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

Summary

The present report is submitted in accordance with Human Rights Council decision 2/102 and provides an update on recent activities of the Office of the High Commissioner for Human Rights on the protection and promotion of human rights while countering terrorism.

The High Commissioner addresses the protection and promotion of all human rights, as well as effective counter-terrorism measures, as complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect. The report outlines the position of the High Commissioner in relation to specific human rights concerns which arise in international cooperation in countering terrorism, notably those related to the detention and transfer of individuals suspected of terrorist activity; procedural obligations; and individual sanctions against terrorist suspects. The report concludes with the identification of a number of practical challenges related to judicial cooperation in the context of counter-terrorism.

* The present report was submitted after the deadline in order to reflect the most up-to-date information.

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I. BACKGROUND

1. The Human Rights Council, in its decision 2/102 of 6 October 2006, requested the High Commissioner for Human Rights to "continue with the fulfilment of [her] activities, in accordance with all previous decisions adopted by the Commission on Human Rights and to update the relevant reports and studies". On the current issue of the promotion and protection of human rights and fundamental freedoms while countering terrorism, a comprehensive annual report (E/CN.4/2006/94) was submitted to the sixty-second session of the Commission on Human Rights pursuant to its resolution 2005/80. The information in the report remains relevant, and is complemented by the report of the Secretary-General submitted to the General Assembly (A/61/353) pursuant to resolution 60/158. The Office of the High Commissioner for Human Rights understands decision 2/102 as preserving the previous annual reporting cycle in respect of this issue until otherwise decided by the Council. The current report to the Human Rights Council accordingly addresses developments in respect of the protection of human rights while countering terrorism over the last year.

2. I continue to address the protection and promotion of all human rights, as well as effective counter-terrorism measures, as complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect. In this context, my Office has concentrated on enhancing the protection of human rights and the rule of law in the context of terrorism and counter-terrorism, notably by strengthening the capacity of security, intelligence and law enforcement agencies to better integrate human rights standards in their work; promoting the human rights of victims of terrorism; and addressing the conditions conducive to exploitation by terrorists.

3. The achievement of these goals is central to the effective implementation of the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly in its resolution 60/288 of 8 September 2006, which situates human rights as the fundamental basis of the fight against terrorism and emphasizes that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular human rights law. My Office is hosting a number of expert meetings and seminars to help clarify and better define Member States' human rights obligations in relation to counter-terrorism; producing tools to assist practitioners; providing technical assistance to Member States, upon their request, in developing human rights-compliant counter-terrorism legislation and policies; and supporting relevant United Nations mechanisms.

4. In the current reporting period, I have continued to examine specific challenges to the protection of human rights in the context of terrorism, notably challenges to international cooperation and the rule of law in counter-terrorism and human rights. In recent years, terrorism and counter-terrorism measures have had a major impact on the administration of justice in countries throughout the world. Domestic and foreign policies have been shaped by States' responses to the threats posed by terrorism. States have a duty to protect those within their jurisdiction against terrorist attacks and there is a clear public interest in supporting effective counter-terrorism measures. However, these measures must be taken within the framework of international human rights law. Practices such as "irregular" transfers of persons suspected of involvement in terrorist activities, the detention of individuals without due process, the use of interrogation methods that are impermissible under international law, and the use of secret evidence and evidence obtained by torture, are of serious concern. The purpose of the present

report is to further clarify the nature and scope of States' obligations in relation to non-refoulement in cases involving a real risk of torture, as well as other human rights abuses; address the human rights implications of targeted sanctions against individuals suspected of terrorist activity; and identify some of the practical challenges to effective judicial cooperation in relation to counter-terrorism, including issues related to the use of intelligence information, exchange of evidence, and information-sharing.

II. RECENT ACTIVITIES

5. In November 2006, my Office and the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) jointly organized a Workshop on Human Rights and International Cooperation in Counter-Terrorism. The meeting was hosted by the Government of Liechtenstein, with participation by the Minister for Foreign Affairs, the Prosecutor-General and the Permanent Representative of Liechtenstein to the United Nations in New York. Approximately 50 people attended the workshop lasting two and a half days. Discussions took place under the Chatham House Rule (confidentiality of meetings facilitates free speech) and provided an opportunity for security experts and legal advisers from ministries of the interior, justice, defence and foreign affairs in various OSCE participating States, as well as human rights and international law experts, to engage in an open and constructive dialogue on human rights challenges that Governments, and others, currently are facing in countering terrorism.

6. Key objectives of the workshop were to identify and discuss international human rights obligations and commitments of OSCE participating States in the field of international cooperation in matters related to combating terrorism and to assist States in ensuring that measures taken to counter terrorism comply with their obligations under international human rights law. The workshop focused on issues related to the transfer of individuals suspected of terrorist activity, including the principle of non-refoulement, procedural guarantees and due process in the context of transferring individuals. Participants also discussed issues related to exchange of evidence and information-sharing, as well as individual sanctions such as asset freezing and the human rights implications of national and international listing mechanisms.

7. In the present report, I address some of the issues raised at the expert workshop and identify a number of challenges for further consideration. Other regions would benefit from a similar analysis of regional case law and practice.

III. HUMAN RIGHTS AND INTERNATIONAL COOPERATION IN COUNTER-TERRORISM

A. Non-refoulement

8. As part of its efforts to counter terrorism, a State may legitimately detain persons suspected of terrorist activity. I note with concern, however, that in some cases individuals suspected of involvement in terrorist activity have been detained and transferred in a manner which takes place outside the practical reach of established national and international legal frameworks. Where any measure involves the deprivation of an individual's liberty, compliance with international and regional human rights law related to liberty and security of persons, the right to recognition before the law and the right to due process is essential.

9. I continue to be concerned by the use by some States of diplomatic assurances, memoranda of understanding, and other forms of diplomatic agreement to justify the return or irregular transfer of individuals suspected of terrorist activity to countries where they may face a real risk of torture or other serious human rights abuse. There is well-established case law and evidence to demonstrate that such arrangements do not work as they do not provide adequate protection against torture and ill-treatment. Diplomatic assurances do not nullify the obligation of non-refoulement, which requires that States refrain from returning an individual to a territory where there is a real risk of ill-treatment. In most cases, assurances are concluded between States which are party to binding international and regional treaties which prohibit torture and cruel, inhuman or degrading treatment or punishment and refoulement to such practices. Ad hoc agreements concluded outside the international human rights legal framework threaten to weaken this system and erode the human rights principles in which it is firmly grounded. Efforts should focus on the full implementation of international human rights obligations through existing structures, notably through the establishment of systems of regular visits, by independent international and national bodies, of places where people are deprived of their liberty. Under States' international human rights obligations, States must take active measures to investigate allegations where there is credible information that individuals are being transported by or through a State's jurisdiction to a place where they face a real risk of torture.

10. The principle of non-refoulement is recognized explicitly in article 33, paragraph 1, of the Convention relating to the Status of Refugees and in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as in article 16 of the newly adopted International Convention for the Protection of All Persons from Enforced Disappearance. It is also reflected in article 7 of the International Covenant on Civil and Political Rights (ICCPR), which the Human Rights Committee has interpreted to include an obligation on States not to expose individuals to "the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement"[1] and, at regional level, in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

11. A Grand Chamber of the European Court of Human Rights reaffirmed the unqualified nature of the prohibition on refoulement in its decision in *Chahal v. The United Kingdom*, noting that the prohibition is absolute and is not subject to exceptions, even in cases where State security is at stake.[2] In the context of counter-terrorism, however, the absolute nature of the prohibition is under challenge. For example, certain Governments currently are seeking to test the absolute nature of the legal prohibition on refoulement as set out in *Chahal* through their interventions as third parties before the European Court of Human Rights in

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[1] General comment No. 20 on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (art. 7), HRI/GEN/1/Rev.1, para. 9.

[2] *Chahal v. The United Kingdom*, 15 November 1996, Reports 1996-V, paras. 74 and 80: "Where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country." See also Louise Arbour, "In our name and on our behalf", *International and Comparative Law Quarterly*, vol. 55, No. 511 (2006), p. 517, footnote 15.

Ramzy v. the Netherlands (application No. 25424/05), a case involving a complaint under article 3 of the European Convention on Human Rights. The applicant argues that, if removed from the Netherlands to Algeria, he will be exposed to a real risk of torture or ill-treatment at the hands of the Algerian authorities. The interveners argue that, even if such a risk exists, the principle of non-refoulement should be balanced against the security interests of the State.

12. I recall the well-established principle in international law which provides that, where there is a real risk of torture or other cruel, inhuman or degrading treatment or punishment in a receiving State, the prohibition of refoulement is absolute and may not be subject to any derogation, qualification or limitation. The principle is often considered a procedural rule which is implicit in, and complements, the general prohibition of torture and other cruel, inhuman and degrading treatment or punishment. However, the obligation also applies in cases involving other serious human rights violations. For example, the Human Rights Committee has stated that article 2 of ICCPR, which requires that States parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control, "entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed".[3] While the Committee does not define which violations may amount to "irreparable harm", at a minimum this would include arbitrary deprivation of the right to life and enforced disappearances, in addition to torture or cruel, inhuman or degrading treatment or punishment. Exposure to a manifestly unfair trial may similarly amount to such harm. Similarly, regional human rights courts as well as national courts have accepted the applicability of non-refoulement in relation to the European Convention on Human Rights provisions on torture and other ill-treatment (art. 3) and flagrant denial of justice (art. 6). There is also evidence to suggest that the protection afforded under article 6 of the European Convention extends to the practice of plea bargaining as this may compromise the right to a fair trial. Although not yet in force, the European Union Charter of Fundamental Rights reflects the practice of the European Court of Human Rights and provides that "[n]o one may be removed, expelled or extradited to a State where there is a serous risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment" (art. 19 (2)).

13. The transfer of an individual suspected of involvement in terrorism may have other serious human rights implications. For example, the transfer and detention of an individual inevitably poses a direct threat to the family life of that individual, notably because family members are often effectively prevented from contact and dependants may be deprived of their source of livelihood. From the perspective of international human rights law, the extent to which the obligation of non-refoulement applies in relation to transfers which may involve a risk of human rights violations such as the right to family life is not yet clear. I will continue to reflect on the scope of the principle of non-refoulement in the context of counter-terrorism.

14. With regard to the risk assessment for torture or other cruel, inhuman or degrading treatment or punishment in individual cases, I note with concern that the different standards

[3] Human Rights Committee, general comment No. 31, para. 12.

applied at national level by States may be an impediment to the consistent application of non-refoulement in the context of counter-terrorism. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires "substantial grounds for believing that [the individual] would be in danger of being subjected to torture" which, according to Committee against Torture, requires "grounds that go beyond mere theory or suspicion".[4] The Human Rights Committee has stated that the non-refoulement obligation arises "where there are substantial grounds for believing that there is a real risk of irreparable harm",[5] while the European Court of Human Rights requires "substantial grounds ... for believing that an individual would face a real risk of being subjected to treatment contrary to article 3".[6] At the national level, however, some Member States have applied a lower standard in assessing the risk, for example by requiring that the risk of torture or ill-treatment be "more likely than not". All States should ensure that legislation at national level in relation to torture is consistent with the Convention against Torture, including appropriate penalties, in order to meet their obligations under international law to prevent and eliminate torture in all its forms.

15. The Committee against Torture has provided some guidance on the evaluation of risk of torture, an assessment which should seek to establish whether the individual concerned would be at personal risk of torture in the country to which he or she would be returned. According to the Committee, "the existence of a consistent pattern of gross, flagrant or mass violation of human rights in a country does not of itself constitute sufficient grounds for determining whether the person in question would be at risk of being subjected to torture upon return to that country", "nor does the absence of such a situation mean that a person cannot be considered at risk of being subjected to torture".[7] An assessment must take place on a case-by-case basis, on grounds that go beyond mere theory or suspicion. For both practical and legal reasons, in cases related to the transfer of individuals from one country to another, the burden of proof should remain with the transferring State to produce relevant information about the risk of torture and ill-treatment in the receiving country.

16. Above all, national counter-terrorism strategies should seek to prevent acts of terrorism, prosecute those responsible for such criminal acts, and promote and protect human rights and the rule of law. In this regard I underscore the importance of respect for the principle of *aut dedere aut iudicare* ("extradite or prosecute"). While recognizing the significant challenges faced by States in dealing with individuals suspected of terrorist activity who remain within their jurisdiction, wherever possible such individuals should be prosecuted under national criminal legislation. From a security and law enforcement perspective, the most effective counter-terrorism strategies involve efforts by the State to allow individuals suspected of

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[4] Committee against Torture, general comment No. 1, para. 6.

[5] Human Rights Committee, general comment No. 31, para. 12.

[6] *Chahal v. the United Kingdom, ECHR*, para. 80, 15 November 1996.

[7] Committee against Torture, *SG v. Netherlands* (No. 135/1999), A/59/44, p. 11, para. 6.2.

terrorism to remain in the country for the purposes of intelligence-gathering and monitoring, while adhering strictly to human rights and the rule of law. In any case, States must respect the principle of non-refoulement as vital to ensuring the prevention of torture.

B. Procedural obligations

17. States have an obligation to conduct any transfer of detainees in a manner which is transparent and consistent with human rights and the rule of law, including the right to respect for a person's inherent dignity, the right of everyone to recognition before the law and the right to due process. The international human rights legal framework requires that any deprivation of liberty be based upon grounds and procedures established by law, that detainees be informed of the reasons for the detention and promptly notified of the charges against them, and that they be provided with access to legal counsel. In addition, prompt and effective oversight of detention by a judicial officer must be ensured to verify the legality of the detention and to protect other fundamental rights of the detainee. Even in states of emergency, minimum access to legal counsel and prescribed reasonable limits upon the length of preventative detention remain mandatory. Moreover, national authorities have an obligation to prevent human rights abuses and to actively investigate and prosecute any allegation of practices which may involve the transfer or detention of individuals in a manner inconsistent with international law.

18. The Human Rights Committee has held that denying individuals contact with family and others violates the States' obligation under ICCPR to treat prisoners with humanity. It has also stressed the importance of provisions requiring that detainees should be held in places that are publicly recognized and that there must be proper registration of the names of detainees and places of detention. The prohibition against unacknowledged detention, taking of hostages or abductions, and enforced disappearance is absolute. The seriousness of these violations is reflected in the newly adopted International Convention for the Protection of All Persons from Enforced Disappearance, article 2 of which defines an enforced disappearance as "the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law". The Convention affirms the right of a victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end. It provides that each State party should take appropriate measures to ensure that enforced disappearance constitutes an offence under its criminal law. Furthermore, the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

19. Procedural challenges related to the obligation of non-refoulement may also arise in the context of immigration and refugee law. For example, in some States concerns have been raised with regard to the possible misuse and abuse of refugee and immigration procedures by individuals suspected of terrorist activity, while others have expressed concerns related to the right of an individual to appeal against a denial of refugee status.

20. In this regard, reference should be made to the flexibilities built in to the framework of international human rights law and international refugee law, which contains a number of

provisions for guarding against abuses. For example, article 14, paragraph 2, of the Universal Declaration of Human Rights states that the right to seek and enjoy asylum "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations". Similarly, article 33, paragraph 2, of the Convention relating to the Status of Refugees limits the ambit of the rule against refoulement where "there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country". Where a person has already been granted refugee status, that status may be cancelled where there is new evidence which, had it been available at the time that the refugee application was considered, would have led to a refusal of status. Moreover, the obligations under the Refugee Convention do not apply to the country of refuge where the exclusion clauses under article 1F of the Convention are applicable. In particular, article 1F (b) of the Convention relates to the commission by the applicant of serious non-political crimes, which may include acts of terrorism, prior to the person's admission to the country of refuge. States should make every effort to ensure the scrupulous application of the provisions reflected in articles 1F and 33 (2), paragraph 2, of the Convention. Even in these cases, however, the human rights prohibition against refoulement continues to apply.

21. All States have a positive obligation to ensure that their territory is not used to transfer persons to places where they are likely to be subjected to torture, including taking all practical steps to determine whether foreign movements through its territory involve such practices whether are grounds so to believe. However, there are a number of practical challenges in this regard facing States whose territory is used to facilitate the transfer of an individual terrorism suspect. For example, what procedures should a State impose as a minimum obligation to satisfy these positive obligations and ensure that it is not complicit in the practice of "irregular" transfers?

22. At a minimum, States must ensure that any transfer of persons from one territory to another are undertaken pursuant to a prescription by law and within the framework of international law. In addition, judicial oversight and review must be available prior to any transfer, and investigations must be undertaken in response to credible allegations of rendition involving a real risk of torture. In any event, an assessment of all the circumstances should be made, including the prior practice on the part of the transiting State; the origin and destination of the transiting aircraft or vehicle; the preparedness or otherwise of the transiting State to share information and/or provide assurances; and, in the case of aircraft, the status of the aircraft under article 4 of the Convention on International Civil Aviation (Chicago Convention).

C. Individual sanctions

23. Targeted sanctions against individuals suspected of involvement in terrorist activity may be an effective tool in States' efforts to combat terrorism. For example, the freezing of an individual's financial assets or the imposition of a travel ban may be important means for tracking, and even preventing, terrorist activity. However, the current international regime of sanctions against individuals suspected of involvement in terrorist activity poses a number of serious challenges to human rights. The human rights implications of national and international listing mechanisms for terrorist organizations and individuals suspected of terrorist activity,

including listings at United Nations and regional levels leading to asset freezing, merit particular consideration in light of the severe consequences an individual listing can have for the individual, as well as his or her family and community.

24. The current system of targeted sanctions against selected persons or non-State entities includes general anti-terrorism measures under Security Council resolution 1373 (2001) and al-Qaeda/Taliban sanctions under Security Council resolution 1267 (1999). The listing of a person or an entity under Security Council resolution 1267 (1999), and subsequent resolutions including resolution 1390 (2002), entails a duty on all Member States to adopt a number of sanctions measures against listed individuals and entities, including travel bans and assets freezing. Decisions on whether to place an individual or entity on the sanctions list are made by the Security Council Committee established pursuant to resolution 1267 (1999) (the 1267 Committee) on the basis of information provided by a Member State, and delisting can only occur with the unanimous consent of Committee members or by a decision of the Security Council. At regional level, the Council of the European Union has established a system of individual sanctions through the adoption of detailed Common Positions and Regulations, for the implementation of Security Council listings.

25. While the system of targeted sanctions represents an important improvement over the former system of comprehensive sanctions, it nonetheless continues to pose a number of serious human rights concerns related to the lack of transparency and due process in listing and delisting procedures. For example, at present, there is no mechanism for reviewing the accuracy of the information behind a sanctions committee listing or the necessity for, and proportionality of, sanctions adopted, nor does the individual affected have a right of access to an independent review body at the international level. The only recourse for review of individuals and entities that may be wrongly listed, for example, is for the individual or entity to approach the Security Council through their State of nationality or residence. While a full consideration of these human rights concerns is beyond the scope of this paper, in brief, they include questions related to:

- *Respect for due process rights*: Individuals affected by a United Nations listing procedure effectively are essentially denied the right to a fair hearing;

- *Standards of proof and evidence in listing procedures*: While targeted sanctions against individuals clearly have a punitive character, there is no uniformity in relation to evidentiary standards and procedures;

- *Notification*: Member States are responsible for informing their nationals that they have been listed, but often this does not happen. Individuals have a right to know the reasons behind a listing decision, as well as the procedures available for challenging a decision;

- *Time period of individual sanctions*: Individual listings normally do not include an "end date" to the listing, which may result in a temporary freeze of assets becoming permanent. The longer an individual is on a list, the more punitive the effect will be;

- *Accessibility*: Only States have standing in the current United Nations sanctions regime, which assumes that the State will act on behalf of the individual. In practice, often this does not happen and individuals are effectively excluded from a process which may have a direct punitive impact on them; and

- *Remedies*: There is a lack of consideration to remedies available to individuals whose human rights have been violated in the sanctions process.

26. These concerns were reflected in the World Summit Outcome Document (see General Assembly resolution 60/1), which calls upon the Security Council, with the support of the Secretary-General, "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exemptions".[8]

27. Pursuant to this mandate, which was enshrined in paragraph 109 of General Assembly resolution 60/1, the Secretary-General tasked the Office of Legal Affairs - in close cooperation with the Office of the High Commissioner for Human Rights and the Department of Political Affairs - with beginning an interdepartmental process to develop proposals and guidelines that would be available for the consideration of the Security Council.[9] On the basis of this process, the Secretary-General drafted a non-paper, setting out his views concerning the listing and delisting of individuals and entities on sanctions lists, which he sent to the members of the Security Council for their consideration. On 22 June 2006, the Security Council held an open thematic debate on "Strengthening international law: rule of law and maintenance of international peace and security". In a statement in the framework of this debate, the Legal Counsel referred to the Secretary-General's non-paper, stating that:

> "According to the non-paper, the minimum standards required to ensure that the procedures are fair and transparent would include the following four basic elements:
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> > "First, a person against whom measures have been taken by the Council has the right to be informed of those measures and to know the case against him or her as soon as and to the extent possible. The notification should include a statement of the case and information as to how requests for review and exemptions may be made. An adequate statement of the case requires the prior determination of clear criteria for listing.

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[8] Various initiatives to follow up on the Outcome Document are ongoing. For example, in March 2006, Germany, Sweden and Switzerland, together with other like-minded States, circulated an analytical report commissioned from the Watson Institute for International Studies, entitled "Strengthening targeted sanctions through fair and clear procedures". The Council of Europe also commissioned a report by Iain Cameron, entitled "The ECHR, due process and UN Security Council counter-terrorism sanctions".

[9] Report of the Secretary-General on the implementation of decisions from the 2005 World Summit Outcome for action by the Secretary-General (A/60/430 of 25 October 2005), para. 20.

> "Secondly, such a person has the right to be heard, via submissions in writing, within a reasonable time by the relevant decision-making body. That right should include the ability to directly access the decision-making body, possibly through a focal point in the Secretariat, as well as the right to be assisted or represented by counsel. Time limits should be set for the consideration of the case.
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> "Thirdly, such a person has the right to review by an effective review mechanism. The effectiveness of that mechanism will depend on its impartiality, degree of independence and ability to provide an effective remedy, including the lifting of the measure and/or, under specific conditions to be determined, compensation.
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> "Fourthly, the Security Council should, possibly through its Committees, periodically review on its own initiative targeted individual sanctions, especially the freezing of assets, in order to mitigate the risk of violating the right to property and related human rights. The frequency of such review should be proportionate to the rights and interests involved. The non-paper indicates also that those elements would apply mutatis mutandis in respect of entities."[10]

28. Some improvements have been made recently to the procedures related to the United Nations targeted sanctions regime. In November 2006, the 1267 Committee produced revised standards which apply to new listings including a requirement on designating States to provide more detailed information about individuals and entities to be listed, as well as detailed statements of cases. Nonetheless, the targeted sanctions regime continues to pose a number of serious human rights challenges, notably due to the fact that the process does not provide an opportunity for affected individuals to be informed that such measures are being taken against them or to make submissions, nor does it provide a process for individuals to challenge their listing. In December 2006 the Security Council adopted resolution 1730 (2006) with a view to addressing these concerns. Resolution 1730 establishes new "delisting procedures" as well as a focal point within the Secretariat to serve as a liaison between the designating country and receive delisting requests. While the High Commissioner welcomes this first step towards ensuring fair and clear procedures for placing individuals and entities on Security Council sanctions lists and for removing them, the measures taken so far are far from being a comprehensive solution to the problem.

29. Human rights concerns such as those outlined above have prompted a number of challenges to the individual listings procedures before national and regional courts.[11] The most recent of these involved a challenge before the European Court of First Instance by the

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[10] Security Council, 5474th meeting, 22 June 2006 (S/PV.5474).

[11] See, for example, *Kadi v. Council and Commission*, Case T-315/01, 21 September 2005; *Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T-306/01, 21 September 2005; Faraj Hassan, Case T-49/04, 12 July 2006; and Chafiq Ayadi, Case T-253/02, 12 July 2006.

Organisation des Modjahedines du peuple d'Iran,[12] a group which originally was listed as a terrorist organization by the Secretary of State for the Home Department of the United Kingdom of Great Britain and Northern Ireland on 28 March 2001, under the Terrorism Act 2000. The organization brought two unsuccessful actions against this order, including a request for judicial review before the High Court and an appeal to the Proscribed Organisations Appeal Commission (POAC). In 2002, the EU Council adopted Common Position 2002/340/CFSP, with an updated list including the applicant organization. The applicant lodged an application at the Court of First Instance, asking the Court inter alia to annul the relevant Common Position and related decisions, and declare the Common Position and decisions to be inapplicable.

30. CFI considered arguments related to infringements of the right to a fair hearing, to the obligation to state reasons for a listing decision, and to the right to effective legal protection. The Court found that neither the Regulation nor the Common Position provide for notification of the evidence adduced or for a hearing of the parties concerned, either before or together with the initial decision to freeze funds or, in the context of subsequent decisions. The applicant had not been apprised of the specific evidence against it, and was therefore not in a position to make known its views on the matter or avail itself of the right of action before the Court. Neither the written pleadings of the parties nor the file produced before the Court enabled it to determine with certainty, after the close of the oral procedure, the grounds on which the original listing decision was based. The Court concluded that the decision did not contain a sufficient statement of reasons and that the applicant's right to a fair hearing was not observed. The Court declared that it was not in a position to review the lawfulness of the decision, and annulled the decision insofar as it concerned the applicant.

31. While the decision of the Court of First Instance involved a challenge to an individual sanction process at regional level, the Court's reasoning illustrates the fundamental importance of due process rights in the context of counter-terrorism, in particular the right to a fair hearing and independent review of individual sanctions against persons suspected of terrorist activity. Improvements to the current United Nations sanctions regime have been made, however, further improvements are necessary in order to ensure a listing process which is transparent, based on clear criteria, and with an appropriate, explicit, and uniformly applied standard of evidence, as well as an effective, accessible and independent mechanism of review for individuals and concerned States. At a minimum, the standards required to ensure fair and clear procedures must include the right of an individual to be informed of the measures taken and to know the case against him or her as soon as, and to the extent possible, without thwarting the purpose of the sanctions regimes; the right of such a person to be heard within a reasonable time by the relevant decision-making body; the right to effective review by a competent, independent review mechanism; the right of such a person to counsel with respect to all proceedings; and the right of such a person to an effective remedy.

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[12] *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union,* 12 December 2006.

IV. CONCLUSIONS

32. **I recall in the report above the importance of placing human rights at the core of international cooperation in counter-terrorism and the obligation of all States to ensure that measures taken to combat terrorism comply with their obligations under international human rights law, in particular the right to recognition before the law, due process, and non-refoulement. Compliance with international human rights standards is essential where any counter-terrorism measure involves the deprivation of an individual's liberty. In particular, States must ensure that any transfer of persons from one territory to another is undertaken pursuant to a prescription by law and within the framework of international law.**

33. **International cooperation is vital to ensuring respect for human rights standards in relation to sanctions against individuals suspected of involvement in terrorist activity. With regard to the United Nations sanctions regime, further improvements are needed to ensure a listing process which is transparent, based on clear criteria, and with an appropriate, explicit, and uniformly applied standard of evidence, as well as an effective, accessible and independent mechanism of review for individuals and concerned States. Fair and clear procedures must include the right of an individual to be informed of the measures taken and to know the case against him or her; the right of such a person to be heard within a reasonable time by the relevant decision-making body; the right to effective review by a competent, independent review mechanism; the right of such a person to representation with respect to all proceedings; and the right of such a person to an effective remedy.**

34. **Further challenges to human rights in the context of counter-terrorism include issues related to judicial cooperation, such as questions related to the gathering of information by one State at the request of another; the transfer of information from one jurisdiction to another; judicial proceedings involving evidence gathered abroad; and the use of intelligence information in judicial proceedings. Practical hurdles to effective judicial cooperation in counter-terrorism include issues related to the impact of the origins of intelligence information on its admissibility as evidence; differences in the definition of the elements of crime between jurisdictions, as well as "dual criminality" concerns; procedures for gathering evidence, in particular where interrogation of witnesses or suspects is coercive and amounts to torture or cruel, inhuman and degrading treatment; unlawful interferences with privacy with respect to interception, search, seizure and surveillance; the right to remedy for violation of human rights in the context of evidence gathering and information-sharing; the transfer and/or admissibility of evidence gathered by unlawful means; the principle of legality in relation to the definition of terrorist offences; the protection of witnesses; and questions related to the burden of proof in criminal proceedings. My Office will continue to reflect on these issues with a view to assisting States in strengthening the effectiveness of mutual legal assistance, respect for human rights and upholding the rule of law in effectively countering terrorism.**
