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### Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

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

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

### *Summary*

The present report is submitted pursuant to Human Rights Council resolution 19/19. The report highlights relevant developments that have taken place since the last report of the High Commissioner on the protection of human rights and fundamental freedoms while countering terrorism, notably through initiatives of the General Assembly at its sixty-seventh session; relevant developments within the Counter-Terrorism Implementation Task Force (CTITF); other recent activities of the Office of the High Commissioner for Human Rights; as well as relevant recent activities of the Security Council Committee and its Executive Directorate.

The report then raises some of the challenges to due process and the right to fair trial in the counter-terrorism context. Observations, as well as challenges and good practice recommendations, are distilled as illustrative highlights of the discussions at the first three regional expert symposia organized by the Office of the High Commissioner for Human Rights, as Chair of the CTITF Working Group on Protecting Human Rights While Countering Terrorism, in collaboration with the CTITF Office.

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## **I. Introduction**

1. In its resolution 19/19, the Human Rights Council took note with appreciation of the report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/50), as well as the work to implement the mandate given to her by the Commission on Human Rights in its resolution 2005/80 and the General Assembly in its resolution 60/158, and requested the High Commissioner to continue her efforts in this regard. The Council also encouraged the United Nations bodies, agencies, funds and programmes involved in supporting counter-terrorism efforts to continue to facilitate the promotion and protection of human rights and fundamental freedoms, as well as due process and the rule of law, while countering terrorism.

2. The present report is submitted in accordance with Council resolution 19/19. It highlights relevant developments that have taken place since the submission of the High Commissioner's previous report, notably through initiatives of the General Assembly at its sixty-seventh session, including the review of the United Nations Global Counter-Terrorism Strategy and the high-level meeting on the rule of law at national and international levels; relevant developments within the Counter-Terrorism Implementation Task Force (CTITF); other recent activities of the Office of the High Commissioner for Human Rights (OHCHR); as well as relevant recent activities of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism (Counter-Terrorism Committee) and its Executive Directorate. In follow-up to the High Commissioner's previous report to the Council on the protection of human rights and fundamental freedoms while countering terrorism, a number of specific concerns are then raised, related to due process and the right to fair trial in the counter-terrorism context. Many of these concerns were addressed during the course of discussions at three regional expert meetings recently organized by the CTITF Working Group on Protecting Human Rights While Countering Terrorism. Highlights of those discussions are therefore reflected in section III. Conclusions and recommendations related to the protection of human rights and fundamental freedoms while countering terrorism are summarized in section IV.

## **II. Recent developments**

### **A. Activities of the General Assembly**

#### **Review of the United Nations Global Counter-Terrorism Strategy**

3. Through the adoption of resolution 66/282 of 28 June 2012, the General Assembly concluded its third biennial review of the United Nations Global Counter-Terrorism Strategy. The High Commissioner welcomes the reaffirmation of the Global Strategy as a clear commitment by Member States to ensuring the promotion and protection of human rights and the rule of law as the fundamental basis of the fight against terrorism. Resolution 66/282 emphasizes the importance of an integrated and balanced implementation of all four pillars of the Global Counter-Terrorism Strategy. In so doing, it reasserts the fundamental role played by the promotion and protection of human rights and fundamental freedoms, as reflected in pillar IV, in the implementation of all pillars of the Strategy. The High Commissioner is also encouraged by the explicit recognition by Member States of the role that civil society can play in the implementation of the Strategy, as well as their commitment to supporting victims of terrorism.

**High-level meeting on the rule of law at the national and international levels**

4. On 24 September 2012, following on its resolution 65/32, the General Assembly convened a high-level meeting on the rule of law at the national and international levels. In addressing Member States at the high-level meeting, the High Commissioner underscored the importance of the rule of law as the backbone of legal protection of human rights, and recalled the four main components of the rule of law, namely legality, equality, accountability and participation. She also highlighted the critical importance of national ownership of rule of law principles. States must embrace nationally what they have committed to internationally by ensuring that international norms and standards are the foundation of the rule of law at the national level, including in their efforts to prevent and counter terrorism.

5. At the high-level meeting, Heads of State and Government adopted a Declaration on the rule of law at national and international levels,<sup>1</sup> which sets out a common understanding of definitional elements and the scope of the rule of law. Importantly, the Declaration recognizes that the rule of law applies to all States equally, as well as to international organizations, including the United Nations and its principal organs. It underscores that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.

6. The commitments reflected in the Declaration all have an important bearing on efforts to prevent and counter terrorism, including a specific reaffirmation that all counter-terrorism measures must be in compliance with the obligations of States under international law, in particular human rights law. In this regard, the Declaration reinforces the commitments made by Member States under the Global Counter-Terrorism Strategy.

7. Many Member States and Observers used the occasion of the high-level meeting to make specific, time-bound, voluntary pledges,<sup>2</sup> either individually or jointly, spelling out concrete steps that they would take to advance the rule of law. The list includes pledges towards, inter alia: the ratification of international human rights and other treaties; strengthening rule of law-based criminal justice systems; support for the International Criminal Court; the incorporation of international crimes into national legislation; improving the international framework on mutual legal assistance; improving access to justice for disadvantaged groups, including through greater access to legal aid; ensuring accountability for human rights violations and crimes; combating corruption; support for, and protection of, the human rights of victims; and strengthening of the administration of justice. Many of these measures would contribute in important ways towards strengthening the effectiveness of a rule of law-based, criminal justice approach to countering terrorism, in compliance with human rights.

8. Through the Declaration, Member States have urged the Security Council to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are maintained and further developed. A number of States have also voluntarily pledged specifically to submit to the Security Council concrete suggestions on ways to strengthen the United Nations sanctions system by further improving fair and clear procedures, especially with regard to enhancing the scope and mandate of the Ombudsperson procedure. The High Commissioner has consistently advocated for a sanctions regime, including any procedure for listing and de-listing, that is transparent,

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<sup>1</sup> A/RES/67/1.

<sup>2</sup> Some of these pledges draw on recommendations made by the Secretary-General in the programme of action detailed in "Delivering justice: programme of action to strengthen the rule of law at the national and international levels" (A/66/749).

based on clear criteria, and underpinned by an appropriate, explicit, and uniformly applied standard of evidence. This should include an effective, accessible independent review mechanism, capable of providing effective reparation in cases where human rights are violated.<sup>3</sup> The High Commissioner urges Member States to give due consideration to these criteria when developing suggestions for the Council's consideration.

## **B. Activities of the United Nations Counter-Terrorism Implementation Task Force**

9. The Office continues to lead the CTITF Working Group on Protecting Human Rights While Countering Terrorism, with the aim of supporting Member States' efforts to enhance their knowledge, understanding and implementation of the international human rights framework and the rule of law in the fight against terrorism, and to support them in their efforts to implement measures included in Pillar IV of the United Nations Global Counter-Terrorism Strategy.

10. In 2011 and 2012, the CTITF Working Group on Protecting Human Rights While Countering Terrorism organized three in a series of four regional expert workshops on ensuring the right to fair trial and due process in the context of countering terrorism, with a fourth workshop scheduled for early 2013. Details including highlights of the discussions at the three workshops held to date are reflected in section III below.

11. In October 2012, the CTITF Working Group on Protecting Human Rights While Countering Terrorism also launched a new project on human rights training and capacity-building for law enforcement officials involved in counter-terrorism-related activities. With support from donor governments, the project aims at assisting Member States in their efforts to ensure that law enforcement policies and activities are consistent with their obligations under international human rights law. First steps will include developing training modules and other materials, and establishing a roster of experts who can provide training and technical advice to States as needed.

12. The CTITF Working Group on Protecting Human Rights While Countering Terrorism has also developed a series of human rights reference guides, which aim to provide clear and practical guidance on human rights-compliant counter-terrorism measures in selected areas and to form the basis for training at the national and regional levels. The United Nations Counter-Terrorism Centre (UNCCT) has approved the allocation of funds for the translation into all official United Nations languages and publication of the existing two Basic Human Rights Reference Guides, *The Stopping and Searching of Persons* and *Security Infrastructure*. Funds have also been approved for the development of further guides on detention in the context of countering terrorism; conformity of national counter-terrorism legislation with international human rights law; proscription of organizations; and the right to a fair trial and due process in the context of countering terrorism.

13. In September 2012, the Working Group adopted its annual workplan, through which it will seek funding for the organization of a series of regional workshops on the promotion of accountability in the counter-terrorism context, applying a victim-centred approach; taking stock of counter-terrorism legislation adopted at national level since 11 September 2001, and the impact of such legislation on the enjoyment of human rights; and the implementation at the practical level of the Basic Human Rights Reference Guide on the right to a fair trial and due process in the context of countering terrorism. The Working

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<sup>3</sup> See also Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism to the General Assembly (A/67/396).

Group will also continue to: facilitate the exchange of information on priority human rights concerns, as well as good practice examples on the protection of human rights in the context of counter-terrorism, drawing on experiences at national and regional level; assess the support and assistance currently given to Member States to ensure the promotion and protection of human rights in the context of counter-terrorism; identify gaps and weaknesses, and develop proposals for strengthening support to Member States towards the protection of human rights in the context of counter-terrorism at national level. In doing so, the Working Group will cooperate with civil society organizations.

14. In the context of the role of OHCHR in the CTITF Working Group on Supporting and Highlighting Victims of Terrorism, the Assistant Secretary-General for Human Rights participated as a panellist in a Panel event on the rights of victims of terrorism. The event, which took place in New York on 2 April 2012, was organized by the Permanent Mission of Spain and the CTITF Office. Throughout the reporting period, the Office has continued to highlight human rights concerns and endeavoured to mainstream human rights norms and standards in the work of this Working Group, within the framework provided by the Counter-Terrorism Strategy and General Assembly resolution 65/221.

15. As a member of the CTITF Working Group on Border Management Relating to Counter-Terrorism, the Office has provided extensive human rights-related input to the Online Compendium of Legal Instruments, Standards and Recommended Practices Relating to Border Management, which was launched on 18 July 2012. The Office also sought to ensure that human rights issues are given due attention in the joint CTITF and United Nations Regional Centre for Preventive Diplomacy for Central Asia initiative towards a plan of action for the implementation of the Global Counter-Terrorism Strategy in Central Asia, which was adopted on 30 November 2011. The Office has participated in regular CTITF briefings to Member States on current activities of CTITF member entities and in CTITF Inter-Agency Coordination meetings.

### **C. Other activities of the Office of the High Commissioner for Human Rights**

16. At the invitation of the Swiss Federal Department of Foreign Affairs, the Office participated in the Conference between the Members of the Global Counterterrorism Forum (GCTF) and the United Nations as well as Other International, Regional and Sub-regional Organizations, which was held in Interlaken from 22 to 24 February 2012. At that meeting, OHCHR drew attention to the various ongoing initiatives within the United Nations human rights system of relevance to GCTF and its various initiatives. In May 2012, OHCHR participated in the third meeting of the GCTF Working Group on Criminal Justice and the Rule of Law in The Hague. In the course of discussions at both meetings, the Office highlighted relevant OHCHR initiatives, including capacity-building activities for judges, prosecutors, defence lawyers and law enforcement agencies, as well as the work of international human rights treaty bodies, the human rights special procedures and the universal periodic review. These mandates play a critical role in assisting States to ensure that their counter-terrorism efforts are both effective and human rights-compliant, and offer substantive and practical guidance of direct relevance to the Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector adopted by GCTF.<sup>4</sup> In this regard, it should be noted that an explicit linkage between these Good

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<sup>4</sup> These include, for example, the Report of the High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/50), and the Report of the Special Rapporteur on the promotion and protection of human rights and

Practices and specific international human rights law and standards would help to enhance their legitimacy and ensure, in line with the introduction to the Rabat Memorandum, that counter-terrorism measures adopted at national level on the basis of the Good Practices are grounded in human rights obligations and the rule of law. The Office has also contributed substantively to other GCTF initiatives, as appropriate, with a view to supporting efforts to ensure these initiatives are grounded in, and cohere with, international human rights law and standards.<sup>5</sup> The Office participated in a stocktaking exercise on criminal justice and rule of law approaches to counter-terrorism programming in Southeast Asia, which was initiated by the GCTF Working Group on Southeast Asia Capacity Building.

17. The Office continues to collaborate closely with the Security Council Counter-Terrorism Committee and its Executive Directorate. In April 2011, OHCHR contributed actively to a special meeting on the prevention of terrorism of the Counter-Terrorism Committee with international, regional and subregional organizations in Strasbourg, an event which was co-organized by the Council of Europe. In September 2011, the Office participated in a meeting in New York of the Counter-Terrorism Committee to commemorate the adoption of Security Council Resolution 1373 and the establishment of the Committee. OHCHR representatives also participated in a regional workshop organized by CTED on implementation of resolution 1624 (2005), held in Nairobi in November/December 2011, and in a practitioners' seminar organized by CTED on the role of the prosecutor in terrorist cases, in Algiers in June 2012.

18. Other activities have included the Office's participation in a civil society event on national security detentions in Afghanistan and Pakistan, held in Istanbul from 26 to 29 January 2012. In March 2012, OHCHR contributed to a conference in Copenhagen on Ensuring Respect for Human Rights and the Rule of Law while Countering Terrorism: Criminal Prosecution of Terrorist Offences, held under the auspices of the Danish European Union Presidency. On 8 May 2012, the Office contributed to a panel discussion on United Nations reform, the rule of law and counter-terrorism in New York. On 9 and 10 October 2012, OHCHR participated in a workshop in London organized jointly by the United Nations Office on Drugs and Crime (UNODC) and the Commonwealth Secretariat for judges of the Nigerian Federal High Court on issues related to the adjudication of terrorism-related cases. On 12 and 13 November 2012, OHCHR participated in a meeting held in Vienna by the Organization for Security and Co-operation in Europe (OSCE) on Strengthening Regional Co-operation, Criminal Justice Institutions and Rule-of-Law Capacities to Prevent and Combat Terrorism and Radicalization that leads to Terrorism.

#### **D. Other developments: activities of the Security Council Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate**

19. The Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate (CTED) continue to take account of relevant human rights concerns in their work programmes focused on the implementation of Security Council resolutions 1373 (2001) and 1624 (2005). Under the chairmanship of India since January 2011, the

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fundamental freedoms while countering terrorism entitled "Ten areas of best practices in countering terrorism" (A/HRC/16/51).

<sup>5</sup> This has included substantive input to the draft Algiers Memorandum on Good Practices on Preventing and Denying the Benefits of Kidnapping for Ransom by Terrorists and Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings as well as the draft GCTF Victims of Terrorism Action Plan, all of which had been prepared by the GCTF Working Group on Countering Violent Extremism.

Committee has held thematic discussions on issues relevant to the resolutions, all of which have referred to relevant human rights aspects. This has included reference to the need to take human rights into account in handling requests for extradition and mutual legal assistance, as well as the importance of ensuring fair treatment in the freezing of assets of persons believed to be involved in the commission of terrorist acts. Relevant human rights issues were addressed in global surveys prepared by the Committee and submitted to the Security Council on implementation by States of resolutions 1373 (2001) and 1624 (2005). Furthermore, in conformity with Security Council resolution 1963 (2010), CTED ensures attention to relevant human rights issues in the context of country visits organized with the consent of the visited Member State.

20. In line with General Assembly resolution 66/171 and Human Rights Council resolution 19/19, the Committee and its Executive Directorate continued to liaise with the Office of the High Commissioner for Human Rights, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and other human rights entities. CTED held an in-house brainstorming session on the human rights aspects of implementation of resolution 1624 (2005), in October 2011, to which it invited the Special Rapporteur on the promotion and protection of human rights while countering terrorism, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on freedom of religion or belief. CTED also continued its active contribution to the CTITF Working Group on Protecting Human Rights While Countering Terrorism, chaired by the Office, including through its participation in the three regional workshops on fair trial and due process in the context of counter-terrorism organized by OHCHR as Chair of the working group.

### **III. Due process and the right to fair trial in the context of counter-terrorism**

21. In her report (A/HRC/16/50) to the Council, the High Commissioner expressed her deep concern over measures adopted by some States in their fight against terrorism which continue to infringe on basic standards of fair trial or otherwise limit access to the judicial process. These measures have included the adoption and application, in many States, of legislation containing overly broad and vague definitions of terrorist offences. Such laws fail to comply with the principle of legality<sup>6</sup> as they do not provide for reasonable notice of what actions they cover, or are so broad that they cover actions which either should not reasonably be deemed terrorist in nature, or considered to be crimes at all. The breadth and scope of such legislation has also allowed for arbitrary and discriminatory enforcement by authorities, and has led, in many cases, to infringements of the rights to freedom of expression, assembly, association and religion or belief, as well as violations of due process-related rights, including the right to fair trial.<sup>7</sup>

22. In addition, in response to the challenges posed by the threat of terrorism, some States have sought to bypass the criminal justice system to deal with counter-terrorism cases. This has been done through the use of administrative counter-terrorism measures, including administrative detention, control orders, terrorist listings and the use of immigration and deportation laws instead of criminal justice systems. Authorities in some States have resorted to detaining people accused of terrorism without respect for the

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<sup>6</sup> International Covenant on Civil and Political Rights, art. 15.

<sup>7</sup> *Ibid.*, arts. 9 (3) and 14.



safeguards that are due under international law to all persons deprived of their liberty.<sup>8</sup> In some jurisdictions, the permissible period for pre-charge detention has been extended for persons suspected of terrorist activity, while the length of time a person may be held either without judicial authorization or review of reasons for detention has been increased. The result has been that in many places, individuals accused of terrorist activity have been held for prolonged periods without charge or trial, in some cases without recourse to independent judicial review. Such practices may violate the right to liberty and to be free from arbitrary detention, under international law.<sup>9</sup> They also increase the risk of torture and other ill-treatment, and impede accountability where such violations occur. Lengthy pre-trial detention also may violate the presumption of innocence, thereby jeopardizing the right to fair trial.

23. Other policies and practices have also challenged the right to fair trial for persons accused of terrorist activity. The use of anonymous witnesses and the expansion of the type of evidence that can be withheld from the defence in cases against persons suspected of terrorist activity are practices which have challenged the right to fair trial in a number of States. In some jurisdictions, the use of evidence including confessions obtained through torture or ill-treatment has been permitted, in violation of international human rights law. A number of countries have established extraordinary or specialized chambers within the ordinary courts, or special courts, to conduct terrorism-related trials, at times in a manner that is inconsistent with human rights standards, including as this relates to the right to a fair trial by an independent and impartial tribunal, and also without sufficient due process guarantees for the accused.<sup>10</sup>

#### **Regional expert symposia on fair trial and due process in the counter-terrorism context**

24. In order to address these challenges and provide good practice guidance on due process and the right to fair trial in the context of counter-terrorism, as Chair of the CTITF Working Group on Protecting Human Rights While Countering Terrorism, the Office has jointly organized a series of regional expert symposia in collaboration with the CTITF Office. Through these meetings, we have sought to facilitate meaningful participation of regional and national experts and practitioners working on issues related to due process in the context of counter-terrorism, who would provide first-hand, practical knowledge of the challenges and complexities encountered, as well as good practice experiences to be recommended.

25. The first expert regional symposium took place in February 2011, in Bangkok, for the Southeast Asia region. A second meeting was held in February 2012 in Istanbul, for the Middle East and North Africa region, and a third in Brussels in July 2012, for the European region. A final expert meeting is scheduled to take place in early 2013.

26. The objectives of these regional expert symposia were to assess and analyse the obstacles and challenges to implementing the requirements for fair trial as set out in international human rights law and standards; to identify other key rights to secure the fundamental requirements of a right to a fair trial in the context of counter-terrorism; and to exchange experiences regarding good practices with respect to the protection of human rights in this regard. The symposia also provided an opportunity to consider the role that the regional counter-terrorism instruments have played, where relevant, and the extent to which

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<sup>8</sup> International humanitarian law provides for substantially similar protections for the trial of persons in the context of armed conflicts. See A/HRC/16/50, para. 30.

<sup>9</sup> International Covenant on Civil and Political Rights, art. 9.

<sup>10</sup> See report of the High Commissioner for Human Rights (A/HRC/16/50).

these cohere with applicable international human rights standards. They have also facilitated consideration of questions of accountability for past abuses, both at individual and institutional levels, as well as forward-looking discussions on how institutions and authorities can be both effective in their counter-terrorism objectives while safeguarding due process-related human rights of all persons within their jurisdiction.

27. The outcome of the expert symposia will contribute to the publication, by the OHCHR-led CTITF Working Group on Protecting Human Rights While Countering Terrorism, of a basic human rights reference guide. Drawing on good practice experiences from different regions, the publication will provide guidance to Member States and others on how best to ensure due process and the right to fair trial in the context of counter-terrorism.

28. For the purposes of the present report, certain common general themes and observations, as well as challenges and good practices, are distilled as illustrative highlights of the discussions at the first three regional expert symposia.

### **General observations**

29. A cross-cutting observation made by participants in all three regional symposia was that protecting human rights and ensuring respect for the rule of law itself contributes to countering terrorism, notably by creating a climate of trust between States and those under their jurisdiction, as well as to ensuring, for example, that evidence is excluded for reasons of having been obtained in a manner inconsistent with human rights. Conversely, violating human rights – including due process and the right to fair trial in the counter-terrorism context – can be self-defeating as this can contribute to conditions conducive to the spread of terrorism.

30. There was broad recognition that international human rights instruments are essential to effective counter-terrorism measures at national, regional and international levels. In this regard, it is recalled that the Global Counter-Terrorism Strategy explicitly recognizes that to be effective, counter-terrorism measures undertaken must be consistent with a State's obligations under international law, including international human rights law. The clearest expression of these obligations is in the international human rights treaties to which States are parties. States are therefore strongly encouraged to become party to all of these instruments, as part of a holistic and effective counter-terrorism strategy. Doing so also gives the State credibility and legitimacy in the eyes of the community, and provides clear, internationally accepted baselines for State conduct.

31. Discussions at the expert regional symposia also affirmed the primacy of rule of law-based, criminal justice approaches to counter-terrorism. Through good practice and experience, there is increasing recognition that regular systems of criminal justice can and should be used for the trial of terrorist suspects. The prosecution of perpetrators of terrorist acts in compliance with international human rights standards is critical to preventing and combating terrorism. It ensures accountability by bringing perpetrators to justice, as well as providing a remedy for victims of terrorism and serving as a deterrent for potential acts of terrorism. A rule of law-based, criminal justice response to terrorism also helps to ensure that institutions at national, regional and international levels are accountable, effective and legitimate. This principle is recognized in the Global Counter-Terrorism Strategy, which underscores the important role of the United Nations in "strengthening the international legal architecture by promoting the rule of law, respect for human rights, and effective

criminal justice systems, which constitute the fundamental basis of our common fight against terrorism.”<sup>11</sup>

### **Challenges and good practices**

32. Discussions at each of the three regional expert symposia also highlighted some of the specific challenges to due process and the right to fair trial in the counter-terrorism context, as well as principles and good practices based on the insights, experiences and expertise of participants.

#### *Prohibition of torture and ill-treatment*

33. For instance, participants were of the view that the heightened risk of torture and ill-treatment in the counter-terrorism context was amongst the most serious of human rights challenges. Discussions highlighted the *ius cogens* and non-derogable nature – even in times of emergency – of the absolute prohibition of torture and other forms of cruel, inhuman, degrading treatment or punishment; of the obligation of non-refoulement; and of the core elements of the right to fair trial, as further reinforcing the importance of strictly upholding these human rights in the counter-terrorism context. Effective oversight and monitoring mechanisms, including through ratification and implementation of the Optional Protocol to the Convention against Torture, were noted as critical to their prevention. Specific measures such as routine medical examinations upon entering and leaving detention, were noted as representing critical safeguards. The important contribution made by the United Nations Subcommittee on the Prevention of Torture to broadening knowledge of best preventive practice and sharing international experiences was highlighted.

#### *National legislation*

34. The enactment and implementation of broadly formulated national counter-terrorism legislation, as well as the abusive use of counter-terrorism legislation by authorities to curb otherwise legitimate activity, was raised as a common concern. Participants noted that counter-terrorism laws and implementing measures must be specific to the countering of conduct which is truly terrorist in nature, such that these laws and measures meet the requirements of the principle of legality. The urgent need for a universally recognized, precise and narrow definition of what constitutes an act of terrorism, as a step towards protecting against abuse at national levels, was highlighted in this regard.

#### *Presumption of innocence*

35. Discussions at each of the symposia highlighted the critical importance of the right to fair trial in the counter-terrorism context of respect for the right to be presumed innocent until proved guilty according to law – and to be treated as presumed innocent.<sup>12</sup> This basic principle requires the burden to remain with the prosecution to prove the guilt of the defendant beyond reasonable doubt. As specified by the Human Rights Committee, the presumption of innocence also binds the executive, which must not prejudge a case by expressing public views as to the guilt of the accused.<sup>13</sup> In the counter-terrorism context, lengthy pretrial detention also may violate the presumption of innocence where it has the effect of punishing a detainee before his or her trial.

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<sup>11</sup> Global Counter-Terrorism Strategy, Plan of Action: Pillar IV, para. 5.

<sup>12</sup> International Covenant on Civil and Political Rights, art. 14 (2).

<sup>13</sup> See for example Communication No. 770/1997, *Gridin v. Russia* (Views adopted on 20 July 2000).

*Equality of arms*

36. The principle of equality of arms was also highlighted as critical to ensure respect for the right to fair trial in the counter-terrorism context. This principle requires that the same procedural rights are provided to all parties, unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.<sup>14</sup> It relates, notably, to a number of aspects of fair trial such as access to evidence, participation in the hearing, and effective legal representation. Discussions highlighted some of the challenges to this fundamental tenet of the right to fair trial, including the broad application of national security or "State secrets" doctrine to prevent disclosure of information; the use of intelligence and secret information as evidence; and the use of anonymous witnesses. The use in some jurisdictions of "special advocates", where the special advocate is not permitted – except under limited circumstances and with the permission of the court – to communicate with anyone after receipt of closed evidence, was highlighted as problematic rather than providing for a solution for the balancing of legitimate national security interests and the rights of the defendant to due process and a fair trial. The lack of adequate resources for such advocates, including research support by staff with appropriate language skills and security clearance, was also noted.

*Intelligence-led law enforcement and the use of intelligence*

37. Discussions referred to concerns over the increased reliance on intelligence and the advent of "intelligence-led law enforcement", which has contributed to the expansion of the authority of intelligence agencies, often without adequate consideration for the due process safeguards necessary to protect against abuses. Where the distinction between law enforcement and intelligence agencies has been blurred because intelligence agencies are endowed with powers normally reserved for law enforcement, such as the powers of investigation, arrest, detention, and interrogation, these powers must be exercised in compliance with the same standards as those applicable to law enforcement, in particular international human rights law.

38. Participants noted the tensions that inevitably arise in relation to the use of intelligence for trial purposes. Intelligence services operate on the principle that information should not be disclosed unless for compelling reasons, whereas trials operate on the basis of the need for full disclosure. Indeed, the use of confidential or anonymous evidence may violate the right to fair trial, unless such use is justified as required in order to pursue a legitimate aim, such as the protection of public safety or the maintenance of national security, and meets criteria including proportionality. Even where such circumstances exist, it was recalled that a defendant or respondent must always be provided with sufficient information so as to answer the case. Equally, where it is sought to introduce at trial intelligence information that has not been obtained in a manner consistent with human rights guarantees, the criminal procedure as a whole is undermined. Justice systems have to balance these tensions and courts – not the executive – must determine whether State secrecy claims are valid in the context of criminal trials. In any event, State secrecy should not be invoked in such a way as to prevent accountability or deny victims their right to effective remedy.

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<sup>14</sup> Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 13. The Committee has explicitly acknowledged that the principle is applicable to criminal and non-criminal proceedings alike.

*Protection of witnesses*

39. In this regard, participants referred to the importance of innovative provisions for the protection of witnesses that are consistent with fair trial, in view of the particular security challenges often presented in counter-terrorism contexts. Good practice examples were provided to suggest that, consistent with fair trial requirements, a witness could be protected while still providing evidence relevant for trial, through for example video testimony from remote locations or distortion of oral testimony. To ensure a fair trial, a court might sometimes need to attach less weight to a particular witness's statement if, for example, it was not possible to cross-examine the witness, and especially if this affected the ability to test the credibility of the witness.

*Independent judiciary*

40. Discussions also emphasized the indispensable role of an independent judiciary in ensuring lawful State conduct, both as a matter of domestic law and in terms of applicable international instruments. The independence of the judiciary is critical to its credibility, legitimacy and effectiveness in ensuring fair trials in the counter-terrorism context. A judiciary that is, and is seen by the population to be, independent is more likely to be able to administer justice fairly and credibly, and to have the confidence of populations in the quality of its decisions. A counter-terrorism strategy that lacks this key check and balance will be sharply diminished in its effectiveness.<sup>15</sup>

*Due process for individuals deprived of their liberty*

41. Recognition of the rights of an individual to know the reasons why he or she has been detained; the right of the families of a detainee to know where he or she is being held; and the right of a detainee to have access to a lawyer, and to challenge the lawfulness of his or her detention, were noted as critical to the right to fair trial.<sup>16</sup> While all of the basic due process rights are in principle available to terrorism suspects, in the same fashion as to others accused of criminal activity, participants noted that in many jurisdictions this basic principle is neither fully acknowledged nor respected in practice. The result has been instances of clear miscarriages of justice, including issues of mistaken identity, which respect at the outset for these elements of the right to fair trial would have mitigated. Discussions highlighted the importance of prompt access to legal counsel also as a measure to prevent torture and other ill-treatment. As such treatment may also result in a forced confession, respect for these guarantees is particularly important to the right to fair trial. Participants also highlighted the importance of family notification, including in circumstances where the suspect arrested was the main breadwinner, whose family would soon be confronted with destitution unless other arrangements for care could be implemented.

42. Participants also underscored the importance of recognition in practice of the legitimacy of counsel's independent role in defending persons accused of terrorism, as well as of adequate remuneration for legal aid services by defence counsel. Alongside an independent judiciary, respect for the legitimate and independent role of legal counsel was seen by participants as the second cornerstone of an effective adversarial process, this required counsel being permitted, within the bounds of the law, to raise all arguments in

<sup>15</sup> The importance of the independence, impartiality and integrity of the judiciary as a prerequisite for upholding the rule of law, as well as of ensuring non-discrimination in the administration of justice, was recently reaffirmed by all Member States through the General Assembly Declaration on the rule of law at national and international levels (A/RES/67/1).

<sup>16</sup> International Covenant on Civil and Political Rights, arts. 9 (3) and 14.

favour of the accused, even if this led to a lengthier or more complex case for the court to address. It was improper for counsel to be accused of terrorism or fostering terrorism solely for taking the most active defence stance possible on behalf of a suspect, or for expressing criticism of inappropriate conduct by the State or its law enforcement authorities. Without respect for counsel's role, a credible trial process was difficult to conceive. It was noted that effective recognition of this principle required corresponding levels of appropriate remuneration, if necessary through the legal aid services of the State.

43. Some States have circumvented additional guarantees, such as judicial review of pretrial detention afforded to persons charged with a crime, by redefining the nature of detention as "administrative" on the grounds of a perceived future threat by the individual to national security, including in situations where the individual has been acquitted in a criminal trial. Participants acknowledged the ready potential for abuse in systems of preventative and administrative detention, and the ease with which such bases for detention can be extended to broader categories. While there may be extreme cases where these forms of detention can be appropriate in very specific circumstances, they need to be clearly defined in law and subject to judicial review as well as periodic independent review to ensure that they are ceased in respect of any individual as soon as no longer strictly necessary. Experience has shown that widespread use of this form of detention can lead to distrust and loss of confidence in the law enforcement and security forces. Greater efforts are needed to limit the use of preventive/administrative detention only to highly exceptional and tightly regulated situations. Participants also highlighted that the right to a fair trial presupposes a right to a speedy trial if the individual concerned is suspected of a terrorist crime recognized under international human rights law. Delays in the trial process could undermine additional guarantees under article 9 (3) of the International Covenant on Civil and Political Rights afforded to detained persons and increase the risk of potentially indefinite detention in violation of international human rights law.

*Risk of "exceptional measures"*

44. The risk of "exceptional measures" becoming normalized was addressed as an overarching concern. This includes the adoption of exceptional counter-terrorism legislation which then becomes permanent, especially where this is not a stand-alone piece of legislation and instead amends existing criminal laws and procedures intended to operate in "normal" situations, or the use of special courts to try terrorist and other criminal cases in circumstances which may not warrant such use. Counter-terrorism measures introduced in moments of crisis or extreme political stress, and which are intended as short-term measures, can readily become entrenched with the passage of time and resorted to routinely by law enforcement authorities. There were also examples where far-reaching counter-terrorism tools, designed to address a particular deficit in the counter-terrorism context, became applied to other areas or used as generalized law enforcement powers.

45. It was suggested that regular review of the human rights compliance of counter terror laws and practices is therefore crucial. As far as possible, counter-terrorism law and practice should be consistent with the principle of normalcy. If any special measures are adopted, they should also be subject to periodic review to ensure compliance with human rights and avoid their entrenchment. Discussants stressed the importance of review mechanisms in order to ensure that both the provisions and actual implementation of counter-terrorism laws are specific, necessary, effective and proportionate.<sup>17</sup>

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<sup>17</sup> See Report of the Special Rapporteur (A/HRC/16/51) (see note 4 above), para. 20: "Regular review and the use of sunset clauses are best practices helping to ensure that special powers relating to the countering of terrorism are effective and continue to be required, and to help avoid the

46. The abolition, in some jurisdictions, of exceptional courts for trial of terrorist suspects in favour of addressing crimes of terrorism through regular systems of criminal justice was noted as a good practice experience. In several countries, the abolition of exceptional courts had been possible, and had increased public confidence both in the ability of the Government to address the problem of terrorism and in the fairness of criminal cases against terrorists in the regular courts. The abolition of such courts also avoided a tendency to resort to such jurisdictions in broader circumstances than had been originally contemplated. For the same reasons, caution was counselled in establishing exceptional jurisdictions in the first place. Rather, strengthening of the ordinary judicial system should be prioritized, and best international practices to be drawn upon in that respect were increasingly available. Where the regular criminal justice system is considered to be inadequate to meet the challenges of trying terrorist cases, efforts should be made to strengthen these rather than to establish special courts. Resort to the trial of civilians in military or special courts should be exceptional and should be limited to cases where the State can show that it is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials.

*Accountability and the rights of victims*

47. Discussions at the regional expert symposia highlighted the critical importance of accountability for human rights violations in the counter-terrorism context. The absence of accountability does harm to victims, to the rule of law, and to the ability of States to influence the promotion and protection of human rights in other jurisdictions and thus to avoid establishing conditions conducive to the spread of terrorism and to radicalization. This includes the need for States to conduct prompt, independent, impartial and thorough investigations wherever there is credible evidence to suggest there have been violations of human rights in the counter-terrorism context.

48. Where investigations result in establishing that a violation has occurred, victims must be afforded effective redress. This should include payment of compensation to individuals who have been denied due process, particularly in cases of excessive pretrial detention and other abuses. While acknowledging that national practices in the area of compensation varied widely, participants agreed that payment of compensation by the State in circumstances where due process had been denied was a particularly effective form of redress and one that went a long way to preventing the fostering of resentment amongst aggrieved individuals and their families as a result of unfair or even illegal practices. In some sense, payment of compensation could be seen as an investment in future stability by recognizing State fault and providing a concrete form of remedy. Alongside such payments, care also needed to be taken to ensure that necessary legal reforms to avoid repeat cases of breaches of due process were also implemented in a timely fashion, seen as an essential element of the guarantee of non-recurrence.

49. The regional expert symposia highlighted the importance of oversight processes, adequate checks and balances, and effective complaints mechanisms as essential for accountability. Participants pointed out that while there are a number of different ways to work towards accountability in the counter-terrorism context, common elements in successful strategies include credible oversight processes (including in legislatures), complaint processes that are accessible to individuals, who can resort to them without fear of retaliation, and distribution of powers and competencies across different entities and structures in a system of “checks and balances” in order to avoid undue concentration of

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“normalization” or de facto permanent existence of extraordinary measures. [...]”

power in any one authority. These approaches are essential to ensuring that the use of counter-terrorism powers is narrowly and appropriately tailored to achieving specific ends, and is not deployed in an over-broad or oppressive fashion. While non-judicial mechanisms were recognized as having potential value, it was also recognized that there should always be the possibility, even as a matter of last resort, for victims to have recourse to judicial remedies.

#### **IV. Conclusions and recommendations**

50. **Participants at the three CTITF Working Group on Protecting Human Rights While Countering Terrorism regional expert symposia on due process and right to fair trial recognized the challenges that arise in the context of countering terrorism, including pressure on State authorities to adopt swift security measures to prevent and combat terrorist acts. They emphasized however, as demonstrated by experience, that protecting human rights and ensuring respect for the rule of law itself contributes to countering terrorism, notably by creating a climate of trust between States and those under their jurisdiction. Conversely, violating human rights – including due process and the right to fair trial in the counter terrorism context – can be self-defeating as this can contribute to conditions conducive to the spread of terrorism.**

51. **The High Commissioner welcomes the reaffirmation of the Global Counter-Terrorism Strategy as a renewed commitment by Member States to ensuring the promotion and protection of human rights and the rule of law as the fundamental basis of the fight against terrorism. As Chair of the CTITF Working Group on Protecting Human Rights While Countering Terrorism, the Office of the High Commissioner for Human Rights remains committed to supporting Member States' efforts to enhance the implementation of their obligations under international human rights law in the fight against terrorism, in line with their commitments under Pillar IV of the Strategy. The High Commissioner encourages CTITF and its entities to continue to integrate a human rights and rule of law-based approach throughout their activities, as well as to enhance their engagement with civil society, in support of the implementation of the Strategy.**

52. **International human rights instruments are essential to effective counter-terrorism measures at national, regional and international levels. Member States, if they have not yet done so, are urged to become party to all international human rights treaties, withdraw remaining reservations and accept the jurisdiction of the International Court of Justice, as well as international human rights treaty body individual complaints procedures.**

53. **The *ius cogens* and non-derogable nature of the absolute prohibition of torture and other forms of cruel, inhumane, degrading treatment or punishment; of the obligation of non-refoulement; and of the core elements of the right to fair trial, further reinforce the importance of strictly upholding these human rights in the counter-terrorism context. National and international efforts to eradicate torture must focus on prevention, including through the establishment of systems of regular visits, by independent international and national bodies, of places where people are deprived of their liberty. The High Commissioner encourages all States that have not ratified the Optional Protocol to the Convention against Torture to do so as soon as possible. Member States are encouraged also to strengthen safeguards against arbitrary detention, on the basis of the model set out in the International Convention for the Protection of All Persons from Enforced Disappearance.**



54. More than 140 Member States have adopted or amended specific counter-terrorism-related legislation over the past decade. It is time now to take stock and assess such legislation against international human rights law. Regular review of the human rights-compliance of counter-terror laws and practices is critical in order to ensure that, in practice and in fact, counter-terrorism measures are specific, necessary, effective and proportionate. As far as possible, counter-terrorism law and practice should be consistent with the principle of normalcy. If any special measures are adopted, they should also be subject to periodic review to ensure compliance with human rights and avoid their entrenchment.

55. The High Commissioner urges Member States to continue to invest in a rule of law-based, criminal justice response to terrorism. Public confidence in legal institutions is critical for counter-terrorism efforts to be credible and effective over the long term. This requires clear laws with a minimum of exceptional or emergency provisions, respect for the independence of the judiciary and the bar, and a willingness of the executive to be the subject of oversight, complaint mechanisms and checks and balances.

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