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PROMOTION AND PROTECTION OF HUMAN RIGHTS

**Protection of human rights and fundamental freedoms
while countering terrorism**

Report of the High Commissioner for Human Rights*

Summary

Section I introduces the present report, recalling that Commission on Human Rights resolution 2005/80 invites the High Commissioner for Human Rights to report regularly to the Commission on its implementation. Section II contains information on activities of the Office of the United Nations High Commissioner for Human Rights relating to the protection of human rights and fundamental freedoms while countering terrorism, and other recent developments of relevance to the mandate. Section III outlines the legal basis for the absolute prohibition of torture and ill-treatment and refolement to such practices and serves as the framework for consideration of the issues discussed in the subsequent section. Section IV looks at the issue of transfers of persons suspected of engagement in terrorist activities or deemed to be threats to national security and the occurrences of securing diplomatic assurances in cases where such persons are perceived to be at risk of torture and cruel, inhuman or degrading treatment or punishment in the receiving State. Section V contains conclusions and recommendations for the consideration of the Commission.

* This report is submitted late in order to incorporate the latest information on the subject.

I. INTRODUCTION

1. Commission on Human Rights resolution 2005/80 requests the High Commissioner for Human Rights, making use of existing mechanisms, to examine the question of the protection of human rights and fundamental freedoms while countering terrorism and to make general recommendations about the obligations of States in this regard. It also asks the High Commissioner to assist the special procedures of the Commission to enhance coordination and avoid duplication of efforts, and provides the basis for deeper cooperation between the Security Council, its Counter-Terrorism Committee (CTC) and the Office of the United Nations High Commissioner for Human Rights (OHCHR). The resolution invites the High Commissioner to report regularly to the Commission and General Assembly on its implementation.

2. Accordingly, Section II of the present report updates the information that was submitted to the General Assembly at its sixtieth session in accordance with the request contained in resolution 2005/80 for regular reporting to that organ.¹ It provides an overview of the activities of the Office carried out in the context of the High Commissioner's mandate as described above and takes note of recent developments with bearing on the protection of human rights while countering terrorism. Section III examines some issues related to transfers of individuals suspected to be linked to terrorism and the seeking of diplomatic assurances against torture and cruel, inhuman or degrading treatment or punishment by outlining the legal basis for the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment and non-refoulement. Section IV then looks in more detail at the issue of transfers of persons suspected of involvement in terrorist activities or deemed threats to national security, and the seeking of diplomatic assurances in places where they risk torture and ill-treatment. It discusses how such practices are infringing on the protection of human rights and reiterates that the actions of States to combat terrorism must be in conformity with international law. Section V contains a series of conclusions and recommendations for further consideration, including an appeal to States to reinforce their efforts to eradicate torture and cruel, inhuman or degrading treatment or punishment as these practices continue to affront human dignity and rights.

II. OHCHR ACTIVITIES AND OTHER DEVELOPMENTS CONCERNING THE PROTECTION OF HUMAN RIGHTS IN THE COUNTER-TERRORISM CONTEXT

3. The Office of the United Nations High Commissioner for Human Rights has continued to analyse the human rights implications of measures taken in the counter-terrorism context and to advocate that counter-terrorism policies, laws, and practices preserve respect for human rights and the rule of law. The High Commissioner has raised with States the issue of the need to respect human rights in countering terrorism. She devoted her Statement for Human Rights Day on 10 December 2005 to two phenomena today which are having an acutely corrosive effect on the global ban on torture and cruel, inhuman or degrading treatment. The first is the trend of seeking "diplomatic assurances" allegedly to overcome the risk of torture and other cruel, inhuman or degrading treatment or punishment of persons being transferred to places where such risks are perceived. And, the second concerns the reported secret detention of an unknown number of persons suspected of involvement in terrorism in unknown locations. OHCHR is also working to ensure that international human rights principles, norms, standards, and jurisprudence relevant to protecting human rights in the counter-terrorist environment are incorporated in

national and regional counter-terrorist decision-making processes and to this end, is cooperating with other United Nations entities, States, regional and civil society organizations. OHCHR continues to participate in the Task Force which was established to implement the global strategy, announced by the Secretary-General on 10 March 2005, to respond to the threat of terrorism.

4. In August 2005, OHCHR provided support to the Working Group of the Sub-Commission on the promotion and protection of human rights set up to elaborate detailed principles and guidelines concerning the promotion and protection of human rights when combating terrorism. In December 2005, OHCHR participated in a meeting of the Council of Europe Steering Committee on Human Rights to discuss the issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures and the appropriateness of concluding a legal instrument containing minimum standards for diplomatic assurances.

5. OHCHR is assisting the special procedures, including by consolidating and building upon their findings and recommendations relevant to protecting human rights in the counter-terrorism context. Many of the special procedures have observed that while States have a duty to protect their citizens against terrorist attacks, numerous States have sanctioned counter-terrorism measures which are inconsistent with internationally recognized human rights standards. At the eleventh annual meeting of special procedures of the Commission, they “reiterated the concerns expressed in their statement of June 2003 regarding the serious incidence that certain measures taken in the name of the fight against terrorism may have on the enjoyment of human rights and fundamental freedoms” (E/CN.4/2005/5, annex I). At the twelfth annual meeting of special procedures, they endorsed a statement expressing concern about the Guantanamo Bay detainees and referred to their 2004 request to the Government of the United States of America to visit those persons arrested, detained or tried on grounds of alleged terrorism or other violations in Iraq, Afghanistan or the Guantanamo Bay naval base (E/CN.4/2006/4, para. 19). This statement followed numerous other issuances since late 2001 of various special procedures relating to the persons detained at Guantanamo Bay and in the context of the conflicts in Afghanistan and Iraq. Several other special procedures including the Working Group on arbitrary detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Representative of the Secretary-General on the situation of human rights defenders, have recorded in their recent reports how counter-terrorism measures are continuing to negatively impact human rights and fundamental freedoms.² In August 2005, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment publicly expressed his concern that the practice of seeking diplomatic assurances for the purpose of expelling or returning persons in spite of a risk of torture and cruel, inhuman or degrading treatment or punishment reflects a tendency in Europe to circumvent the internationally recognized principle of non-refoulement. He warned that diplomatic assurances are not an appropriate tool to eradicate the risk of torture or cruel, inhuman or degrading treatment or punishment by the receiving country. The Office is also working closely with the newly appointed Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (see Commission resolution 2005/80).

6. Regarding cooperation with the Security Council CTC, the revitalization plan for CTC approved by the Security Council in resolution 1535 (2004) anticipated that the Counter-Terrorism Committee Executive Directorate (CTED) would “liaise with the Office of the United Nations High Commissioner for Human Rights and other human rights organizations in matters related to counter-terrorism”. Following strong recommendations from OHCHR and others, a post was included in the CTED organizational structure for a senior human rights officer, which was filled in July 2005. OHCHR continues to cooperate with CTC and is aware that it is now considering practical ways to take human rights concerns into account in the course of its ongoing activities. On a related matter, on 27 October 2005, CTC received a briefing by the new Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. This is an encouraging development and close cooperation is encouraged in the future to ensure that human rights concerns are highlighted to CTC and addressed by it in its exchanges with States.

7. Human rights protection received an encouraging boost during the High-level Plenary Meeting of the sixtieth session of the General Assembly when Heads of State and Government, while condemning terrorism on the basis that it constitutes one of the greatest threats to international peace and security, reiterated that any measures taken by States to combat terrorism should comply with their obligations under international law, in particular human rights, humanitarian and refugee law.

III. RESPECTING THE PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT AND THE PRINCIPLE OF NON-REFOULEMENT

8. While international human rights bodies and mechanisms and regional human rights courts have held that States have the right and duty to protect their citizens against terrorist attacks, they have asserted the need for the actions of States to be in conformity with international human rights, humanitarian and refugee law. Though States have accepted that their counter-terrorist actions must be carried out in conformity with international law, including as expressed most recently at the High-level Plenary Meeting of the sixtieth session of the General Assembly, there is evidence that in reality anti-terrorism measures and practices are posing grave threats to the effective enjoyment of human rights.

9. States are transferring persons suspected of involvement in terrorism or deemed as threats to national security to countries where they know or should know that such persons risk torture or cruel, inhuman or degrading treatment or punishment. Many of the receiving States have established records of human rights violations, including by committing torture and cruel, inhuman or degrading treatment. For various reasons, including because of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment and interdiction of returning a person to a country where he or she would face these violations, sending States have sought and secured diplomatic assurances from receiving Governments that such persons will not be tortured or ill-treated. These assurances have proven unreliable and ineffective in many cases. Those subject to their “guarantees” have been tortured and ill-treated.

10. The right to be free from torture or cruel, inhuman or degrading treatment or punishment is a right that is codified in international law. Torture is also prohibited by customary international law and ranks as *jus cogens* under international law. While international human

rights law permits limitations at certain times of certain rights, the right to be free from torture and cruel, inhuman or degrading treatment or punishment must be respected in all circumstances. It is an absolute right and even in time of public emergency which threatens the life of the nation, it may not be derogated from.³

11. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at articles 1 and 16, provides additional specific protection against torture and cruel, inhuman or degrading treatment or punishment. It defines torture “as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. States parties are required to incorporate this definition into their domestic law.

12. The prohibition against torture and cruel, inhuman or degrading treatment or punishment encompasses the interdiction of returning a person to a country - no matter what his crime or suspected activity - where he or she would face such perils. Under article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 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. However, more and more proof is emerging that States are resorting to torture, cruel, inhuman or degrading treatment or punishment or sending persons to places where they manifestly risk torture and ill-treatment. These practices are being used, for instance, during interrogations to elicit information from persons suspected of involvement in terrorist activities. Certain detention conditions also cause concern as they facilitate the perpetration of torture and cruel, inhuman or degrading treatment or punishment. These occurrences are causing serious human rights violations and setbacks in eradicating practices which have long affronted human dignity and human rights.

13. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, contains the principle of non-refoulement, i.e. that “no State shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. In determining whether such grounds exist, the Convention places the obligation on States to weigh all relevant considerations, including whether a consistent pattern of gross, flagrant, or mass violations of human rights exist in the State to which it might be considering sending a person. In the case of *Paez v. Sweden*, the Committee against Torture found that the State party was under the obligation to refrain from forcibly returning the complainant to his country of origin on article 3 grounds. It held that “the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged

cannot be a material consideration when making a determination under article 3 of the Convention”.⁴ This position was again recently confirmed in the case of *Ms. T.A. v. Sweden* where the Committee considered that substantial grounds existed for believing that Ms. T.A., an asylum-seeker, would risk being subjected to torture if returned to her country of origin. It concluded that deportation would amount to a breach of article 3 of the Convention.⁵

14. The International Covenant on Civil and Political Rights also provides in article 7 that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. In its interpretation of this provision, the Human Rights Committee (HRC) has opined that “States 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 their extradition, expulsion or refoulement”.⁶ Thus, not only is torture and cruel, inhuman or degrading treatment or punishment prohibited, but returning a person to such danger, by whatever method, is also prohibited. HRC established that this protection applies to all persons within the power or effective control of the State party, even if they are located outside the State party’s territory.⁷ In 2004, HRC examined the communication of *Byahuranga v. Denmark* in which the author claimed that his expulsion from the host country to his country of origin would amount to a violation of his rights under article 7 of the Covenant. HRC found that the expulsion order against the author would, if implemented by returning him to the country of origin, constitute a violation of article 7.⁸

15. The principle of non-refoulement is also contained in international refugee law, particularly in article 33 of the Convention relating to the Status of Refugees. International humanitarian law, in common article 3 of the Geneva Conventions, of 12 August 1949, prohibits at any time and in any place, violence to life and person, including torture and cruel treatment, and outrages upon personal dignity, in particular, humiliating and degrading treatment. The Additional Protocols thereto of 8 June 1977 also include fundamental guarantees for humane treatment. Torture and cruel, inhuman or degrading treatment or punishment committed against persons protected by the Geneva Conventions, of 12 August 1949, is considered grave breaches, amounting to war crimes.⁹

16. Further, protection against torture and cruel, inhuman or degrading treatment or punishment is enshrined in several regional human rights treaties such as article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on human rights), article 5 of the American Convention on Human Rights, and article 5 of the African Charter on Human and Peoples’ Rights. Other regional instruments such as the Inter-American Convention to Prevent and Punish Torture and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provide expanded provisions relating to torture and cruel, inhuman or degrading treatment or punishment, and indicate measures that States should take to prevent and penalize such practices.

17. In 1996, the European Court of Human Rights in the case of *Chahal v. the United Kingdom* affirmed that States must not deport a person to a place where she/he risks torture and cruel, inhuman or degrading treatment or punishment, even if that person threatens the national security of the sending State. It held that “article 3 [of the European Convention on Human Rights] enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention

prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct". Further, it stated that no derogation from article 3 of the Covenant was permitted, even in time of public emergency. And, "the prohibition provided by article 3 against cruel, inhuman or degrading treatment or punishment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous cannot be a material consideration". The Court rejected the sending State's reliance on assurances from the receiving State on the basis that it was not convinced that such assurances would provide the person with an adequate guarantee of safety based on human rights violations in the receiving State.¹⁰

IV. TRANSFERS IN THE COUNTER-TERRORISM CONTEXT AND THE PRACTICE OF SEEKING DIPLOMATIC ASSURANCES IN RESPECT OF PERSONS PERCEIVED TO RISK TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

18. States are using counter-terrorism, extradition and immigration laws to transfer non-national suspected terrorists who pose security threats to their countries of origin or third countries, along with other methods such as extraordinary rendition.

19. The term transfer is used in this report to generally mean the involuntary relocation of non-citizens across borders, either to the country of origin or to a third country, from the custody of one Government to another, despite the procedure used and its basis in law, or lack thereof. Certain transfers - expulsions or removals, returns ("refouler"), extraditions or deportations - may be effected by procedures contained in international law or in a country's immigration or extradition legislation while others, such as extraordinary rendition, are not known to be rooted in law.

20. There are various reasons given for the transfer of non-nationals. These include suspicion in their involvement in terrorist activities, assessments that they threaten the national security of the sending State, or for purposes of interrogation in the receiving State. Often, these transfers are carried out on the basis of assurances from receiving States that persons will not be tortured or ill-treated. Cases which have come to light demonstrate that some of these transfers are taking place outside the law, in the absence of procedural safeguards such as due process protection and judicial oversight. Persons subject to such transfers often have no ability to challenge the legality of their transfer or the reliability of the assurances given by the receiving State that they will be protected from torture and cruel, inhuman or degrading treatment or punishment. Several cases which have been adjudicated or are under investigation show that persons subject to such transfers with assurances have suffered human rights violations before, during and after the transfers. In some cases, persons have credibly alleged to have endured grave human rights violations such as torture and cruel, inhuman or degrading treatment or punishment, including in the custody of receiving States' police and security agents.¹¹

While the focus of this report is not on the procedures used for effecting transfers, it is nevertheless important to reiterate that all counter-terrorist transfers should be undertaken in accordance with legally recognized procedures and should respect the rights accorded to all individuals by international law.

21. It is useful to note that assurances have been legitimately relied upon under certain circumstances. For example, some countries retain the right in extradition cases to seek assurances that the death penalty will not be imposed, or if imposed, not executed, where the extraditable offence is punishable by death under the laws of the requesting State and not permitted under the laws of the requested State.¹² Some States have also requested assurances that trials will not take place before military courts.¹³ However, because of the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment and refoulement, the use and efficacy of diplomatic assurances to protect against these acts in countries known for such practices or to circumvent the principle of non-refoulement causes grave concerns.

22. Diplomatic assurances regarding the use of torture and cruel, inhuman or degrading treatment or punishment pose many problems. First, in most cases we see today, the sending and receiving States are all parties to binding international and regional treaties which prohibit torture and cruel, inhuman or degrading treatment or punishment and refoulement to such practices. This system was devised by States and they agreed to be bound by it. Ad hoc arrangements concluded outside the system threaten to undermine it and the progress which has been achieved over more than half a century to extend its ambit and protection to all.

23. Secondly, there is no common legal understanding of the term diplomatic assurances. It is used in a broad sense to mean requesting another State to take back an individual under certain guarantees. Assurances come in both verbal and written form. They are sometimes contained in memorandums of understanding concluded between two States. Certain written assurances reveal very broad provisions which lack legal precision. Moreover, the agreements do not include or refer to a mechanism tasked with authoritative interpretations in case of varying understanding of their provisions. Especially since they are concluded between States with very different cultural and legal traditions and systems, and conflicts of interpretations could well arise, such omission is striking.

24. Thirdly, even though all persons are entitled to the equal protection of existing treaties, assurances basically create a two-class system amongst those transferred, attempting to provide special bilateral protection and monitoring for a selected few while ignoring the plight of many others in detention. By seeking assurances, albeit not effective, for a few while others suffer, sending Governments could be seen as caring only about their own human rights image and as condoning torture and cruel, inhuman or degrading treatment or punishment by acknowledging that these practices exist in the receiving State but turning a blind eye to them. Instead of seeking assurances for a few, sending States would be acting more in line with their international obligations if they respect the principle of non-refoulement and pressure receiving States to take all necessary measures to prevent, punish and eradicate torture and cruel, inhuman or degrading treatment or punishment.

25. Fourthly, assurances appear only to be sought from countries with well-known records of torture and cruel, inhuman or degrading treatment or punishment. The fact that such assurances are sought is in itself acknowledgement that torture and cruel, inhuman or degrading treatment or punishment exists in the receiving State. At this point, the sending State should be reconsidering its non-refoulement obligations.

26. Fifthly, while receiving States are under binding legal obligations to respect and protect human rights, they often are far from fully implementing their obligations, resulting in human rights violations. Frequently they do not have effective systems in place to prevent the use of torture and cruel, inhuman or degrading treatment or punishment and punish its perpetrators. Thus, if a Government does not comply with binding law, it is difficult to see why it would respect legally non-binding agreements.

27. Some have suggested that diplomatic assurances could work if effective post-return monitoring mechanisms are in place. It bears noting that even in cases where international organizations or bodies are carrying out monitoring, they either do not provide absolute guarantees that torture is not happening or they find that it is. Torture and cruel, inhuman or degrading treatment or punishment often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisals, are often reluctant to speak about their suffering. Thus, it is unlikely that a post-return monitoring mechanism set up explicitly to prevent torture and cruel, inhuman or degrading treatment or punishment would have the desired effect.

28. Many international human rights organizations have pointed out that monitoring mechanisms often lack basic safeguards, including private interviews with detainees without advance notice to prison authorities and medical examinations by independent doctors.¹⁴ Further, given growing evidence that assurances are unworkable, many international organizations refuse to be associated with them, including for purposes of monitoring. In one Memorandum of Understanding, there are provisions for an independent monitoring body, but to be nominated by both sides.¹⁵ Since both sending and receiving States have a common interest that no torture or cruel, inhuman or degrading treatment or punishment should be found, such an arrangement could put pressure on the monitoring body to find that these acts are not taking place. To prevent torture and cruel, inhuman or degrading treatment or punishment, States are required to implement systemic safeguards at the legislative, judicial and administrative levels, State-wide. Alternatives such as consular visits cannot replace these safeguards. The Special Rapporteur on the question of torture has stated that “post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability”.¹⁶ Similarly, efforts to draft minimum standards for the use of diplomatic assurances would not result in increased protection for those subject to torture and cruel, inhuman or degrading treatment or punishment.

29. Lastly, diplomatic assurances are not subject to enforcement and there are no sanctions or consequences if violated. In fact, certain sending Governments have publicly testified that once suspects are in the custody of the receiving State, the sending State has a limited capacity to enforce diplomatic assurances. Thus, a returnee’s safety cannot be guaranteed. When violations do occur, accountability is difficult to secure. States are known to have invoked “State secrets privileges” as grounds for non-cooperation with investigations and the release of information concerning transfers and assurances.¹⁷

30. The specific concerns raised by diplomatic assurances have continued to be considered by several human rights bodies and mechanisms. In May 2005, the first case of extraordinary rendition was adjudicated by an international body.¹⁸ The case, *Agiza v. Sweden*, exposed the weaknesses of assurances. In 2001, the complainant, an asylum-seeker who had claimed in his 2000 asylum application that he would be “executed” if returned to his country of origin, was nevertheless forcibly removed there on the basis of assurances from the receiving State that he would be protected from such abuses. Despite the assurances and some efforts at post-return monitoring by the sending State, the complainant was ill-treated during the return and alleged that he was tortured on return. The Committee against Torture ruled that the State party had, inter alia, violated its non-refoulement obligation and that the assurances it had received were insufficient to protect against torture and cruel, inhuman or degrading treatment or punishment.¹⁹

31. There are several reports on the use of diplomatic assurances as regards human rights protection in the counter-terrorism environment.²⁰ Some of these reports were examined by the Special Rapporteurs. The current Special Rapporteur on the question of torture, building on the work of his predecessor²¹ and in the light of increasing evidence about the weaknesses of diplomatic assurances, has concluded that “diplomatic assurances are unreliable and ineffective in the protection of torture and cruel, inhuman or degrading treatment or punishment and States cannot resort to diplomatic assurances as a safeguard against torture and cruel, inhuman or degrading treatment or punishment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon return”. He called on Governments to scrupulously observe the principle of non-refoulement and not expel any person to frontiers or territories where they might risk human rights violations.²² This conclusion and appeal to States should be seriously considered.

32. Many concerns remain about infringements of human rights that occur in the context of counter-terrorism measures, including on the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment and the principle of non-refoulement. It is welcome that there is an open debate on the issue of diplomatic assurances and that inquiries have been undertaken into measures, such as the alleged existence of clandestine detention centres and the transfer of persons without judicial involvement, which threaten the ban on torture and cruel, inhuman or degrading treatment or punishment and refoulement.

33. It is also important to acknowledge some important national judicial and legislative actions that have been taken to ensure that executive power and counter-terrorist actions remain in conformity with the law. Some parliamentarians have recognized the inherent danger of unlawful transfers, not subject to oversight, and the weaknesses of diplomatic assurances, and have introduced legislation and amendments which aim to supplement existing legal instruments against torture and refoulement.²³ Parliaments are working to bring terrorism bills into line with international and regional human rights standards and jurisprudence. They have also voted to uphold the ban on torture and cruel, inhuman or degrading treatment or punishment. Judges have reaffirmed the importance of access to courts for suspected terrorists and judicial review of government counter-terrorism measures and practices, in two cases which were decided upon on 28 June 2004 when these fundamental principles were upheld for both citizens²⁴ and non-citizens.²⁵ And most recently, there was the important ruling that evidence obtained by torture cannot be used in judicial proceedings.²⁶ It is encouraging to note that some States have

accepted the rulings of international bodies in counter-terrorism-related cases and are making changes to their legislation and practices. These positive efforts to uphold international law should be commended and encouraged as States continue to fight against terrorism.

V. CONCLUSIONS AND RECOMMENDATIONS

34. The following conclusions and recommendations are submitted for the consideration of the Commission:

(a) Actions taken by States to combat terrorism should comply with their obligations under international law, in particular human rights, humanitarian and refugee law, and the available opinions and jurisprudence of international bodies and mechanisms and regional and domestic courts;

(b) States should reaffirm their commitment to the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment, and to the principle of non-refoulement. To this end, they should review their legislation to ensure conformity with international standards, repealing provisions that allow returns to situations or risks of torture and cruel, inhuman or degrading treatment or punishment or enacting legislation to protect against transfers which compromise these absolute prohibitions;

(c) States should take all measures to prevent, punish and eradicate torture and cruel, inhuman or degrading treatment or punishment, including by ratifying the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(d) All counter-terrorist transfers should be undertaken in accordance with legally-recognized procedures and should respect the rights accorded to all individuals by international law, including at a minimum a hearing before a judicial body and the right to appeal the transfer;

(e) States should respect the principle of non-refoulement and refrain from relying on diplomatic assurances as protection against torture and cruel, inhuman or degrading treatment or punishment. They should make information available to the Committee against Torture and other relevant bodies about any transfers they have effected of persons suspected of engagement in terrorist activities and actions to secure diplomatic assurances;

(f) Several of the areas for which the Counter-Terrorism Committee is responsible for overseeing have human rights dimensions. In analysing States reports, it would be important to pay attention to whether measures taken in the area of transfers undermine international law and the absolute prohibition of torture and whether they strike a balance between ensuring security and protecting human rights. The Counter-Terrorism Committee should assist States in making sure that measures to combat terrorism are in conformity with international human rights law;

(g) Judicial personnel, civil society and regional organizations should be encouraged to continue their work to uphold human rights and fundamental freedoms in the fight against terrorism.

Notes

¹ Report of the Secretary-General on protecting human rights and fundamental freedoms while countering terrorism (A/60/374).

² Report of the Working Group on arbitrary detention (E/CN.4/2005/6); Report of the Special Rapporteur on the independence of judges and lawyers (E/CN.4/2005/60); Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7); and Report of the Special Representative of the Secretary-General on the situation of human rights defenders (E/CN.4/2005/101). See also the Report of the Independent expert to assist the High Commissioner in examining the question of the protection of human rights and fundamental freedoms while countering terrorism (E/CN.4/2005/103).

³ Article 4 (1) of the International Covenant on Civil and Political Rights permits States parties, in time of public emergency, to take measures derogating from their obligations under the Covenant, but does not permit derogation from, inter alia, article 7 of the International Covenant on Civil and Political Rights which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

⁴ Committee against Torture, *Gorki Ernesto Tapia Paez v. Sweden*, Communication No. 39/1996.

⁵ Committee against Torture, *Ms. T.A. v. Sweden*, Communication No. 226/2003.

⁶ Human Rights Committee, general comment No. 20 (1992) on article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment).

⁷ Human Rights Committee, general comment No. 31 (2004) on the Nature of the General Legal Obligation Imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13.

⁸ Human Rights Committee, *Jonny Rubin Byahuranga v. Denmark*, Communication No. 1222/2003.

⁹ See, for example, the Geneva Convention relative to the Treatment of Prisoners of War, art. 130 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 147 and article 8 of the Rome Statute of the International Criminal Court.

¹⁰ European Court of Human Rights, *Chahal v. the United Kingdom*, 15 November 1996.

¹¹ Committee against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003. See also the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, established 5 February 2004, available at <http://www.ararcommission.ca/eng/index.htm>.

¹² See for example article 6 of the Treaty on Extradition between the Government of Canada and the Government of the United States of America.

¹³ See E/CN.4/2005/103.

¹⁴ See joint statement by Amnesty International, APT, Human Rights Watch (HRW), ICJ, International Federation of Action by Christians for the abolition of torture, IFHT, International Helsinki Federation for Human Rights and the World Organization against Torture.

¹⁵ Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Cooperation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland concerning the provision of assurances in respect of persons subject to deportation, signed at Tripoli on 18 October 2005.

¹⁶ Interim report submitted by Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (A/60/316, para. 46).

¹⁷ HRW, *Still at risk: diplomatic assurances no safeguard against torture*, April 2005 vol. 17, No. 4 (D), pp. 35-37.

¹⁸ Committee against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003.

¹⁹ Ibid.

²⁰ See for example HRW, *Still at risk: diplomatic assurances no safeguard against torture*, April 2005 vol. 17, No. 4 (D).

²¹ In 2002, the Special Rapporteur on the question of torture appealed to all States "to ensure that in all appropriate circumstances the persons they intend to extradite, under terrorist or other charges, will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of cruel, inhuman or degrading treatment or punishment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity" (A/57/173, para. 35). However, in a subsequent report to the General Assembly, the Special Rapporteur noted that in the two years since the aforementioned report was submitted "he has come across a number of instances where there were strong indications that diplomatic assurances were not respected and that transferred persons allegedly were treated in violation of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The issue arises of whether the practice of resorting to assurances is not becoming a political inspired substitute for the principle of non-refoulement which, it must not be forgotten, is absolute and non-derogable". He put forward a series of factors and circumstances that should

be taken into account when examining the issue of reliance on diplomatic assurances, including the situation prevailing in the receiving country and the vulnerability of the person concerned (A/59/324, para. 31).

²² A/60/316, paras. 51-52.

²³ HRW, *Still at risk: diplomatic assurances no safeguard against torture*, April 2005 vol. 17, No. 4 (D).

²⁴ In *Hamdi v. Rumsfeld*, the United States Supreme Court recognized the power of the Government to detain enemy combatants, but held that the due process clause of the Fifth Amendment to the Constitution requires that United States citizens be given the opportunity to challenge the legality of their detention through habeas corpus proceedings.

²⁵ In the case of *Rasul v. Bush*, the Court ruled that the detainees at Guantanamo can have access to United States courts to challenge their detention. The Court ruled on the basis of two habeas corpus petitions which challenged the practice of the Government of the United States of holding foreign nationals in indefinite detention, without counsel and the right to a fair trial or to know the charges against them.

²⁶ Judgements - *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004) and *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)* (Conjoined Appeals), United Kingdom House of Lords, 8 December 2005.
