United Nations A/HRC/16/51/Add.1

General Assembly

Distr.: General
14 February 2010

English/French/Spanish only

Human Rights Council
Sixteenth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin

Addendum

Communications to and from Governments
(From 1 January to 31 December 2011)[*]

[*] The present report is circulated as received.

Contents

I. Introduction

1. The present report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism contains summaries of communications transmitted to Governments as well as replies received between 1 January and 31 December 2010. In addition, the report covers press releases issued in 2010.

2. During the period under review the Special Rapporteur corresponded with Governments, either separately or jointly with other Special Procedures mandate-holders, in 18 communications and he issued three press releases, relating to a total of 12 countries.

3. During the course of 2010, the Special Rapporteur received 10 replies from 7 Governments in response to communications sent in 2009 and 2010 (the former are reflected in the previous report, A/13/37/Add.1). Many of the Governments offered detailed substantive information on the allegations received. The Special Rapporteur underlines that it is crucial that Governments share their information and views with him on the allegations received. The Special Rapporteur encourages cooperation from those Governments which have not yet provided replies to his communications. Replies received after 31 December 2010 will be reflected in a future report to the Human Rights Council.

4. The Special Rapporteur acted upon information received from reliable sources concerning individual cases of alleged breaches of human rights and fundamental freedoms in the context of countering terrorism. In addition, he also took action with respect to legislative developments and proposals undertaken by a number of Member States. The Special Rapporteur recognizes that problems concerning human rights and fundamental freedoms in the context of countering terrorism are not only confined to the countries mentioned.

II. Communications transmitted, replies received and statements made to the press

A. Bahrain

1. Communication sent to the Government

5. On 20 August 2010, the Special Rapporteur, together with the Chair-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders, and the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a joint urgent appeal concerning the situation of Dr. **Abduljalil Al Singace**, Director and Spokesperson of the Human Rights Bureau of the Haq Movement for Civil Liberties and Democracy, Mr. **Abdul Ghani Al Kanja**, Spokesperson of the National Committee for Martyrs and Victims of Torture, Mr. **Jaffar Al-Hessabi**, a Bahraini human right activist who had been living in the United Kingdom (UK) for 15 years where he advocated for the release of political prisoners, Mr. **Mohammed Saeed**, a board member of the non-governmental organization Bahrain Centre for Human Rights, as well as **Sheikh Mohammed Al-Moqdad**, **Sheikh Saeed Al-Nori**, **Sheikh Mirza Al-Mahroos** and **Sheikh Abdulhadi Al-Mukhuder**, who are four religious and political activists.

6. According to the information received:

On 13 August 2010, Mr. Abduljalil Al Singace was reportedly arrested at Bahrain International Airport on his way back from the UK with his family, following his participation on 5 August in a seminar on the human rights situation in Bahrain held at the House of Lords, during which he denounced the alleged deterioration of the human rights and environmental situation in the country. During his stay in the UK, Mr. Al Singace took the opportunity to meet with a number of international human rights organizations. According to reports, Mr. Al Singace, who is disabled and requires the use of a wheelchair, was forcefully apprehended by the authorities. On the same day, a peaceful demonstration in solidarity took place in front of Mr. Al Singace's house, and was violently repressed by security forces using tear-gas, sound bombs and rubber bullets. Several demonstrators were injured in the course of the operation.

On 15 August 2010, security forces raided Mr. Abdul Ghani Al Kanja's home, arrested him and confiscated his computer and mobile phones.

It was reported that Messrs. Al Singace and Al Kanja were accused of "forming an organized network aiming at weakening the security and the stability of the country" under the Anti-Terrorism Law and the Criminal Code. According to Mr Al Singace's lawyer who spoke to the Public Prosecution Office, case numbers were yet to be assigned and Mr. Abduljalil Al Singace was to face charges of sedition and making unauthorised contact with foreign bodies. Both Messrs Al Singace and Al Kanja were reportedly denied access to their lawyer and to their families. Their whereabouts remained unknown as of 20 August 2010.

On 16 August 2010, Mr. Jaffar Al-Hessabi was arrested at Bahrain International Airport on his way back from Iran, following his participation in peaceful protests in London.

On 17 August 2010, Mr. Mohammed Saeed was arrested at his home.

Finally, between 15 and 17 August 2010, Messrs Sheikh Mohammed Al-Moqdad, Sheikh Saeed Al-Nori, Sheikh Mirza Al-Mahroos and Sheikh Abdulhadi Al-Mukhuder were arrested following their recent participation in peaceful protests calling for the release of political prisoners.

7. The mandate holders expressed serious concerns that the arrest and detention of Messrs Abduljalil Al Singace, Abdul Ghani Al Kanja, Jaffar Al-Hessabi, Mohammed Saeed, Sheikh Mohammed Al-Moqdad, Sheikh Saeed Al-Nori, Sheikh Mirza Al-Mahroos and Sheikh Abdulhadi Al-Mukhuder, and the charges brought against some of them, may have been linked to their peaceful activities in defence of human rights, while exercising their right to freedom of opinion and expression. In view of the incommunicado detention of Messrs Abduljalil Al Singace and Abdul Ghani Al Kanja, and possibly of Messrs Jaffar Al-Hessabi, Mohammed Saeed, Sheikh Mohammed Al-Moqdad, Sheikh Saeed Al-Nori, Sheikh Mirza Al-Mahroos and Sheikh Abdulhadi Al-Mukhuder, further concerns were expressed for their physical and psychological integrity, most notably for Abduljalil Al Singace who is disabled and needs assistance to walk. Finally, concern was expressed about the excessive use of force against participants of the peaceful protest in front of Mr. Abduljalil Al Singace's house.

8. The mandate holders appealed to the Government of Bahrain to take all necessary measures to guarantee their right not to be deprived arbitrarily of their liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. They also referred the Government to the

fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1 and 2 which state that "everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" and that "each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice". Furthermore, they brought to the attention of the Government articles 5, point a), 6, points b) and c), and 12, paras. 2 and 3, of the Declaration. They also stressed that the principle of legality in criminal law, enshrined in several international human rights instruments such as article 15 of the International Covenant on Civil and Political Rights and made non-derogable in times of public emergency, implies that the requirement of criminal liability is limited to clear and precise provisions in the law, so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation which would broaden the scope of the proscribed conduct. In view of the mandate holders, at the national level, the specificity of terrorist crimes is defined by the presence of two cumulative conditions: (1) The means used, which can be described as deadly or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; and (2) the intent, which is to cause fear among the population or the destruction of public order or to compel the government or an international organisation to doing or refraining from doing something. It is only when these two conditions are fulfilled that an act may be criminalized as terrorist. Further, they stressed that each Government has the obligation to protect the right to physical and mental integrity of all persons, which is set forth inter alia in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. With regard to the allegations on the violent repression by security forces of the peaceful gathering in front of Mr. Al Singace's house, including the use of tear-gas, sound bombs and rubber bullets, the mandate-holders drew the Government's attention to Principle 4 of the UN Basic Principles on the Use of Force and Firearms by Law Officials, which provides that, "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms." Furthermore, Principle 5 provides that, "Whenever the use of force and firearms is unavoidable law enforcement officials shall, (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate object to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment and (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment." They also appealed to the Government of Bahrain to take all necessary steps to ensure the right of peaceful assembly as recognized in article 21 of the International Covenant on Civil and Political Rights. They also appealed to the Government to take all necessary steps to secure the right to freedom of opinion and expression in accordance with fundamental principles as set forth in article 19 of the International Covenant on Civil and Political Rights.

9. The mandate holders requested the Government to provide details and results of any investigation, medical examinations, and judicial or other inquiries carried out in relation to this case and asked for clarification regarding the legal basis of the arrest and detention of Messrs Abduljalil Al Singace, Abdul Ghani Al Kanja, Jaffar Al-Hessabi, Mohammed Saeed, Sheikh Mohammed Al-Moqdad, Sheikh Saeed Al-Nori, Sheikh Mirza Al-Mahroos and Sheikh Abdulhadi Al-Mukhuder; the legal basis and the nature of the charges brought

against some of them; and the legal basis of the excessive use of force against participants of the peaceful protest in front of Mr. Abduljalil Al Singace's house.

2. Reply from the Government

10. By letter dated 12 October 2010, in response to the communication of 20 August 2010, the Government reported the following: The eight suspects have been arrested because evidence has emerged that they are allied in a structured network aimed at compromising national security and abusing the country's stability. Namely, this network aims to overthrow and change the political system of the country, dissolve the constitution and obstruct the enforcement of its provisions, inciting and planning terrorist acts, inciting hatred and contempt against the regime, threatening public order and endangering the safety and security of the Kingdom.

11. This network has spread disorder in the country by recruiting youths and juveniles and inciting them to compose sabotage groups to commit acts of riot, violence and vandalism, disturbance of civil peace, attacking security personnel, nationals and foreigners residing in Bahrain, terrorizing them and damaging their private properties.

12. All such acts are punishable crimes pursuant to Law No. 58 of 2006 with respect to Protecting the Community from Terrorist Acts. The suspects were arrested under this law and not under Bahrain's Code of Criminal Procedure which provides that suspects must be brought before the Public Prosecution within 48 hours of arrest. According to Article 27 of Law No. 58 of 2006, Judicial Officers are granted the right, subject to the emergence of sufficient evidence, to issue a protective custody order for a period not exceeding five days, and if necessary, permission may be obtained from the Public Prosecution to extend the custody to a period not exceeding 10 days. Such permission is strictly granted if the Judicial Officer provides sufficient evidence that the extension of the custody is essential for the continuation of the investigations. Following this period of 10 days, the suspects were duly referred to the Public Prosecution.

13. As a principal division of the judicial authority, the Public Prosecution have commenced and handled criminal proceedings. Working in its capacity as an investigation and indictment authority, and, following intensive investigations by prosecutors into the clandestine terror network, the eight suspects were laid with 12 charges under the Penal Code No. 15 of 1976, Law No. 58 of 2006 with respect to Protecting the Community from Terrorist Acts and Law No. 4 of 2001 with respect to Countering Money Laundering and Financing of Terrorism. The charges include:

- Founding, organising and managing an outlawed organisation with the aim of violating the law and disrupting provisions of the constitution and to prevent public authorities from exercising their duties, using terrorism;
- Creation and establishment of an organization with the objective of overthrowing the regime, changing the statutes and using illegal violent means such as arson and vandalism;
- Taking part in acts of sabotage, destruction and arson with terrorist attempt;
- Raising funds for an organization that is involved in terrorist acts inside the country, willingly and knowingly;
- Disseminating hatred and mockery of the political system through public speeches and the internet;
- Agreeing and inciting to destroy public property;
- Spreading provocative propaganda, news and false statements to destabilize public security and cause damages to public interests;

- Publicly instigating sectarian hatred which disturbs civil peace;
- Inciting others through public speeches and the Internet to disregard the law;
- Inciting participation in public congregations with the purpose of committing arson, vandalism, and confronting the security authorities; and
- Unlawfully using force and violence to compel a public servant to abstain from his duty.

14. It is clear that all charges are on terror crimes, use of force and instigation to it. In this regard, it should be mentioned that all guarantees relevant to the suspects' rights have been respected during the investigations.

15. With regard to the reasons for the suspects' arrest, the Government would like to emphasize that the arrests were based purely on security measures, and were not motivated by nor linked to their peaceful activities in defence of human rights, but had been in the light of the existence of confirmed information, investigations and evidence that they are part of a structured network aimed at compromising national security and abusing the country's stability.

16. The suspects, along with all citizens of Bahrain, preserve their right to work legitimately and peacefully in defence of human rights, as enshrined by the Declaration on Human Rights Defenders. They also preserve the right of freedom of expression and opinion, as enshrined in the Constitution of Bahrain which provides that everyone has the right to express his opinion and publish it by word of mouth or in writing under the rules and conditions laid down by law, provided that the fundamental beliefs of Islamic doctrine are not infringed, the unity of the people is not prejudiced, and discord or sectarianism is not aroused. Legal action is only exercised against those who deviate from the scope of the legitimate and peaceful work in the defence of human rights and freedom of expression and recourse to the execution of acts amounting to the abuse of law.

17. Following the arrest of the eight suspects, they have all confessed that they were indeed involved in forming sabotage groups and instructed them to carry out rioting, arson, vandalism and attacking security men. Abduljalil Al-Singace confessed that he supported the groups financially to purchase necessary equipment and materials to undertake such sinful acts. He also admitted in details that he, along with the other seven suspects, incited openly and secretly to spread chaos in the country and to carry out sabotage acts, along with fund raising from citizens and businessmen under the guise of religion, charity and support for the families of prisoners and alleged martyrs and victims of torture.

18. Further, security authorities have arrested individuals who carried out arsons and rioting in varying incidents and in various areas, all of whom have confessed that Abduljalil Al-Singace was their main supporter and inciter for those acts.

19. In relation to the concern regarding whether the acts shall be criminalised as terrorist, the first two conditions (means used and intent) put forward will be demonstrated. Firstly, with respect to the means used. The sabotage groups have been committing acts of violence, rioting, vandalizing private and public properties, carrying out arsons, blocking highways and crippling all forms of life activities. These groups have added violence to their acts by using Molotov bombs, homemade bombs and sharpened iron bars. Molotov bombs are considered as improvised incendiary weapons and are primarily intended to set targets ablaze and destroy them. In fact, two police were killed in two separate horrific attacks by Molotov bombs: a policeman, and an innocent Pakistani passer-by, father of five, let alone the casualties and sufferers of such acts, be them members of security authorities or of the general population.

20. Secondly, concerning the intent behind the aforementioned attacks, it may be seen from these acts of violence that the sabotage groups are aiming at the destruction of public order. They intend to cause fear among the general population and they chose to undertake their terrorist acts at night to spread even greater terror in the hearts of the general public. Some of the suspects have confessed that this intent was present while inciting the sabotage groups to commit acts of destruction to public order.

21. Hence, having seen that the means used by the sabotage groups can be described as deadly and of serious violence against members of the general population; and, having regard that the intent is to cause fear among the population along with destructing public order, one may fairly deduce that the bold presence of these two conditions cumulatively fulfil these acts to be criminalised as terrorist.

22. Last but not least, elucidation shall duly be made on the allegations on the violent repression by security forces of the peaceful protest in front of Abduljalil Al-Singace's house. Principally, the Government has taken all necessary steps to ensure the right of peaceful assembly. Acting in accordance with article 21 of the International Covenant on Civil and Political Rights, the Government recognizes that no restrictions may be placed on this right other than those imposed inconformity with the law and which are necessary in the interest of national security of public safety, public order or the protection of the rights and freedoms of others. In this connection, participants in the protest in front of Al-Singace's house have resorted to violence for realization of the purpose for which they have assembled (release Al-Singace), causing their peaceful demonstration to be deemed as a riot. Security forces have exercised their authority granted by article 180 of the Penal Code and ordered the demonstrators to disperse. Should the order come to no avail, security forces shall be empowered to take the necessary measures for dispersing those who have not complied with the order by arresting them and may use force within reasonable limits against any person resisting said order. They may not use firearms except in extreme necessity or when someone's life is in danger. The demonstrators have continued rioting despite receiving orders from security forces to disperse. Having ignored such orders, and, having regard to the interest of public order, security forces were compelled to use force to confront and terminate the mounting violence and disperse the rioters. In this connection, security forces have exerted force in accordance with the provisions of the public security forces law. Namely, article 13 has regulated the use of force in dispersing demonstrators and rioters. Force is only exerted following the failure of non-violent means, warning of resorting to the use of force and being the only remaining means of separation, along with resorting to force in order to obstruct an assault or resistance from demonstrators or rioters.

23. In this connection, mention shall be duly made that these rioters and protesters, who were initially incited by the suspects, have been camouflaging their acts of violence by labeling them as human rights activism or peaceful demonstrations or protests. It goes without saying that committing acts of riot, violence and vandalism under the disguise of promoting and protecting human rights reflects nothing but a solid violation of article 3 of the Universal Declaration of Human Rights which stipulates that everyone has the right to life, liberty, and security of person. The Government of Bahrain is bound to protect individuals and groups against the abuse of these fundamental rights.

24. The Government of Bahrain reaffirms its adherence to the provisions stipulated in the UN body of Principles for the Protection of all Persons under any form of Detention or Imprisonment. All persons under any form of detention are treated in a humane manner with respect for their physical and psychological integrity and inherent dignity of the human person. Most notably, with regard to the disability of Abduljalil Al-Singace, he has been provided with a wheelchair and is always assisted when walking. Any arrest, detention or imprisonment is only carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose. Convinced that the adoption

of this Body of Principles would make an important contribution to the protection of human rights, Bahrain has prohibited by law any act contrary to the rights and duties contained therein.

25. It is also worth stressing that the recent arrests have no relation whatsoever with the parliamentary elections scheduled to take place on 23 October 2010. All suspects do not recognize these elections. They never participated in them, and not only did they boycott the elections, but they called for a boycott ever since the re-birth of parliamentary elections in 2002.

26. In conclusion, the Government of Bahrain reaffirms its guarantee to provide all necessary measures to ensure that all suspects are not deprived arbitrarily of their liberty and are entitled in full equality to fair proceedings before an independent and impartial tribunal. Bahrain also reaffirms its respect to the observance of the purposes and principles of, inter alia, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Bahrain recognizes the relation between peace and security and the enjoyment of human rights and fundamental freedoms, and is mindful that the absence of peace and security does not excuse non-compliance. Bahrain also acknowledges the important role of the Human Rights Council in the contribution to the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals, and fully supports its efforts in promoting universal respect for human rights along with its determination to examine thoroughly all the cases brought to its attention.

3. Communication sent to the Government

27. On 15 October 2010, the Special Rapporteur, together with the Chair-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders sent a joint urgent appeal concerning the arrest and detention of Mr. **Ali Abdulemam**. Mr. Abdulemam is the creator and manager of the www.bahrainonline.org news website, and a blogger who regularly wrote articles regarding media freedom and freedom of expression in Bahrain.

28. According to the information received:

> On 4 September 2010 at approximately 9 p.m., Mr. Abdulemam was arrested following a summons, via a telephone call, for questioning by the National Security Apparatus (NSA). Since his arrest, Mr. Abdulemam was denied access to legal representation, and doubts existed as to whether or not he had been presented before the Public Prosecutor within the time limits proscribed by law. He was denied access to family members until 29 September 2010.
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> Mr. Abdulemam's arrest was reportedly declared by the Ministry of Interior to form part of an investigation into an alleged "terrorist network accused of planning and executing a campaign of violence, intimidation and subversion in Bahrain".
>
> According to article 27 of the 2006 "Law to Protect Society from Acts of Terrorism", which was invoked by the authorities in the arrests of Mr. Abdulemam and various other human rights defenders, a suspect may be detained for a maximum of 15 days before either being brought before the Public Prosecutor who must question the suspect within three days and either order him remanded or released. Government officials claimed that Mr. Abdulemam was presented before the Public Prosecutor soon after his arrest. On 22 September 2010 it was announced by officials that, beginning on 27 September 2010, all detained human rights activists would be allowed to receive visits from their families. Mr. Abdulemam's brother,

Mr. Hossein Abdulemam, visited the Office of the Public Prosecutor in order to apply for permission to visit Mr. Abdulemam in detention. He was, however, subsequently informed by an official at said Office that Mr. Abdulemam had not been brought before the Public Prosecutor and that there is neither any record of, nor personal number assigned to him, at the Office.

Mr. Abdulemam's initial 15-day detention period expired on 19 September 2010; if true, the aforementioned lack of knowledge regarding the case at the Office of the Public Prosecutor would suggest that Mr. Abdulemam's detention continues in contradiction of said legislation.

Mr. Abdulemam's wife was allowed to visit him in detention for the first time on 29 September 2010; however, Mr. Abdulemam had yet to be granted access to his lawyer.

The Ministry of the Interior allegedly denied that Mr. Abdulemam's arrest was in any way related to his political views. However, since 5 September 2010 - the day following Mr. Abdulemam's arrest - the BahrainOnline.org website was unavailable both within Bahrain and abroad. Furthermore, it was feared that Mr. Abdulemam had been compelled to reveal the password for his Internet service.

29. Concern was expressed that the arrest and detention of Mr. Abdulemam may be related to his peaceful and legitimate work in defence of human rights, particularly with respect to freedom of expression. Furthermore, mindful of the allegation that Mr. Abdulemam had yet to be granted access to his lawyer and brought before the Public Prosecutor, serious concern was expressed for his physical and psychological integrity.

30. The mandate holders appealed to the Government of Bahrain to take all necessary measures to guarantee his right not to be deprived arbitrarily of his liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. As the arrest and detention of Mr. Ali Abdulemam may have been related to his role as creator and manager of the www.bahrainonline.org news website and a blogger, they also appealed to the Government to take all necessary steps to secure the right to freedom of opinion and expression in accordance with fundamental principles as set forth in article 19 of the International Covenant on Civil and Political Rights. Moreover, in relation to the allegation that the BahrainOnline.org website had been unavailable both within Bahrain and abroad since 5 September 2010, the mandate holders wished to reiterate the principle enunciated by Human Rights Council resolution 12/16, which calls on States - while noting that article 19, paragraph 3, of the International Covenant on Civil and Political Rights provides that the exercise of the right to freedom of opinion and expression carries with it special duties and responsibilities - to refrain from imposing restrictions which are not consistent with paragraph 3 of that article, including on (iii) access to or use of information and communication technologies, including radio, television and the Internet. They also stressed that the principle of legality in criminal law, enshrined in several international human rights instruments such as article 15 of the International Covenant on Civil and Political Rights and made non-derogable in times of public emergency, implies that the requirement of criminal liability is limited to clear and precise provisions in the law, so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation which would broaden the scope of the proscribed conduct. In view of the mandate holders, at the national level, the specificity of terrorist crimes is defined by the presence of two cumulative conditions: (1) The means used, which can be described as deadly or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; and (2) the intent, which is to cause fear among the population or the destruction of public order or to compel the government or an international organization to doing or refraining from doing something, in

the advancement of a political, religious or ideological cause. It is only when these two conditions are fulfilled that an act may be criminalized as terrorist. The mandate holders further referred the Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1; 2; 6, points b) and c); 9, para.1; and 12, paras. 2 and 3. They further referred to the Basic Principles on the Role of Lawyers, in particular principle 8, according to which all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials. They further drew the Government's attention to principle 5, which provides that Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence, and principle 7, which states that Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

31. The mandate holders asked for clarification concerning the legal grounds for the continued detention of Mr. Ali Abdulemam, allegedly without access to legal representation or being brought before the Public Prosecutor, and how these measures were compatible with international norms and standards as stipulated, inter alia, in the International Covenant on Civil and Political Rights. They also requested an indication whether and how the requirements of the principle of legality were observed in relation to the definition of the crime that reportedly formed the basis of the arrest and detention of Mr. Ali Abdulemam.

4. Reply from the Government

32. In a letter dated 15 November 2010, the Government responded to the joint urgent appeal of 15 October 2010 and underlined that it has not, and does not, target or prosecute any individuals based on their peaceful views or opinions. Further, Bahrain is committed to the rule of law, and to following the proper legal and constitutional procedures designed to protect the rights of all in society. In the case of Mr. Abdulemam, the summary set out in the communication is inaccurate. Mr. Abdulemam was arrested on 4 September on the basis of evidence of his membership of a terrorist network. Investigations have found the network to be responsible for inciting and planning terrorist acts, inciting hatred and contempt against the Government, threatening public order and endangering the safety and security of the Kingdom. The aim of the network is to overthrow and change the political system of the country by force, dissolve the Constitution and obstruct the enforcement of its provisions. The network recruited nationals and foreigners, youngsters and adults, and incited them to commit acts of riot, violence and vandalism, disturbance of civil peace, attacking security personnel, nationals and foreigners residing in Bahrain, terrorizing them and damaging their private property. All such acts are punishable crimes pursuant to Law No. 58 of 2006 with respect to Protecting the Community from Terrorist Acts. This law grants Judicial Officers the right - subject to the emergence of sufficient evidence - to issue a protective custody order for a period not exceeding five days, and if necessary, permission may be obtained from the Public Prosecution to extend the custody to a period not exceeding 10 days. Such permission is strictly granted if the Judicial Officer provides sufficient evidence that the extension of the custody is essential for the continuation of the investigations. Given the nature of Mr. Abdulemam's suspected crimes, he was arrested under this Law No. 58 of 2006 with respect to Protecting the Community from Terrorist

Acts, and not under Bahrain's Code of Criminal Procedure which provides that suspects must be brought before the Public Prosecution within 48 hours of arrest.

33. Prior to the elapse of the period of protective custody of five days, Mr. Abdulemam was duly referred to the Public Prosecution on 9 September 2010, which commenced and handled criminal proceedings. Following intensive investigations by prosecutors, Mr. Abdulemam was charged under the Penal Code No. 15 of 1976 and Law No. 58 of 2006 with respect to Protecting the Community from Terrorist Acts. He is currently facing the following charges: Joining an outlawed organization with the aim of violating the law and disrupting provisions of the Constitution and to prevent public authorities from exercising their duties, using terrorism and violence; inciting to acts of sabotage, destruction and arson; publicly instigating sectarian hatred which disturbs civil peace; and spreading provocative propaganda, news and false statements to destabilize public security and cause damages to public interests.

34. Contrary to the fears expressed in the Communication, on 23 September, the Public Prosecution gave permission for the families of the defendants in this case to visit those in custody, and Mr. Abdulemam's family subsequently visited him on 29 September. In relation to the concern regarding whether the acts shall be criminalized as terrorist, the first two conditions (means used and intent) put forward were met according to the Government: Firstly, with respect to the means used, the sabotage groups have been committing acts of violence, rioting, vandalizing private and public property, carrying out arsons, and blocking highways. These groups have added violence to their acts by using Molotov bombs (Molotov cocktails), homemade bombs and sharpened iron bars. Molotov bombs are considered as improvised incendiary weapons and are primarily intended to set targets ablaze and destroy them. In fact, two deaths occurred in two separate attacks by Molotov bombs, in which a policeman, and a civilian Pakistani passer-by, father of five, were killed. Secondly, the intent of these acts was to undermine public order, and to cause fear among the general population, for example, by carrying out their attacks at night to spread even greater fear among the general public. Indeed, some of the suspects have admitted that this was their intent. Therefore, given that the acts of the groups in question clearly amount to serious (sometimes deadly) violence, and given that their intent was to cause fear among the population and to disrupt public order, it can clearly be seen that the activities amount to acts of criminal terrorism.

35. It is worth mentioning that Mr. Abdulemam, along with other members of the network, has sought to label the acts of violence as human rights activism or peaceful demonstrations or protest. Inciting to acts of riot, violence and vandalism under the guise of promoting and protecting human rights is a flagrant violation of article 3 of the Universal Declaration of Human Rights which stipulates that everyone has the right to life, liberty and security of person. The Government of Bahrain is bound to protect individuals and groups against the abuse of these fundamental rights. Mr. Abdulemam is the creator of the www.bahrainonline.org website, which he has managed for many years. He provided that he has created this forum to instigate sectarian hatred and to spread provocative propaganda, news and false statements to destabilize public security and damage public interest. The leaders and members of the terrorist network have used this website, with the knowledge and observance of Mr. Abdulemam, to incite acts of sabotage, violence and terrorism. Furthermore, this website is known to praise such acts by posting footage and photos of the destruction and damage caused by those groups, along with glorifying them as heroes. Mr. Abdulemam has confirmed that he was funded by leaders of the terrorism network for doing so.

36. With regard to the concern expressed with respect to the physical and psychological integrity of Mr. Abdulemam, it is underlined that the Government of Bahrain fully reaffirms its adherence to the provisions stipulated in the UN Body of Principles for the

Protection of all Persons under any form of Detention or Imprisonment. All persons under any form of detention are treated in a humane manner and with respect for their physical and mental integrity and inherent dignity of the human person. Any arrest, detention or imprisonment is only carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose. Convinced that the adoption of this Body of Principles would make an important contribution to the protection of human rights, Bahrain has prohibited by law any act contrary to the rights and duties contained therein.

37. Mr. Abdulemam is charged with criminal offences. He preserves his right to be presumed innocent and is treated as such until proved guilty in a public trial according to law, at which he has all the guarantees necessary for his defence. Bahrain restates its commitment to preserving the suspect's right to fair proceedings before an independent and impartial tribunal to determine the criminal charges against him. The law guarantees the independence of the judiciary and the probity and impartiality of judges. In this context, attention is drawn to article 104 of the Constitution of Bahrain, which stipulates "No authority shall prevail over the judgment of a judge, and under no circumstances may the course of justice be interfered with." Mr. Abdulemam has exercised his constitutional and legal rights with regards to his legal representation. Although he has refused to appoint a counsel for himself and no counsel has taken the initiative to represent him, he was legally represented in the first court hearing that was held publicly on 28 October 2010. As provided by the relevant legislation, if a suspect does not have legal counsel, one will be assigned to him by the court at its expense. Further, judgments of the criminal court may be challenged before the courts of Appeal, while the Courts of Cassation can examine the compliance of the judgments of the foregoing courts with the law.

38. Leaders and members of the terrorist network, along with all citizens of Bahrain, preserve their right of the legitimate and peaceful work in the defence of human rights, as enshrined in the Declaration on Human Rights Defenders. They also preserve the right of freedom of expression and opinion, as enshrined in the Constitution of Bahrain which provides that everyone has the right to express his opinion and publish it by word of mouth or in writing under the rules and conditions laid down by law, provided that the fundamental beliefs of Islamic doctrine are not infringed, the unity of the people is not prejudiced, and discord or sectarianism is not aroused. Legal action is only exercised against those who deviate from the scope of the legitimate and peaceful work in the defence of human rights and freedom of expression and recourse to the execution of acts amounting to the abuse of law.

39. In conclusion, the Government of Bahrain reaffirms its guarantee to provide all necessary measures to ensure that Mr. Ali Abdulemam is not deprived arbitrarily of his liberty and is entitled in full equality to fair proceedings before an independent and impartial tribunal. Bahrain acknowledges the significant role of the Human Rights Council in the contribution to the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals, and fully supports its efforts in promoting universal respect for human rights along with its determination to examine thoroughly all the cases brought to its attention. The Government underlined its appreciation of its ongoing cooperation with the United Nations human rights machinery and special procedures and assured of its desire to continue and develop this relationship in an open and transparent manner.

B. Canada

1. Communication sent to the Government

40. On 13 April 2010, the Special Rapporteur, together with the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a letter to the Government of Canada informing it that the mandate holders had been approached by third parties in the case of Mr. **Omar Khadr**, a Canadian citizen, who was understood to still be detained at Guantánamo Bay. Omar Khadr was 15 years old when he was arrested and 16 years at the time he was transferred to Guantánamo Bay. Information received indicated that Mr. Khadr had been subjected to prolonged and severe sleep deprivation by U.S. officials in order to enhance the extraction of information from him during interrogations conducted by Canadian officials in 2004 when he was 17 years old. Military commission proceedings against Mr. Khadr were scheduled to recommence in July 2010 at Guantánamo Bay.

41. In a 29 January 2010 decision, Canada's Supreme Court reasoned that violations of Mr. Khadr's rights under the Charter of Rights and Freedoms were ongoing as the information obtained by Canadian officials during the course of their interrogations, conducted when Mr. Khadr was a minor without access to legal counsel or habeas corpus and had been subjected to improper treatment by the U.S. authorities at the time of the interview in March 2004, may form part of the case currently being held. In light of this decision, the mandate holders remained seriously concerned that Mr. Khadr will continue to be tried in military commission proceedings that do not adhere to international fair trial standards.

42. The mandate holders referred the Government to the Special Rapporteur's report on his mission to the United States of America (A/HRC/6/17/Add.3) that highlighted serious situations of incompatibility between international human rights obligations and the counter-terrorism law and practice of the United States. Concerns highlighted in that report relate mainly to proceedings conducted by military commissions, which have not been fully addressed by the adoption of the 2009 U.S. Military Commissions Act, and the use of evidence obtained under torture or by coercion. Furthermore, they referred to the report of the then Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the then Special Rapporteur on the independence of judges and lawyers, the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the then Special Rapporteur on freedom of religion or belief, and the then Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120) that revealed a series of human rights violations of the detainees and recommended that terrorism suspects be detained and tried in accordance with criminal procedure that respects safeguards enshrined in relevant international law.

43. In view of Mr. Khadr's prolonged and abusive detention at Guantánamo Bay, the perpetuated violation of his rights under domestic law and international human rights law, and given that he will most likely not be afforded with a trial according to international fair trial standards, the mandate holders urged the Government to take appropriate remedial action in accordance with the recent Supreme Court decision and international standards. Given the ongoing violation of Mr. Khadr's rights, the Special Rapporteur's were of the opinion that repatriation to Canada, where he would be either released or prosecuted by a court of law in accordance with international fair trial standards, would pose the most suitable and effective option. In their view, the sending of a diplomatic note to the Government of the United States formally seeking assurances that any evidence or statements shared with U.S. authorities as a result of the interviews of Mr. Khadr by Canadian agents and officials in 2003 and 2004 not be used against him by U.S. authorities

in the context of proceedings before the Military Commission or elsewhere, does not constitute an effective remedy for the human rights violations he was subjected to.

44. The mandate holders wished to reiterate their deep interest that the violations of Mr. Omar Khadr's rights come promptly to an end and highlighted their availability for consultations on this matter.

2. Reply from the Government

45. By a letter of 10 May 2010, the Government of Canada responded to the letter of 13 April 2010 and indicated that it had taken many steps to address the interests of Mr. Khadr in respect of his detention by the United States in Guantanamo Bay. Canadian government observers have been present at his hearings before the Military Commission in Guantanamo Bay and the Court of Military Commission Review in Washington, D.C. Furthermore, officials of Foreign Affairs and International Trade Canada have carried out regular visits with Mr. Khadr and will continue to do so. The visits allow access to Mr. Khadr to assess his welfare and treatment, and to obtain information about his mental and physical condition.

46. Canada has consistently sought to ensure that Mr. Khadr receives the benefits of due process, including access to Canadian counsel of his choice. More examples of the Government of Canada's actions in respect of Mr. Khadr are outlined in the dissenting reasons of Justice Nadon of the Federal Court of Appeal (2009 FCA 246 at paragraph 88) which and can be viewed at http://decisions.fca-caf.gc.ca/en/2009fca246/2009fca246.html.

47. Mr. Khadr was arrested in 2002 by U.S. Forces in the context of his alleged involvement in the armed conflict in Afghanistan following his alleged recruitment and use as combatant by al Qaeda, and was later transferred to Guantanamo Bay by the Americans. Mr. Khadr's presence in this conflict was not the result of actions by Canada and at no time since his arrest has he fallen under Canadian jurisdiction. Mr. Khadr has been detained by the United States, has remained under U.S. jurisdiction continuously since then, and now faces serious changes pursuant to U.S. legislation. Therefore, while the mandate holders' letter raises important issues, most of them would be more properly addressed to the Government of the United States.

48. It is important to note that the Government of Canada at no time requested that the United States subject Mr. Khadr to any form of mistreatment. To the contrary, the Government of Canada has consistently asked the Government of the United States to ensure that Mr. Khadr be treated humanely and in a manner consistent with his age. With respect to the allegation of sleep deprivation, it is important to bear in mind the particular facts as to when and how the allegation was brought to Canada's attention. In those circumstances, the decision of a Canadian official to proceed with the final interview did not amount to Canadian acquiescence in such treatment.

49. On 22 January 2009, the Honourable Barack Obama, President of the United States, issued an Executive Order ordering that the Guantanamo Bay detention facilities be closed no later than one year from that date and that the status of each Guantanamo detainee be immediately reviewed. As a result of this review, on 13 November 2009, Mr. Eric Holder, Attorney General of the United States, announced that the United States will proceed to trial against Mr. Khadr by way of a military commission trial. This choice of mechanisms put in place to try detainees is a matter for the U.S. authorities.

50. In the Special Rapporteurs' correspondence, it was also referred to the decision of the Supreme Court of Canada in Mr. Khadr's appeal. The Government notes that, in its ruling, the Supreme Court recognized the constitutional responsibility of the executive to make decisions on matters of foreign affairs, given the complex and ever-changing circumstances of diplomacy, and the need to take into account Canada's broader interests.

In response to the Supreme Court's ruling, the Government of Canada delivered a diplomatic note to the Government of the United States on 16 February 2010, formally seeking assurances that any evidence or statements shared with U.S. authorities as a result of the interviews of Mr. Khadr by Canadian agents and officials in 2003 and 2004 not be used against him by U.S. authorities in the context of proceedings before the Military Commission or elsewhere.

51. The Government of Canada was not prepared at that time to discuss with the Special Rapporteurs the question of whether it should seek the repatriation of Mr. Khadr to Canada as this matter was again the subject of litigation before the courts.

C. India

1. Communication sent to the Government

52. On 22 January 2010, the Special Rapporteur addressed a letter of allegation to the Government of India concerning the arrest of **Mr. Andrea Pagnacco** on 11 January 2010 in the Indian state of Rajasthan. According to the information received:

53. Mr. Pagnacco, who is an active environmental campaigner, was detained for illegally using a satellite phone. He was subsequently ordered detention for 14 days pending investigation under Indian anti-terrorism legislation as well as for violating Indian wireless and telegraphy laws. Mr. Pagnacco was granted bail and was free to travel while further investigations on the aforementioned charges were pending.

54. While being conscious of the fact that States, as part of their obligation to promote and protect human rights, are required to undertake a number of measures for the effective fight against terrorism, the Special Rapporteur underlined that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law. In connection with the arrest of Mr. Pagnacco and with particular respect to the adequate criminalization of the crime of terrorism, the Special Rapporteur took the opportunity to recall the cumulative characterization of terrorist crimes as elaborated by the Security Council in its resolution 1566 (2004). Here, he in particular stressed the first two of those criteria, according to which an act, in order to be classified as terrorist, must have been (i) committed against members of the general population, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages, and, (ii) committed for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act. Together, these conditions reflect the principle that terrorism should be defined through its inexcusable methods of violence and against bystanders and its intention to create fear among the general population rather than through political or other aims, which may overlap with the aims of social movements that have nothing to do with terrorist acts. (see, for example, A/HRC/6/17, paragraph 73).

55. In connection with the latter, the Special Rapporteur reiterated the fundamental right pertaining to freedom of expression, as established in article 19 of the Covenant on Civil and Political Rights. While acknowledging that the need to effectively counter terrorism may imply legitimate restrictions on actions connected to the enjoyment of this right, he recalled that all such limitations must be applied in accordance with precise criteria established by law and according to the principles of proportionality and necessity. By no means should counter-terrorism measures be used to limit rights that are fundamental for a democratic society. In the absence of any information regarding Mr. Pagnacco's involvement in activities related to terrorism, the Special Rapporteur highly appreciated if the Government of India could reassure him that the charges are not related to his activities

for the protection of the environment and provide him with detailed substantive information on (i) which are the acts that form the basis for the specific charges on national security in the case referred to above; (ii) which is the legal basis for and what are the corresponding punishments for the charges under investigation; and how does Indian legislation define the crime of terrorism and related offences?

2. Reply from the Government

56. After having acknowledged receipt of the communication by letter dated 29 January 2010, the Government of India, by letter dated 7 October 2010, conveyed that the allegation had been investigated by the Government and found to be inaccurate. While it is true that Mr. Andrea Pagnacco was detained for illegally using a satellite phone in India without the necessary permission from Indian authorities, it is inaccurate to state that he was arrested, detained or charged under Indian anti-terrorism legislation. He was brought before the Court on charges under Indian wireless and telegraphy legislations and was released after the payment of a fine.

D. Iraq

1. Communication sent to the Government

57. On 11 May 2010, the Special Rapporteur, together with the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances, the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the then Special Rapporteur on extrajudicial, summary or arbitrary executions, sent a joint urgent appeal to the Government of Iraq regarding **the arrest of a group of between 400 and 700 men by the Iraqi Army in the Mosul region and their further transfer and abusive treatment in a secret detention facility near Baghdad**.

58. According to the information received:

> From September to December 2009, between 400 and 700 men would have been arrested and detained by the Iraqi Army in the course of an operation in the Mosul area and transferred to a secret detention facility near Baghdad, at the old Muthanna airport. Since their arrest, the whereabouts of these detainees were allegedly unknown and family members have reportedly been filing missing person reports with the Government. In April 2010, 431 of these men would have been found in the Al Rusafa Detention Centre. While being held in the Old Muthanna airport facility, this group of men would have been subject to torture and various forms of ill-treatment, including beatings, whipping, intentional wounding with firearms, breaking of limbs and teeth, suffocation, electric shocks, extraction of fingernails and toenails, acid and cigarette burns, rape by interrogators, detainees being forced to rape other detainees and threatened with rape of members of immediate family, humiliation, and denial of urgent medical treatment leading to, at least, one reported death in custody.
>
> The alleged conditions of detention in the mentioned facility were reportedly inadequate, including overcrowding and poor holding facilities. Detainees would have been intentionally denied access to medical care, family, and legal representatives. Further, according to the information received, no registry and/or records of the detention in such facility were kept. Detainees were allegedly forced to sign false confessions of terrorist crimes.

59. The mandate holders expressed grave concern about the fact that the fate and whereabouts of 431 men detained in the course of this operation were unknown between September-December 2009 and April 2010 as well as about their physical and mental

integrity. Very serious concern was expressed about the fact that fate and whereabouts of a number of detainees, which could amount to over 200 men, remained unknown. Serious concern was also expressed about the allegations of torture and ill-treatment which may have led to, at least, one case of death while in custody. Further, concern was expressed about the alleged conditions of detention as well as about the allegations of denial of medical treatment, legal counselling and family contacts.

60. On the allegations of torture and ill-treatment, the mandate holders stressed that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth inter alia in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the latter of which Iraq had pledged to ratify in the context of the Universal Periodic Review Process. The mandate holders drew the attention of Iraq's Government to paragraph 1 of Human Rights Council Resolution 8/8 which "Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all Governments to implement fully the prohibition of torture and other cruel, inhuman or degrading treatment or punishment." In addition, they referred to paragraph 7(c) of Human Rights Council Resolution 8/8 of 18 June 2008, which reminds all States that "Prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and the dignity of the person."

61. Regarding the allegation of intentional denial of medical treatment which may had led to at least one death while in custody, the mandate holders drew Government's attention to the fundamental principles applicable under international law to these cases. More specifically, article 7 of the International Covenant on Civil and Political Rights, to which Iraq is a party, provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Further, article 6 of the Covenant states that no one shall be arbitrarily deprived of his or her life. When the State detains an individual, it is held to a heightened level of diligence in protecting that individual's rights. When an individual dies as a consequence of injuries sustained while in State custody, there is a presumption of State responsibility (see, for instance, the Human Rights Committee's views in the case of Dermit Barbato v. Uruguay, communication no. 84/1981 (21/10/1982), paragraph 9.2). In order to overcome the presumption of State responsibility for a death resulting from injuries sustained in custody, there must be a "thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances" (Principle 9 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions). This principle was reiterated by the Human Rights Council in resolution 8/3, stating that all States have "to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions". The Council added that this includes the obligations "to identify and bring to justice those responsible, …, to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring and end to impunity and prevent the recurrence of such executions". These obligations to investigate, identify those responsible and bring them to justice arise also under articles 7 and 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

62. They further brought to the attention of the Government, the Standard Minimum Rules for the Treatment of Prisoners, as approved by the Economic and Social Council by

resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, and in particular Rules 22(2) and 25(1), as well as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988. The Committee against Torture and the Human Rights Committee have consistently found that conditions of detention can amount to inhuman and degrading treatment. The mandate holders also drew the Government's attention to paragraph 6(b) of Human Rights Council Resolution 8/8, which urges States "To take persistent, determined and effective measures to have all allegations of torture or other cruel, inhuman or degrading treatment or punishment promptly and impartially examined by the competent national authority, to hold those who encourage, order, tolerate or perpetrate acts of torture responsible, to have them brought to justice and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have been committed, and to take note in this respect of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Principles) as a useful tool in efforts to combat torture".

63. Regarding the alleged forced confessions by the detainees in relation to terrorist crimes, the mandate holders referred the Government to article 15 of the Convention against Torture, which provides that, "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." They also recalled that paragraph 6c of Human Rights Council resolution 8/8 of 2008 urges States "to ensure that no statement established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". In addition to being a crucial fair trial guarantee, this principle is also an essential aspect of the non-derogable right to physical and mental integrity set forth, inter alia, in article 7 of the International Covenant on Civil and Political Rights.

64. Concerning the persons whose fate and whereabouts were still unknown, the mandate holders wished to recall the United Nations Declaration on the Protection of All Persons from Enforced Disappearances which sets out necessary protection by the State, including in articles 2 (no State shall practice, permit or tolerate enforced disappearances); 3 (each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction); 6 (no order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance); 7 (no circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances); 9 (right to a prompt and effective judicial remedy to determine the whereabouts of persons deprived of their liberty); 10 (right to access of competent national authorities to all places of detention; to be held in an officially recognized place of detention, in conformity with national law and to be brought before a judicial authority promptly after detention; to accurate information on the detention of persons and their place of detention being made available to their family, counsel or other persons with a legitimate interest); and 12 (right to the maintenance in every place of detention of official up-to-date registers of all detained persons).

65. The mandate holders requested clarification from the Government of Iraq, inter alia, on details on the measures taken to find out and monitor the whereabouts of this group of men after their arrest and detention as well as their physical and mental condition. If the fate and whereabouts of a number of these men were still unknown, the Government was asked to provide details on any investigation or other inquiries which may have been carried out. The mandate holders further requested an indication from the Government whether the continued detention of the concerned individuals was subject to judicial

oversight by a competent judge, and information about the allegation that, at least, one person detained during this operation died while in custody. They requested details on the investigations and any prosecutions that may have been conducted, and whether penal, disciplinary or administrative sanctions had been imposed on the alleged perpetrators.

2. Reply from the Government

66. As at 31 December 2010, there had been no response to the Special Rapporteur's correspondence.

3. Communication sent to the Government

67. By letter dated 1 December 2010, the Special Rapporteur, jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a letter of allegation on the situation of suspects detained in Iraq on terrorism-related charges and on the issue of secret detention. The mandate holders wished to bring to the attention of the Government information they had received, which originated from Government files of the United States of America, and had, subsequently, become publicly dubbed "the Wikileaks Iraq War logs", relating to the alleged torture and ill-treatment of Iraqi citizens by Iraqi security forces. The mandate holders informed the Government of Iraq that a similar letter was addressed to the Government of the United States of America.

68. According to the information received, there was extensive abuse of detainees by Iraqi security forces over a five-year period between 2004 and 2009. The allegations of torture and ill-treatment were documented by forces of the United States of America. The information also suggested that such acts were conducted with impunity and appears to go normally unpunished. It was alleged that the vast majority of detainees are Sunni Arabs from central, western and north-western Iraq, held on suspicion of involvement in or supporting the Sunni armed groups that had fought against the Iraqi Government and US forces. The information received also pointed out that many hundreds of Shi'a Muslims suspected of supporting the al-Mahdi Army - followers of the radical religious figure Muqtada al-Sadr - who until recently before had engaged in armed activities against Iraqi and US forces, mainly in Baghdad and southern Iraq, formed a sizable part of the detainee population. Most of the detainees were held on suspicion of terrorism-related offences on the basis of the 2005 Iraqi Anti-Terrorism Law, but without trial or charges being brought against them, and in some cases detained incommunicado or in secret detention facilities, for several years. The Anti-Terrorism Law defines terrorism broadly as "any criminal act carried out by an individual or an organized group targeting an individual, a group of individuals, national or private institutions and causing damage to private or public properties with the aim of affecting the safety or security situation or national unity, or to terrorise and scare people or spread disturbance in order to achieve terrorist aims."

69. Thousands of Iraqi nationals who had been detained by US forces were handed over from US to Iraqi custody between early 2009 and July 2010 under a November 2008 US-Iraq agreement that contained no provisions for safeguarding the detainees' physical and mental integrity after the transfer. Article 4(3) of the Status of Forces Agreement (SOFA), taking effect at midnight on 31 December 2008, only stated in broad terms that: "It is the duty of the United States Forces to respect the laws, customs, and traditions of Iraq and applicable international law." It is alleged that tens of thousands of detainees were still being held by Iraqi authorities without trial, despite a 2008 Amnesty Law that provided for the release of all uncharged detainees after six months of detention if they had not been brought before an investigative judge, and after one year of detention if they had not been referred to a specialized court.

70. The mandate holders drew the attention to two examples from "the war logs" as illustrations of several hundred allegations of systematic torture and ill-treatment by Iraqi forces.

> 1. ALLEGED DETAINEE ABUSE BY IA AT THE DIYALA JAIL IN BAQUBAH
>
> 2006-05-25 07:30:00
>
> AT 1330D, ___ REPORTS ALLEGED DETAINEE ABUSE IN THE DIYALA PROVINCE, IN BA'___ AT THE DIYALA JAIL, vicinity. ___. 1X DETAINEE CLAIMS THAT HE WAS SEIZED FROM HIS HOUSE BY IA IN THE KHALIS AREA OF THE DIYALA PROVINCE. HE WAS THEN HELD UNDERGROUND IN BUNKERS FOR APPROXIMATELY ___ MONTHS AROUND ___ SUBJECTED TO TORTURE BY MEMBERS OF THE /___ IA. THIS ALLEGED TORTURE INCLUDED, AMONG OTHER THINGS, THE ___ STRESS POSITION, WHEREBY HIS HANDS WERE BOUND/___ AND HE WAS SUSPENDED FROM THE CEILING; THE USE OF BLUNT OBJECTS (.___. PIPES) TO BEAT HIM ON THE BACK AND LEGS; AND THE USE OF ELECTRIC DRILLS TO BORE HOLES IN HIS LEGS. FOLLOW UP CARE HAS BEEN GIVEN TO THE DETAINEE BY US ___. THE DETAINEE IS UNDER US CONTROL AT THIS TIME. ALL PAPERWORK HAS BEEN SENT UP THROUGH THE NECESSARY ___ AND PMO CHANNELS. CLOSED: 260341MAY2006. Significant activity MEETS MNC- ___
>
> 2. ALLEGED DETAINEE ABUSE BY IP IVO BA': ___ DETAINEES INJ, ___ CF INJ/DAMAGE
>
> 2006-05-27 11:00:00
>
> AT 1700D, ___ REPORTS ALLEGED DETAINEE ABUSE IN THE DIYALA PROVINCE, IN BA'___ AT THE DIYALA JAIL, vicinity. ___. 7X DETAINEES CLAIMS THEY WERE SEIZED BY IA IN THE KHALIS AREA OF THE DIYALA PROVINCE. THEY WERE DETAINED AROUND - ___ AND SUBJECTED TO TORTURE BY MEMBERS OF THE IA AND IP. THIS ALLEGED TORTURE INCLUDED, AMONG OTHER THINGS, STRESS POSITIONS, BOUND/___ AND SUSPENDED FROM THE CEILING; THE USE OF VARIOUS BLUNT OBJECTS (.___. PIPES AND ANTENNAS) TO BEAT THEM, AND FORCED CONFESSIONS. ALL DETAINEES WERE DETAINED FOR ALLEGED INVOLVEMENT IN AN ATTACK ON A IA Check Point IN KHALIS. FOLLOW UP CARE HAS BEEN GIVEN TO THE DETAINEES BY US ___. THE DETAINEES ARE UNDER US CONTROL AT THIS TIME. ALL PAPERWORK HAS BEEN SENT UP THROUGH THE NECESSARY ___ AND PMO CHANNELS. Serious Incident Report TO FOLLOW. CLOSED: 280442MAY2006. MEETS ___

71. The mandate holders sought clarification of the circumstances regarding the torture and ill-treatment described in the document. They stressed that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth inter alia in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Concern was expressed about the allegation of torture and ill-treatment by Iraqi security forces. The mandate holders drew the Government's attention to paragraph 1 of Human Rights Council Resolution 8/8 which "Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all Governments to implement fully the

prohibition of torture and other cruel, inhuman or degrading treatment or punishment." They recalled the obligations of the Government of Iraq under article 1 of the Convention against Torture which not only prohibits torture and requires States to refrain from acts of torture but also place an obligation to 'prevent acts of torture', as well as under article 6 of the Convention against Torture, which requires State Parties to establish their jurisdiction over acts of torture if they are committed in any territory under its jurisdiction; when the alleged offender is a national of that State and when the victim is a national of that State if that State considers it appropriate. It also requires State Parties to establish their jurisdiction over acts of torture in cases where the alleged offender is present in their territory. Article 7 goes on to provide that State Parties must either extradite alleged offenders or submit the case to its competent authorities for the purpose of prosecution.

72. With regards to impunity, investigations and prosecution alleged in this letter, the mandate holders drew the Government's attention to article 12 of the Convention against Torture, which requires the competent authorities to undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that torture has been committed, to its article 7, which requires State parties to prosecute suspected perpetrators of torture; and to paragraph 6b of Human Rights Council Resolution 8/8, which urges States "To take persistent, determined and effective measures to have all allegations of torture or other cruel, inhuman or degrading treatment or punishment promptly and impartially examined by the competent national authority, to hold those who encourage, order, tolerate or perpetrate acts of torture responsible, to have them brought to justice and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have been committed, and to take note in this respect of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Principles) as a useful tool in efforts to combat torture". Furthermore, the mandate holders pointed out that, insofar as international humanitarian law is applicable, under the Fourth Geneva Convention, Iraq is required to provide effective penal sanctions for grave breaches such as torture or inhuman treatment and to "take measures necessary for the suppression of all [other] acts contrary to the provisions of [GC IV]".

73. Additionally, the Government's attention was drawn to General Comment No. 2 of the United Nations Committee against Torture of 24 January 2008 (UN Doc.CAT/C/GC/2, para.18) which reiterates that "where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission."

74. They further recalled article 2(2) of the Convention against Torture, which provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. In this regard, they noted paragraph 2 of Resolution 8/8 of the Human Rights Council, which "Condemns in particular any action or attempt by States or public officials to legalize, authorize or acquiesce in torture under any circumstances, including on grounds of national security or through judicial decisions."

75. As regards the allegation that detainees were held incommunicado for several years, the mandate holders drew the attention of the Government to paragraph 12 of General Assembly Resolution A/RES/61/153 of 14 February 2007, which "reminds all States that prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and dignity of the person." As regards the allegations that some of the detainees were held in secret detention, they further referred to the Joint Study on Global Practices in relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur, the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention represented by its Vice-Chair, and the Working Group on Enforced or Involuntary Disappearances represented by its Chair (UN Doc. A/13/42, 19 February 2010), in which the mandate holders concluded that "[s]ecret detention as such may constitute torture or ill-treatment for the direct victims as well as for their families" (para. 289), and that "[t]he generalized fear of secret detention and its corollaries, such as torture and ill-treatment, tends to effectively result in limiting the exercise of a large number of human rights and fundamental freedoms" (para. 290).

76. Concerning the 2005 Anti-Terrorism Law, subject to which it is alleged that most of the detainees were held, the mandate holders stressed that the principle of legality in criminal law, enshrined in several international human rights instruments such as article 15 of the International Covenant on Civil and Political Rights and made non-derogable in times of public emergency, implies that the requirement of criminal liability is limited to clear and precise provisions in the law, so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation which would broaden the scope of the proscribed conduct. In their view, at the national level, terrorist crimes should be defined by the presence of two cumulative conditions: (1) The means used, which can be described as deadly or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; and (2) the intent, which is to cause fear among the population or the destruction of public order or to compel the government or an international organization to doing or refraining from doing something, in the advancement of a political, religious or ideological cause. It is only when these two conditions are fulfilled that an act may be criminalized as terrorist.

77. The mandate holders urged the Government to take all necessary measures to guarantee that the rights and freedoms of the aforementioned persons, whose identities could not be established, and of several hundreds of others whose allegations of systematic torture and ill-treatment had been recorded by US personnel, are respected and that accountability of any person guilty of the alleged violations is ensured and requested that it adopts effective measures to prevent the recurrence of these acts. They further requested clarification as to what measures the Government had taken to suppress the commission of torture and other ill-treatment by US, Coalition or Iraqi forces and information on action, including interventions, investigations or prosecution of acts of torture or ill-treatment alleged in the letter. They asked what measure the Government had taken to investigate or prosecute members of Iraqi forces and/or civilian authorities who were alleged to have committed or been complicit in the commission of torture, and whether and how the requirements of the principle of legality had been observed in relation to the definition of the crime of terrorism that reportedly formed the basis of the arrest and detention of most of the above-mentioned detainees.

4. Reply from the Government

78. As at 31 December 2010, no reply by the Government of Iraq had been received to the communication dated 1 December 2010.

5. Communication sent to the Government

79. On 17 December 2010, the Special Rapporteur, together with the Special Rapporteur on extrajudicial, summary or arbitrary executions, sent a joint urgent appeal regarding a statement made by the Minister of Interior that about **39 detainees suspected of having links with al-Qa'ida linked groups were to be executed**.

80. According to information received:

> On 2 December 2010, the Ministry of Interior convened a press conference where Government officials paraded about 39 detainees suspected of having had rejoined al-Qa'ida linked groups after their release from prison. Some of those detained were suspected of having links with Iraq's al-Qa'ida branch known as "State of Iraq" (ISI), including Mr. Azim al-Zawi, reportedly the third-highest leader of the ISI, Mr. Ahmed Hussein 'Ali, known as the "Mufti of Anbar" and Mr. Abdul Razzaq, the organization's alleged media chief.
>
> It was alleged that at the press conference, the Minister of Interior was quoted to have had said "today, we will send these criminals and the investigation results to the courts that will sentence them to death. Our demand is not to delay the carrying out of the executions against these criminals [in order] to deter terrorist and criminal elements."

81. The mandate holders brought to the attention of the Government of Iraq that although international law does not prohibit the death penalty, it nonetheless mandates that it must be regarded as an exception to the fundamental right to life, and must as such be applied in the most restrictive manner. It is essential that capital punishment, whenever it is resorted to, should fully respect all fair trial standards contained in international human rights law in the relevant proceedings with the sentence being pronounced only following a regular judicial process. They were concerned about the alleged statements made by the Minister of Interior which seemed to prejudge the outcome of the trial. The mandate holders also drew the attention of the Government to article 14(2) of the International Covenant on Civil and Political Rights, which Iraq had ratified on 25 February 1971. The provision states that "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law". This provision is fundamental in capital punishment cases as provided under article 6 of the International Covenant on Civil and Political Rights that "this penalty can only be carried out pursuant to a final judgment rendered by a competent court". Only full respect for stringent due process guarantees distinguishes capital punishment as possibly permitted under international law from a summary execution, which by definition violates human rights standards. They therefore urged the Government to take all necessary steps to ensure that the rights under international law of the accused persons are fully respected. Were it true that the Minister of Interior had in advance of the trial pronounced himself of its outcome, including the sentence of death, the mandate holders took the view that only through full respect for the right to a fair trial and through excluding the use of capital punishment in the 39 cases in question could Iraq reach compliance with its international human rights obligations.

82. Concerning the allegation that the 39 detainees were suspected of having links with al-Qa'ida associated groups, which had apparently formed the factual basis of the terrorism-related charges that were reportedly brought against them, the mandate holders stressed that the principle of legality in criminal law, enshrined in several international human rights instruments such as article 15 of the International Covenant on Civil and Political Rights and made non-derogable in times of public emergency, implies that the requirement of criminal liability is limited to clear and precise provisions in the law, so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation which would broaden the scope of the proscribed conduct. In their view, at the national level,

terrorist crimes should be defined by the presence of two cumulative conditions: (1) The means used, which can be described as deadly or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; and (2) the intent, which is to cause fear among the population or the destruction of public order or to compel the government or an international organization to doing or refraining from doing something, usually in the advancement of a political, religious or ideological cause. It is only when these two conditions are fulfilled that an act may be criminalized as terrorist.

83. The mandate holders requested the Government, inter alia, to provide information on the exact charges that had been made against the 39 detainees, what measures were put in place to ensure that due process guarantees are respected in accordance with international fair trial standards, including the right to presumption of innocence, and whether and how the requirements of the principle of legality had been observed in relation to the definition of the terrorism-related offences with which the 39 detainees had reportedly been charged.

6. Reply from the Government

84. As at 31 December 2010, there had been no response to the Special Rapporteur's correspondence.

E. Kazakhstan

1. Communication sent to the Government

85. On 2 July 2010, the Special Rapporteur, together with the Chair-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant, sent a joint urgent appeal to the Government of Kazakhstan regarding Mr. **Ershidin Israel**, 38 years, ethnic Uyghur of Chinese nationality, held at the Pretrial Investigation Center No. 1 of Almaty, Seifulina Street.

86. According to the information received:

> Mr. Israel fled the Xinjiang Uyghur Autonomous Region of China to Kazakhstan in September 2009 after he had provided information to Radio Free Asia's Uyghur Service about the alleged torture to death of a Uyghur detainee and the subsequent arrest of two individuals whom the Chinese authorities accused of providing information on the case to the same radio station.
>
> After his arrival in Kazakhstan, Mr. Israel applied for refugee status from the office of the United Nations High Commissioner for Refugees (UNHCR) in Almaty, which he was granted in mid-March 2010. Mr. Israel also made an application to the Kazakh authorities for asylum, which was still pending. At the end of March 2010, UNHCR had secured a resettlement offer for Mr. Israel from Sweden. Mr. Israel was scheduled to depart to Sweden on 1 April 2010.
>
> Subsequently, the Kazakh authorities denied Mr. Israel's application for an exit visa, indicating that his name appeared on Interpol's terrorism watch list. Prior to that, the Chinese authorities had made an extradition request based on terrorism allegations against Mr. Israel.
>
> The authorities agreed that Mr. Israel live in a 'safe place'/apartment designated by UNHCR and that Mr. Israel be accompanied by representatives of UNHCR to interviews that have been conducted by the authorities repeatedly over the previous months and were focused on his background and how he crossed the border into Kazakhstan.

On 23 June 2010, Mr. Israel was arrested by the authorities with a view to his possible extradition to China. A court hearing took place on 25 June and the court upheld and sustained the arrest in relation to the possible extradition. Mr. Israel appealed that court decision; the appeals proceedings were expected for 2 July 2010. Information received indicated that in case the appellate court upholds the lower's court decision, the office of the Prosecutor-General was likely to request more information from the Chinese authorities in relation to the extradition request.

87. Concern was expressed about the possible forcible return of Mr. Israel to China where he was at risk to be arrested and tried on terrorism charges in relation to the aforementioned information provided by him to Radio Free Asia. Further concern was expressed about Mr. Israel's physical and mental integrity if returned to China. The mandate holders underlined that General Assembly resolution 59/191, in its paragraph 1, stresses that: "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law", as do Security Council resolutions 1456 (2003) and 1624 (2005) in paragraphs 6 and 4 respectively. They stressed that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth inter alia in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ratified by Kazakhstan in 2005) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (accession by Kazakhstan in 1998). They further drew the Government's attention to article 3 of the Convention against Torture, which provides that no State party shall expel, return ("refouler"), or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. Paragraph 9 of General Comment 20 of the Human Rights Committee on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, states that State parties "must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or refoulement". Furthermore, paragraph 9 of General Assembly resolution 61/253 urges States "not to expel, return ("refouler"), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture". The Special Rapporteur noted in paragraph 70 of his report A/62/263 to the General Assembly "that the listing of terrorists may also have bearing upon international protection." Being conscious of the fact that the listing may be carried out on the basis of national practices or based on decisions by international bodies, the Special Rapporteur also underlined that "persons included in terrorist lists remain within the ambit of human rights law, the principle of non-refoulement being applicable and in need of particular attention." The Special Rapporteur dealt with further limitations, criteria and safeguards necessary in such listing procedures in a previous report to the General Assembly (A/61/267, paras. 30-41).

88. In relation to Mr. Israel's arrest by the authorities of Kazakhstan, the mandate holders appealed to the Government to take all necessary measures to guarantee his right not to be deprived arbitrarily of his liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. In connection to the right to fair proceedings before an independent and impartial tribunal, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in his report on his visit to Kazakhstan in 2009, stated that "Whereas Kazakhstan is a party to the Convention relating to the status of refugees of 1951 and works closely with the office of the United Nations High Commissioner for Refugees, the domestic legislation does not contain provisions implementing the principle of non-refoulement stipulated by article 3 of the Convention against Torture. In this context, the Special Rapporteur also expressed concern that "although under the law any decision of a

State body can be challenged in the court, in reality, clear procedures regarding full access to justice in extradition and deportation proceedings are lacking" (A/HRC/10/39/Add.3, para. 44).

89. Regarding the information provided by Mr. Israel to Radio Free Asia, the mandate holders appealed to the Government to take all necessary steps to secure the right to freedom of opinion and expression in accordance with fundamental principles as set forth in article 19 of the International Covenant on Civil and Political Rights, which provides that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

90. The mandate holders sought clarification from the Government, inter alia, on what procedures were in place to guarantee fair and independent proceedings in relation to Mr. Israel's arrest and possible extradition to China, what substance there was to the use of the notion of "terrorism" in the consideration of extraditing Mr. Israel to China, rather than allowing his resettlement to Sweden, and on how the actions undertaken by public officials regarding this case were compatible with the international norms and standards of the right to freedom of opinion and expression.

2. Reply from the Government

91. As at 31 December 2010, there had been no response by the Government of Kazakhstan to the Special Rapporteur's correspondence.

F. Morocco

1. Correspondance par le Rapporteur Spécial

92. Le 11 mai 2010, le Rapporteur spécial conjointement avec la Rapporteuse spéciale sur l'indépendance des juges et des avocats, et le Rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumains ou dégradants, ont envoyé une lettre concernant le traitement subi par Mme **Doha Aboutabit** dans le cadre de sa garde à vue dans les installations de la police judiciaire de Casablanca suite à son arrestation le 3 décembre 2009. Mme Aboutabit aurait été, depuis juillet 2009, Chef de service à l'hôpital Aït-Qamra dans la région d'Al-Hoceima.

93. Selon les informations reçues :

> Le 3 décembre 2009, Mme Aboutabit aurait été arrêtée au domicile de ses parents à Rabat et aurait été emmenée au poste de police d'Al-Maarif à Casablanca. Mme Aboutabit serait restée détenue douze jours dans les locaux des services de sécurité, soit la durée légale maximum de garde à vue prévue dans le cadre d'une enquête préliminaire en cas d'infraction terroriste. Le juge d'instruction de la Cour d'appel de Rabat l'aurait placée sous mandat de dépôt à la prison de Salé où elle serait toujours détenue.
>
> Mme Aboutabit serait accusée d'avoir « financé le terrorisme » pour avoir, il y a quelques années, prêté une somme d'argent à son frère. Celui-ci se serait par la suite rendu en Irak où, selon les autorités, il aurait trouvé la mort en 2008.
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> Selon les informations reçues, durant sa garde à vue, Mme Aboutabit aurait subi de graves tortures psychologiques commises par des policiers. En l'occurrence, ceux-ci l'auraient menacé de brûler son visage avec un briquet, ainsi que de ne plus revoir son enfant si elle ne reconnaissait pas les actes dont on l'accusait. Suite à ces menaces, elle aurait confirmé les aveux suggérés par la police.

Tout au long de sa garde à vue, Mme Aboutabit n'aurait pas eu la possibilité de communiquer avec un avocat, pas même quarante-huit heures après la première prolongation de la garde à vue tel qu'il est prévu dans le Code de procédure pénale (art. 66) et par la loi en matière d'infraction terroriste au Maroc.

94. Les mandataires ont exprimé leurs craintes sérieuses pour l'intégrité physique et mentale de Mme Aboutabit. Ils ont attiré l'attention du Gouvernement du Maroc sur les dispositions suivantes. Selon l'article 9(1) du Pacte international relatif aux droits civils et politiques, « [t]out individu a droit à la liberté et à la sécurité de sa personne. Nul ne peut faire l'objet d'une arrestation ou d'une détention arbitraire. » L'article 9(3) du Pacte international dispose que « [t]out individu arrêté ou détenu du chef d'une infraction pénale sera traduit dans le plus court délai devant un juge ou une autre autorité habilitée par la loi à exercer des fonctions judiciaires, et devra être jugé dans un délai raisonnable ou libéré. Enfin, le droit de quiconque, se trouvant privé de sa liberté par arrestation ou détention, d'introduire un recours devant un tribunal est prévu à l'article 9(4) du même Pacte. Dans son Observation générale No. 29 de 2001, le Comité des droits de l'homme a confirmé que ce droit est protégé en toutes circonstances, en raison notamment du rôle crucial joué par les garanties de procédure visant à garantir la conformité avec le droit, non-susceptible de dérogation, de ne pas être soumis à la torture, ni à des peines ou traitements cruels, inhumains ou dégradants, prévu à l'article 7 du Pacte international relatif aux droits civils et politiques. Enfin, le Comité des droits de l'homme, dans ses observations finales concernant le Maroc, a considéré comme excessive la période de garde à vue – 48 heures (renouvelables une fois) pour les crimes ordinaires et 96 heures (renouvelables deux fois) pour les crimes liés au terrorisme –, période pendant laquelle un suspect peut être détenu sans être présenté devant un juge (para. 15, CCPR/CO/82/MAR).

95. Les mandataires ont aussi attiré l'attention du Gouvernement sur le paragraphe 7b de la Résolution 8/8 du Conseil des droits de l'homme de juin 2008 laquelle rappelle aux États que « [l]es mesures d'intimidation ou les pressions visées à l'article premier de la Convention contre la torture, notamment les menaces graves et crédibles contre l'intégrité physique de la victime ou d'une tierce personne, ainsi que les menaces de mort, peuvent être assimilées à un traitement cruel, inhumain ou dégradant ou à la torture. »

96. Par ailleurs, ils ont également rappelé au Gouvernement les dispositions de la Résolution 61/153 dans laquelle l'Assemblé Générale « rappelle à tous les États qu'une période prolongée de mise au secret ou de détention dans des lieux secrets peut faciliter la pratique de la torture et d'autres peines ou traitements cruels, inhumains ou dégradants et peut en soi constituer un tel traitement, et demande instamment à tous les États de respecter les garanties concernant la liberté, la sécurité et la dignité de la personne. »

97. De plus, ils ont attiré l'attention du Gouvernement sur le fait qu'en vertu de l'article 12 de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants les autorités compétentes doivent assurer qu'une enquête impartiale aura lieu chaque fois qu'il y a des motifs raisonnables de croire qu'un acte de torture a été commis. Ils ont rappelé au Gouvernement que l'article 7 de la Convention demande aux États d'assurer que ceux qui sont suspects de commettre des actes de torture soient traduits en justice.

98. Ils ont également rappelé au Gouvernement l'article 13 de la Convention contre la torture, qui exige que « [t]out État partie assure à toute personne qui prétend avoir été soumise à la torture sur tout territoire sous sa juridiction le droit de porter plainte devant les autorités compétentes dudit État qui procéderont immédiatement et impartialement à l'examen de sa cause. […]» Dans ce contexte, ils ont aussi rappelé les paragraphes 6 b et e de la Résolution 8/8 du Conseil des droits de l'homme de juin 2008, qui exhorte les États « b) À prendre des mesures durables, décisives et efficaces pour que toutes les allégations de torture ou autres peines ou traitements cruels, inhumains ou dégradants soient examinées

promptement et en toute impartialité par l'autorité nationale compétente, et que ceux qui encouragent, ordonnent, tolèrent ou commettent des actes de torture, notamment les responsables du lieu de détention où il est avéré que l'acte interdit a été commis, en soient tenus responsables, traduits en justice et sévèrement punis, et à prendre note à cet égard des Principes relatifs aux moyens d'enquêter efficacement sur la torture et autres peines ou traitements cruels, inhumains ou dégradants et d'établir la réalité de ces faits (Protocole d'Istanbul), qui peuvent contribuer utilement à lutter contre la torture; » et « À prévoir en faveur des victimes d'actes de torture ou d'autres peines ou traitements cruels, inhumains ou dégradants, une réparation, une indemnisation équitable et suffisante et une réadaptation sociomédicale appropriée. »

99. Les mandataires ont également rappelé au Gouvernement les Principes de base relatifs au rôle du barreau, adoptés par le huitième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants qui s'est tenu à La Havane (Cuba) du 27 août au 7 septembre 1990, et en particulier:

- principe 5. Les pouvoirs publics veillent à ce que toute personne, lorsqu'elle est arrêtée ou mise en détention ou lorsqu'elle est accusée d'un crime ou d'un délit, soit informée sans délai, par l'autorité compétente, de son droit à être assistée par un avocat de son choix ; et
- principe 7. Les pouvoirs publics doivent en outre prévoir que toute personne arrêtée ou détenue, qu'elle fasse ou non l'objet d'une inculpation pénale, pourra communiquer promptement avec un avocat et en tout cas dans un délai de 48 heures à compter de son arrestation ou de sa mise en détention.

100. Les mandataires ont demandé au Gouvernement de leur fournir toutes les informations, et éventuellement tous les résultats des examens médicaux effectués, des enquêtes et des investigations judiciaires menées en relation avec les faits. Si les allégations étaient avérées, les mandataires ont demandé au Gouvernement de leur fournir toute information sur les poursuites et procédures engagées contre les auteurs de violence. Ils lui ont également demandé de fournir toute information sur les mesures prises pour garantir, tant sur le plan législatif qu'en pratique, que toute personne arrêtée ou détenue puisse communiquer promptement avec un avocat. Enfin, ils ont demandé au Gouvernement de clarifier les faits relatifs à l'accusation de financement de terrorisme dirigée contre un individu ainsi que la base légale de cette accusation.

2. Correspondance du Gouvernement

101. Par lettre datée du 11 juin 2010, le Gouvernement a indiqué que l'enquête diligentée en l'objet a révélé, que la dénommée Doha Aboutabit a été arrêtée le 3 décembre 2009, par les services de la brigade nationale de la police judicaire dans le respect total des lois en vigueur et sous contrôle effectif du parquet.

102. Doha Aboutabit a été auditionnée en date du 15 décembre 2009 par le juge d'instruction près l'annexe de là cour d'appel à Salé et a été placée sous mandat de dépôt à la prison civile de ladite ville.

103. Les faits qui sont reprochés à la-mise en cause sont prévus et réprimés par l'article 218- 4 du code pénal qui énonce : « Constituent des actes de terrorisme les infractions ci-après : le fait de fournir, de réunir ou de gérer par quelque moyen que ce soit, directement ou indirectement, des fonds, des valeurs ou des biens dans l'intention de les voir utiliser ou en sachant qu'ils seront utilisés, en tout ou en partie, en vue de commettre un acte de terrorisme, indépendamment de la survenance d'un tel acte et le fait d'apporter un concours ou de donner des conseils à cette fin. »

104. Concernant sa mise en garde à vue : Il y a lieu de signaler que le contact des personnes gardées à vue avec leurs avocats, est régi par les articles 66 et 80 du code de procédure pénale qui édicte que : « toute personne gardée à vue peut en cas de prolongation de cette mesure demander à l'officier de police judiciaire de communiquer avec son avocat, l'exercice de ce droit est subordonné à l'autorisation du ministère public qui peut dans le cadre des affaires liées au terrorisme retarder la communication de l'avocat et son client mais sans dépasser 48h à compter de la 1 ère prolongation. » L'exercice de ce droit exige la formulation d'une demande par la personne gardée à vue. Or, la mise en cause n'a formulé aucune demande dans ce sens.

105. Concernant l'allégation de torture et de mauvais traitement : L'allégation selon laquelle Doha Aboutabit aurait subi de graves tortures psychologiques et des menaces par des policiers durant sa garde à vue est sans fondement car, aucune plainte pour torture ou menace n'a été déposée par l'intéressée ou son représentant, ni au Cours ni postérieurement de la garde à vue.

G. Pakistan

1. Communication sent to the Government

106. On 5 February 2010, the Special Rapporteur sent a letter of allegation to the Government of Pakistan concerning Messrs. **Umar Farooq, Waqar Khan, Ahmed Minni, Aman Hassan Yemer** and **Ramy Zamzam,** aged between 19 and 24, United States citizens, who were detained on suspicion of terrorism in the city of Sarghoda. The Government was informed that a letter on this case was also being sent to the Government of the United States of America.

107. According to the information received:

> The five men were arrested on 7 December 2009 in Sarghoda, Punjab Province and charged with plotting terror attacks in Pakistan as well as with having links to Al-Qaida and seeking to join militants fighting United States troops across the border in Afghanistan. The most serious of the charges was conspiracy to carry out a terrorist act, which could carry life imprisonment depending on what the act is. The five men have, allegedly, confessed their intention to carry out "jihad" and to fight against the war on terror. Following their appearance before a special antiterrorism court during a closed session on 18 January 2010, the men reportedly shouted out allegations of having been subjected to torture before being transported back to the prison. According to the information received, a court order from the same court session confirmed that the men in question "made a complaint that they have been tortured in the custody of police" and that, consequently, the judge ordered medical examinations for the men. Allegedly, none of them was allowed to be represented by their lawyer of own choice.

108. While being conscious of the fact that States' obligation to protect and promote human rights requires them to take effective measures to combat terrorism, the Special Rapporteur underlined that General Assembly resolution 59/191, in its paragraph 1, stresses that: "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law", as do Security Council resolutions 1456 (2003) and 1624 (2005) in paragraphs 6 and 4 respectively.

109. The Special Rapporteur wished to recall in particular the non-derogable nature of the prohibition against torture or any other cruel, inhuman or degrading treatment or punishment, as established in the International Covenant on Civil and Political Rights, which Pakistan signed on 17 April 2008. The Human Rights Committee in its General

Comment on states of emergency (article 4 of the Covenant) has stated that there is a close connection between the prohibition of torture in article 7 and the right of all persons deprived of their liberty to human treatment and respect for the inherent dignity of the human person as established in article 10 (1) of the International Covenant on Civil and Political Rights. In relation to this, the Human Rights Committee has interpreted article 10 (1) as a norm of international law that is not subject to derogation (CCPR/C/21/Rev.1/Add.11, paragraph 13(a).

110. Furthermore, with regard to the right to a fair trial, article 14 (3) of the Covenant establishes a number of minimum guarantees, which shall be granted to every person charged of a crime, and in its section (g) stipulates that no one shall be compelled to testify against himself or to confess guilt. Hence, any direct or indirect physical or undue psychological pressure on the accused for these purposes constitutes a violation of this right, and consequently the Human Rights Committee states that "it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession" (CCPR/C/GC/32, paragraph 41). In addition to recalling the general obligation of all States to offer an effective remedy through prompt and impartial investigations by a competent authority when torture complaints have been filed, the Special Rapporteur took the opportunity to stress, with the words of the Human Rights Committee in its General Comment No. 32, paragraph 33, on article 14 of the Covenant, that "in cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such claim".

111. The Special Rapporteur sought clarification from the Government on the legal basis for the detention of the five detainees; the specific acts that they were accused of; what evidence had been presented against the suspects in the case; what measures had been taken in order to secure that the men had regular access to and were allowed to communicate in private with a lawyer of their own choice; what measures had been taken by the executive branch to investigate the torture complaints made in the case; and what impact such measures had according to the law upon the judicial proceedings against the five detainees.

2. Reply from the Government

112. As at 31 December 2010, there had been no response by the Government of Pakistan to the Special Rapporteur's letter of allegation.

3. Communication sent to the Government

113. On 9 March 2010, the Special Rapporteur, together with the Chair-Rapporteur of the Working Group on Arbitrary Detention, and the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a joint urgent appeal concerning Mr. **Charuh Buranov**, aged 21, citizen of Uzbekistan.

114. According to the information received,

> Mr. Buranov was held at the secret service headquarters in Islamabad in connection with terrorism-related suspicions and under imminent threat of being repatriated to Uzbekistan. It was unclear whether he had access to any judicial review regarding the refoulement.
>
> One of his brothers was imprisoned in Uzbekistan in connection with terrorism charges, but allegedly rather for his religious convictions.

115. The mandate holders drew the Government's attention to the right to physical and mental integrity of Mr. Charuh Buranov. This right is set forth in the Universal Declaration of Human Rights; it is also proclaimed in the International Covenant on Civil and Political

Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to both of which Pakistan is a signatory. The right to physical and mental integrity encompasses the principle of non-refoulement, reflected in article 3 of the Convention against Torture, which provides that no State party shall expel, return ("refouler"), or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. Furthermore, paragraph 6d of Human Rights Council resolution 8/8 urges States not to expel, return (refouler), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture and; the Council recognizes in this respect that diplomatic assurances, where used, do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of non-refoulement.

116. The mandate holders reminded the Government of the report on the visit to Uzbekistan of the then Special Rapporteur on Torture (E/CN.4/2003/68/Add.2), which stated that "torture or similar ill-treatment is systematic as defined by the Committee against Torture [and that] torture and other forms of ill-treatment appear to be used indiscriminately against persons charged for activities qualified as serious crimes such as acts against State interests, as well as petty criminals and others", and of the then Special Rapporteur on Torture's annual follow-up reports A/HRC/4/33/Add.2, paras. 668-670, and A/HRC/7/3/Add.2, paras 751-752, where reference is made to previous statements about the situation in Uzbekistan.

117. The mandate holders appealed to the Government to take all necessary measures to guarantee Mr. Charuh Buranov's right not to be deprived arbitrarily of his liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights. They drew the attention of the Government to a report of the Working Group on Arbitrary Detention (A/HRC/4/40, para. 47), in which it argued that "[t]he principle of non-refoulement remains […] relevant also with regard to arbitrary detention. Where there are substantial grounds for believing that there is a real risk that the person to be removed from the territory will be deprived of his or her liberty in the receiving State (as is often the case when the ground for removal is a suspicion of involvement in terrorist activities), the sending State should examine whether such detention would be arbitrary within the meaning of the three categories of arbitrary detention identified in the Working Group's methods of work…".

118. The mandate holders asked the Government for clarification, inter alia, about whether Mr. Buranov was in detention in Pakistan at the time, and if he was, to indicate the legal basis for his arrest and detention and how these measures were compatible with applicable international human rights norms and standards as stipulated, inter alia, in the Universal Declaration of Human Rights. They also asked for information on whether he had had access to judicial remedies regarding his detention and his possible return to Uzbekistan, and to legal counsel. Since Mr. Buranov's detention was allegedly based on terrorism-related suspicions, the Government was further asked to clarify what was the link with terrorism and what law was applicable to this case, including by providing the specific legal provisions.

4. Reply from the Government

119. As at 31 December 2010, there had been no response by the Government of Pakistan to the Special Rapporteur's correspondence.

H. Peru

Comunicado de prensa del Relator Especial

120. El 8 de septiembre de 2010, tras su visita oficial al Perú del 1 al 8 de septiembre de 2010, el Relator Especial publicó un comunicado de prensa en el cual se informaba que el objetivo de su misión era estudiar el marco legislativo e institucional peruano, así como las políticas en la lucha contra el terrorismo, y su cumplimiento conforme al derecho internacional de los derechos humanos. El Relator Especial quisiera agradecer al Gobierno peruano y a todos sus demás interlocutores por la positiva cooperación que permitió la realización de una misión exitosa.

121. Durante su misión el Relator Especial visitó Lima, Ayacucho y Cusco. Se reunió con el Ministro de Relaciones Exteriores y el Ministro de Defensa, así como con funcionarios de los Ministerios de Relaciones Exteriores, Justicia y del Interior. También se reunió con funcionarios de la Fiscalía, las Fuerzas Armadas, la Policía y los servicios de inteligencia. Además se reunió con parlamentarios, jueces de la Corte Suprema y otros miembros del Poder Judicial, la Defensora del Pueblo y sus representantes regionales, el Presidente de la Comisión de la Verdad y Reconciliación, y con autoridades regionales y locales en Ayacucho y en Cusco. También se reunió con representantes de la sociedad civil, incluyendo organizaciones no gubernamentales, académicos, abogados, representantes de comunidades locales e indígenas y de desplazados, víctimas del terrorismo, y víctimas de violaciones de derechos humanos cometidas por el Estado, y con miembros de las comisiones de reparaciones.

122. El Relator Especial, durante sus reuniones como también mediante otros métodos de investigación, recaudó información sobre las cuestiones prácticas y las consecuencias de las medidas contra el terrorismo del Perú. Los abogados de los acusados de delitos de terrorismo, como también miembros de las fuerzas de seguridad, de las cuales algunos de sus miembros supuestamente cometieron violaciones de derechos humanos en el contexto de la lucha contra el terrorismo, aportaron perspectivas y experiencias valiosas. En el Penal Miguel Castro Castro en Lima y en el Penal de Yanamilla en Ayacucho pudo entrevistarse en privado con procesados y sentenciados por delitos de terrorismo. El Relator Especial asimismo visitó una comunidad reasentada de desplazados internos y se reunió con líderes de comunidades retornadas.

123. El Relator Especial fue informado de la violencia y del conflicto armado interno que afectó al Perú desde 1980 a 2000, y del trágico sufrimiento de la población, en particular de las comunidades indígenas y campesinas como consecuencia del terrorismo, igual que de las actividades contra el terrorismo realizadas por el Estado. Alaba la labor exhaustiva de la Comisión de la Verdad y la Reconciliación Nacional establecida en 2001, que culminó en un importante informe final en agosto de 2003. Varios representantes de distintos niveles del Gobierno le informaron acerca de los esfuerzos y los desafíos al implementar las recomendaciones de la Comisión.

124. En sus anteriores trabajos temáticos y por países acerca del derecho a un juicio justo en la lucha contra el terrorismo, el Relator Especial ha recalcado la importancia del principio de la normalidad, es decir su firme preferencia por abordar el terrorismo como delito grave, sujeto a un proceso ordinario ante tribunales ordinarios. El Perú aporta lecciones importantes en ese sentido tras haber prescindido de los “tribunales sin rostro”. Sin embargo, el Relator Especial sigue preocupado porque el Perú es uno de los pocos países que reiteradamente ha recurrido a la declaración del estado de emergencia, y a derogar algunas de sus obligaciones de derechos humanos debido al terrorismo.

125. Como dimensión de las políticas de lucha contra el terrorismo de decenios anteriores, cabe destacar el enjuiciamiento de una gran cantidad de personas por terrorismo,

aunque los juicios no cumplieron con las normas internacionales de derechos humanos por el uso, entre otras cosas, de los llamados “tribunales sin rostro”. A raíz de un fallo de la Corte Constitucional de 2003 que declaró la inconstitucionalidad de varios elementos del marco jurídico que se aplicaba anteriormente, se llevaron a cabo nuevos juicios, que dio pie a la absolución de la mayor parte de los acusados que habían sido condenados equivocadamente por delitos de terrorismo. El proceso de rejudicialización y de absoluciones se ha convertido en un elemento importante del proceso de reconciliación, y de la restauración del estado de derecho en el país. Igual de importante ha sido el hecho de que el Sr. Alberto Fujimori Fujimori, antiguo Presidente del Perú, y varios de sus colaborados gubernamentales y militares más cercanos, hayan sido llevados ante la justicia, en un muy aclamado juicio, por las graves violaciones de derechos humanos cometidas durante los años en que la Constitución y sus garantías fueron suspendidas o pasadas por alto.

126. Sin embargo, aunque reconoce la complejidad de estos casos y de una gran cantidad de otros casos en curso, el Relator Especial se preocupa porque el juicio y el castigo de funcionarios del estado por violaciones de derechos humanos, incluyendo matanzas de la población civil, avanzan muy lentamente y pueden toparse con obstáculos legales, tanto antiguos como nuevos. La percepción de un clima de impunidad, que ya existe, se ha reforzado recientemente mediante el nuevo Decreto legislativo no. 1097, que parecería someter a prescripción los procesos penales contra perpetradores de delitos de lesa humanidad cometidos en el Perú antes del 9 de noviembre de 2003, aunque tanto la Corte Interamericana de Derechos Humanos como el Tribunal Constitucional del Perú han exigido que se lleven a juicio dichos delitos independientemente de un plazo límite. El Decreto legislativo no. 1097 tiene otra disposición que parecería imponer un plazo estricto irrazonable para el manejo de casos de delitos de lesa humanidad, lo que a juicio del Relator Especial probablemente dará pie a violaciones del derecho internacional. Muchos de los interlocutores del Relator Especial opinan que el Decreto legislativo no. 1097 es inconstitucional y no debe ser aplicado por los tribunales peruanos.

127. El Decreto legislativo no. 1095 de reciente adopción relativo al uso de la fuerza por las fuerzas armadas en territorio nacional parecería basarse en una premisa equivocada de que una decisión interna para autorizar a las fuerzas militares a ejercer los poderes del Estado en una zona dentro del territorio peruano generaría la aplicación del derecho humanitario, con posibles consecuencias adversas para los derechos humanos. La definición de “grupos hostiles”, que según la ley se supone actúan como parte a un conflicto armado es tan lata que podría abarcar a movimientos de protesta social que no llevan armas de fuego consigo. El Relator Especial recalca que el derecho humanitario internacional solamente es aplicable cuando los hechos objetivos en el terreno demuestran la existencia de un conflicto armado en curso entre partes identificables, las cuales son capaces de llevar a cabo hostilidades armadas y se organizan para ello.

128. El Relator Especial celebra que el gobierno peruano haya adoptado la Ley Número 28592 en el año 2005 sobre el Plan Integral de Reparaciones, que contempla reparaciones individuales y colectivas para las víctimas del conflicto armado interno. El Relator Especial señala como elemento de mejores prácticas el hecho de que los planes de reparación no hacen diferenciación alguna entre las víctimas de la violencia terrorista y las victimas de abusos de las autoridades militares y policiales del Estado, sino que tratan de brindar justicia a todas las víctimas de la violencia en pie de igualdad.

129. Los crímenes terroristas cometidos durante el periodo de 1980 a 2000 afectaron en gran medida a la población en las zonas recónditas del país, que se caracterizan por la ausencia y la falta de protección de las autoridades estatales, y por ello afectaron mayormente a las comunidades indígenas y rurales excluidas, indigentes y discriminadas. El Relator Especial considera de capital importancia que la aplicación de los programas

colectivos de reparación se lleven a cabo mediante la participación efectiva de los beneficiarios de los mismos. Esto concierne en particular a los pueblos indígenas y a mujeres que a menudo se hallaron en el fuego cruzado del conflicto violento. Aunque reconoce la importancia de la labor de la Comisión Multisectorial de Alto Nivel (CMAN) para integrar a los gobiernos regionales y locales en el proceso de implementación, manifiesta su preocupación porque hasta la fecha se ha dado muy poca consideración a la participación de la mujer. Esto quedó muy claro en sus conversaciones con varios interlocutores que frecuentemente no pudieron identificar elementos específicos de género en la implementación de los programas de reparación. Además, el Relator Especial se preocupa porque la obligación de consultar con los pueblos indígenas, tal como lo requiere el Convenio número 169 de la OIT, ratificado por el Perú, no se tiene debidamente en cuenta en la implementación de los programas colectivos de reparaciones. La potenciación debe ser un elemento central dentro del proceso de reconciliación. Además el Relator Especial quiere recalcar que la participación efectiva ayuda a evitar a que haya más episodios de injusticia social, y a que se corra el riesgo de fomentar caldos de cultivo para nuevas oleadas de terrorismo. A su juicio, la piedra angular para la construcción de una sociedad sin terrorismo es la participación de las mujeres, los pueblos indígenas y las comunidades rurales en el diseño y la implementación de programas de reparaciones.

130. Durante su misión, el Relator Especial buscó información sobre las formas y las amenazas actuales del terrorismo en el Perú. Se le informó que los remanentes de la organización Sendero Luminoso, principal perpetrador de las atrocidades contra la población civil y otros delitos terroristas durante el periodo entre 1980 a 2000 actualmente operan principalmente en la región del VRAE, en una alianza con grupos de crimen organizados que se dedican al narcotráfico. No queda claro hasta qué punto ésto constituye una real amenaza de una nueva oleada de terrorismo, en comparación con otros tipos de crimen organizado. El Relator Especial fue informado de casos de rebrote de actividades ideológicas y de propaganda, incluyendo en algunos centros docentes, que recuerdan los lemas de Sendero Luminoso, pero que no parecen estar vinculados con esa organización o con actos reales de terrorismo.

131. El Relator Especial, aunque reconoce el derecho y el deber del Estado de luchar contra el terrorismo, y consciente del espantoso sufrimiento de grandes partes de la población durante los decenios de violencia y conflicto armado interno, recalca que el terrorismo solamente se puede combatir cumpliendo con las normas internacionales de derechos humanos. El principio de la legalidad no permite definiciones excesivamente amplias y latas de los crímenes relacionados con el terrorismo. El derecho a un examen judicial eficaz en relación a cualquier tipo de detención tiene que ser efectivo igualmente en casos basados en acusaciones de terrorismo. La independencia del poder judicial es indispensable en una lucha contra el terrorismo que sea efectiva y respetuosa de la ley. El Relator Especial se preocupa por información que se le suministró en Ayacucho acerca de un juez que modificó un mandato de detención, emitido en un proceso relacionado con el terrorismo, en una orden de comparecencia, y cuya destitución del poder judicial por el órgano competente de control se estaría solicitando exclusivamente por esta razón.

132. El Relator Especial se preocupa por la formulación amplia de la definición básica del delito de terrorismo en el Artículo 2 del Decreto-ley no 25475 que no ha sido enmendado oficialmente, aunque el Tribunal Constitucional haya emitido en su fallo de 2003 unas directrices sobre la interpretación de esta disposición.

133. Reitera su posición de que el terrorismo debe definirse en función de los medios injustificables a los que recurre, a saber violencia letal o, sino violencia física grave, contra miembros de la población civil o segmentos de la misma, o la toma de rehenes. Conjuntamente con la intención de sembrar el miedo en la población, o de obligar a un gobierno a hacer algo, este umbral de violencia es suficiente para distinguir el terrorismo de

cualquier otro tipo de delito, o de la protesta social por ello. El Relator Especial opina que la definición peruana es excesivamente lata ya que no se basa en semejante umbral de violencia.

134. Igualmente, el Relator Especial sigue preocupado porque el artículo 4 del mismo Decreto-ley parecería tipificar como colaboración con el terrorismo aquellas acciones cuyos "objetivos" coincidan con los que persiguen los terroristas, en vez de exigir vínculos fácticos con actos específicos de terrorismo o con personas que perpetran esos actos.

135. El Relator Especial durante su misión, debido a la naturaleza lata de estas disposiciones, buscó información acerca de episodios en que se hubiera recurrido a detenciones o enjuiciamientos por delitos de terrorismo en relación a casos que constituyan protesta social y no terrorismo. Se convenció de que semejante tendencia de hecho existe también en el Perú, aunque huelga decir que la vigilancia de un poder judicial independiente puede contrarrestarla debidamente. En Cusco se le informó de un incidente en el que la policía había identificado equivocadamente una manifestación de la comunidad local como partidaria de Sendero Luminoso. En Ayacucho le llamó la atención conocer en el Penal de Yanamilla a dos líderes comunitarios indígenas en detención preventiva por delitos de terrorismo aunque pareciera que solamente estaban manifestando de manera pacífica las reclamaciones legítimas de sus comunidades, incluso algunas relativas al Convenio no. 169 de la OIT. Además ha manifestado su preocupación al gobierno peruano por una investigación por delitos de terrorismo contra 35 activistas indígenas y ambientales que se oponían a proyectos mineros en Piura. Igualmente fue informado que los medios de comunicación o algunos políticos locales utilizan el concepto de terrorismo para estigmatizar las expresiones de protesta.

136. El Relator Especial recomienda el examen de los artículos 2 y 4 del Decreto-ley No. 25475 y otras disposiciones que definen lo que constituyen crímenes terroristas para lograr un cumplimiento estricto con el requisito de la legalidad. Es consciente de que la aplicación de las disposiciones existentes está limitada por directrices que dimanan del fallo del Tribunal Constitucional de 2003. Sin embargo, recomienda una reforma legislativa para contrarrestar cualquier tentación hacia una aplicación más amplia. Según él, la perspectiva de redactar y adoptar una ley apropiada contra el terrorismo es una oportunidad para alejarse de los Decretos-ley, es decir, leyes adoptadas por el ejecutivo mediante la delegación de la autoridad, y para reforzar el estado de derecho mediante la creación a través de la legislación parlamentaria de un marco apropiado para las medidas contra el terrorismo.

137. Durante su misión el Relator Especial fue informado de que una Comisión de expertos ha preparado un proyecto de nueva ley contra el terrorismo que sustituiría el Decreto-ley no. 25475. La nueva ley también tendría en cuenta el marco de las obligaciones internacionales del Perú con arreglo a distintos convenciones y protocolos contra el terrorismo, y resoluciones del Consejo de Seguridad. El Relator Especial celebra este plan y la oferta que se le cursó durante la misión a ser consultado acerca del proyecto de ley en un futuro cercano.

138. El Relator Especial fue informado de que actualmente en el Perú hay cientos de casos que han sido clasificados como conflictos sociales, con frecuencia relacionados al disfrute efectivo de derechos humanos o a elementos de subsistencia, es decir agua, energía, educación, servicios de salud o tierras agrícolas. Recalca que dichos conflictos no pueden resolverse confundiendo la protesta con la subversión, o mediante la detención e imputación por delitos de terrorismo a los líderes de las mismísimas comunidades que más padecieron durante los decenios de violencia y de conflicto interno armado, las cuales siguen marginalizadas y sujetas a la discriminación.

139. El Relator Especial señala que aunque el Perú es parte de la Convención contra la Tortura y, desde 2006, de su protocolo facultativo (OPCAT), aún no ha creado un mecanismo nacional independiente para visitar todos los sitios de detención, aunque haya una propuesta para confiar esta función a la Defensora del Pueblo. La creación de un mecanismo nacional independiente de visitas es una de las principales obligaciones de tratado con arreglo al OPCAT y es particularmente importante en el contexto de la lucha contra el terrorismo, pues las personas detenidas como sospechosas de terrorismo corren frecuentemente el riesgo agravado de tortura, y por ello un mecanismo efectivo de prevención es necesario para eliminar cualquier tentación de recurrir a medios prohibidos de interrogación durante la investigación de casos de terrorismo.

140. El Relator Especial quisiera agradecer a todos sus interlocutores por su cooperación constructiva en la preparación de la misión, como también durante la misma, en particular al Ministerio de Relaciones Exteriores por la excelente facilitación de la visita. Asimismo manifiesta su agradecimiento a la Coordinadora Residente de las Naciones Unidas y a las agencias de la ONU en el Perú, como también a la Oficina del Alto Comisionado de los Derechos Humanos y su competente y comprometida delegación, integrada por dos asistentes y dos intérpretes.

I. Spain

1. Comunicación enviada por el Relator Especial al Gobierno

141. El 26 de noviembre de 2010, el Relator Especial, envió una carta al Gobierno, junto con el Relator Especial sobre la tortura y otros tratos o penas crueles, inhumanos o degradantes, en relación a la posible extradición del Sr. **Ali Aarrass**.

142. Según la información recibida:

> El Consejo de Ministros de España habría otorgado la aprobación final en una petición del Reino de Marruecos para extraditar al Sr. Ali Aarrass por cargos de terrorismo.
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> El Sr. Ali Aarrass habría sido detenido el 28 de marzo de 2010, en Melilla con base en una orden de detención internacional solicitada por el Reino de Marruecos. Se alega que el Sr. Aarrass habría sido detenido junto con el Sr. Mohammed el Bay, quien también habría sido objeto de una orden de búsqueda y captura internacional, y que ambos se encontrarían detenidos desde el 1 de abril de 2008. El Sr. Ali Aarrass estaría siendo buscado en Marruecos por cargos relacionados con el terrorismo y estaría acusado de pertenecer a una red terrorista dirigida por el Sr. Abdelkader Belliraj. A raíz de las decisiones judiciales del 21 de noviembre 2008 y 23 de enero de 2009, y de una garantía del Gobierno de Marruecos de que el Sr. Ali Aarrass no sería condenado a la pena de muerte o a cadena perpetua sin libertad condicional, el Gobierno español habría autorizado su extradición el 19 de noviembre de 2010. El Gobierno español habría negado la solicitud de extradición del Sr. el Bay, quien tendría doble ciudadanía española y marroquí. El 24 de noviembre, la Audiencia Nacional habría enviado una carta a Interpol y al Director del Centro Penitenciario de Algeciras solicitándoles que facilitaran la extradición del Sr. Aarrass a la mayor brevedad posible.
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> Desde el año 2006, el Sr. Aarrass habría sido investigado por la Audiencia Nacional española por cargos relacionados con el terrorismo. El 16 de marzo de 2009, el tribunal habría cerrado provisionalmente la investigación por falta de pruebas.

143. Se expresa temor por el hecho de que el Sr. Ali Aarrass pueda ser sometido a torturas y malos tratos en caso de ser extraditado a Marruecos. Individuos detenidos en Marruecos y acusados de estar vinculados a la "Célula Belliraj" han alegado haber sido sometidos a torturas por miembros de la Dirección de Vigilancia del Territorio (Direction de la surveillance du territoire, DST), un organismo de inteligencia, durante su detención en régimen de incomunicación en el centro de detención de Témara.

144. Los Relatores se permitieron hacer un llamamiento al Gobierno para buscar una clarificación de los hechos para asegurar que el derecho a la integridad física y mental de la persona mencionada sean protegidos de conformidad, entre otros, a la Declaración Universal de los Derechos Humanos, el Pacto Internacional de Derechos Civiles y Políticos, la Declaración sobre la Protección de todas las Personas contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes y la Convención contra la Tortura.

145. Al mismo tiempo, recordaron al Gobierno el principio fundamental enunciado en el artículo 5 de la Declaración Universal de los Derechos Humanos y reiterado en el artículo 7 del Pacto internacional relativo a los derechos civiles y políticos, que estipula que nadie será sometido a torturas ni a penas o tratos crueles, inhumanos o degradantes. El Comité de los derechos humanos indicó en su Observación general n° 20 sobre el artículo 7 que "los Estados Partes no deben exponer a las personas al peligro de ser sometidas a torturas o a penas o tratos crueles, inhumanos o degradantes al regresar a otro país tras la extradición, la expulsión o la devolución" Asimismo, llamaron su atención al artículo 3 de la Convención contra la tortura y otros tratos o penas crueles, inhumanos o degradantes según el cual "Ningún Estado Parte procederá a la expulsión, devolución o extradición de una persona a otro Estado cuando haya razones fundadas para creer que estaría en peligro de ser sometida a tortura". Los Relatores indicaron que era de su opinión que el principio contenido en la Observación del Comité de los derechos humanos y en la disposición de la Convención contra la tortura representa un elemento inherente a la obligación fundamental de evitar contribuir de una manera u otra a la violación de la interdicción de someter toda persona a torturas o otros tratos o penas crueles, inhumanos o degradantes.

146. También recordaron al Gobierno que el Relator Especial sobre la Tortura, en su informe A/60/316, señaló que "las garantías diplomáticas no son dignas de crédito y son ineficaces para proteger de la tortura y los malos tratos: por lo general, se trata de obtener ese tipo de garantías de los Estados donde la práctica de la tortura es sistemática; donde los mecanismos de seguimiento posterior a la devolución han demostrado que no ofrecen ninguna garantía contra la tortura; donde las garantías diplomáticas no son jurídicamente vinculantes, por lo que carecen de efectos jurídicos y no cabe exigirse responsabilidad si no se cumplen; y donde la persona a la que las garantías tienen por objeto proteger carece de recursos si se violan esas garantías. Por consiguiente, el Relator Especial opina que los Estado no pueden recurrir a las garantías diplomáticas como salvaguardia contra la tortura y los malos tratos cuando haya razones fundadas para creer que una persona estaría en peligro de ser sometida a tortura o malos tratos a su regreso" y exhortó "a los gobiernos a observar escrupulosamente el principio de la no devolución y a no expulsar a ninguna persona a fronteras o territorios donde puedan correr el riesgo de ser objeto de violaciones de los derechos humanos, independientemente de que se haya reconocido oficialmente su condición de refugiado." (párr. 51 y 52).

147. Los Relatores instaron al Gobierno a adoptar todas las medidas necesarias para proteger los derechos y las libertades de la persona mencionada e investigar, procesar e imponer las sanciones adecuadas a cualquier persona responsable de las violaciones alegadas. Asimismo instaron al Gobierno a tomar las medidas efectivas para evitar que tales hechos, de haber ocurrido, se repitan.

148. Teniendo en cuenta la urgencia del caso, agradecieron recibir del Gobierno una respuesta sobre las acciones emprendidas para proteger los derechos de la persona anteriormente mencionada.

149. Los Relatores se permitieron hacer un llamamiento al Gobierno para buscar una clarificación de los hechos para asegurar que el derecho a la integridad física y mental de la persona mencionada sean protegidos de conformidad, entre otros, a la Declaración Universal de los Derechos Humanos, el Pacto Internacional de Derechos Civiles y Políticos, la Declaración sobre la Protección de todas las Personas contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes y la Convención contra la Tortura.

150. Al mismo tiempo, recordaron al Gobierno el principio fundamental enunciado en el artículo 5 de la Declaración Universal de los Derechos Humanos y reiterado en el artículo 7 del Pacto internacional relativo a los derechos civiles y políticos, que estipula que nadie será sometido a torturas ni a penas o tratos crueles, inhumanos o degradantes. El Comité de los derechos humanos indicó en su Observación general n° 20 sobre el artículo 7 que "los Estados Partes no deben exponer a las personas al peligro de ser sometidas a torturas o a penas o tratos crueles, inhumanos o degradantes al regresar a otro país tras la extradición, la expulsión o la devolución" Asimismo, llamaron su atención al artículo 3 de la Convención contra la tortura y otros tratos o penas crueles, inhumanos o degradantes según el cual "Ningún Estado Parte procederá a la expulsión, devolución o extradición de una persona a otro Estado cuando haya razones fundadas para creer que estaría en peligro de ser sometida a tortura". Los Relatores indicaron que era de su opinión que el principio contenido en la Observación del Comité de los derechos humanos y en la disposición de la Convención contra la tortura representa un elemento inherente a la obligación fundamental de evitar contribuir de una manera u otra a la violación de la interdicción de someter toda persona a torturas o otros tratos o penas crueles, inhumanos o degradantes.

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152. Los Relatores instaron al Gobierno a adoptar todas las medidas necesarias para proteger los derechos y las libertades de la persona mencionada e investigar, procesar e imponer las sanciones adecuadas a cualquier persona responsable de las violaciones alegadas. Asimismo instaron al Gobierno a tomar las medidas efectivas para evitar que tales hechos, de haber ocurrido, se repitan.

153. Teniendo en cuenta la urgencia del caso, agradecieron recibir del Gobierno una respuesta sobre las acciones emprendidas para proteger los derechos de la persona anteriormente mencionada.

154. Los Relatores solicitaron al Gobierno español que informara sobre los motivos por los cuales habría aceptado extraditar al Sr. Ali Aarrass por cargos relacionados con terrorismo al Reino de Marruecos si, el 16 de marzo de 2009, la Audiencia Nacional Española habría cerrado provisionalmente la investigación en su contra por cargos relacionados con terrorismo; así mismo, solicitaron información sobre la forma en que el Gobierno de España se asegura de que el Sr. Ali Aarrass no sea extraditado, si existe un riesgo real de tortura u otros tratos o penas crueles, inhumanos o degradantes, en contravención a la obligación legal internacional de no devolución.

2. Comunicación del Gobierno

155. Por medio de carta de fecha de 7 diciembre de 2010, el Gobierno indicó que los representantes del Sr. Ali Aarrass han planteado su queja de forma simultánea en, al menos, tres instancias internacionales diferentes: procedimientos especiales; Comité de Derechos Humanos de Naciones Unidas y, aunque no tiene constancia formal, el Gobierne indica tener información de que se ha presentado una demanda ante el Tribunal Europeo de Derechos Humanos (demanda inicialmente inadmitida aunque ha sido reiterada posteriormente).

156. El Gobierno puso de manifiesto que el Sr. Ali Aarrass no fue detenido en la fecha que se indica en la carta enviada por ambos Relatores Especiales, sino que fue detenido con anterioridad, encontrándose en situación de prisión provisional a la espera de extradición.

157. Respecto a la alegación realizada sobre posible riesgo de tortura o malos tratos en el caso de la entrega del Sr. Ali Aarrass a Marruecos, el Gobierno indicó que, durante el procedimiento de extradición, esta alegación fue analizada, debatida y resuelta por los Tribunales españoles. En este sentido, en el auto de 21 de noviembre de 2008, la Sección Segunda de la Sala de lo Penal de la Audiencia Nacional rechazó tales alegaciones, señalando lo siguiente:

> “La denuncia de la situación de las cárceles marroquíes adolece de generalidad apoyada en informaciones de medios de publicación en Internet no contrastadas, estando por tanto huérfana de toda acreditación.
>
> En cuanto a la posibilidad de imposición de la pena de prisión perpetua, el art. 4.6 de la LExP establece que no procede la extradición cuando el Estado requirente no diera garantía de que la persona reclamada no será sometida a tratos inhumanos o degradantes. La cuestión, no obstante, ya ha sido resuelta tanto por la jurisprudencia dél TEDH (SS. 7 de julio de 1.989, caso Soering vs Reino Unido, y de 16 de noviembre de 1.999, caso TYV vs Reino Unido) y nuestro Tribunal Constitucional, (SS 91/2000, de 30 de marzo y 148/2004, de 13 de septiembre) al establecerse que en el caso de que le fuera impuesta la pena de cadena perpetua, se establezca la condición de que el cumplimiento de la misma no será indefectiblemente de por vida, considerándose tal condición, de conformidad con la jurisprudencia citada,, garantía necesaria y suficiente de salvaguarda, de los derechos a la vida, integridad física y prohibición de tortura o tratos inhumanos o degradantes en el ámbito extradicional. En conclusión cabe indicar como, en todos los países de nuestro entorno cultural y civilización, la reclusión perpetua no se impone de tal forma que suponga la extinción física en prisión de la vida del condenado. Basta, por ello, establecer la condición de que si se impone la pena de prisión perpetua será limitada.
>
> Conviene tener presente que el art. 11 del Tratado de Extradición, prevé para los supuestos de condena a la pena capital; que la misma será sustituida por la pena prevista para los mismos hechos por la legislación del estado requerido”.

158. Por otro lado, se indicó que el Auto de 23 de enero de 2009 del Pleno de la misma Sala, que resuelve el recurso interpuesto contra el auto referido anteriormente, rechaza que exista riesgo de violación de los derechos humanos que se alega:

> "F) Y respecto a la conculcación de los derechos humanos, en los folios 266 a 269 obra aportado un informe de Amnistía Internacional sobre los Derechos Humanos en el mundo, y más concretamente en Marruecos, haciéndose referencia al empleo de torturas para extraer confesiones, a los malos tratos infligidos por los guardadores penitenciarios y por las fuerzas de seguridad, a la falta de acceso a los cuidados médicos y a las restricciones a las visitas de familiares.
>
> Tales vulneraciones denunciadas no pueden reputarse como sistemáticas y generalizadas, al no existir acreditación sobre ello; como tampoco existe prueba alguna, ni siquiera indiciaria, sobre concreta y real exposición del reclamado a tratos inhumanos o degradantes en el supuesto de que se acceda a su extradición.
>
> En otro orden de cosas, el Tribunal de instancia resuelve la cuestión sobre la prohibición de aplicación al reclamado de la pena de muerte mediante la imposición de la condición consistente en el compromiso que ha de adquirir el Estado requeriente acerca de que la pena a imponer no será indefectiblemente de por vida. Sin embargo, esta Sala en Pleno estima más ajustada a la normativa del Convenio bilateral de 1997, modificar la aludida condición por la prevista para los mismos hechos por la legislación del Estado requerido".

159. El Gobierno informó que el Auto del Pleno de la Sala estima en parte el recurso, estableciendo como garantía que para determinar la pena aplicable se aplique la legislación española.

160. Respecto a la apreciación por los Tribunales españoles del riesgo alegado por el Sr. Ali Aarrass, el Gobierno precisó que han de distinguirse dos aspectos distintos referidos al riesgo invocado. Por una parte, el que se refiere a las condiciones en las que pueda llevarse a cabo la investigación penal en Marruecos y la situación personal del extraditado en ese período. Al respecto, el Gobierno indicó que el Pleno de la Sala de lo Penal de la Audiencia Nacional ha señalado que las "vulneraciones denunciadas no pueden reputarse como sistemáticas y generalizadas, al no existir acreditación sobre ello; como tampoco existe prueba alguna, ni siquiera indiciaria, sobre concreta y real exposición del reclamado a tratos inhumanos o degradantes en el supuesto de que se acceda a su extradición.". En este sentido, el Gobierno indicó que no se ha considerado que haya quedado suficientemente acreditado dicho riesgo concreto de un potencial sometimiento a tortura o tratos inhumanos o degradantes.

161. En segundo lugar, se hace referencia a las garantías exigibles, en caso de que el extraditado fuera condenado. En este sentido el Gobierno señala que la Sala de lo Penal de la Audiencia Nacional impuso como condición para la entrega, que la pena a imponer sea la prevista para los mismos hechos en la legislación española. Subrayando que, esta no es una mera "garantía diplomática" sino que es una previsión expresa del Convenio bilateral de extradición de la que han decidieron hacer uso las autoridades españolas.

162. En cuanto a las aclaraciones sobre el archivo de la investigación penal desarrollada en España, el Gobierno manifestó que: 1° En primer lugar debe resaltarse que, como señaló la Sala de lo Penal de la Audiencia Nacional, no nos encontramos ante dos investigaciones penales por los "mismos hechos". En efecto, los hechos que están en el origen de la demanda de extradición presentada por Marruecos son los siguientes:

> El reclamado fue reclutado para formar parte del Movimiento de los Muyaidin de Marruecos por Abdelkader Bellirej, que formaba parte de dicho grupo desde finales del año 1982. Este, tras una reunión en París con los responsables de la

organización, conoció al líder, Abdelaziz Nouamani, que le instó a reclutar a varias personas, entre las que finalmente figuró el reclamado, quien se convirtió en un elemento activo de la misma, con disposición para establecer relaciones con otros grupos terroristas para la ejecución de sus planes. Se informa que solicitó a Abdelkader Bellirej y a un colaborador argelino que intervinieran a su favor ante los líderes del Grupo Salafista para la Predicación y el Combate de Argelia, con el objetivo de coordinar la instalación de un campamento yihadi en ese país para los voluntarios marroquíes del Movimiento de los Muyahidine de Marruecos bajo las órdenes del Grupo Salafista. El viaje de Abdelkader Bellirej a Argelia con el mencionado fin se produjo en 2005.

163. Se informa también que las diligencias previas seguidas ante el Juzgado Central de Instrucción n° 5 de la Audiencia Nacional, se dirigieron a investigar los siguientes hechos, tal como resultan descritos en el Auto del Pleno de la Sala de lo Pena de la Audiencia Nacional:

> "Según los autos de prisión y de declaración como bastante de la fianza carcelaria por cuantía de 24.000 euros prestada en nombre del aquí reclamado, dictados el 6 y el 7-11-2006 por el Juzgado Central de Instrucción n° 5 (folios 149 a 151), al reclamado por Marruecos se le persigue en España por haber supuestamente facilitado la entrada en aquel país de un Kalashnikov, una pistola, un revólver y municiones en 2001 para la célula terrorista liderada por Abderrazak Soumah, a través de Mohamed El Haraoui, para su entrega a Mohamed Nougaoui, emir de la célula yihadista de Nador, adscrito al movimiento salafista yihadista marroquí; armas que habrían sido facilitadas desde Bélgica, en donde el imputado residía".

164. 2° El Gobierno informó que en consecuencia, los hechos investigados en España no son los mismos que están en el fundamento de la petición de extradición. En España se investigó el posible tráfico de armas por el territorio español con destino a un grupo terrorista en Marruecos. Por su parte, los hechos por los que se solicita la extradición son la pertenencia del reclamado a una organización terrorista, realizando actividades de contacto y colaboración con diferentes personas en Argelia, con el objetivo de coordinar la instalación de un campamento yihadi en ese país para los voluntarios marroquíes del Movimiento de los Muyahidine de Marruecos bajo las órdenes del Grupo Salafista.

165. El Gobierno informó que se trataría, por tanto, de hechos diferentes aunque puedan estar relacionados con una misma organización terrorista, de pertenecer a la cual es acusado el Sr. Ali Aarrass.

166. 3° A continuación, el Gobierno informó que el procedimiento seguido ante el Juzgado Central de Instrucción n° 5 de la Audiencia Nacional se refiere exclusivamente a los hechos relacionados con el tráfico de armas a través de España, y es sobre tales hechos sobre los que se ha dictado Auto de sobreseimiento provisional (archivo provisional) del procedimiento, señalando lo siguiente:

> "En el transcurso de la investigación de la presente causa, se han practicado cuantas diligencias se han estimado necesarias para la comprobación del delito investigado, no habiéndose podido concluir en la comisión del mismo por parte de la persona imputada (…) procede alzar las mismas y acordar el Sobreseimiento Provisional de las presentes diligencias".

167. Se informa que dicho sobreseimiento provisional se acuerda al amparo de artículo 641.2° de la Ley de Enjuiciamiento Criminal (LECrim). Tal declaración judicial procede cuando "resulte del sumario haberse cometido un delito y no haya motivos suficientes para acusar a determinada o determinadas personas como autores, cómplices o encubridores". Por tanto, de acuerdo con le LECrim, la resolución judicial constata la existencia de un hecho delictivo, pero concluye que no hay pruebas suficientes para acusar del delito de

tráfico de armas con fines terroristas al Sr. Ali Arras. El Gobierno indicó que este tipo de sobreseimiento (archivo provisional) no produce efecto de cosa juzgada, ni excluye que el sospechoso sea investigado en otro país por otros hechos o, incluso, por los mismos hechos.

168. 4° Finalmente el Gobierno informó que no habría contradicción alguna entre las decisiones tomadas por las autoridades españolas ya que no hay identidad entre los hechos investigados en España y los que están en el fundamento de la petición de extradición a Marruecos. Por otro lado, se informa que no existe contradicción porque la decisión de archivo provisional dictada en España está justificada por la falta de pruebas suficientes para dirigir la acusación de tráfico de armas contra el Sr. Ali Aarrass y no excluye que los hechos pudieran ser investigados en otro Estado en el que pueda existir otro material probatorio.

169. *Acknowledgements*. The Government of Spain continued to furnish the Special Rapporteur with notices about new rulings of the European Court of Human Rights in terrorism-related cases concerning Spain.

J. Syrian Arab Republic

Reply from the Government

170. On 11 February 2010, the Government of the Syrian Arab Republic responded to a joint urgent appeal sent on 2 October 2009 by the Special Rapporteur, together with the Chairperson-Rapporteur of the Working Group on Arbitrary Detention and the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, regarding the case of Mr. **Mustafa Setmariam Nassar** (see A/HRC/13/37/Add.1, para. 92).

171. The Government informed that there is no detainee in any of the Syrian prisons with the name of Mustafa Setmariam Nassar. Furthermore, the Government informed that there are no secret detention centres in the Syrian Arab Republic.

K. Tunisia

Déclaration de presse

172. Le dernier jour de sa visite officielle en Tunisie, du 22 au 26 janvier 2010, le Rapporteur Spécial des Nations Unies pour la promotion et la protection des droits de l'homme et des libertés fondamentales dans la lutte antiterroriste, M. Martin Scheinin, a publié la déclaration suivante :

173. « J'aimerais exprimer ma reconnaissance au Gouvernement de la Tunisie, qui m'a apporté sa coopération pendant ma mission. J'ai pu discuter longuement et en toute transparence avec de nombreux interlocuteurs représentant les autorités et la société civile J'ai mené des entretiens fructueux avec le Ministre des Affaires Etrangères, le Ministre de la Justice et des Droits de l'Homme, les représentants du ministère de l'intérieur, des juges, des parlementaires et le Comité Supérieur des Droits de l'Homme et des Libertés Fondamentales. J'ai également rencontré les représentants de la communauté internationale, des avocats, des universitaires et des organisations non-gouvernementales, y compris les organisations des droits de l'homme et des organisations de défense des victimes du terrorisme. Au sujet de la loi et de la pratique anti-terroriste du pays. Par ailleurs, j'ai visité les locaux de garde à vue de la police à Bouchoucha ainsi que la prison de Mournaguia, où j'ai pu m'entretenir avec plusieurs personnes soupçonnées ou convaincues de crimes terroristes. Je tiens à remercier tous mes interlocuteurs, y compris les détenus, ainsi que les victimes d'actes terroristes et leurs familles qui ont bien voulu me parler. Tout cela m'a

permis de connaître la situation pour évaluer d'une manière objective le respect des droits de l'homme dans le contexte anti-terroriste en Tunisie.

174. Chaque Etat a l'obligation de protéger la vie et l'intégrité de ses citoyens et résidents et de les mettre à l'abri de menaces émanant du terrorisme. Mais en même temps, les normes internationales en matière de droits de l'homme doivent être entièrement respectées, y compris les droits des personnes soupçonnées d'être impliquées dans des crimes terroristes. La Tunisie a souvent répété ses engagements à cette fin, notamment en ratifiant la plupart des Conventions internationales ayant trait aux droits de l'homme et au terrorisme. L'invitation qui m'a été faite est, me semble-t-il, un pas important dans cette voie. Je remettrai un rapport complet à l'une des sessions à venir du Conseil des Droits de l'Homme. Voici quelques-unes des observations essentielles à la fin de ma visite.

175. Cadre juridique : S'agissant du cadre juridique, je salue quelques amendements apportés récemment à la loi, en particulier une rédaction plus précise des dispositions concernant l'incitation, l'abolition des « juges sans visages » et le renforcement des garanties liées à la prolongation de la garde à vue. Cependant la loi anti-terroriste de 2003 comporte encore certaines lacunes qui, à l'instar de nombreux autres pays, sont imputables à la définition du terrorisme : les normes internationales exigent que tous les éléments d'un crime soient exprimés explicitement et avec précision dans les définitions juridiques. Je l'ai toujours souligné, la violence à issue fatale ou toute autre violence physique grave contre tout ou une partie du grand public devrait être au cœur de toute définition du terrorisme Article 15 du Pacte international sur les droits civils et politiques ; E/CN.4/2006/98 ;. Ce n'est pas le cas en Tunisie : dans la majorité des cas depuis 2003, de simples intentions sont punies, qu'il s'agisse de « planification » ou « d'appartenance », cette dernière notion renvoyant à des organisations ou groupes vaguement définis. On m'a parlé de nombreux cas de jeunes hommes, et j'en ai vu quelques-uns, dont le principal crime était d'avoir téléchargé ou regardé certaines émissions en ligne, ou de s'être réunis avec d'autres pour discuter de questions religieuses.

176. Les autorités ne m'ont toujours pas remis de statistiques précises sur le nombre d'affaires pour terrorisme jugées dans les tribunaux tunisiens ces dernières années. Le terrorisme n'est pas un phénomène courant en Tunisie, et cependant il semble que le champ d'application des dispositions anti-terroristes est beaucoup trop large et devrait être limité. Comme dans d'autres pays, je vois là un risque de « pente savonneuse », qui non seulement aboutit à la condamnation de personnes pour terrorisme, qui ne méritent pas d'être ainsi stigmatisées, mais met également en péril l'efficacité de la lutte anti-terroriste en banalisant le phénomène.

177. La loi tunisienne interdit la torture, et le pays est Partie à la Convention contre la torture. Cependant, il n'existe apparemment pas de disposition claire exigeant des juges qu'ils entament une instruction « ex-officio » lorsque des allégations de torture sont faites devant les tribunaux, ni qu'ils motivent le rejet d'une plainte pour torture ou qu'ils excluent toute preuve ou aveu obtenus sous la torture. Ces carences du cadre juridique peuvent ériger un bouclier d'impunité pour les auteurs de torture ou de mauvais traitements.

178. Ecart entre la loi et la réalité : L'expérience la plus troublante que j'ai faite pendant ma mission était de constater de graves incohérences entre la loi et ce qui se passait dans la réalité, selon les informations que j'ai reçues. Je continuerai de coopérer avec le Gouvernement pour rédiger un rapport complet, mais dans l'intervalle j'ai décidé d'exprimer quelques-unes de mes principales préoccupations :

- Il semblerait, et les autorités l'ont admis, que la date d'arrestation peut être postdatée, ce qui revient à contourner les règles relatives à la durée permissible d'une garde à vue, constituant ainsi la détention au secret et la disparition de la personne;

- Le recours fréquent aux aveux comme élément de preuve devant les tribunaux, en absence d'enquête appropriée sur les allégations de torture ou d'autres mauvais traitements;
- Les garanties inappropriées contre la torture, comme par exemple l'accès à un examen médical indépendant et l'accès à un avocat dès l'arrestation, plutôt qu'après la première comparution devant le juge d'instruction;
- Le nombre excessivement faible de poursuites ou d'autres conclusions précises relatives à la torture par rapport à la fréquence des allégations.

179. Il est vrai qu'à bien des égards, les autorités tunisiennes ont agi en toute transparence pendant ma visite, néanmoins on m'a refusé l'accès aux locaux d'interrogatoire de la Police Judiciaire (notamment la Sous-direction pour les affaires criminelles), toujours connue comme "Direction de la Sécurité d'Etat", et ce en dépit de mes nombreuses demandes. Ceci est d'autant plus troublant que les allégations de torture ou de mauvais traitements concernent le rôle de la police judiciaire avant l'enregistrement officiel de la garde à vue, pendant l'instruction/interrogatoire, ou lorsqu'un détenu en attente de procès est sorti de la prison pour les besoins de l'enquête.

180. Stratégie de lutte contre le terrorisme : Je suis convaincu que la démarche à piliers multiples pour prévenir le terrorisme grâce aux mesures sociales, d'enseignement et de non-discrimination, adoptées par la Tunisie est un excellent exemple qui mérite réflexion. Je crains cependant que l'acquis de ces politiques indéniablement positives soit aisément compromis par les violations de la loi qui, comme toujours, hypothèquent le succès de la lutte contre le terrorisme.

181. Je reprends à mon compte les recommandations de quelques mécanismes des Nations Unies en matière de droits de l'homme récemment adressées à la Tunisie, tout en l'encourageant à continuer d'investir dans le domaine de l'enseignement, à combler le fossé social et à combattre la pauvreté. J'espère coopérer comme par le passé avec le Gouvernement au cours des mois à venir pour mettre au point le rapport complet de la mission. »

L. Turkey

1. Communication sent to the Government

182. On 7 January 2010, the Special Rapporteur, together with the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances, and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, sent an urgent appeal regarding Mr. **Muharrem Erbey** and the **Human Rights Association (Insan Haklari Dernegi – IHD)**. Mr. Erbey is a human rights lawyer, the General Vice-Chairperson of IHD and the Chairperson of IHD's Branch in Diyarbakir Province. The Human Rights Association (Insan Haklari Dernegi – IHD) works on, inter alia, the right to life and enforced disappearances.

183. According to the information received:

> On 24 December 2009, Mr. Erbey, along with several Kurdish opposition members, journalists and civil society activists, was arrested by police officers during an operation launched by the anti-terrorism branch of the police in several provinces following an order issued by the Diyarbakir Chief Public Prosecution Office. On the same day, the premises of the IHD in Diyarbakir were allegedly raided by the police. The police officers, who initially had not had a warrant, finally obtained a court order to search the offices. During the raid, computers and

documents including archives on cases of enforced disappearance and torture and other human rights violations were allegedly confiscated.

Mr. Erbey was remanded in custody at the Diyarbakir D Type Prison. On 26 December 2009, he was allegedly accused of being the international affairs representative of the illegal armed group "the Community of Kurdish Society" (Koma Civaken Kurdistan – KCK) and consequently charged with "being a member of an illegal organization" pursuant to Articles 314 and 220/6 of the Criminal Code.

It was alleged that the arrest and the charges against Mr. Erbey could have been linked to his participation in the preparations of a workshop held in Diyarbakir in September 2009 to debate constitutional amendments relating to minorities' rights, his statement on the rights of the Kurdish minority before the Belgian, Swedish and English Parliaments and his participation in the "Kurdish Film Festival" in Italy in 2009.

184. Concern was expressed that the arrest of Mr. Erbey and the raid of the IHD's premises could have been directly related to their legitimate work in defense of human rights.

185. The mandate holders referred the Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter the Declaration), and in particular its articles 1; 5, points b) and c); and 6, points b) and c). In its resolution 7/12, the Human Rights Council urged Governments to take steps to provide adequate protection to witnesses of enforced or involuntary disappearances, human rights defenders acting against enforced disappearances and the lawyers and families of disappeared persons against any intimidation or ill-treatment to which they might be subjected. They mandate holders urged the Government to take all necessary measures to guarantee that the rights and freedoms of Mr. Erbey are respected, including his right to freedom of opinion and expression, in accordance with fundamental principles as set forth in article 19 of the International Covenant on Civil and Political Rights.

186. They sought clarification form the Government on, inter alia, the legal basis for the detention of Mr. Erbey, in particular on how the charges were compatible with applicable international human rights norms and standards, on how it is established whether an organization is illegal, and whether there were any procedures in place to appeal such a designation.

2. Reply from the Government

187. As at 31 December 2010, there had been no response by the Government of Turkey to the mandate holders' joint urgent appeal.

3. Communication sent to the Government

188. On 23 June 2010, the Special Rapporteur, together with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression addressed a joint allegation letter concerning continued prosecutions against and sentencing of journalists under the Law to fight terrorism, Act 3713, as amended, (henceforth Anti-Terror Act), in particular article 7 which prohibits "spreading propaganda relating to a terrorist organization".

189. According to information received:

On 4 June 2010, Mr. Irfan Aktan was sentenced to one year and three months imprisonment for an article he wrote regarding the strategy of the Kurdistan

Workers' Party (PKK) entitled "Weather Conditions in the Region and in Qandil: No Solution without Fighting", which was published in the Express magazine on 15 October 2009. Mr. Merve Erol, editor of the magazine, was sentenced to a fine of 16,000 Turkish Lira. Both were found guilty of dispersing propaganda material relating to a terrorist organization in violation of article 7(2) of the Anti-Terror Act.

In a separate trial held on the same day, Mr. Filiz Kocali, former publisher of Gunluk, and Mr. Ramazan Pekgoz, its editor, and Mr. Ziya Cicekci, its owner, were sentenced to seven and a half years in prison each under the same article of the Anti-Terror Act for reports published on 8 and 9 August 2009. These reports allegedly contained interviews carried out in Northern Iraq with Murat Karayylan, the top commander of the PKK.

On 10 June 2010, Mr. Ragip Zarakolu, who had been on trial since May 2009 on charges of violation of article 7(2) of the Anti-Terror Act for publishing a novel entitled "More Difficult Decisions than Death" written by Mr. Mehmet Guler, was acquitted. However, at the same trial, Mr. Mehmet Guler was convicted to a fifteen month prison term for "spreading propaganda" of the PKK.

190. While the mandate holders welcomed the acquittal of Mr. Zarakolu, concern was expressed that repeated and frequent use of the Anti-Terror Act against journalists whose writings are unfavourable to the Government stifles the right to freedom of opinion and expression in the country. They noted that a total of 103 people, including 15 journalists, were arraigned in the first four months of 2010 alone on charges related to the Anti-Terror Act.

191. With a view to the overly broad application of the term terrorism in the Anti-Terror Act, the Special Rapporteur, in his report on the visit to the country in 2006 (A/HRC/4/26/Add.2, paras. 14, 18, and 28-33), expressed his concern about prosecutions for acts related to freedom of expression, association and assembly in relation to the notion of terrorism. In this report, he also highlighted that there are elements both in the Anti-Terror Act which may put severe limitations on the legitimate expression of opinions critical of the Government or State institutions, on the forming of organizations for legitimate purposes, and on the freedom of peaceful assembly.

192. The mandate holders appealed to the Government to take all necessary steps to secure the right to freedom of opinion and expression in accordance with fundamental principles as set forth in article 19 of the International Covenant on Civil and Political Rights. In addition, they deemed it appropriate to make reference to Human Rights Council Resolution 12/16, para. 5 o), which calls upon States to refrain from using counter-terrorism as a pretext to restrict the right to freedom of opinion and expression in ways that are contrary to their obligations under international law. They also drew the Government's attention to resolutions of the Human Rights Council (13/26, para. 1) and of the General Assembly (64/168) which reaffirmed that States must ensure that any measure taken to combat terrorism comply with their obligations under international law, in particular international human rights, refugee and humanitarian law.

193. The mandate holders requested from the Government of Turkey, inter alia, to provide details of the prosecution against and/or sentencing of Mr. Irfan Aktan, Mr. Merve Erol, Mr. Filiz Kocali, Mr. Ramazan Pekgoz, Mr. Ziya Cicekci, and Mr. Mehmet Guler, and how they were compatible with the international norms and standards of the right to freedom of opinion and expression and the related right to peaceful assembly and association. In particular, they requested information on how the prosecutors or judges argued that the publication of the above-mentioned items both showed intent to incite to terrorism and carried an objective danger that one or more terrorist acts would be carried out as a consequence of their publication. The Special Rapporteurs also asked for

clarification on how the Anti-Terror Act, in particular its article 7, is compatible with the international norms and standards on the right to freedom of opinion and expression.

4. Reply from the Government

194. As at 31 December 2010, there had been no response by the Government of Turkey to the mandate holders' joint letter of allegation.

M. Uganda

1. Communication sent to the Government

195. On 23 September 2010, the Special Rapporteur, together with the Chair-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on the situation of human rights defenders, sent a joint urgent appeal to the Government of Uganda on the arrest and situation at the time of Mr. **Al-Amin Kimathi**, of Kenyan nationality and Executive Coordinator of Muslims Human Rights Forum (MHRF), and Mr. **Mbugua Mureithi**, of Kenyan nationality and a human rights lawyer. Mr. Al-Amin Kimathi had worked to expose and document human rights violations, arbitrary detention and unlawful renditions in the context of counter-terrorism operations in the East and Horn of Africa. Mr. Mbugua Mureithi represented the families of Kenyan suspects transferred to Uganda on allegations of involvement in the 11 July 2010 bombings in Kampala.

196. According to the information received:

On 16 September 2010, the Ugandan police arrested the two Kenyan human rights defenders at the Entebbe International Airport. Both men were travelling to Kampala for the court hearing of Kenyan suspects arrested in connection with the bombings that killed 70 people in Kampala on 11 July 2010.

According to reports received, the two human rights defenders were transferred to the Rapid Response Unit headquarters in Kireka, a suburb of Kampala, where they were reportedly held incommunicado and had no access to a lawyer.

It was reported that, on 18 September 2010, Mr. Mbugua Mureithi had been released from police custody in Kampala and immediately expelled to Kenya. Mr. Al-Amin Kimathi had reportedly been held incommunicado at the Ugandan police's Rapid Response Unit Headquarters in Kireka, Kampala, without charges or access to legal representation, until 21 September. On this date, Mr. Al-Amin Kimathi was brought before a judge and remanded to the Luzira Maximum Security Prison on charges of murder and attempted murder as well as terrorism-related charges in connection with the bombings that took place in Kampala in July 2010.

Due to their arrest, detention and, in the case of Mr. Mureithi, expulsion, the two men had not had a chance to meet with their clients, who were charged with offences including murder and terrorism, punishable by death under Ugandan law. The court case involving their clients had continued in their absence.

197. Concern was expressed at the arrest of Mr. Al-Amin Kimathi and Mr. Mbugua Mureithi and at allegations received that their arrest could have been linked to their work, respectively as human rights lawyer and in denouncing and documenting unlawful practices by the authorities in counter-terrorism operations. Further concern was expressed about allegations indicating that Mr. Al-Amin Kimathi had had no access to a lawyer since the time of his arrest and until he was remanded to the Luzira Maximum Security Prison.

198. The mandate holders appealed to the Government to take all necessary measures to guarantee their right not to be deprived arbitrarily of their liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. They also referred the Government to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and in particular principles 16, which stipulates that Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. Furthermore, they drew the attention of the Government to principle 18, which provides that lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

199. The mandate holders also stressed that the principle of legality in criminal law, enshrined in several international human rights instruments such as article 15 of the International Covenant on Civil and Political Rights and made non-derogable in times of public emergency, implies that the requirement of criminal liability is limited to clear and precise provisions in the law, so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation which would broaden the scope of the proscribed conduct. In their view, at the national level, the specificity of terrorist crimes is defined by the presence of two cumulative conditions: (1) The means used, which can be described as deadly or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; and (2) the intent, which is to cause fear among the population or the destruction of public order or to compel the government or an international organization to doing or refraining from doing something, in the advancement of a political, religious or ideological cause. It is only when these two conditions are fulfilled that an act may be criminalized as terrorist.

200. The mandate holders further referred the Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1 and 2 which state that "everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" and that "each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice". They also brought to the attention of the Government the following provisions of the Declaration: article 9, para. 3, point c) which provides that everyone has the right, individually and in association with others to offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms; and article 12, paras 2 and 3 of the Declaration which provide that the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or

opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

201. Inter alia, the mandate holders requested information on the reason for the arrest and detention of Mr. Mbugua Mureithi and Mr. Al-Amin Kimathi, and to specify the charges brought against Mr. Kimathi. They further requested that the Government provide information regarding the allegations that Mr. Kimathi had had no access to a lawyer since the time of his arrest and until he was remanded to the Luzira Maximum Security Prison and on the basis for the expulsion of Mr. Mbugua Mureithi to Kenya, in particular whether any anti-terrorism related legislation was invoked. Finally, they asked what measures had been taken, if any, to protect the work of human rights defenders in the country, including lawyers.

2. Reply from the Government

202. As at 31 December 2010, there had been no response by the Government of Uganda to the mandate holders' joint urgent appeal.

N. United States of America

1. Communication to the Government

203. On 27 April 2010, the Special Rapporteur, together with the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a letter to the Government of the United States of America, advising it that the mandate holders had been approached by third parties in the case of **Omar Khadr**, a Canadian citizen, who was understood to still be detained at Guantánamo Bay. Omar Khadr was 15 years old when he was arrested and 16 years at the time he was transferred to Guantánamo Bay. Information received indicated that Mr. Khadr had been subjected to prolonged and severe sleep deprivation by U.S. officials in order to enhance the extraction of information from him during interrogations conducted also by Canadian officials in 2004 when he was 17 years old. Military commission proceedings against Mr. Khadr were scheduled to recommence in July 2010 at Guantánamo Bay.

204. In a 29 January 2010 decision, the Supreme Court of Canada reasoned that violations of Mr. Khadr's rights under the Canadian Charter of Rights and Freedoms were ongoing as the information obtained by Canadian officials during the course of their interrogations, conducted when Mr. Khadr was a minor without access to legal counsel or habeas corpus and had been subjected to improper treatment by the U.S. authorities at the time of the interview in March 2004, may form part of the case upon which he was held.

205. The Special Rapporteur remained seriously concerned that Mr. Khadr will continue to be tried in military commission proceedings that do not adhere to international fair trial standards.

206. They referred to the Special Rapporteur's report on his mission to the United States of America (A/HRC/6/17/Add.3) that highlighted serious situations of incompatibility between the international human rights obligations and the counter-terrorism law and practice of the United States. Concerns highlighted in that report relate particularly to the use of military commissions to try terrorist suspects (A/HRC/6/17/Add.3, paras. 19-32).

207. While noting the Government's efforts to address some of the concerns outlined in report A/HRC/6/17/Add.3 by the adoption of the 2009 Military Commissions Act (henceforth 2009 MCA), the mandate holders reiterated their continuing preoccupations

with the impact of the amended Act on the enjoyment of human rights and fundamental freedoms which mainly relate to 1) the jurisdiction of military commissions, 2) their composition, 3) the use of evidence, 4) the limited scope of the appellate review, and 5) the death penalty. They understood that the last-mentioned item does not apply in the case of Mr Khadr.

208. First, according to § 948c of the 2009 MCA, "any alien unprivileged enemy belligerent" is subject to trial by military commissions. While noting that the term of "unlawful enemy combatant" was abandoned by the amended Act, 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. Furthermore, as already highlighted in the above-mentioned report, 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. In addition, the amended Act did not address the serious concern of the retroactive applicability of criminal law by military commissions, to the extent that the offences listed had not been covered by the law applicable at the time of the commission of the actual acts, which is in breach of article 15 of the International Covenant on Civil and Political Rights (ICCPR) and universally acknowledged principles of law.

209. Second, given that the provisions for the composition of military commissions were not amended in substance, the Special Rapporteurs reiterated their 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 was still no prohibition against the selection of members of a commission who fall within the same chain of command.

210. However, some positive development could be contained in § 948k (c) (2) of the 2009 MCA which provides that the Secretary of Defense shall prescribe regulations for the appointment and performance of defense counsel in capital cases. Depending on the content of these regulations, this amendment may somewhat strengthen the role of the defense in capital punishment cases which call for rigorous adherence to fair trial guarantees. However, at the same time this feature of the 2009 MCA again highlights the fact that the applicable law is being drafted several years after the facts and possibly tailored to address specific known cases.

211. Third, the mandate holders welcomed the important amendments made in relation to the exclusion of statements by the accused (§ 948r of the 2009 MCA). In comparison to the 2006 MCA that only excluded statements obtained by torture, 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. Furthermore, § 948r (c) (2) (B) of the 2009 MCA requires in relation to other statements, that the statement be made "voluntarily". The Special Rapporteurs noted that in the determination of the "voluntariness", the military judge is required to consider the circumstances defined in § 948r (d) of the 2009 MCA. It should, however, be noted that this new "voluntariness" protection contained in the new Act is subject to 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.

212. The Special Rapporteurs regretted that hearsay evidence is still admissible under § 949a (b) (3) (d) of the 2009 MCA, noting, nonetheless, that this applies now within stricter limits than previously under the 2006 MCA.

213. Regarding classified information, they welcomed the amendment made in § 949p-1 (b) of the 2009 MCA that prescribes that any information admitted into evidence pursuant to any rule, procedure, or order by the military judge shall be provided to the accused which is likely to strengthen the equality of arms in the proceedings.

214. Last, the mandate holders referred to § 950g (d) of the 2009 MCA, which provides that 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. Furthermore, pursuant to this amended provision, the exclusive appellate jurisdiction (§ 950g (a) of the 2009 MCA), the United States Court of Appeals for the District of Colombia Circuit, shall take action only with respect to matters of law. While the Special Rapporteurs positively noted the explicit inclusion of the 'sufficiency of evidence to support the verdict' within the scope of review, they remained concerned that the limitation of appeal rights subsequent to conviction remain limited to matters of law, which is incompatible with article 14, paragraph 5, of the ICCPR.

215. In sum, concerns highlighted above let the mandate holders conclude that, while several improvements had been made in comparison to the 2006 MCA, the 2009 MCA still contains provisions which may have a significant negative impact on the enjoyment of human rights, in particular international fair trial guarantees.

216. Applied to the case of Omar Khadr, the above mentioned concerns were exacerbated by the fact that he was a minor at the time of the commission of the alleged offence and of the interrogation that had taken place in 2004.

217. In view of the above and Mr. Khadr's prolonged and abusive detention at Guantánamo Bay that contravenes the legal obligations of the United States under various international instruments, including the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the mandate holders urged that the charges brought against Mr. Khadr in the military commissions proceedings be dropped and he be repatriated to Canada or transferred to a U.S. federal court for prosecution in accordance with international fair trial standards. In particular, no information extracted by torture or other forms of cruel, inhuman or degrading treatment or punishment may be used in these proceedings, as stipulated by Article 15 CAT and Article 7 ICCPR.

218. The Special Rapporteurs wished to express our deep interest that the violations of Mr. Omar Khadr's rights come promptly to an end and that he be provided with compensation for any violations experienced, in accordance with international standards. They highlighted their availability for consultations on this matter.

219. As the case of Mr. Khadr also relates to Canada, the Government of the United States of America was informed that the mandate holders shared their concerns with the Canadian Government in a separate letter.

220. *Acknowledgements.* The Special Rapporteur appreciates the subsequent invitation, by letter dated 2 August 2010, from the Government to observe the trial phase of the Military Commission proceedings against Omar Khadr. As a plea arrangement was reached on 13 October 2010 and the trial was reduced to sentencing hearings during the week of 25 October 2010, the Special Rapporteur chose not to follow this invitation.

2. Reply from the Government

221. By letter dated 30 June 2010, the Government of the United States responded to a joint urgent appeal sent on 2 October 2009 by the Special Rapporteur, together with the Chairperson-Rapporteur of the Working Group on Arbitrary Detention and the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,

regarding the case of Mr. **Mustafa Setmariam Nassar** (see A/HRC/13/37/Add.1, para. 125). In response, the Government indicated that while it is not in a position to comment on the specific allegations referred to, it would like to take this opportunity to emphasise that the United States is committed to the promotion and protection of human rights and fundamental freedoms for all individuals at home and abroad and to share specific steps taken by the Obama administration that relate to the broader concerns expressed in the correspondence.

222. During his second full day in office, President Obama issued three Executive Orders providing for comprehensive review and reform of U.S. detention, interrogation and transfer policies. These Executive Orders reaffirmed that all persons in U.S. custody must be treated humanely as a matter of law. For example, it is required that the International Committee of the Red Cross (ICRC) be given notice and timely access to any individual detained in any armed conflict in the custody or under the effective control of the United States Government, consistent with Department of Defense regulations and policies.

223. One of the orders, Executive Order 13491, created a Special Task Force on Interrogation and Transfer Policies. Following a review of U.S. transfer policies, on 24 August 2009, the Task Force made a number of recommendations to the President in order to ensure that U.S. transfer practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise to undermine or circumvent the obligations of the United States to ensure the humane treatment of individuals in its custody or control. These recommendations have been accepted by the President.

224. As President Obama reiterated to the General Assembly in September [2009], "living our values doesn't make us weaker, it makes us safer and it makes us stronger." We look forward to continuing to work closely with U.N. Member States and to remaining in an open dialogue with the Special Procedures mandate holders to advance this collective goal.

3. Communication sent to the Government

225. On 5 February 2010, the Special Rapporteur addressed a letter of allegation to the Government of the United States of America regarding Messrs. **Umar Farooq**, **Waqar Khan**, **Ahmed Minni**, **Aman Hassan Yemer** and **Ramy Zamzam**, all United States citizens, aged between 19 and 24, who were allegedly detained on suspicion of terrorism in the city of Sarghoda in Pakistan. The Government was informed that a letter on this case was also being sent to the Government of Pakistan.

226. According to the information received:

> The five men reportedly travelled to Pakistan in November 2009, from their homes in the northern Virginia and Washington, D.C., area. They were arrested on 7 December 2009 in Sarghoda, Punjab Province, and had been charged with plotting terror attacks in Pakistan as well as with having links to Al-Qaida and seeking to join militants fighting United States troops across the border in Afghanistan. The most serious of the charges was conspiracy to carry out a terrorist act, which could carry life imprisonment depending on what the act is.
>
> United States Assistant Secretary of State Philip Crowley reportedly said that Pakistani authorities contacted the United States embassy in Islamabad following the arrests. He further appeared to have said that an embassy team, including at least one agent from the Federal Bureau of Investigation and an officer from the State Department's regional security office, met the five detainees. Confirming that "... we are trying to talk to them, find out ... what they were up to, what the implications are", Crowley, furthermore, stated that "we should let the investigation go forward

before we draw any conclusions." Similarly, Secretary of State Hillary Clinton earlier told reporters that United States officials had "had access" to the five. It remained unclear whether the United States Government will negotiate with Islamabad for the purpose of having the five men extradited or returned to the United States.

Allegedly, the five American citizens confessed their intention to carry out "jihad" and to fight against the war on terror. Following their appearance before a special antiterrorism court during a closed session on 18 January 2010, the men reportedly shouted out allegations of having been subjected to torture before being transported back to the prison. According to reports, a court order from the same court session confirmed that the men in question "made a complaint that they have been tortured in the custody of police" and that, consequently, the judge ordered a medical examination for the men. Allegedly, none of them was allowed to be represented by their lawyer of own choice.

227. The Special Rapporteur underlined that General Assembly resolution 59/191, in its paragraph 1, stresses that: "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law", as do Security Council resolutions 1456 (2003) and 1624 (2005), in paragraphs 6 and 4 respectively.

228. He further recalled in particular the non-derogable nature of the prohibition against torture or any other cruel, inhuman or degrading treatment or punishment, as established in the International Covenant on Civil and Political Rights. The Human Rights Committee in its General Comment on states of emergency (article 4 of the Covenant) has, furthermore, established that there is a close connection between the prohibition of torture in article 7 and the right of all persons deprived of their liberty to human treatment and respect for the inherent dignity of the human person as established in article 10 (1) of the International Covenant on Civil and Political Rights. In relation to this, the Human Rights Committee has interpreted article 10 (1) as a norm of international law that is not subject to derogation. Furthermore, with regard to the right to a fair trial, article 14 (3) of the Covenant establishes a number of minimum guarantees, which shall be granted to every person charged of a crime, and thereby, in section (g) stipulates that no one shall be compelled to testify against himself or to confess guilt. Hence, any direct or indirect physical or undue psychological pressure on the accused for these purposes constitutes a violation of this right, and consequently the Human Rights Committee states that "it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession".

4. Reply from the Government

229. By letter dated 30 June 2010, the Government of the United States responded to the letter of allegation dated 5 February 2010, indicating that the United States is committed to the promotion of human rights at home and abroad. Therefore, it shares the Special Rapporteur's concern that all persons deprived of their liberty be treated humanely. As President Obama has said, "we need not sacrifice our security for our values, nor sacrifice our values for our security."

230. The Government is well aware of the situation involving these American citizens and has worked consistently to provide them every available consular assistance and service. It notes that the Special Rapporteur's correspondence contains allegations related to torture and access to legal counsel. The United States takes seriously all reports of abuse and torture and has raised those reports with officials from the Government of Pakistan. It has also visited the prisoners regularly throughout their detention, and consular staff has been present at the U.S. citizens' hearings. With regard to the five individuals' access to

legal counsel consular officers routinely provide a list of attorneys qualified to assist U.S. citizens in local legal proceedings during consular visits to detained U.S. citizens overseas. It has been publicly reported that all five individuals are represented by private attorneys in the ongoing legal proceedings in Pakistan. The Government stated that the Special Rapporteur can appreciate that privacy considerations preclude it from discussing further details related to this case.

231. With respect to the Special Rapporteur's inquiry regarding U.S. law enforcement, the Government cannot provide detailed information regarding an open law enforcement matter, including information regarding circumstances under which any U.S. law enforcement personnel may have the opportunity to question individuals. The Government can, however, confirm that the United States is in full compliance with its international obligations and domestic law concerning treatment of the five individuals named in the Special Rapporteur's letter. Specifically, pursuant to international treaties to which it is a party and its domestic law, U.S. officials are prohibited from engaging in torture and other cruel, inhuman or degrading treatment or punishment both within and outside the territory of the United States.

5. Communication sent to the Government

232. On 23 July 2010, the Special Rapporteur, together with the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a joint urgent appeal to the Government of the United States of America regarding the repatriation to Algeria of one man, **Mr. Abdul Aziz Naji,** from a group of six men of Algerian nationality being held at the U.S. Military base in Guantanamo Bay, Cuba, since 2002. The Government's attention was drawn to the fact that their situation had already been the object of a communication sent by the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the Government on 16 July 2010.

233. According to new information received:

> Mr. Abdul Aziz Naji was repatriated against his will to Algeria where he would have reportedly faced a real and serious risk of being subject to torture or ill-treatment. The risk would allegedly come from Algerian security services and non-State actors. This was reportedly the first involuntary transfer of a detainee out of Guantanamo by the Obama administration.

234. Concern was expressed about the physical and psychological integrity of Mr. Abdul Aziz Naji. The mandate holders stressed that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth inter alia in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. They sought clarification from the Government whether the Government had used diplomatic assurances provided by the Algerian authorities instead of, or as part of, the risk assessment for the repatriation of Mr. Abdul Aziz Naji. They further requested an indication on how the Government intended to effectively monitor the compliance of such assurances on the part of the Algerian authorities, and on how this repatriation was in conformity with the principle of non-refoulement as provided for by international law. The mandate holders also asked for details of any investigation and judicial or other inquiries carried out in relation to this case.

6. Reply from the Government

235. By a letter dated 13 August 2010, the Government of the United States responded to the joint urgent appeal of 23 July 2010, and also to the communication sent by the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or

punishment to the Government on 16 July 2010. It reiterated its deep commitment to ensuring that transfers from Guantanamo conform to its post-transfer humane treatment policies and welcomed this opportunity to respond. On his second full day in office, President Obama ordered Guantanamo closed. His commitment to doing so has not wavered, even as closing Guantanamo has proven to be an arduous and painstaking process. A task force comprised of representatives from six federal agencies scrupulously considered each Guantanamo detainee's case to assess whether the detainee could be transferred or repatriated consistent with U.S. national security, the interests of justice, and the Government's policy not to transfer individuals to countries where they would more likely than not face torture or, in appropriate cases, where the individual has a well-founded fear of persecution. The United States considers detainee transfers on a case-by-case basis, taking into account a wide variety of information from a range of sources - including submissions received from the detainee and/or his counsel - regarding the particular circumstances of the transfer, the proposed receiving country (including both its general human rights record and its record in handling previously-transferred detainees), the individual concerned and any concerns about serious mistreatment that may arise in the context of the transfer, whether form Governmental or private actors.

236. Since the beginning of the Obama Administration, the United States has transferred 64 detainees to 25 different destinations. More than half of these 64 detainees were resettled in third countries because the U.S. Department of State, working together with the other five agencies, determined that they could not be returned to their country of origin due to humane treatment concerns. The Government is not aware of any credible reports of mistreatment occurring in the aftermath of any of these transfers.

237. The United States has applied the aforementioned policies and practices in determining whether particular Algerian detainees held at Guantanamo could be appropriately repatriated to Algeria. Due to restrictions related to litigation involving some of these individuals, the Government limits its discussion here to the cases of Abdul Aziz Naji and Saiid Farhi. Both individuals alleged generalized fears of mistreatment by either the Government of Algeria or terrorist groups in Algeria. In considering whether these fears were credible, the United States considered not only the claims asserted by these two individuals, but also whether there were any credible allegations of serious mistreatment related to past transfers to Algeria. In particular, the Government considered the fact that ten detainees previously have been repatriated from Guantanamo to Algeria without any credible allegations brought to our attention of post-transfer mistreatment, and that neither Mr. Naji nor Mr. Farhi presented treatment concerns in a manner that suggested any particularized likelihood of harm that would set their cases apart from the previously repatriated Algerian detainees. Upon reviewing and considering all of the concerns they raised in this context, the United States concluded that both Mr. Naji and Mr. Farhi could be repatriated consistent with the aforementioned policies on post-transfer humane treatment.

238. Both Mr. Naji and Mr. Farhi filed several motions in U.S. federal courts to stop their transfer to Algeria. Mr. Naji's motions were considered and denied by two U.S. federal district court judges, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), and the U.S. Supreme Court. Mr. Farhi, sought and obtained from the district court an injunction barring his transfer to Algeria, but the D.C. Circuit reversed that decision, and the U.S. Supreme court declined to block his transfer. In reaching these decisions, the courts have relied upon the policy of the United States not to transfer detainees where it determines that they are more likely than not to be tortured, and the determination of the Department of State that Mr. Naji and Mr. Farhi can be repatriated to Algeria consistent with that policy.

239. The United States transferred Mr. Naji to the custody of the Government of Algeria on 18 July 2010. He was held for questioning in accordance with Algerian law, which allows terrorism suspects to be held in detention for up to twelve days before appearing in court. Reports that Mr. Naji has been indicted are inaccurate. He was released on 25 July after appearing before a magistrate, who opened criminal proceedings against Mr. Naji and ordered that the report to the local police station on a weekly basis pending further investigation of this case. As indicated in numerous press reports, as well as a statement issued by his lawyers, Mr. Naji is at home with his family. He has indicated that he was treated well by the Government of Algeria during the initial period of detention. Mr. Farhi currently remains at Guantanamo.

240. The United States has and will continue to apply its post-transfer humane treatment policies to all detainee transfers, including any future transfers to Algeria. In the event the Government determines that a particular Algerian national cannot be appropriately repatriated to Algeria consistent with these policies, either because of information that comes to light about the general treatment of transferred Guantanamo detainees, or because of particularized concerns, then the repatriation will not occur until such concerns are addressed.

7. Communication sent to the Government

241. On 26 November 2010, the Special Rapporteur, together with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, sent a letter of allegation to the Government of the United States of America concerning information they had received, which originated from the Government's own files, and had become publicly dubbed "the Wikileaks Iraq War logs" relating to the alleged complicity in the torture and ill-treatment of Iraqi citizens by forces of United States of America in Iraq. The mandate holders informed the Government that they had addressed a similar letter to the Government of Iraq.

242. According to the information received:

> There was extensive abuse of detainees by Iraqi security forces over a five-year period between 2004 and 2009. United States authorities had knowledge of the systematic use of torture and other ill-treatment by Coalition, Iraqi and private security officials; and, in most cases, failed to intervene to prevent and/or investigate hundreds of reports of systematic abuse and torture. The information also suggested that such acts were conducted with impunity and appeared to go normally unpunished. The information contained allegations that US forces acting under "fragmentary orders," "Frago 242" and "Frago 039" were required to make no intervention in cases of abuse and/or torture involving Iraqis if the US troops were not initially involved. The orders also required US forces to report abuse to the US command but not to conduct any further investigation or take any further action to stop abuse or torture unless instructed to do so by higher order.
>
> The mandate holders drew the Government's attention to three examples from "the war logs" as illustrations of several hundred allegations of systematic torture and ill-treatment recorded by US personnel.
>
> 1. ALLEGED DETAINEE ABUSE BY TF ___ IN ___ 2006-02-02 17:50:00
>
> AT 2350C, IN ___, WHILE CONDUCTING OUT-PROCESSING, DETAINEE # ___ REPORTED THAT HE WAS ABUSED DURING HIS CAPTURE. DETAINEE IS MISSING HIS RIGHT EYE, AND HAS SCAR___ ON HIS RIGHT FOREARM. DETAINEE STATES THAT HIS INJURIES ARE A RESULT OF THE ABUSE THAT HE RECEIVED UPON CAPTURE. DIMS INDICATE THAT THE DETAINEE WAS CAPTURED ON ___ IN ___, AND THE CAPTURING UNIT

WAS TASK FORCE ___. THE DETAINEES CAPTURE TAG NUMBER IS ___. IN PROCESSING PERSONNEL STATE THAT THE DETAINEE___ CAPTURE PHOTO DEPICTS A BANDAGE OVER HIS RIGHT EYE, AND INJURY TO HIS RIGHT FOREARM. THE DETAINEE HAS COMPLETED THE DETAINEE ABUSE COMPLAINT FORM, AND WE ARE SEEKING A SWORN STATEMENT FROM THE DETAINEE. PER ORDER OF Task force ___, THE DETAINEE ___ TRANSFERRED AS SCHEDULED, AND CONTINUE CID INVESTIGATION UPON ARRIVAL AT ___ GHRAIB.

2. ALLEGED DETAINEE ABUSE BY IA AT THE DIYALA JAIL IN BAQUBAH

2006-05-25 07:30:00

AT 1330D, ___ REPORTS ALLEGED DETAINEE ABUSE IN THE DIYALA PROVINCE, IN BA'___ AT THE DIYALA JAIL, vicinity. ___. 1X DETAINEE CLAIMS THAT HE WAS SEIZED FROM HIS HOUSE BY IA IN THE KHALIS AREA OF THE DIYALA PROVINCE. HE WAS THEN HELD UNDERGROUND IN BUNKERS FOR APPROXIMATELY ___ MONTHS AROUND ___ SUBJECTED TO TORTURE BY MEMBERS OF THE /___ IA. THIS ALLEGED TORTURE INCLUDED, AMONG OTHER THINGS, THE ___ STRESS POSITION, WHEREBY HIS HANDS WERE BOUND/___ AND HE WAS SUSPENDED FROM THE CEILING; THE USE OF BLUNT OBJECTS (.___. PIPES) TO BEAT HIM ON THE BACK AND LEGS; AND THE USE OF ELECTRIC DRILLS TO BORE HOLES IN HIS LEGS. FOLLOW UP CARE HAS BEEN GIVEN TO THE DETAINEE BY US ___. THE DETAINEE IS UNDER US CONTROL AT THIS TIME. ALL PAPERWORK HAS BEEN SENT UP THROUGH THE NECESSARY ___ AND PMO CHANNELS. CLOSED: 260341MAY2006. Significant activity MEETS MNC- ___

3. ALLEGED DETAINEE ABUSE BY IP IVO BA': ___ DETAINEES INJ, ___ CF INJ/DAMAGE

2006-05-27 11:00:00

AT 1700D, ___ REPORTS ALLEGED DETAINEE ABUSE IN THE DIYALA PROVINCE, IN BA'___ AT THE DIYALA JAIL, vicinity. ___. 7X DETAINEES CLAIMS THEY WERE SEIZED BY IA IN THE KHALIS AREA OF THE DIYALA PROVINCE. THEY WERE DETAINED AROUND - ___ AND SUBJECTED TO TORTURE BY MEMBERS OF THE IA AND IP. THIS ALLEGED TORTURE INCLUDED, AMONG OTHER THINGS, STRESS POSITIONS, BOUND/___ AND SUSPENDED FROM THE CEILING; THE USE OF VARIOUS BLUNT OBJECTS (.___. PIPES AND ANTENNAS) TO BEAT THEM, AND FORCED CONFESSIONS. ALL DETAINEES WERE DETAINED FOR ALLEGED INVOLVEMENT IN AN ATTACK ON A IA Check Point IN KHALIS. FOLLOW UP CARE HAS BEEN GIVEN TO THE DETAINEES BY US ___. THE DETAINEES ARE UNDER US CONTROL AT THIS TIME. ALL PAPERWORK HAS BEEN SENT UP THROUGH THE NECESSARY ___ AND PMO CHANNELS. Serious Incident Report TO FOLLOW. CLOSED: 280442MAY2006. MEETS ___

In addition, information had been received that thousands of Iraqi nationals who had been detained by US forces were handed over from US to Iraqi custody between early 2009 and July 2010 under a November 2008 US-Iraq agreement that contains no provisions for safeguarding the detainees' physical and mental integrity after the transfer. Article 4(3) of the Status of Forces Agreement (SOFA), taking effect at midnight on 31 December 2008, only states in broad terms that: "It is the

duty of the United States Forces to respect the laws, customs, and traditions of Iraq and applicable international law." Many of the detainees transferred into Iraqi custody are suspected of terrorism-related offences on the basis of the 2005 Iraqi Anti-Terrorism Law.

243. The mandate holders stressed that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth inter alia in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. They were concerned that the US authorities handed over thousands of detainees to Iraqi security forces who US authorities knew were continuing to torture and abuse detainees. They drew the Government's attention to paragraph 1 of Human Rights Council Resolution 8/8 which "Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all Governments to implement fully the prohibition of torture and other cruel, inhuman or degrading treatment or punishment." The Special Rapporteurs recalled the obligations of the Government under article 1 of the Convention against Torture which not only prohibits torture and requires States to refrain from acts of torture but also place an obligation to 'prevent acts of torture'.

244. Additionally, the mandate holders pointed out that the United Nations Committee against Torture has stated that "if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to punishment for ordering, permitting or participating in this transfer contrary to the State's obligation to take effective measures to prevent torture in accordance with article 2, paragraph 1. The Committee has expressed its concern when States parties send persons to such places without due process of law as required by articles 2 and 3." (General Comment No. 2, 24 January 2008, UN Doc. CAT/C/GC/2, para.19). Similarly, they drew the Government's attention to article 6 of the Convention against Torture, which requires State Parties to establish their jurisdiction over acts of torture if they are committed in any territory under its jurisdiction; when the alleged offender is a national of that State and when the victim is a national of that State if that State considers it appropriate. It also requires State Parties to establish their jurisdiction over acts of torture in cases where the alleged offender is present in their territory. Article 7 goes on to provide that State Parties must either extradite alleged offenders or submit the case to its competent authorities for the purpose of prosecution.

245. With regard to fragmentary orders 242 and 039, the mandate holders were concerned that US officials failed to investigate thousands of cases of abuse, torture, rape and murder. They drew the Government's attention to article 12 of the Convention against Torture, which requires the competent authorities to undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that torture has been committed, and article 7 of the Convention against Torture, which requires State parties to prosecute suspected perpetrators of torture, as well as to paragraph 6b of Human Rights Council Resolution 8/8. Further, under the Fourth Geneva Convention, the US is required to provide effective penal sanctions for grave breaches such as torture or inhuman treatment and to "take measures necessary for the suppression of all [other] acts contrary to the provisions of [GC IV]".

246. Additionally, the Government's attention was drawn to General Comment No. 2 of the United Nations Committee against Torture which reiterates that "where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State

officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission." (General Comment No. 2, 24 January 2008, UN Doc. CAT/C/GC/2, para.18).

247. The mandate holders further recalled article 2(2) of the Convention against Torture, which provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture. It was noted that paragraph 2 of Resolution 8/8 of the Human Rights Council "Condemns in particular any action or attempt by States or public officials to legalize, authorize or acquiesce in torture under any circumstances, including on grounds of national security or through judicial decisions."

248. With regards to the information that US forces witnessed and documented torture by Iraqi force, the Human Rights Committee has systematically recognised the extraterritorial application of the International Covenant on Civil and Political Rights for cases of effective control over foreign territory. In its previous Concluding Observations concerning the United States, the Committee recommended that "[t]he State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant; and (c) consider in good faith the interpretation of the Covenant provided by the Committee pursuant to its mandate." (UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 10). In its General Comment No. 31, the Committee stated that 'a State Party must respect and ensure the rights […] to anyone within the power or effective control of that state party, even if not situated within the territory of the state party.' It continues by saying that 'this principle also applies to those within the power or effective control of the forces of a state party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.' (General Comment No. 31, 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para.10).

249. The mandate holders urged the Government to take all necessary measures to guarantee that the rights and freedoms of the aforementioned persons, whose identities could not be established, and of several hundreds of others whose allegations of systematic torture and ill-treatment have been recorded by US personnel, are respected and that accountability of any person guilty of the alleged violations is ensured. They requested information from the Government, inter alia, on measures taken to suppress the commission of torture and other ill-treatment by US, Coalition or Iraqi forces, including on action such as interventions, investigations or prosecution of acts of torture or ill-treatment alleged in the communication. Additionally, it was asked to provide clarification about alleged "fragmentary orders" requiring US forces to take no actions in cases involving torture or where there has been an allegation of torture, if US forces are not initially involved. Further, the Special Rapporteurs asked about measures taken by the Government to investigate or prosecute members of the US forces who were alleged to have committed or been complicit in the commission of torture and of those authorities who instructed or allowed the US military personnel to transfer detainees to Iraqi jurisdiction in spite of knowing that those detainees would run a high risk of being tortured. Finally, they

requested information on measures taken to address concerns that US forces handed over detainees to Iraqi custody despite a clear risk of torture.

8. Reply from the Government

250. As at 31 December 2010, there had been no response by the Government of the United States of America to the mandate holders' communication of 26 November 2010.

9. Press statement

251. On 21 July 2010, the Special Rapporteur, together with the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, issued a press statement on their concerns about the fate of Guantánamo detainees and called on the Obama administration to ensure that it does not forcibly transfer anyone to another State where the person could be subject to torture. They expressed their worries that the lives of two Algerian detainees could be put in danger without a proper assessment of the risks they could face if returned against their will to their country of origin, drawing attention to two decisions by the US Supreme Court, which had paved the way for the transfer of two of the Algerian detainees held at Guantánamo Base, Cuba. They continued by appreciating the efforts of the authorities to close the Guantánamo detention facility, however, stressed that the risk assessment should be a meaningful and fair process, and that courts should be part of it. Both detainees feared that, if returned to Algeria, they could be subject to torture or other forms of ill-treatment by the security services or non-State actors. These two men were part of a group of six Algerian nationals held in Guantánamo, all in a similar situation. According to the Special Rapporteurs, diplomatic assurances are unreliable or difficult to monitor and cannot substitute the sending country's obligation to assess the real risk facing the individual, recalling reports that the US Government had obtained such assurances from the Algerian authorities. The mandate holders had often seen diplomatic assurances used by Governments to circumvent the absolute prohibition of torture as established in article 3 of the Convention against Torture. They concluded that the situation referred to could have become the first involuntary transfers of Guantánamo detainees of the Obama administration.