrorist acts of any motives and origins.

2) That child prisoners can still be judged under the anti-terror-law and can remain imprisoned for long periods, that the claims of torture and ill-treatment are not assessed and that pursuant to the Children's Rights Convention, the deprivation of children of their liberty should be considered as the last solution.

With the Law numbered 6008 on necessitating amendments on the counter-terrorism law and other laws;

a) Increasing the punishments to be inflicted on children who commit terror acts by half was abrogated by the amendment made in the 5th article of the Anti-Terrorism Law,

b) Minors' being judged in children's courts was regulated in the 9th article of the Anti-Terrorism,

c) The age to consider someone as a child was raised to 18 from 15 by the amendment made in the 13th article of the Anti-Terror Law.

It has been deemed appropriate to take Ministry of Justice's view into consideration as a basis regarding the issue of judging, imprisoning and thus depriving children of their freedom under the Counter-terrorism Law as the last solution.

The issue that the claims on torture and ill-treatment weren't assessed was dealt with under the 3rd claim and the 10th question.

3) That defence rights of the subjects judged of terror crimes can be restricted, especially the courts in the southeast do not provide required evidence and access to the investigation file is restricted, that torture and ill-treatment still exist and that both the code of privacy is violated in health checks and necessary care is not shown by doctors.

a) Terror has been seriously endangering human rights and aiming at demolishing democracy and civil society, and dragging the country into political instability. It is a threat against the use of many human rights, particularly the right to life, freedom and personal security. Personal security is a basic right and accordingly the protection the person is one of the major responsibilities of the state. In other words, while combating terrorism is a right of a state, it is, at the same time, a duty stemming from its positive responsibility.

152. Therefore, all states have the right to take precautions for fighting terrorism in order to protect their countries, citizens and values.

153. States must abide by the responsibilities on human rights arising from international law and the rule of law. In the event that these precautions restrict human rights, it is necessary to express these restrictions as clearly as possible and they need to be essential and proportionate to the objective.

154. In this respect, "Council of the European Union, Committee of Ministers' Principles on Human Rights and Counter-Terrorism" , which was adopted in the 804th meeting of acting ministers on July 11,2002 needs to be reviewed because:

I. In the section titled "Responsibility of states to protect everyone against terror", it is underlined that states are responsible for taking necessary measures to protect basic rights of everybody in the scope of their authority, especially the right to life. This positive responsibility completely justifies a state's struggle against terror as per the mentioned principles.

II. In the 3rd article of the section titled "Legal Proceedings", it is noted that combating terrorism might require on certain conditions that some restrictions be brought upon the right of defence from the perspectives stated below:

- (i) regulations regarding finding a lawyer and getting legal advice;
- (ii) regulations regarding access to the case file;
- (iii) Consulting to the statements of the witnesses with secret ID.

III. In the second article of the section titled "Detention", it is stated that combating terrorism might require the infliction of further restrictions upon a subject deprived of freedom because of a terror act, on condition that the taken precautions are directly proportionate to the pursued objective and in respect of the issues noted below:

- (i) Regulations on communication and tracing the correspondence including the sessions between the lawyer and his client;
- (ii) Placing the subjects deprived of their freedom because of terror acts in the sections protected with special security measures.

155. Obviously, these regulations within the Anti-terror Law No: 3713 are harmonious with the principles of the European Council.

156. The article 10/b of the Anti-terror law no: 3713 carries the provision that "The suspect may benefit from the legal assistance of only one defence lawyer. The right of the detained suspect to get legal advice from a lawyer might be restricted for 24 hours by the ruling of the judge upon the request from the public prosecutor; however the suspect's statement cannot be taken within this period.

157. As can be understood from the article, the restriction on meeting the lawyer can only be realised by the ruling of the judge and in the meantime the statement of the detained suspect is not taken.

158. Therefore, new regulations brought in conformity to the internationally accepted principles are thought not to have negative effects on Turkey's fight against torture in the

future because Turkey has been following the policy "Zero tolerance to Torture" and will continue to do so.

b) The provisions of the Law on the Judgement of Civil Servants and other Public Officials are applied to the investigations and prosecutions to be opened about the civil servants and public officials who have committed the crime of torture and ill-treatment and an ex-officio investigation is launched by Public Prosecutors.

159. Crimes of Torture and ill-treatment were reorganised within the context of Turkish Penal Code no: 5237, which entered into force on June 1, 2005, as Torture (Article 94), aggravated torture because of its result (Article 95) and Infliction (Article 96), the definition of torture was expanded and its punishment was increased.

160. As per the 256th article of the Turkish Penal Code no: 5237, which entered into force on June 1, 2005, if the public official, who has the authority to exercise power, displays disproportionate use of power in line of duty, the provisions on wilful injury are stipulated.

161. The role of Public Prosecutors in crime investigations was increased further by the regulations made in the law of criminal procedure no: 5271, which was put into force on June 1, 2005.

162. Judicial and Administrative investigations have been carried out on the officials violating rights by displaying arbitrary behaviour contrary to the general principles and policies of our organisation and those found guilty are punished.

163. In addition to this, conforming to the provisions of legislation in use and within the context of the policy "zero tolerance on torture", with the aim of

- Preventing the persons in detention from committing suicide or harming themselves,
- Eliminating the claims of human rights violations made for various reasons to put the personnel under suspicion,
- Preventing some members of the personnel, even if they are isolated incidents, from violating the rights of the persons under detention

164. digital screening and voice recording systems have been set up in detention rooms and statement taking rooms of City Police Departments' Counter-terrorism Divisions since 2007 and the efforts are still continuing to be made to set up the same system in 2011.

c) Pursuant to the 9th article of the Directive on Apprehension, Detention and Statement Taking, the subject's health condition at the time of apprehension was determined by a doctor's examination in the event of the detention of the apprehended subject or the apprehension of a subject by exercising power

165. The health condition of a subject in detention is also determined by a doctor's report before the procedures of replacement of the subject for any reason, lengthening the period of detention, releasing or transferring of the subject to judicial authorities.

166. It is essential that the examination be made in accordance with the relation between the doctor and the patient and that the doctor and the examined person be left alone.

167. However, the doctor may demand that the medical examination be carried out under the surveillance of a law enforcement officer by stating his concerns for personal security. This demand is met by preparing the necessary documents. In these circumstances, a lawyer might also be present during the medical examination upon the request of the subject under detention, on condition that this wouldn't lead to any delays.

168. Besides, a copy of the admission report is given to the accompanying law enforcement officer, in order to be added to the investigation file. However, of the departure reports prepared when the detention period is lengthened, a replacement is required or the subject is released from the custody, a copy is kept in the health institution and other two copies are sent immediately to the related Public Prosecutor's Office in a closed and stamped envelope by the health institution that prepared the report.

169. A copy of these reports is given to the subject himself in detention or to his attorney and a copy is added to the investigation file by the Public Prosecutor.

170. Doctors have to report to the Public Prosecutor any traces and signs of torture and ill-treatment during their medical examination.

171. In practice, taking actions in line with the provisions of the mentioned legislation, the personnel are given pre-service and in-service trainings on the related legislation and the significance and the sensitivity of the subject is emphasised with a view to preventing torture and ill-treatment.

4) That the subjects who are jailed pending trial as part of the investigation of KCK are the members of the Peace and Democracy Party (BDP), the detention of Muh'arrem ERBEY, a member of Human Rights Association (IHD), might be related to his being a human rights defender.

172. It has been deemed appropriate to take Ministry of Justice's view into consideration as a basis on this issue.

5) The privacy of the Ergenekon case was violated and some journalists faced some judicial investigations as part of the mentioned case.

173. It has been deemed appropriate to take Ministry of Justice's view into consideration as a basis on this issue.

B. ASSESSMENTS MADE ON QUESTIONS:

1) Are there any amendments planned to be made in the Counter-Terrorism Law in order to harmonize with the international human rights standards?

174. Our country is a member of various supervision mechanisms, particularly ECHR and CPT, when practices in the field of human rights are considered. In practice, action is taken by the guidance of ECHR practices and the recommendations of CPT and amendments in legislation are made when necessary.

175. As per the 9th article of our constitution international agreements that are put into force in due form are considered as statutory. Any controversies that might appear because of differences in agreements on basic rights and freedoms between international agreements that are put into force in due form and national laws, the provisions of international agreements prevail.

176. At present, there is no work carried out by TNP in respect of making amendments in the Anti-Terror Law.

2) What kind of results were obtained in the practices regarding children as a result of the amendments made in the Anti-Terror Law in June 2010?

177. With the amendments made in some articles of the Anti-Terror Law no: 3713 by another law no: 6008 on July 22, 2010:

1- The clause added to the 5th article of the Anti-terror Law states that the provisions of this article cannot be practised against children. In line with the "proportionality" principle, one of the basic objectives of the child justice system, and the

principle of "always prioritising children's benefits", this amendment prevents the increase of the punishment applied to adults from being applied to children,

2- The second sentence of the first clause of the 9th article of the Anti-terror law stating that "the cases opened against children over 15 who were involved in these crimes are heard in these courts" were extracted from the text of the article and children who committed terrorist acts started to be judged in juvenile courts notwithstanding their age and the definition of child was thus made conforming to the national and international norms,

3- "The expression stating that a person is over 15", which was in the second sentence of the first clause of the 9th article of the Anti-terror law, was taken out of the article and this eliminated the options of turning the punishment to alternative deterrents or prohibiting postponing for the children who committed a terror act.

178. It has been deemed appropriate to take Ministry of Justice's views into consideration as a basis regarding the issue of the procedures carried out after the amendments made in the Anti-Terror Law no: 3713.

3) What kinds of measures have been taken to take the persons who emigrated back their villages?

179. It has been deemed appropriate to take the views of Ministry of Interior- Provincial Administration into consideration as a basis regarding this matter.

4) What kinds of works have been carried out for the abolition of the Ward System?

180. It has been deemed appropriate to take the views of Ministry of Interior- General Directorate of Local Administrations into consideration as a basis regarding this matter.

5) What kinds of steps have been taken in order to enable the civil society to contribute to the strategies of minority rights, political participation rights and counter-terrorism?

181. TNP has been diligently making efforts to develop the mechanisms to eliminate terror and to upgrade human rights standards by cooperating with the people and the organisations embracing combating terrorism and advancing human rights as their primary responsibilities. In this regard, contributions from non-governmental organisations are welcome in the works and projects conducted.

6) What kinds of works have been carried out in the field of protecting minority languages and minority rights?

It has been deemed appropriate to take the views of Ministry of Interior- Provincial Administration into consideration as a basis regarding this matter.

7) Have there been any institutional or legal amendments planned to fight terrorism with non-military methods?

8) Has there been a project going on to make the necessary institutional changes that will make trained law enforcement officials take over the task of the military personnel in counter-terrorism operations?

9) Have there been any plans to make changes about the abrogation of the temporary

There is no work carried out by TNP in respect of making amendments in the mentioned issues.

10) What kind of measures have been taken to fight the understanding of "impunity", which might appear in case of human rights violations during the operations carried out in the field of counter-terrorism?

182. The provisions of the Law on the Judgement of Civil Servants and other Public Officials are applied to the investigations and prosecutions to be opened about the civil servants and public officials who have committed the crime of torture and ill-treatment and an ex-officio investigation is launched by Public Prosecutors.

183. Crimes of Torture and ill-treatment were reorganised within the context of Turkish Penal Code no: 5237, which entered into force on June 1, 2005, as Torture (Article 94), aggravated torture because of its result (Article 95) and Infliction (Article 96), the definition of torture was expanded and its punishment was increased.

184. As per the 256th article of the Turkish Penal Code no: 5237, which entered into force on June 1, 2005, if the public official, who has the authority to exercise power, displays disproportionate use of power in line of duty, the provisions on wilful injury are stipulated.

185. The role of Public Prosecutors in crime investigations was increased further by the regulations made in the law of criminal procedure no: 5271, which was put into force on June 1, 2005.

186. Judicial and Administrative investigations have been carried out on the officials violating rights by displaying arbitrary behavior contrary to the general principles and policies of our organisation and those found guilty are punished.

187. With a view to progressing human rights standards, TNP has been conducting many projects, giving importance to training activities, participating in the legislation regulation works and following the developments in the field of human rights as part of the understanding of "zero tolerance for torture".

188. Such developments and regulations in TNP have been appreciated by international institutions and organisations and this is reflected on both the Turkey Progress reports prepared by the EU and CPT reports.

189. In Turkey Progress Report (November 5, 2008) of the European Commission it is noted that "As regards prohibition of torture and inhumane or degrading treatment or punishment, the downward trend in allegations of torture and ill-treatment in the anti-terror departments of the police stations continued. The legal safeguards introduced by the government's zero tolerance policy on torture are having a positive effect."(Chapter 23: Justice and Fundamental Rights)",

190. Finally; In Turkey Progress Report (November 9, 2010) of the European Commission, it is stated that; ""The government pursued its efforts to ensure compliance with legal safeguards to prevent torture and ill-treatment. This policy has continued to produce positive results. "

191. The Special Rapporteur received a further reply by the Government of Turkey dated 19 March 2012.

192. With reference to the letter of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Martin Scheinin, dated 27 June 2011, the Permanent Mission of the Republic of Turkey wishes to submit the following additional information regarding the questions number 3 and 6 in the said letter.

Question number 3:

193. What kind measures have been taken to take back the emigrated persons back to their villages?

Back to the Village and Rehabilitation Project;

194. This Project is designed to facilitate the return of Turkish citizen who want to voluntarily go back to their villages. It established the social and economic infrastructure in these villages in order to form sustainable living conditions for the returnees. The project also improves the adjustment capacity and social economic wellbeing of those citizens who do not wish to return to their villages.

195. Currently the said Project is applied in 14 cities in the Eastern and the Southeast Anatolia, namely Adiyaman, Agri, Batman, Bingöl, Bitlis, Diyarbakir, Elazig, Hakkari, Mardin, Mus, Siirt, Srinak, Tunceli and Van.

196. According to the demographic data gathered from the Governor's Office, 386360 Turkish citizens of 62.448 households have left their villages in these 14 cities. Back to the Village and Rehabilitation Project, facilitated the return of 187.861 citizens from 28.384 households so far. A

197. Also through the circular of the Ministry of Interior of the Republic of Turkey on "project based funding", dates 30 June 2009, 87 sub-projects were financially supported. Among these projects which were supported from 2009 to 2011 are: construction of social center, your center, women and children education center, vocational school, dormitories, agriculture, and husbandry.

Legislative Amendments:

198. The Law on Compensation for Damage Arising from Terror and Combatting Terror (Law 5233) was passed by the Parliament of the Republic of Turkey on July 17, 2004. The said law is intended to provide compensation to those citizens for damage caused during operations against terrorism. Compensation is provided for physical injuries, disabilities, death loss of immovable and moveable properties.

199. The afore-mentioned law established numerous local Damage Assessment commissions headed by the Deputy Governors to investigate and compensate citizens. Multiple commissions were set up in Bingöl, Diyarbakir, Hakari and Mardin where individual applications were above the average. Currently there exist 45 Commissions working country wide and 48 Commissions have already concluded their work.

E. Follow-up to mission to United States of America⁵⁰

Letter to the Government

200. On 1 May 2012, the Special Rapporteur addressed the following letter to the Government of the United States of America.

201. I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism pursuant to Human Rights Council resolution 19/19, and in the spirit of the dialogue developed by the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Martin Scheinin, with your Excellency's Government prior to, during and following his fact-finding mission to your country carried out between 16 to 25 May 2007 (A/HRC/6/17/Add.3). In this connection, I would also like to thank you for the opportunity I was given to discuss some of the concerns raised in the following in person with Mr. John Sammis, United States Deputy Representative for ECOSOC, on 20 October 2011 during my visit to New York on

⁵⁰ A/HRC/6/17/Add.3.

the margins of the presentation of my report to the Third Committee of the General Assembly (A/66/310).

202. In light of a number of developments at the national level that have taken place since my predecessor's country visit to the United States, as well as at United Nations level, including the recommendations issued in November 2010 following the Universal Periodic Review (UPR) of the United States,⁵¹ and the adoption of the respective Concluding Observations on the United States by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in May 2008⁵² and the Committee on the Elimination of Racial Discrimination in the same month,⁵³ I wish to follow up with your Excellency's Government on a few issues that my predecessor elaborated on in his mission report on the legal and institutional counter-terrorism framework and practice in your country. I therefore take the opportunity to address some of the recent developments reported to me that have taken place at the national level.

Detention, access to court and due process guarantees (A/HRC/6/17/Add.3, paras. 55 to 60, 63)

Continuing practice of indefinite detention without charge or trial and the enactment of the National Defense Authorization Act

203. I take note that, as recommended in my predecessor's report (A/HRC/6/17/Add.3, para. 56), the categorization of persons as "unlawful enemy combatants" has been abandoned. However, concerning his related further call to release or to put on trial those persons detained under that previously termed categorization, I regret that the authorities have continued the practice of indefinite detention without charge or trial. This was first demonstrated by Executive Order 13567 issued by President Obama on 7 March 2011,⁵⁴ which instituted long-term or indefinite administrative detention for a select number of detainees held at the naval base in Guantanamo Bay. According to section 2 of the Order, continued law of war detention is warranted for a detainee if it is "necessary to protect against a significant threat to the security of the United States". While a Periodic Review Board (section 3 of the Order) has been established to review the situation of each detainee, it is to be noted that such a review pertains to an assessment of the necessity of the continued detention pursuant to section 2, rather than a review of the lawfulness of the detention as required by international human rights law under article 9, para. 4, of the International Covenant on Civil and Political Rights (ICCPR).

204. In addition, on 31 December 2011, H.E. President Obama signed into law the H.R. 1540, the "National Defense Authorization Act for Fiscal Year 2012" (NDAA). In his Presidential Statement made on that occasion, the President claimed to have signed the bill "despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists."⁵⁵ I would like to draw the attention of your Excellency's Government to my following main concerns in relation to that Act.

⁵¹ Report of the working group on the Universal Periodic Review, United States of America, A/HRC/16/11 and A/HRC/16/11/Add.1.

⁵² CRC/C/OPAC/USA/CO/1.

⁵³ CERD/C/USA/CO/6.

⁵⁴ Executive Order on Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, available at <http://www.gpo.gov/fdsys/pkg/FR-2011-03-10/pdf/2011-5728.pdf>.

⁵⁵ Available at: <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

205. At the outset, I would like to refer to the recommendation of my predecessor to ensure that all detainees are held in accordance with international human rights standards, including that any form of detention is subject to accessible and effective court review, which entails the possibility of release (A/HRC/6/17/Add.3, para. 63). Pursuant to section 1021 of the NDAA, covered persons, as defined by paragraph b of that provision, may be subjected to detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force (sec. 1021 para. c (1) of the NDAA) and/or to trial by Military Commissions according to legislation amended by the 2009 Military Commissions Act (sec. 1021 para. c (2) of the NDAA).

206. While the principle of detention during an international armed conflict of combatants, i.e. soldiers of one of the States involved in the war, until the end of hostilities is well-established in international humanitarian law, the NDAA extends the possibility of long-term or indefinite detention without charge or trial beyond the context of such conflict and determines its applicability also to those persons who are not combatants, including persons suspected of having provided substantial support (article 1021 para. (b) of the NDAA).

207. Furthermore, in relation to the recommendation for a full judicial review of any form of detention (A/HRC/6/17/Add.3, para. 63), I would like to highlight that while federal courts decided in favour of some Guantanamo detainees that had brought habeas corpus petitions, determining that there was no basis for their detention, this did not entail the detainees' release as the ruling spelt out that the applicable legislation did not give jurisdiction to the courts to order resettlement on the territory of the United States but affirmed the authority of the political branches of government to exercise the power of release of non-citizens held by the Federal Government.⁵⁶ In this context, I would like to refer your Excellency's Government to para. 83 of the Working Group on Arbitrary Detention's report A/HRC/13/30, in which it is stated that "For such remedy [to cases of arbitrary detention] to be effective, as required by article 2 (3) of the International Covenant on Civil and Political Rights, detaining States are under an obligation to release the arbitrarily detained (foreign) detainee into their own territory even if they wish to deport the (foreign) detainee, but where deportation of the detainee otherwise liable for removal to the country of origin or to a third country accepting the detainee is not promptly possible."⁵⁷

208. Moreover, according to section 1023 of the NDAA, the objective of the NDAA periodic review of individuals held at Guantanamo Bay is not to determine the legality of any detainee's law of war detention, but to make discretionary determinations whether or not a detainee represents a continuing threat to the security of the United States.

209. The aforementioned judicial and administrative remedies are not sufficient to meet the due process standards, as embodied in article 9, paras. 3 and 4 of the ICCPR, as they do not constitute an effective court review, which entails the possibility of release. In this context, I would like to refer to recommendations made to your Excellency's Government during the Universal Periodic Review calling on the authorities to ensure that all remaining detainees be tried without delay in accordance with international law or be released (A/HRC/16/11, paras. 92.156 and 92.160).

210. I would also like to draw the attention of your Excellency's Government to the overly broad definition of "covered persons" as contained in section 1021 para. (b) of the NDAA, in particular the term "substantially supported al-Qaeda, the Taliban, or associated forces" [emphasis added]. I note that section 1021 para. (e) of the NDAA was introduced

⁵⁶ Available at: <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

⁵⁷ A/HRC/13/30, para. 83.

on 12 December 2011, by Congress as a new provision, which declares the continuing applicability of existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons captured or arrested in the United States. This, however, does not remedy my serious concern regarding the incompatibility of section 1021 of the NDAA with international human rights law.

211. Furthermore, section 1022 of the NDAA provides for military custody for covered persons as established by paragraph 2 of this provision. While noting that the term “covered persons” is narrowly defined, I am concerned that military custody is established as a general rule for the defined category of individuals, with the only exception of a waiver submitted by the President to Congress containing a certification in writing that such a waiver is in the country’s national security interest. It is my understanding that previous similar cases of arrests inside the country and subsequent custody have been successfully handled by federal, state and local law enforcement authorities. While H.E. President Obama in his statement of 31 December 2011, said that he “reject[ed] any approach that would mandate military custody where law enforcement provides the best method of incapacitating a terrorist threat”,⁵⁸ I remain seriously concerned as to the breadth of the Act’s detention authority as it is not limited to individuals having committed a belligerent act in the context of an actual armed conflict as required by the laws of war. This provision, termed by the President as “unnecessary and ha[ving] the potential to create uncertainty”,⁵⁹ puts the implementation of safeguards against violations of the most basic fundamental human rights, such as the prohibition of torture and other ill-treatment and the prompt access to legal counsel, at stake.

212. Finally, in relation to the issue of long-term or indefinite detention and my predecessor’s comments regarding detainees held in Afghanistan and Iraq (A(HRC/6/17, para. 18), I would like to raise concern in relation to the situation of detainees held at the Bagram air base, Afghanistan, where, according to the information at my disposal, no judicial review, including in the form of habeas corpus, has been undertaken nor is currently permitted.⁶⁰

213. In this connection, I would also like to refer to the Concluding Observations of the Committee on the Rights of the Child (CRC/C/OPAC/USA/CO/1), in which it expressed its concern at the number of children detained in U.S. administered detention facilities in Iraq and Afghanistan over extended periods of time, in certain instances for one year or more, without adequate access to legal advisory services.⁶¹ The Committee recommended that the State guarantee periodic and impartial review of their detention and conduct such reviews at greater frequency for children than adults.⁶²

Ban on transfers from Guantanamo Bay

214. On 22 January 2009, H.E. President Obama issued Executive Order 13492 requiring the closure of the Guantanamo Bay Naval Base and calling for a prompt and comprehensive interagency review of the status of all individuals detained at the time therein. Pursuant to this interagency review,⁶³ 126 detainees of the 240 individuals reviewed were approved for transfer.⁶⁴

⁵⁸ Available at: <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

⁵⁹ Available at: <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

⁶⁰ See also *Al Maqaleh v. Gates*, 605 F. 3d 84 - Court of Appeals, Dist. of Columbia Circuit 2010, 21 May 2010.

⁶¹ CRC/C/OPAC/USA/CO/1, para. 28.

⁶² CRC/C/OPAC/USA/CO/1, para. 30 f.

⁶³ Final Report of the Guantanamo Review Task Force, 22 January 2010, available at

215. However, section 1027 of the NDAA establishes a prohibition to transfer Guantanamo detainees into the United States for any reason, including prosecution and release. Furthermore, section 1028 of the NDAA restricts the transfer of detainees, previously cleared for release by the Administration, to foreign countries for resettlement or repatriation. In addition, Section 1026 of the NDAA prohibits the use of funds to construct or modify facilities in the United States to house detainees transferred from Guantanamo Bay. As a result, these provisions effectively block the implementation of Executive Order 13492 to close the detention facility at Guantanamo Bay. In this connection, I would like to refer to several recommendations made to your Excellency's Government during the Universal Periodic Review in relation to the closure of the Guantanamo Bay detention facility (A/HRC/16/11, paras. 92.155, 92.156, 92.157, 92.158 and 92.159).

216. In the light of the aforementioned concerns regarding the compatibility of the provisions of the NDAA with international human rights law, I would like to urge your Excellency's Government to revisit and accordingly revoke those provisions and in the meanwhile ensure that the Act is implemented in the most complete manner regarding the enjoyment of human rights.

Failure to disestablish military commissions

217. The former Special Rapporteur urged your Excellency's Government to disestablish the military commissions (A/HRC/6/17/Add.3, para. 59). While the legislation pertaining to the functioning of the Military Commissions has been amended by the 2009 Military Commissions Act, important incompatibilities with international human rights law persist in relation to the jurisdiction of military commissions, their composition, the use of evidence, the limited scope of the appellate review, and the death penalty (please refer to the letter of 27 April 2010 of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Martin Scheinin, and the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak, A/HRC/16/51/Add.1, p. 50). In the absence of a reply from your Excellency's Government, and in view of the information I have received on the decision of the Convening Authority to seek the death penalty against Mr. Abd Al-Rahim Al-Nashiri, I would like to reiterate the main concerns the two former mandate-holders had expressed.

218. While the term "unlawful enemy combatant" was removed from the amended 2009 MCA, the definition of "alien unprivileged enemy belligerent", as contained in § 948a (7) of the MCA, does not exclude the possibility of civilians being tried by military commissions. In this context, I would like to refer to recommendations made to your Excellency's Government during the Universal Periodic Review in relation to the trial of terrorist suspects by legally established judicial instances and not by exceptional tribunals or jurisdictions (A/HRC/16/11, paras. 92.218 and 92.170).

219. Furthermore, offences listed in § 950v (24)-(29) of the 2009 MCA (terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying and conspiracy) go beyond offences under the law of war. The amended Act has not addressed the serious concern of the retroactive applicability of criminal law by military commissions, to the extent that the offences listed were not covered by the law applicable at the time of the commission of the actual acts. This is in breach of article 15 of the ICCPR and universally acknowledged principles of law.

<http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

⁶⁴ At the time of the release of the Report of the Guantanamo Review Task Force, 44 of the 126 had already been transferred from Guantanamo to countries outside the United States.

220. Moreover, provisions for the composition of military commissions have not been amended in substance. This is why I would like to reiterate the former mandate-holders' concern about the lack of independence and impartiality, including the lack of appearance of impartiality, of the commissions, which mainly result from the principle that members in a military commission are selected for each trial by the convening authority, which forms part of the executive branch, and the fact that there is still no prohibition against the selection of members of a commission who fall within the same chain of command.

221. As my predecessor did, I would like to welcome that the amended provisions exclude "any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment, as defined by section 1003 of the Detainee Treatment Act of 2005" to be admissible in a military commission proceeding. In addition, § 948r (c) (2) (B) of the 2009 MCA requires in relation to other statements, that the statement be made "voluntarily". While I note that the military judge is required to consider in the determination of the "voluntariness" the circumstances defined in § 948r (d) of the 2009 MCA, the new provisions make exceptions regarding statements made at the point of capture or during closely related active combat engagement, provided the interest of justice be best served by admission of the statement into evidence. Moreover, I deeply regret that, pursuant to § 949a (b) (3) (d) of the 2009 MCA, hearsay evidence is still admissible, noting, however, that this applies now within stricter limits than under the previous legislation.

222. In addition, pursuant to § 950g (d) of the 2009 MCA, the scope of review applies only to the findings and sentences as approved by the Convening Authority and as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review. In addition, the United States Court of Appeals for the District of Columbia Circuit as the exclusive appellate jurisdiction (§ 950g (a) of the 2009 MCA), shall take action only with respect to matters of law, which raises concerns as to its compatibility with article 14, para. 5, of the ICCPR.

223. Finally, in relation to my predecessor's recommendation that the imposition of the death penalty be excluded for military tribunals or courts martial, I note with deep regret that the death penalty continues to be available for certain crimes under the amended 2009 MCA. As highlighted in my predecessor's report, 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, which is, as shown above, not the case for military commissions.

224. In sum, given the persisting significant inconsistencies of the 2009 MCA with international human rights law, I urge your Excellency's Government to revoke this legislation and ensure that all detainees still held at Guantanamo Bay are brought before federal courts for prosecution or released.

Interrogation and rendition practices (A/HRC/6/17/Add.3, paras. 61 and 62)

225. I would like to positively note the adoption of Executive Order 13491 by President Obama on 22 January 2009, which revoked orders and regulations adopted after 11 September 2001, which might have contradicted international and national minimum standards. As previously highlighted by the former Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy, and the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak, in their press release of 23 January 2009, in implementing these decisions, the United States Government ought to fully respect all human rights obligations, including the absolute prohibition of torture and the principle of non-refoulement.

226. In this connection, my predecessor recommended to your Excellency's Government to take transparent steps to ensure that the Central Intelligence Agency (CIA) practice of

“extraordinary rendition” is completely discontinued and is not conducted in the future (A/HRC/6/17/Add.3, para. 62). Required steps for a full discontinuation and prevention of such practices to reoccur in the future include measures of accountability in relation to the implementation of interrogation techniques that violated article 7 ICCPR, the Convention against Torture and, in the context of an armed conflict, common article 3 of the Geneva Conventions.

227. The information at my disposal further suggests that despite the serious allegations of incidents of torture only very few effective criminal investigations against the actual perpetrators, superiors who ordered, or acquiesced, in these practices or those who legally authorized them were conducted and concluded so far. I note that a number of internal, disciplinary and otherwise administrative procedures have been instituted or completed in different parts of the executive and legislative branches. However, in the face of the serious aforementioned allegations, it is my opinion that those non-judicial measures are insufficient to meet the State’s obligation under article 12 of the CAT, which provides that it has to investigate *ex officio* all cases where there is reasonable ground to believe that an act of torture has been committed.⁶⁵ In this connection, I would like to draw to the attention of your Excellency's Government the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by General Assembly resolution 55/89 of 4 December 2000, and in particular principle 3 (a), which provides: “The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry. The persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence.” In light of these requirements, I emphasize the importance of judicial inquiries into the serious allegations of torture.

228. Moreover, I would like to draw the attention of your Excellency’s Government to the Concluding Observations of the Committee against Torture, in which it recommended that the authorities “promptly, thoroughly and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting in any way, to acts of torture committed by their subordinates.”⁶⁶ Furthermore, I would like to refer in this context to the report on the Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, A/HRC/13/42, in particular to recommendations made to all concerned States, as contained in para. 292 (e) and (f) in relation to investigations regarding alleged instances of secret detention and torture and other ill-treatment.

229. As regards required accountability measures, I would also like to express concern at the reported destruction by the CIA of almost one hundred videotapes documenting the use of “enhanced interrogation techniques”, including water-boarding, on Mr. Zayn Al-Abidin Muhammad Husayn and Mr. Abd Al-Rahim Al-Nashiri. In this connection, I took note of the respective judgment of the United States District Court for the Southern District of New York which denied that the CIA could be held in civil contempt as the Agency had enacted an internal protocol that should avoid such destructions to occur in the future.⁶⁷ While

⁶⁵ See also, A/65/273, para. 55 and A/HRC/13/39, para. 45.

⁶⁶ CAT/USA/CO/2, para. 9.

⁶⁷ United States District Court for the Southern District of New York, *American Civil Liberties Union et alia vs. Department of Defense et alia.*, Opinion and Order denying Motion to hold Defendant Central Intelligence Agency in Civil Contempt, 10/5/2011.

positively acknowledging that the CIA has instituted some kind of preventive measure, which according to the ruling judge “should lead to greater accountability within the Agency and prevent another episode like the videotapes’ destruction”, I would like raise my doubt as to whether these new protocols would constitute a sufficient and effective remedy in relation to the Agency’s accountability and its personnel that is in compliance with international human rights law.

230. In this connection, I would also like to express my regret at the recent decision by the District Court of Colombia of 2 April 2012,⁶⁸ dismissing a case challenging the refusal by your Excellency’s Government to disclose certain documents to the plaintiffs pursuant to the Freedom of Information Act concerning the involvement of the United Kingdom in the US programmes of extraordinary renditions, secret detention and coercive interrogation of suspected terrorists. The decision appears to have been based on an erroneous understanding of the constitutional position of the United Kingdom’s All-Party Parliamentary Group on Extraordinary Rendition (APPGR). As I said in the statement issued on 12 April 2012,⁶⁹ the APPGR cannot sensibly be categorised as an emanation of the State or of the Government of the United Kingdom. Under the system of Cabinet Government in the United Kingdom the APPGR is entirely independent of government and is a model of democratic oversight of the actions of the intelligence and security services. Transparency about the involvement of State officials in the rendition of terrorist suspects is essential to securing the accountability of public officials and bringing an end to impunity for serious human rights violations.

231. Furthermore, according to the information at my disposal, I would like to express concern about the use of techniques outlined the United States Army Field Manual, which in its appendix M includes the employment of the “separation interrogation technique”, by exception, to meet unique and critical operational requirements. In this connection, I would like to refer to the report of the Special Rapporteur on torture, Mr. Juan Mendez, to the General Assembly (A/66/268), in which he finds that “where the physical conditions and the prison regime of solitary confinement cause severe mental and physical pain or suffering, when used as a punishment, during pre-trial detention, indefinitely, prolonged, on juveniles or persons with mental disabilities, it can amount to cruel, inhuman or degrading treatment or punishment and even torture.” In addition, he highlights that the use of solitary confinement increases the risk that acts of torture and other ill- treatment or punishment will go undetected and unchallenged.

Definitions of terrorism and material support (A/HRC/6/17/Add.3, para. 64)

232. My predecessor recommended to your Excellency’s 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 (A/HRC/6/17/Add.3, para. 64). In this connection, I remain concerned at the broad interpretation by your Excellency’s Government of the prohibition to “knowingly provide material support or resources to a foreign terrorist organization”, §2339B(a)(1) of 18 U. S. C., as demonstrated in your Excellency’s Government’s various submissions on the case Holder vs. Humanitarian Law Project.⁷⁰ My concern relates in particular to the following activities: training (§2339A(b)(2) 18 U. S. C.), expert advice or assistance (§2339A(b)(3)

⁶⁸ All Party Parliamentary Group on Extraordinary Rendition et al. v. U.S. Department of Defense et al. (Apr. 2, 2012).

⁶⁹ Available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12053&LangID=E>.

⁷⁰ <http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>.

18 U. S. C.) and the provision of personnel (§2339B(h) 18 U. S. C.). In my opinion, the prohibition of these activities, in the context of the furthering of legal political objectives of a designated entity is likely to violate international human rights law, in particular article 19 of the ICCPR. Therefore, as the case of *Holder vs. Humanitarian Law Project* demonstrated, the provision of advice to train members of a designated organization how to use international law to resolve disputes peacefully and to teach them how to petition for relief various representative bodies such as the United Nations, can naturally not constitute a crime, as such activity does not in itself further – i.e. materially support – the terrorist ends of such organization or free up any resources of that organization that may then be used to pursue its terrorist activities.⁷¹

233. Furthermore, the former Special Rapporteur strongly urged the authorities to ensure that they do not participate in the extrajudicial execution of any person, including terrorist suspects (A/HRC/6/17/Add.3, para. 64). According to the information at my disposal, your Excellency's Government is alleged to have conducted several targeted killings in a number of countries pursuant to a new policy. Together with the Special Rapporteur on extrajudicial, summary or arbitrary executions, I have addressed one of these cases in a communication to your Excellency's Government of 2 November 2011, to which we await your Excellency's Government's reply.

Racial and religious profiling (A/HRC/6/17/Add.3, para. 65)

234. In his country mission report, my predecessor also recommended not to use the country of origin of a person as a proxy for racial or religious profiling, and urged the authorities not to act in a manner which might be seen as advocating the use of race or religion for the identification of persons as terrorists. In this connection, I would like to refer to the recommendation of the Committee against the Elimination of Racial Discrimination that the State party strengthen its efforts to combat racial profiling at the federal and state levels [...] ⁷²and to recommendations made on the occasion of the Universal Periodic Review of the United States, A/HRC/16/11, particularly those contained in paras. 92.64, 92.68, 92.101, 92.102 and 92.108 in relation to measures to be taken to ban racial profiling.

Privacy and surveillance (A/HRC/6/17/Add.3, paras. 67 and 68)

235. In relation to the former Special Rapporteur's recommendation regarding the introduction of an independent mechanism to ensure the compliance of the Attorney General's guidelines on the availability of surveillance warrants under the Foreign Intelligence Service Act (FISA) and the minimization procedures applicable to the surveillance of U.S. persons (A/HRC/6/17/Add.3, para. 67), it appears to me that with the four-year extension of the Patriot Act, signed into law by H.E. President Obama in May 2011, the main concerns as raised in the country mission report persist.

236. Finally, regarding the call by my predecessor to take steps to introduce independent checks and balances upon the authority of the Federal Bureau of Investigations (FBI) and other intelligence agencies to use National Security Letters (A/HRC/6/17/Add.3, para. 68), I am concerned at reports alleging widespread violations of law committed by the FBI in

⁷¹ See also Dissenting Opinion by Justice Breyer, joined by Justices Ginsburg and Sotomayor, in the case of *Holder vs. Humanitarian Law Project*, <http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>.

⁷² CERD, CERD/C/USA/CO/6, 8 May 2008, para. 14

the period of 2001 to 2008.⁷³ Information at my disposal also suggests that nearly one third of the alleged violations were related to the unlawful use of National Security Letters.

237. I would, therefore, in connection with the issues elaborated in this letter, be grateful if your Excellency's Government could provide me with detailed substantive information on the following matters, and any other matters that your Excellency's Government deems appropriate as follow-up to my predecessor's recommendations contained in his country visit report, at your earliest convenience, but no later than 31 May 2012:

1. In the light of the recently adopted National Defense Authorization Act as well as the 2009 Military Commissions Act, what steps does your Excellency's Government envisage to ensure that legislation and practice in relation to the detention of terrorist suspects comply with international human rights norms and standards?
2. How does your Excellency's Government ensure that investigations conducted in relation to allegations of torture and other ill-treatment of detainees, including those held at Guantanamo Bay, meet the country's obligations under article 12 of CAT?
3. Kindly provide me with information on current practices applied as "separation interrogation technique" under Appendix M of the Army Field Manual and explain how your Excellency's Government ensures that they do not amount to torture or cruel, inhuman or degrading treatment or punishment.
4. How does your Excellency's Government ensure that the material support clause is in compliance with international human rights law?
5. In relation to the alleged extrajudicial killings of terrorist suspects, I would like to receive information on the rules of international law that your Excellency's Government considers to govern its determination that people be targeted and the basis for a determination to kill rather than capture; clarity as to which treaty instruments or customary norms are considered to apply to target and kill individuals, including terrorist suspects; the legal basis, your Excellency's Government invokes to determine the targeted individual to be a combatant or a civilian directly participating in hostilities; whether your Excellency's Government considers its determination to be governed by the law applicable to the use of inter-State force and the international law doctrine of self-defense, and whether self-defense is invoked in addition or as an alternate to international humanitarian law and international human rights law.
6. I would be grateful if your Excellency's Government could provide me with information on recently adopted measures or those currently being considered to combat racial profiling, including in relation to the adoption of the End Racial Profiling Act or equivalent federal legislation.
7. Please provide me with information on the most recent steps taken to implement the recommendation on the introduction of an independent mechanism to ensure the compliance of the Attorney General's guidelines on the availability of surveillance warrants under the FISA and the minimization procedures applicable to the surveillance of U.S. persons with international human rights law.

⁷³ See for example Report of the Electronic Frontier Foundation, Patterns of Misconduct: FBI Intelligence Violations from 2001 – 2008, January 2011, available at https://www.eff.org/files/EFF%20IOB%20Report_0.pdf.

8. In relation to the use of National Security Letters, kindly provide me with information on the most recent steps taken regarding the introduction of a check and balances mechanism upon the authority of the FBI and other intelligence agencies or other relevant measures to ensure that there is no arbitrary interference with the right to privacy, as required by article 17 of the ICCPR.

238. My intention is to report on my correspondence with your Excellency's Government in a forthcoming report to the Human Rights Council.

Reply from the Government

239. The Special Rapporteur received the following reply by the Government of the United States of America dated 12 June 2012.

240. Thank you for your letter of May 1, 2012, inviting the United States to provide supplemental information on issues raised by the former Special Rapporteur Martin Scheinin in his 2007 mission report as well as information on certain other identified issues. The United States welcomes the opportunity to respond to your request, and has endeavoured to provide as complete a response as possible by the requested reply date of May 31, 2012.

241. The United States has taken numerous steps to fulfill President Obama's commitments to review and, where necessary, reform U.S. detention, interrogation, and transfer policies, to uphold the rule of law in U.S. detention practices, and to ensure conformity of U.S. detention practices with U.S. obligations under international law. This response highlights certain of these steps that are responsive to your request.

The Framework Set Forth in Executive Order 13491:

242. The United States understands that there have been concerns about a lack of adequate international legal protections for individuals the United States engages with overseas, particularly in armed conflict situations. In part to address these concerns, President Obama has taken a number of actions, including the January 22, 2009 issuance of three Executive Orders relating to U.S. detention and interrogation policies broadly and the Guantanamo Bay detention facility specifically. Executive Order 13491 on Ensuring Lawful Interrogations, 74 Fed. Reg. 4894 (2009), which was adopted, inter alia, "to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions," provides that:

243. Consistent with the requirements of . . . the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person . . . whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

Id., Preamble and Sec. 3(a).

244. Executive Order 13491 directed a review of U.S. interrogation practices in order to: improve the effectiveness of human intelligence-gathering; promote the safe, lawful, and humane treatment of individuals in United States custody, and of United States personnel who are detained in armed conflicts; and ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and domestic law. That review culminated in a report that proposed that the Obama Administration establish a specialized interrogation group to bring together officials from law enforcement, the U.S. Intelligence Community, and the Department of Defense to conduct interrogations in a manner that will

strengthen national security consistent with the rule of law. The report also made policy recommendations with respect to scenarios in which the United States moves or facilitates the movement of a person from one country to another or from U.S. custody to the custody of another country to ensure that U.S. practices in such transfers comply with U.S. law, policy, and international obligations, and do not result in the transfer of individuals to face torture. The President has reviewed and accepted the recommendations of the Task Force, and the U.S. Government is implementing the Task Force recommendations.

245. The Executive Order also prohibits torture and other cruel, inhuman, and degrading treatment and directs the use of only those interrogation techniques set forth in the Army Field Manual and other authorized federal law enforcement techniques. The Order provided that in relying on the Army Field Manual, “officers, employees, and other agents of the United States Government” . . . “may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation -- including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2–22.3, and its predecessor document, Army Field Manual 34–52 -- issued by the Department of Justice between September 11, 2001, and January 20, 2009.” (Section 3(c)). The Army Field Manual is consistent with Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and with the requirements of the Convention Against Torture.

246. In addition, the U.S. Supreme Court has recognized the applicability of Common Article 3 of the Geneva Conventions to the conflict with Al Qaeda, *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-631 (2006), and the United States announced in March 2011 that it supports the principles set forth in Article 75 of Additional Protocol I to the Geneva Conventions of 1949 as a set of norms that it follows out of a sense of legal obligation in international armed conflict. It has also urged the U.S. Senate to provide advice and consent to ratification of Additional Protocol II to the Geneva Conventions, which contains detailed humane treatment standards and fair trial guarantees that apply to any criminal proceeding associated with the conduct of non-international armed conflict. The United States has recently conducted an extensive review and concluded that current U.S. military practices are consistent with Protocol II, as well as with Article 75 of Protocol I, including the rules within these instruments that parallel the rules in the ICCPR.

247. The United States has continued to work to address concerns of the international community and civil society in regard to its actions abroad, recognizing that complex issues arise with respect to the relevant body of law that determines whether a State’s actions in the actual conduct of an armed conflict comport with international law. Under the doctrine of *lex specialis*, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in international humanitarian law, including the Geneva Conventions of 1949, the Hague Regulations of 1907, and other international humanitarian law instruments, as well as in the customary international law of armed conflict. In this context, it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing. These two bodies of law contain many similar protections. For example, prohibitions on torture and cruel treatment exist in both, and the drafters in each area have drawn from the other in developing aspects of new instruments; the Commentaries to Additional Protocol II to the Geneva Conventions make clear that a number of provisions in the Protocol were modeled on comparable provisions in the ICCPR. Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized.

Investigation into allegations of torture and other cruel, inhuman or degrading treatment:

248. The United States does not permit its personnel to engage in acts of torture or cruel, inhuman or degrading treatment of people in its custody, either within or outside U.S. territory. This principle is embodied in multiple U.S. laws and has been reaffirmed by President Obama with respect to all situations of armed conflict, as discussed above.

249. The Obama Administration has released, in whole or in part, more than 40 opinions and memoranda authored by the Department of Justice Office of Legal Counsel (OLC) concerning national security matters as a result of litigation under the Freedom of Information Act. These include four previously classified memoranda released on April 16, 2009, which addressed the legality of various techniques used to interrogate terrorism suspects detained by the CIA and which were revoked to the extent that they were inconsistent with Executive Order 13491.

250. The U.S. Government has vigorously investigated allegations of detainee abuse and has prosecuted individuals for engaging in such conduct. The Department of Defense, Department of Justice, and other components of the U.S. Government have investigated or prosecuted allegations of mistreatment of detainees held in connection with counterterrorism operations, including in administrative and criminal inquiries and proceedings.

251. The Department of Justice has successfully prosecuted two instances of detainee abuse in federal civilian court. In 2003, the U.S. Department of Justice brought criminal charges against David Passaro, a CIA contractor accused of brutally assaulting a detainee in Afghanistan in 2003. The CIA described his conduct as “unlawful, reprehensible, and neither authorized nor condoned by the Agency.” Passaro was convicted of felony assault and sentenced to eight years and four months in prison. In a second case, on February 3, 2009, Don Ayala, a U.S. contractor in Afghanistan, was convicted in U.S. federal court of voluntary manslaughter in the death of an individual whom he and U.S. soldiers had detained.

252. The U.S. Attorney’s Office for the Eastern District of Virginia continues to investigate various allegations of abuse of detainees. In addition, the Attorney General announced on August 24, 2009, that he had ordered “a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations.” Assistant U.S. Attorney John Durham assembled an investigative team of experienced professionals to recommend to the Attorney General whether a full investigation was warranted “into whether the law was violated in connection with the interrogation of certain detainees.” Following a two-year investigation, on June 30, 2011, the Justice Department announced that it was opening a full criminal investigation into the deaths of two individuals in CIA custody overseas, and that it had concluded that further investigation into the other cases examined in the preliminary investigation was not warranted.

Detention at Guantanamo Bay:

253. With respect to detention at Guantanamo Bay, Cuba, all U.S. detention operations, including at Guantanamo Bay, are consistent with Common Article 3 of the Geneva Conventions, and other applicable international laws. The Obama Administration remains committed to closing the detention facility at Guantanamo Bay. In addition, the Administration remains committed to maintaining a principled, credible, and sustainable policy for detention under the law of war, regardless of location.

254. Pursuant to Executive Order 13492, one of the three January 22, 2009 orders, a task force composed of representatives from the U.S. Departments of Defense, State, Justice,

and Homeland Security, the Office of the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff (the “Task Force”) completed, in January 2010, a comprehensive review of the 240 individuals detained at Guantanamo and subject to the review to determine whether those individuals should be transferred from U.S. custody, tried by the U.S. Government for criminal conduct, or whether another lawful disposition, consistent with the interests of justice, and the national security and foreign policy interests of the United States, was appropriate. As a result of that process, 126 individuals at Guantanamo were designated for transfer, 36 detainees were designated for potential prosecution, 48 detainees were designated for continued detention under the law of war based on a finding that they pose a national security threat that could not be mitigated sufficiently if transferred from U.S. custody at that time, and 30 detainees from Yemen were designated for “conditional detention” based on the current security environment in that country. Since the Task Force completed its review, 69 detainees have been transferred to 25 different destinations, including the transfer of 40 detainees to third countries due to humane treatment or other concerns in their home countries. One hundred and sixty-nine detainees remain at Guantanamo.

255. In 2008, the Supreme Court held in *Boumediene v. Bush* that individuals detained by the Department of Defense at Guantanamo Bay have the constitutional right to petition for habeas corpus relief. Since the decision in *Boumediene*, detainees have been challenging the legality of their detention via habeas corpus petitions in the U.S. Federal District Court in the District of Columbia, a court that is part of the independent judicial branch of the U.S. Government, and separate from the Executive Branch. Detainees have access to counsel of their choice and to appropriate evidence, and are assured a means of challenging the lawfulness of their detention before an independent court. Except in rare circumstances required by compelling security interests, all of the evidence relied upon by the government to justify detention in habeas proceedings is disclosed to the detainees’ counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in these cases to establish its legal authority to hold the detainees by a preponderance of the evidence.

256. Since *Boumediene*, all of the detainees at Guantanamo Bay who have prevailed in habeas proceedings under orders that are no longer subject to appeal have either been repatriated or re-settled, or have received offers of resettlement. Approximately 25 detainees have been released after winning their habeas cases in the federal courts.

257. In March 2011, President Obama issued Executive Order 13567, which, consistent with applicable law, provides periodic review for certain individuals detained at Guantanamo Bay. This periodic review process is designed to ensure that such individuals are detained only as long as necessary to protect against a significant threat to the security of the United States. The periodic review process includes a full review at least every three years, in addition to file reviews every six months. For each full review, the detainee may introduce relevant information, call certain witnesses, answer any questions posed by the Periodic Review Board, and present a written or oral statement. The detainee will be assisted by a government-provided personal representative to advocate on his behalf during the review process and, in addition, may be assisted by private counsel at no expense to the government. If a significant question is raised as to whether the detainee’s continued detention is warranted during a file review, a full review will be convened promptly. The Department of Defense has published guidelines to implement the periodic review process required by the President’s Executive Order and the NDAA.

258. The United States has also implemented enhanced procedural protections for military commissions, including: prohibiting the admission at trial of statements obtained by use of torture or cruel, inhuman, or degrading treatment, except against a person accused

of torture or such treatment as evidence that the statement was made; providing a right to exculpatory evidence and a right to present evidence, compel witnesses, compel favorable testimony, and challenge the government's evidence; stipulating that an accused in a capital case be provided with counsel "learned in applicable law relating to capital cases"; providing the accused with greater latitude in selecting his or her own military defense counsel; enhancing the accused's right to discovery; and establishing an enhanced system for handling classified information.

Detention in Afghanistan:

259. On March 9, 2012 the U.S. Government and the Government of Afghanistan signed a Memorandum of Understanding regarding the transfer of approximately 3,100 Afghan detainees at the Detention Facility in Parwan (DFIP) to Afghanistan in six months, and arrangements to transfer full responsibility for the facility. On April 8, 2012, the U.S. Government and the Government of Afghanistan signed a further memorandum of understanding regarding Afghanization of Special Operations, which confirmed that Afghan nationals newly detained by U.S. forces, outside special operations, as defined in the MOU, are to be released or transferred to Afghan authorities for prosecution or administrative detention in accordance with Afghan law.

260. Under current review procedures for individuals held at the DFIP, the U.S. Department of Defense reviews the basis for the detainee's detention 60 days after transfer to the DFIP, six months later, and periodically thereafter. These robust Detainee Review Board (DRB) procedures have improved the ability of the United States to assess whether the facts support the detention of each individual, and enhance a detainee's ability to challenge the basis of detention as well as the determination that continued detention is necessary to mitigate the threat posed by the detainee. For example, each detainee is appointed a personal representative, who is required to act in the best interests of the detainee and has access to all reasonably available information (including classified information) relevant to review board proceedings. Detainees can present evidence and witnesses if reasonably available, and the United States helps facilitate the collection of documentary evidence (such as letters from family and local villagers on behalf of detainees), as well as witness appearances in person, telephonically, or by video conferencing. The unclassified portions of review board proceedings are generally open, including to family, nongovernmental observers, and other interested parties. Determinations that a detainee meets the criteria for continued detention are reviewed for legal sufficiency by a Judge Advocate. Detainees are provided with the non-classified results of these reviews of their cases.

261. The United States also has expended considerable effort to support Afghan criminal trials for detainees captured and detained by coalition forces in Afghanistan and to support Afghan administrative review procedures similar to the U.S. DRB procedures. In June 2010, the U.S. and Afghan Governments partnered to establish the Justice Center in Parwan (JCIP), which enables the transition of U.S. military detainees into the Afghan criminal justice system through transparent trials conducted by the Government of Afghanistan under Afghan law. The JCIP has become the premier venue for the fair and legitimate prosecution of Afghan national security cases. U.S. Government officials provide mentoring, training, and assistance to Afghan judges, prosecutors, defense attorneys, and investigators at the JCIP. The courts at the JCIP—which include primary and appellate courts for adult and juvenile defendants—have processed 548 national security criminal cases over the past 18 months. The United States has also worked with coalition partners to establish monitoring procedures for detainees transferred from the International Security Assistance Force (ISAF) to Afghan custody.

Detention Provisions in the Fiscal Year 2012 National Defense Authorization Act:

262. Over the past three years, Congress has imposed a series of restrictions on the discretion of the Executive Branch to transfer or prosecute individuals held at Guantanamo Bay. As your letter observes, the NDAA continues prohibitions on the use of funds for the transfer of Guantanamo Bay detainees to the United States and the construction of detention facilities in the United States to house Guantanamo Bay detainees. The Administration opposed these restrictions as well as those imposing constraints on its ability to transfer detainees abroad, which you also note in your letter.

263. Although we will continue to interpret these provisions to avoid constitutional conflict, ultimately the Administration seeks repeal of these restrictions so that disposition of the remaining Guantanamo Bay detainees can move forward as appropriate, consistent with the national security interests of the United States and the interests of justice. These restrictions apply only to FY 2012 and the Administration will oppose efforts to impose such restrictions in the FY 2013 NDAA.

264. We also note that Section 1021 of the NDAA creates no new detention authorities; it simply reaffirms the President's existing authority under the 2001 Authorization for Use of Military Force (AUMF), as informed by the laws of war, to detain certain individuals until the end of the hostilities authorized by the AUMF. Section 1021(d) states plainly that "[n]othing in [Section 1021] is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force." As the President has made clear, we will interpret Section 1021 in a manner that ensures that any detention it authorizes complies with our Constitution, the international law of war, and all other applicable law.

265. With respect to Section 1022 of the NDAA, the temporary military custody requirement in that section applies to a very narrow category of terrorism suspects and can be waived. President Obama made clear in his December 31, 2011 signing statement that he "reject[s] any approach that would mandate military custody where law enforcement provides the best method of incapacitating a terrorist threat." He also emphasized that under no circumstances will he accept an interpretation of the NDAA that purports to establish a rigid, across-the-board requirement for military detention, or that compromises the U.S. ability to conduct counter-terrorism investigations in the manner that it has done for the past three years.

266. On February 28, 2012, the President issued a directive that sets out procedures for determining who is subject to Section 1022 and when it should be waived. It explains when and how any military custody determination will be made, exercises the waiver of the military custody requirement in several categories of cases, and sets out procedures for exercising additional case-by-case waiver authority in the interest of national security. These procedures are designed to ensure that Section 1022 is implemented in a manner consistent with all applicable law, the President's signing statement, and the flexibility provided in the statute. They also recognize that the U.S. civilian criminal justice system and our law enforcement officials, often with cooperation from our partners abroad, have been invaluable in disrupting terrorist plots and incapacitating terrorists through prosecution and incarceration, and will continue to be essential to our counterterrorism strategy going forward.

267. With respect to questions concerning the legal and policy framework for U.S. military operations against Al-Qae'da and associated forces, including U.S. targeting practices, reflective of the importance this Administration has placed on transparency, the United States has publicly discussed such issues several times in the last year. We would refer you in particular to the speeches by Assistant to the President John O. Brennan at the Woodrow Wilson International Center for Scholars on April 30, 2012; Attorney General

Eric Holder at Northwestern University School of Law on March 5, 2012; and Department of Defense General Counsel Jeh Johnson at Yale Law School on February 22, 2012.

268. The United States welcomes a continuing, open dialogue with you, and we hope that this information helps to underscore the United States' abiding commitment to the humane treatment of individuals while countering terrorism. We are committed to the implementation of the General Assembly's Global Counterterrorism Strategy that makes clear that strong and effective counterterrorism policies and practices are not only compatible with human rights, but can best succeed when they are grounded in human rights and the rule of law. The United States' commitment to UN efforts to advance Member States' protection and promotion of human rights and the rule of law at home and abroad is demonstrated in part by our forthcoming \$1 million grant to the UN Counterterrorism Implementation Task Force to deliver training, technical advice and capacity building in this regard. We continue to work closely with UN Member States to advance the protection and promotion of human rights and the rule of law at home and abroad, and we thank you for your actions in support of these shared goals.
