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**Human Rights Council**

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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, Ben Emmerson****Framework principles for securing the human rights of victims of  
terrorism\****Summary*

This is the first annual report submitted to the Human Rights Council by the new Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson.

In chapter II of the report, the Special Rapporteur lists his key activities undertaken from 1 August 2011 to 2 April 2012. In the main report, contained in chapter III, the Special Rapporteur describes the legally binding and internationally recognized human rights of victims of terrorism, and elaborates on the corresponding international obligations of States to secure those rights. He recommends that States move towards enshrining those rights and obligations in a specific international instrument.

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\* Late submission.

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## I. Introduction

1. The present report is submitted to the Human Rights Council pursuant to Council resolution 19/19. In the report, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism lists his key activities undertaken from 18 August 2011 to 2 April 2012 and focuses thematically on the human rights of victims of acts of terrorism and the corresponding international obligations of States.

## II. Activities of the Special Rapporteur

2. On 19 September 2011, the Special Rapporteur participated in the Secretary-General's Symposium on International Counter-Terrorism Cooperation, where he gave a statement<sup>1</sup> on Promoting human rights and the rule of law while countering terrorism, during the fifth session.

3. On 12 October, the Special Rapporteur held consultations in London with representatives of civil society, lawyers and national human rights institutions from different regions.

4. On 20 October, the Special Rapporteur delivered his first statement<sup>2</sup> and presented his first annual report (A/66/310) to the General Assembly, in which he identified two related areas falling within his mandate, on which he intended to focus, namely States' obligations towards victims of terrorism (para. 20), and States' duty to promote strategies for the prevention of terrorism.

5. In October 2011, the Special Rapporteur held meetings in New York with the Security Council Counter-Terrorism Committee; the 1267/1989 Al Qaeda Sanctions Committee and its Ombudsperson; the permanent representatives of Germany and Mexico to the United Nations; the United States Deputy Representative for the Economic and Social Council and various representatives of civil society. At the Secretariat level, he met with the Chair of the Counter-Terrorism Implementation Task Force (CTITF) and participated in a round-table meeting with the Working Group on Security Council resolution 1624 (2005) of the Counter-Terrorism Committee Executive Directorate (CTED), concerning the human rights implications of Security Council resolutions 1624 (2005) and 1373 (2001).

6. On 15 November, the Special Rapporteur delivered a statement<sup>3</sup> at the international seminar "Terrorism and human rights standards," organized by the regional office of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Santiago de Chile and the Chilean National Institute for Human Rights.

7. On 11 March 2012, the Special Rapporteur published an article in the Danish newspaper, *Berlingske Tidende*, authored jointly with the Minister of Foreign Affairs of Denmark and the European Union Counter-Terrorism Coordinator, to mark the European Day in Remembrance of Victims of Terrorism.

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<sup>1</sup> See [http://www.ohchr.org/Documents/Issues/Terrorism/SG-SymposiumIntervention\\_SR\\_on\\_CT\\_HR.pdf](http://www.ohchr.org/Documents/Issues/Terrorism/SG-SymposiumIntervention_SR_on_CT_HR.pdf).

<sup>2</sup> Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11736&LangID=E>.

<sup>3</sup> Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11737&LangID=E>.

8. On 2 April 2012, the Special Rapporteur took part in a panel discussion on the rights of victims of terrorism, hosted jointly by Spain, the CTITF, the Fundación Miguel Ángel Blanco and the Fundación Víctimas del Terrorismo.

9. The Special Rapporteur thanks the Government of Burkina Faso for having extended an invitation to visit the country in November 2011, which he was compelled to postpone until 2012. He also expresses his thanks to the Government of Honduras for extending an invitation. The Government of Chile indicated that a country visit could take place in 2012. Following the issuance of a standing invitation to all special procedures mandate holders, the Special Rapporteur sent a reminder concerning his outstanding visit request to Thailand. He also sent a visit request to Nigeria, which, like Burkina Faso, is a partnering country for the Integrated Assistance for Countering Terrorism initiative of the CTITF. There are outstanding visit requests to Algeria, Malaysia, Pakistan, the Philippines and the Russian Federation. In addition, he is awaiting an invitation for a second visit to Egypt.

### **III. State obligations corresponding to the human rights of victims of terrorism**

10. The present report identifies the core human rights of victims of terrorism, elaborates the international obligations resting on States to protect those rights, and recommends that States take steps towards enshrining these rights and obligations in a specific international instrument.

11. At the outset, the Special Rapporteur strongly urges States to recognize that the deliberate infliction of lethal or potentially lethal violence by non-State actors in the course of an act of terrorism amounts, in all cases where death or serious physical or psychological injury results, to a grave violation of the human rights of the victim, irrespective of the question of direct or indirect State responsibility.

12. Some still argue that terrorists, rebels and other belligerents cannot commit violations of international human rights law unless the degree of organization, territorial control and State recognition involved in a conflict situation has escalated to the level of a full-blown insurgency or internal armed conflict. However, it is a central tenet of international human rights law that it must keep pace with a changing world. Some of the gravest violations of human rights are nowadays committed by, or on behalf of, non-State actors operating in conflict situations of one kind or another,<sup>4</sup> including by domestic and international terrorist networks. If international human rights law is to keep pace with these changes, the victims of acts of terrorism must now be recognized as victims of grave violations of international human rights law.<sup>5</sup>

13. For those who seek a nexus to State responsibility, this may be identified in the general duty of States, under article 6 of the International Covenant on Civil and Political Rights (the “Covenant”), to protect the right to life of individuals on their territory, as well as “the involuntary sacrifice of victims on behalf of the State, which is the most frequent target of terrorist acts.”<sup>6</sup> Certainly, when viewed from a victim's perspective, the mass killing of civilians which is the objective of most terrorist campaigns, involves the deprivation of the most fundamental human right of all. The Special Rapporteur acknowledges that there is a responsible body of opinion to the effect that only States and

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<sup>4</sup> See for example A/HRC/19/69, paras. 105-120.

<sup>5</sup> See for example Law No. 29/2011 of Spain, and para. 60 of this report.

<sup>6</sup> United Nations Office on Drugs and Crime (UNODC), *The Criminal Justice Response to Support Victims of Acts of Terrorism* (New York, 2011), para. 68.

comparable entities can violate human rights. However, he does not share this view. Indeed, it can be argued that allowing victims of terrorism to remain as legally ossified “prisoners of doctrine”<sup>7</sup> is an outdated and retrograde analysis that can lead to various forms of secondary victimization.<sup>8</sup>

14. It is a striking fact that despite the proliferation of international agreements concerned with the suppression of terrorism, there is none that specifically addresses the human rights of the victims and the corresponding obligations of States. The dehumanization of victims of terrorism has been recognized by the General Assembly as a condition conducive to the spread of terrorism.<sup>9</sup> The Special Rapporteur considers that international recognition of victims of terrorism as individuals whose fundamental human rights have been violated, and the incorporation of this principle in a specific international instrument on the rights of victims of terrorism will strengthen international efforts towards an effective global counter-terrorism strategy.

15. Chapter I of the Global Counter-Terrorism Strategy encourages Member States to consider putting in place national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives. Chapter IV stresses the need to promote and protect the rights of victims of acts of terrorism.<sup>10</sup> The present report aims to contribute to those objectives by recommending that States formally recognize victims of terrorism as victims of international human rights violations, and agree certain minimum principles in a specific international instrument dedicated to securing the protection of their fundamental human rights.

16. For the purposes of this report, the Special Rapporteur identifies four main categories of victims of terrorism:<sup>11</sup>

- **Direct victims of terrorism:** Natural persons who have been killed or have suffered serious physical or psychological injury as the result of an act of terrorism.<sup>12</sup> Terrorist acts often affect a large number of direct victims, whose most fundamental human rights, such as their right to life and their rights to physical security and moral integrity, have been violated or threatened.<sup>13</sup>
- **Secondary victims of terrorism:** Natural persons who are the next of kin or dependents of a direct victim of terrorism. The General Assembly has accepted that the term *victim* “includes, where appropriate, the immediate family or dependants of the direct victim.”<sup>14</sup> This has been expressly recognized by regional human rights bodies in the context of the State’s positive obligations to protect the right to life,<sup>15</sup> and has been extended to include de facto marriages and similar personal partnerships.<sup>16</sup> Similarly, the Council of Europe’s Committee of Ministers’

<sup>7</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006), chap. 2.1.

<sup>8</sup> See Andrew Clapham, “Human rights obligations of non-state actors in conflict situations,” *International Review of the Red Cross*, vol. 88, No. 863 (September 2006), pp. 491-523.

<sup>9</sup> General Assembly resolution 60/288, annex, chap. I, introductory para.

<sup>10</sup> *Ibid.*, annex, chap. IV.

<sup>11</sup> See also Rianne Letschert, Ines Staiger and Antony Pemberton (eds.), *Assisting Victims of Terrorism: Towards a European Standard of Justice* (2010), pp. 16-20.

<sup>12</sup> See General Assembly resolutions 40/34 (1985); and 60/147 (2005), annex, chap. V, para. 8.

<sup>13</sup> For national practice and legislation, see UNODC (footnote 6 above), paras. 70-129.

<sup>14</sup> See footnote 12 above.

<sup>15</sup> See European Court of Human Rights (ECHR), *Osman v. The United Kingdom*, no. 87/1997/871/1083.

<sup>16</sup> See ECHR, *Finogenov and others v. Russia*, nos. 18299/03 and 27311/03, para. 205; also Inter-American Court of Human Rights (IACtHR), *Velasquez Rodriguez v. Honduras*, Judgment of 21 July 1989, paras. 50-52; and *Aloeboetoe et al. v. Surinam*, Judgment of 10 September 1993, para. 71.

Guidelines on the protection of victims of terrorist acts extend the protection of the Guidelines, in appropriate circumstances, to the close family of the direct victim (chap. I - Principles, para. 1).

- **Indirect victims of terrorism:** Individuals who have suffered serious physical or psychological injury as the indirect result of an act of terrorism. This category includes (a) members of the public (such as hostages or bystanders) who have been killed or injured through the use of potentially lethal force against suspected terrorists; (b) eyewitnesses who have sustained serious psychological harm as the result of witnessing a violent terrorist incident or its immediate aftermath; (c) individuals who have been subjected to potentially lethal force by a public authority after being mistakenly identified as a suspected terrorist;<sup>17</sup> (d) rescue workers who suffer serious physical or psychological harm as the result of taking part in emergency relief.<sup>18</sup>
- **Potential victims of terrorism:** For the purposes of promoting a comprehensive statement of basic rights and obligations in this sphere, potential victims of future terrorist acts are an important additional category. They are the principal beneficiaries of the State's positive obligations under article 6 of the International Covenant on Civil and Political Rights. Moreover, the prevention of future acts of terrorism is an important part of the rationale for the State's obligation, under article 6 of the Covenant, to conduct a prompt, thorough, independent and impartial investigation into any act of terrorism.

## A. Legal obligation of States to protect the right to life

17. The first obligation of any State, and a key component of its *raison d'être*, is the duty to protect the lives of its citizens and of all individuals within its territory or subject to its jurisdiction (A/66/310, para. 20). The right to life under article 6 of the Covenant<sup>19</sup> has been characterized as the supreme human right;<sup>20</sup> it is non-derogable within the meaning of article 4, paragraph 2, of the Covenant.<sup>21</sup>

18. The States' obligations under article 6 of the Covenant go beyond the duty of refraining from the intentional and unlawful taking of life by public officials. Article 6 also embodies States' positive duty to take appropriate steps to safeguard the lives of individuals within its jurisdiction. Regional human rights organs have established longstanding jurisprudence in relation to States' positive obligation to protect individuals from life-threatening injury through the criminal acts of third parties.<sup>22</sup> More specifically, they have elaborated standards regarding States' duty to protect the right to life in the context of acts of terrorism. The Council of Europe Guidelines on human rights and the fight against terrorism refer to the "imperative duty of States to protect their populations against possible terrorist acts," (Preamble, para. f) while the Inter-American Commission on Human Rights

<sup>17</sup> This category is typified by the case of Jean Charles de Menezes, who was fatally shot on a London underground train on 22 July 2005, in the mistaken belief that he was one of those responsible for the London bombings.

<sup>18</sup> See footnote 12.

<sup>19</sup> See also European Convention on Human Rights, art. 2; African Charter on Human and People's Rights, art. 4; American Convention on Human Rights, art. 4; Revised Arab Charter (2004), art. 5.

<sup>20</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd edition (Rhein, Engel, 2005), p. 121.

<sup>21</sup> Human Rights Committee, general comment No. 6 (1982), para. 1.

<sup>22</sup> See ECHR, *Osman v. The United Kingdom*; *LC B v. The United Kingdom*, no. 23413/94, 9 June 1998, para. 36; IACtHR, *Velasquez Rodriguez v. Honduras*, para. 166.

emphasizes that “the State has the right and duty to guarantee the security of all.”<sup>23</sup> The State’s duty to uphold national security and its obligation to ensure the protection of the human rights of all those within its jurisdiction thus amount to a series of complementary, simultaneous and mutually reinforcing obligations.

19. It is axiomatic that States are under the obligation of an international law to put in place effective criminal law provisions to deter the incitement,<sup>24</sup> preparation and commission of terrorist offences, supported by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.<sup>25</sup> Defences available under national laws must be drafted with sufficient precision to ensure effective protection of the right to life and physical security.<sup>26</sup>

20. The right to life under article 6 of the Covenant cannot be construed in such a way as to place States in the position of guarantor against every terrorist threat, as this would impose a disproportionate burden on the authorities.<sup>27</sup> However, in certain defined circumstances, public officials can come under a positive obligation to take operational measures to prevent a terrorist act from occurring.<sup>28</sup> For such a positive operational obligation to arise, it must be established that (i) the authorities knew or ought to have known of (ii) the existence, at the relevant time, of a real and immediate (iii) risk to the life of an identified individual or group of individuals within its jurisdiction due to (iv) criminal acts of a third party, and that they failed to (v) take measures within the scope of their legal powers and available resources, and in conformity with their international obligations which, judged objectively and reasonably, might have been expected to avoid that risk.<sup>29</sup>

21. In relation to requirement (i), States are required to establish effective mechanisms for identifying potential future threats of terrorist attack, to analyse the information with reasonable care, to reach an informed risk assessment and to take appropriate action. That action may include not only the disruption of threatened attacks by law enforcement agencies but also, where appropriate, the provision of information to the public. Many States have established dedicated institutions, mostly in the form of intelligence or security agencies, whose task is to detect potential national security threats, including terrorist threats, through the gathering and analysis of relevant information. The activities of those agencies must be fully compliant with international human rights law.<sup>30</sup>

22. In relation to requirement (ii), authorities will not, in general, be in possession of all relevant facts in advance, and are therefore often obliged to plan counter-terrorism operations on the basis of incomplete factual hypotheses. State authorities are confronted on a daily basis with an immense amount of material about possible security threats.<sup>31</sup> Purely ex post facto assessments cannot be the sole basis for a finding of State responsibility for a violation of the right to life. They may however be of central importance when relevant authorities are called upon to conduct investigations for the

<sup>23</sup> Inter-American Commission on Human Rights (IACHR), “Report on Terrorism and Human Rights,” para. 107, available at <http://www.cidh.oas.org/Terrorism/Eng/toc.htm>; see also IACtHR, *Neira-Alegria et al. v. Peru*, Judgment of 19 January 1995.

<sup>24</sup> See Security Council resolutions 1372 (2001) and 1625 (2005).

<sup>25</sup> ECHR, *Osman v. The United Kingdom*, paras. 115-116.

<sup>26</sup> ECHR, *A v. The United Kingdom*, no. 100/1997/884/1096; *X and Y v. The Netherlands*, no. 8978/80.

<sup>27</sup> See footnote 25 above; see also ECHR, *Branko Tomašić and Others v. Croatia*, no. 46598/06, para. 50; ECHR, *Giuliani and Gaggio v. Italy*, no. 23458/02, Judgment of 24 March 2011, para. 245.

<sup>28</sup> See footnote 25.

<sup>29</sup> *Ibid.*

<sup>30</sup> See the compilation of good practices on legal and institutional frameworks for intelligence services and their oversight, promulgated by the former Special Rapporteur (A/HRC/14/46, paras. 9-50).

<sup>31</sup> See for example “Coroner’s Inquests into the London Bombings of 7 July 2005,” Report under rule 43 of the Coroner’s rules 1984, paras. 11-12.

purpose of identifying the lessons learnt from a terrorist incident, so that the authorities may be better able to prevent similar future incidents.

23. In connection with requirement (iii), there is a distinction to be drawn between cases where the authorities have previously accepted an obligation to provide personal protection to an individual or group identified as being at specific risk (in which case, the authorities may be said to have assumed direct responsibility for guaranteeing the physical safety of those individuals or groups<sup>32</sup>) and cases in which the obligation at issue is the overarching duty resting on the State to afford adequate protection against the general threat posed by terrorism to the population at large.<sup>33</sup> In the latter context, States have competing considerations to balance, including protection of the rights of others to liberty and security, fair trial, privacy, freedom of expression and freedom of movement. They may also be constrained by the allocation of scarce resources. States must therefore be afforded a certain discretion in planning general counter-terrorism strategies and in choosing from the legislative, executive and operational means at their disposal for discharging their positive operational obligations under article 6 of the Covenant.<sup>34</sup>

24. Regarding the term “criminal” in requirement (iv), no distinction is to be drawn in this connection between terrorism and other crimes against person or property. The Special Rapporteur adopts and reiterates the approach of his predecessor that all acts of terrorism should be categorized as ordinary crimes, and dealt with within the legal and institutional framework of ordinary criminal law.<sup>35</sup>

25. In relation to requirement (v), counter-terrorism measures must be fully in compliance with international human rights and humanitarian law. They must respect the right to life of suspects and bystanders; the absolute prohibition on the use of torture or other ill-treatment or punishment during interrogation or detention; the right to liberty and security; the right to a fair and public trial by an independent and impartial tribunal; the principle of legal certainty and non-retrospectivity in the application of the criminal law; as well as the qualified rights to privacy, freedom of expression and freedom of association. Counter-terrorism measures must also be carefully tailored to meet the specific threat that has been identified, while avoiding discrimination, including unjustified differences in the treatment of particular religious or ethnic groups or of foreign nationals.<sup>36</sup> The adoption of human rights-abusive, counter-terrorism measures has been recognized by the General Assembly as one of the conditions conducive to the spread of terrorism.<sup>37</sup> The Special Rapporteur considers it self-evident that human rights abuses by States in countering the threat of terrorism hand a propaganda victory to the terrorists and provide them with distorted arguments by which they recruit others to their cause. Not only are such measures internationally unlawful, but they also increase, to an unknown extent, the risk to potential future victims of terrorism.

26. An important dimension of requirement (v) is the State’s positive duty to intervene in the course of a major terrorist incident and its aftermath. The requirements of article 6 of the Covenant imply that any rescue operation should be based on a carefully considered general emergency plan, prepared and approved in advance by the authorities. States have a

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<sup>32</sup> See footnote 25.

<sup>33</sup> ECHR, *Mastromatteo v. Italy*, no. 37703/97, para. 69; *Maiorano and Others v. Italy*, no. 28634/06, para. 107.

<sup>34</sup> ECHR, *Ciechonska v. Poland*, no. 19776/04, para. 65.

<sup>35</sup> See A/HRC/16/51, para. 21, practice 3.1.

<sup>36</sup> See ECHR, *A and others v. The United Kingdom*, no. 3455/05.

<sup>37</sup> See General Assembly resolution 60/288.

duty to plan such operations in a manner that minimizes the risk of physical injury to the greatest possible extent.<sup>38</sup>

27. Where lethal force is deliberately inflicted by State officials, there may be a threat not only to the life of the suspect, but also to the life of any innocent bystander. This is particularly so where firearms are used. In a case involving terrorist hostage-taking, the European Court of Human Rights has held that “the primary aim of the [rescue] operation should be to protect lives from unlawful violence.”<sup>39</sup> Counter-terrorist operations that result in loss of life must therefore be subjected to penetrating judicial or other independent scrutiny to determine not only whether the actions of the State officials who administered lethal force were lawful, but also whether the operation as a whole, including its planning and control, was strictly proportionate.<sup>40</sup>

28. The Special Rapporteur is profoundly conscious of the multifaceted difficulties States encounter in protecting their populations from terrorist violence, and expresses his recognition of the complexity of the problem. More specifically, one must bear in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.<sup>41</sup> The choice of means may depend on the extent to which the authorities are in control of a particular situation.<sup>42</sup> Nonetheless, the conscientious discharge of these important and difficult duties is a central responsibility of Statehood.

29. In addition to the law enforcement measures defined in chapter II of the Global Counter-Terrorism Strategy,<sup>43</sup> States have a responsibility for implementing preventive initiatives aimed at reducing the risk of future acts of terrorism. This can be seen as a dimension of the State's positive obligation under article 6 of the Covenant to take steps to protect the lives of future potential victims of acts of terrorism. States must tackle not only the manifestations of terrorism, but its causes, as foreseen in chapter I of the Strategy. Conditions conducive to the spread of terrorism, as identified by Member States, include prolonged unresolved conflicts; dehumanization of victims of terrorism in all its forms and manifestations; lack of the rule of law; violations of human rights; ethnic, national and religious discrimination; political exclusion; socio-economic marginalization and lack of good governance.<sup>44</sup>

30. The Special Rapporteur considers that the capacities of the United Nations in conflict prevention, negotiation, mediation, conciliation, peacekeeping and peacebuilding<sup>45</sup> should be more actively sought and deployed in national counter-terrorism strategies. In this connection, he welcomes the initiative by the CTITF Working Group on preventing and resolving conflicts to issue guidelines for United Nations mediators.<sup>46</sup>

<sup>38</sup> See also ECHR, *Finogenov and Others v. Russian Federation*, nos. 18299/03 and 27311/03, paras. 243-262.

<sup>39</sup> ECHR, *Isayeva v. Russia*, no. 57950/00, para. 191; also IACtHR, *Miguel Castro Castro Prison v. Peru*, Judgment of 25 November 2006, para. 228(d); and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Havana, 27 August to 7 September 1990), available at <http://www2.ohchr.org/english/law/firearms.htm>.

<sup>40</sup> See ECHR, *McCann v. the United Kingdom*, no. 18984/91, paras. 150 and 205. As to the scope of this investigative obligation see section B below.

<sup>41</sup> See also ECHR, *Makaratzis v. Greece*, no. 50385/99, para. 69; *Maiorano and Others v. Italy*, para. 105.

<sup>42</sup> See ECHR, *Finogenov and Others v. The Russian Federation*, nos. 18299/03 and 27311/03, para. 213.

<sup>43</sup> General Assembly resolution 60/288, annex, chap. II, para. 3.

<sup>44</sup> *Ibid.*, annex, chap. I.

<sup>45</sup> *Ibid.*, annex, chap. I, para. 1.

<sup>46</sup> See “Guidelines for UN Mediators – Terrorism,” available at <http://www.un.org/en/terrorism/ctitf/>

31. The suggested link between poverty and terrorism is controversial.<sup>47</sup> However, in the Special Rapporteur's view, there are at least "patterns of correlation" suggesting that societies characterized by economic, social, political and educational exclusion "are often breeding, or recruitment, grounds for terrorism" (A/HRC/6/17, para. 64). The Organisation for Economic Co-operation and Development (OECD) has suggested that efforts at terrorism prevention should focus on grievances arising from inequality and social exclusion.<sup>48</sup>

32. Finally, in this connection, the Special Rapporteur strongly believes that human rights-compliant counter-terrorism measures help to prevent the recruitment of individuals to acts of terrorism (A/HRC/16/51, para. 12). Human rights abuses have all too often contributed to the grievances which cause people to make the wrong choices and to resort to terrorism. Singling out communities and disproportionately addressing law enforcement measures against them entails the risk of collective alienation. States that have derogated from their human rights obligations on grounds of national emergency, or resorted to military responses in countering terrorism, have witnessed an erosion of institutional, procedural and substantive safeguards. The collective commitment of the international community to protect the rights of potential future victims of terrorism necessarily entails an equally resolute commitment to the principles of international human rights law in the conception and implementation of counter-terrorism strategies.

## **B. States' adjectival obligation to conduct an independent and impartial investigation**

33. Article 15 of the Council of Europe Convention on the Prevention of Terrorism recognizes States' duty to investigate the facts of an alleged terrorist crime and, where appropriate, to prosecute or extradite the alleged perpetrator. With the increasingly transnational character of terrorist networks, there has been a corresponding evolution of cross-border cooperation and mutual legal assistance in the investigation and prosecution of terrorist suspects. States are now obliged to cooperate with one another in transnational counter-terrorist investigations (including in the arrest and detention of suspects), in responding to requests for mutual legal assistance and in extraditing suspects and fugitives.<sup>49</sup> These obligations, however, take effect subject to States' a priori international obligations to refuse such assistance where it would expose an individual to a real risk of torture or inhuman or degrading treatment<sup>50</sup> or to a "flagrant denial of justice."<sup>51</sup>

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<sup>47</sup> CTITF, "First Report of the Working Group on Radicalisation and Extremism that Lead to Terrorism: Inventory of State Programmes," para. 20, available at <http://www.un.org/terrorism/pdfs/radicalization.pdf>; see also A/59/2005, para. 16.

<sup>48</sup> OECD, *A Development Co-operation Lens on Terrorist Prevention: Key Entry Points for Action*, DAC Guidelines and Reference Series (OECD, 2003), pp. 8-9, available at <http://www.oecd.org/dataoecd/17/4/16085708.pdf>.

<sup>49</sup> See UNODC, *Manual on International Cooperation in Criminal Matters related to Terrorism* (New York, 2009), Module 1.B and 1.C.

<sup>50</sup> See ECHR, *Soering v. The United Kingdom*, no. 14038/88; and, concerning intelligence agencies' cooperation with States known to practice torture, see HM Government, "Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees" (United Kingdom, July 2010). This Guidance was considered by the Administrative Court of the High Court of Justice of England and Wales in *Equality and Human Rights Commission v Prime Minister & Ors* [2011] EWHC 2401 (Admin) (3 October 2011), which held that cooperation with the interrogation of a suspect by another State would always be unlawful when "hooding" is used.

<sup>51</sup> See ECHR, *Othman (Abu Qatada) v. The United Kingdom*, no. 8139/09.

34. Regional courts have made the point that prosecution or extradition of individuals alleged to be responsible for unlawful killings serves as a measure of prevention.<sup>52</sup> In this way, the State's duty to investigate and prosecute terrorist suspects is directly linked to its obligation to end impunity and prevent future acts of terrorism. Individuals suspected, on objectively reasonable grounds, of having engaged in the incitement, preparation, instigation or commission of terrorist acts should be duly investigated and, if appropriate, prosecuted, convicted and punished according to the ordinary rules of criminal law and procedure,<sup>53</sup> or else extradited to another State to face trial. This implies, in either event, that the eventual trial of a person accused of involvement in an act of terrorism will meet international standards for a fair and public hearing before an independent and impartial civilian court. A public court hearing provides visible justice to the victims and their families. In contrast, indefinite or secret detention of terrorist suspects, without charge or trial, is not only contrary to international law<sup>54</sup> but also precludes the possibility of victim participation in the process of bringing offenders to justice.

35. The Special Rapporteur concurs with the view of the European Court of Human Rights that the State's obligation to protect life requires an effective official investigation whenever individuals have been killed or sustained life-threatening injuries through the use of lethal or potentially lethal force in a terrorist context, whether from an unlawful act of terrorism committed by a non-State actor, or from the acts or omissions of public officials in the implementation of counter-terrorism strategies.<sup>55</sup>

36. In its evolving jurisprudence, the European Court of Human Rights has established a number of criteria to assess the effectiveness of such an investigation, which may be discharged by an inquest, a public inquiry, an independent investigation or a combination of mechanisms. The State's obligation cannot however be discharged merely through the availability of a civil remedy at the initiative of the victim or his/her next-of-kin. In the Special Rapporteur's view, the following minimum requirements must be satisfied in every case:

- Once the matter has come to the attention of the authorities, they must act *ex officio* and not wait for a formal complaint lodged by the deceased's next of kin.<sup>56</sup> This applies not only to deaths resulting from a lethal terrorist act, but also to deaths caused by State officials during a counter-terrorism operation, and cases where it is plausibly alleged that public officials have culpably failed in the responsibility to take preventive measures to avert an act of terrorism.
- The investigation should always begin promptly. A timely investigation is more likely to secure reliable evidence. While there may be obstacles delaying progress in an investigation, it must be carried out with reasonable expedition.<sup>57</sup>

<sup>52</sup> See for example ECHR, *Kaya v. Turkey*, no. 22535/93, para. 85.

<sup>53</sup> See A/HRC/16/51, practice 3, para. 1; also Human Rights Committee general comment No. 6 (1982), para. 3; CCPR/CO/73/UK; CCPR/CO/73/UKOT, para. 8.

<sup>54</sup> Even where States have entered formal derogations, in international or regional human rights instruments on grounds of national emergency, measures of detention must nevertheless be exceptional and temporary in nature and the extent of the derogation must, in all respects, meet the standards of proportionality and non-discrimination; see for example ECHR, *A and others v. The United Kingdom*, no. 3455/05.

<sup>55</sup> ECHR, *Branko Tomašić and Others v. Croatia*, no. 46598/06, para. 62.

<sup>56</sup> See also ECHR, *İlhan v. Turkey*, no. 22277/93, para. 63.

<sup>57</sup> See for example ECHR, *Yaşa v. Turkey*, no. 22495/93, paras. 102-104; *Cakıcı v. Turkey*, no. 23657/94, paras. 80, 87 and 106; *Mahmut Kaya v. Turkey*, no. 22535/93, paras. 106-107; *Isayeva, Yusupova and Bazayeva v. Russia*, nos. 57947-49/00, para. 212; *Benuyeva and Others v. Russia*, no. 8347/05, para. 112.

- In all cases, once an investigation has been opened, the authorities must ensure that the next-of-kin are kept fully informed of its progress, and are provided with an adequate opportunity to participate.
- The investigation must be capable of leading to the identification and punishment of those responsible. The principle of accountability extends to situations in which it is alleged that public officials have caused death or life-threatening injury through the negligent use of lethal force, or have negligently failed to prevent a terrorist act.
- In cases where State responsibility is at issue the investigative authorities must be wholly independent from those potentially implicated,<sup>58</sup> which implies not only a lack of hierarchical or institutional connection but also a practical independence.<sup>59</sup> Those potentially implicated should have no supervisory role, whether direct or indirect, over those conducting the investigation.<sup>60</sup>
- There must be a sufficient element of public scrutiny of the investigation and its results to secure public accountability. This is essential to maintaining public confidence in the authorities' adherence to the rule of law, and prevents any appearance of collusion in, or tolerance of, unlawful acts or omissions.<sup>61</sup>
- The authorities must have taken reasonable steps to secure and evaluate all potentially relevant evidence. Investigators should commission the necessary forensic and post-mortem reports, providing a complete and objective account of the scientific findings; record all potentially relevant evidential sources; conduct site visits; and identify, question and take comprehensive written statements from all relevant witnesses.<sup>62</sup> Any conclusions must be based on a complete, objective and impartial analysis of the evidence, including an examination of the authorities' own actions.<sup>63</sup>
- In all cases, investigators must be genuinely impartial and must not harbour preconceptions about the matter they are investigating or the identity of those responsible for any fatalities. Nor should they approach the investigation in a way that might promote or protect the interests of any public official who may be at fault.<sup>64</sup> They should be demonstrably free of undue influence.<sup>65</sup>
- If the investigation leads to criminal or other judicial proceedings, there must be a possibility for the effective participation of the next-of-kin.<sup>66</sup>

37. The victim or the victim's family must in all cases be provided with the information necessary to exercise any rights they may have in domestic law to participate in criminal proceedings against the suspected perpetrator. All States should establish a support service to assist victims of terrorism throughout the process, until the conclusion of any ordinary

<sup>58</sup> See ECHR, *Güleç v. Turkey*, no. 21593/93, paras. 81-82; *Öğür v. Turkey*, no. 21594/93, paras. 91-92.

<sup>59</sup> See for example ECHR, *Batu and Others v. Turkey*, no. 33097/96 and 57834/00, para. 135; *Ergi v. Turkey*, no. 23818/94, paras. 83-84.

<sup>60</sup> ECHR, *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, para. 277.

<sup>61</sup> See ECHR, *Güleç v. Turkey*, no. 21593/93, para. 82; *Gül v. Turkey*, no. 22676/93, para. 93.

<sup>62</sup> For a list of mandatory investigative steps see ECHR, *Gül v. Turkey*, no. 22676/93, paras. 89-90; also *Tanrıkulu v. Turkey*, no. 23763/94, para. 109; *Salman v. Turkey*, no. 21986/93, para. 106; *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, para. 162; *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, para. 113; also footnote 62 above.

<sup>63</sup> ECHR, *Finogenov and Others v. The Russian Federation*, nos. 18299/03 and 27311/03, paras. 272, 274.

<sup>64</sup> By analogy with the principles of judicial independence identified by the Human Rights Committee, communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.2.

<sup>65</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights* (see footnote 20 above), pp. 320-321.

<sup>66</sup> ECHR, *McCann v. The United Kingdom*, no. 18984/91, para. 162.

avenues of appeal. Professionals should brief victims or their next-of-kin as to their rights, and direct them to institutions where they can obtain the required assistance.<sup>67</sup>

38. Depending on the specificities of the domestic criminal justice system, victims may have standing to intervene in criminal proceedings. In some States, victim participation may take the form of replacing the prosecutor, or providing assistance to the prosecution. In others, victims may be allowed to participate as a third party. In yet other States, they are permitted to submit “victim impact statements,” describing the effect of the alleged crime and/or presenting their concerns independently of the prosecution.<sup>68</sup>

39. Generally, rights of victim participation are more extensively recognized in inquisitorial systems than in adversarial systems.<sup>69</sup> Any prosecution for terrorist-related crime, however, involves a triangulation of interests between the accused, the victim and the prosecutor. Making due allowance for the differences in national systems, the Special Rapporteur strongly recommends that States which currently have no possibility for a victim of terrorism, or his/her next-of-kin, to participate in criminal proceedings against the perpetrator (other than as witnesses of fact) should give serious and urgent consideration to implementing one or more of the initiatives described above.<sup>70</sup> The Special Rapporteur considers the formal recognition of victims of terrorism in criminal proceedings to be an important part of recognizing the humanity of the victims, thereby publicly reinforcing the human costs of terrorism.

40. In addition to the requirement for a State-funded support service, legal aid or assistance is often indispensable for ensuring that any victim, regardless of financial means, can participate effectively in any judicial proceedings.<sup>71</sup> Where the victim group consists of a large number of individuals, provision should be made, where appropriate, for their joint representation by one legal professional or association. Victims and their families should also have the right to free interpretation in a language they understand, irrespective of their role in the proceedings.<sup>72</sup>

41. Where the victims or next-of-kin reside in a State other than the State in which the alleged offenders are prosecuted, the prosecuting State must make effective provision for remote participation. The State in which the victim resides may also have obligations in this regard.

42. In order to avoid secondary victimization, States must ensure a victim-sensitive criminal justice procedure. Where victims of terrorism have given information to the authorities, or are called upon to provide testimony during a prosecution, their rights to life, physical security and privacy may be in danger.<sup>73</sup> States must “organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled,”<sup>74</sup> subject always to the need to put safeguards in place to ensure that any protective measures are compatible with the accused person's right to a fair and public hearing under article 14 of

<sup>67</sup> UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism* (New York, 2011), paras. 130–145.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid., paras. 52–53

<sup>70</sup> See the report of the Secretary-General's Symposium on Supporting Victims of Terrorism, held in New York in September 2008, available at <http://www.un.org/terrorism/pdfs/UN%20Report%20on%20Supporting%20Victims%20of%20Terrorism.pdf>.

<sup>71</sup> See European Union, Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), art. 4, paras. 1 and 2 (a)-(c), and art. 6.

<sup>72</sup> For national practice and legislation, see UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism* (New York, 2011), paras. 146–226.

<sup>73</sup> ECHR, *Doorson v. The Netherlands*, no. 20524/92.

<sup>74</sup> Court of Appeal of England and Wales, *A and others v. Lord Saville of Newdigate* [2002] 1 WLR 1249; also House of Lords of the United Kingdom, *In Re Officer L* [2007] 1 WLR 2135.

the Covenant.<sup>75</sup> States should therefore ensure that they have the means available to protect informants and witnesses through the adoption of suitably tailored protective measures. Such measures are not only a part of the State's positive obligations towards the witness, they are also indispensable in encouraging witnesses to come forward in the first place.

43. Criminal proceedings, including any ordinary appeal procedures, should be conducted with reasonable expedition, as required by article 14 of the Covenant. Not only does this guarantee the right of the accused to a trial within a reasonable time, it also avoids prolonging the agony of uncertainty for the victim or his/her next-of-kin.

44. Where, following an investigation into an act of terrorism, a criminal prosecution is not initiated the competent prosecuting authority must give reasons for its decision.<sup>76</sup> States should allow victims to challenge any such decision before an independent court or tribunal or other comparable authority.<sup>77</sup>

45. The right of victims of terrorism to privacy and respect for their family life should be protected against unjustified intrusion. In some circumstances, victims and their families may need to be protected against over-exposure to the media.<sup>78</sup> Medical and other personal information may also need to be protected from unnecessary disclosure to the public in the course of criminal proceedings.<sup>79</sup>

### C. The right of victims of terrorism to form representative organizations

46. Non-governmental organizations have been established in a number of countries with the aim of promoting the interests of victims of terrorism.<sup>80</sup> Such organizations perform a vital role in ensuring that the needs of the victims are properly understood and communicated. They are to be applauded for their efforts in advocating the cause of the victim by helping to personalize and convey the human tragedies that terrorism inflicts.

47. Organizations representing victims of terrorism enjoy the rights to freedom of association and expression under articles 19 and 22 of the Covenant, including the right to articulate criticism of public authorities. Any State interference with the unfettered exercise of those rights (including requirements for official registration) must be prescribed by law, pursue a legitimate public interest, and be strictly proportionate in scope.<sup>81</sup> Such organizations should have unimpeded access to an independent and impartial court or tribunal with power to overturn the restriction.

48. States must also secure the rights of organizations representing victims of terrorism against unlawful interference by non-State actors.<sup>82</sup> Where necessary, such organizations must be afforded effective measures of protection against the risk of reprisals from the perpetrators of acts of terrorism, or their supporters, as well as against any attempt, from any quarter, to intimidate or silence them.

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<sup>75</sup> ECHR, *Van Mechelen v. The Netherlands*, nos. 21363/93, 21364/93, 21427/93, 22056/93, paras. 56-65.

<sup>76</sup> Divisional Court of England and Wales, *R v. DPP ex parte Manning and Melbourne* [2000] 3 WLR 463.

<sup>77</sup> See Rianne Letschert, Ines Staiger and Antony Pemberton (eds.) (footnote 11 above), Tilburg Declaration, recommendation V.3.

<sup>78</sup> For national practice and legislation, see UNODC (footnote 73 above), paras. 235-291.

<sup>79</sup> ECHR, *Z v. Finland*, no. 22009/93; *Craxi (No. 2) v. Italy*, no. 25337/94.

<sup>80</sup> See for example Global Survivors Network (<http://www.globalsn.net>); European Network of Associations of Victims of Terrorism ([www.europeanvictims.net/](http://www.europeanvictims.net/)).

<sup>81</sup> Human Rights Committee, general comment no. 34 (2011), para. 34.

<sup>82</sup> In the context of freedom of assembly, see ECHR, *Plattform "Ärzte für das Leben" v. Austria*, no. 10126/82, para. 32.

## D. States' responsibility to provide reparation to victims of terrorism

49. The principle of State responsibility is at the core of the right to reparation. As long ago as 1927, the Permanent Court of International Justice affirmed that any act or omission by a public official, qualifying as an unlawful act under public international law, gives rise to international responsibility, and imposes on the State a corresponding international law duty of reparation.<sup>83</sup>

50. The emergence of human rights in international law altered the traditional concept of State responsibility. International human rights law regulates relations between States and the human beings under their jurisdiction, making individuals the subject of international law, and direct beneficiaries of legally enforceable human rights. The official commentaries on the articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, note that in relation to a breach of a human rights treaty, the individual should be regarded as the ultimate beneficiary of the relevant rights.<sup>84</sup> This obligation, which exists as a matter of public international law, is reflected in specific "just satisfaction" provisions of the principal international and regional human rights treaties.

51. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law states that full and effective reparation should include, as appropriate, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>85</sup>

- **Restitution** consists of measures re-establishing the situation of the victim prior to the violation. Restitution of the status quo ante is, however, rarely possible in the present context, since acts of terrorism, by their very nature, often have irreversible consequences.
- **Compensation**, or indemnity, is a specific form of reparation providing just satisfaction (monetary awards for pecuniary and non-pecuniary loss resulting from the violation, together with costs for legal and other expenses reasonably incurred).
- Measures of **rehabilitation** include medical and psychological care, as well as other social services. Acts of terrorism leave deep scars on the survivors as well as the relatives of those who have died, eyewitnesses and members of the intervening rescue services.
- **Satisfaction** is a non-financial form of reparation that includes, inter alia, full and public verification of the facts, and formal acceptance of any State responsibility. Satisfaction can play an important role in achieving reparation in those cases where public officials have caused or contributed to a death through culpable acts or omissions.
- **Guarantees of non-repetition** or non-recurrence include the investigative obligation to take all reasonable steps to identify system failures and human errors, and the obligation to reform laws and administrative practices that may have caused or contributed to the opportunity for an act of terrorism to be committed.

<sup>83</sup> See Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland)*, 26 July 1927, p. 21.

<sup>84</sup> A/56/10, chap. IV, sect. E, subsect. 1.

<sup>85</sup> General Assembly resolution.60/147, annex, paras. 18-23; see also IACtHR, *Loayza-Tamayo v. Peru*, judgement of 27 November 1998, para. 85.

52. Where a public official is directly or indirectly responsible for a violation of the right to life or physical integrity, on the principles of either the positive or negative obligation to respect the relevant rights, the position is straightforward. On orthodox principles of State responsibility, the State is obliged to make reparation to the victim in one or more of the forms identified in the preceding paragraph, suitably tailored to the circumstances.

53. The Special Rapporteur considers that the same principle should apply to *all victims of terrorism or their next-of-kin, without distinction*. As emphasized in paragraphs 11 and following above, it must now be recognized that a death or serious injury resulting from an act of terrorism amounts to an interference with the rights to life and/or physical security, whether or not the acts or omissions of a public official caused or contributed to the death. Accordingly, the Special Rapporteur urges States to voluntarily accept a binding international obligation to provide reparation to the victims of all acts of terrorism occurring on their territory in which a natural person has been killed or has suffered serious physical or psychological harm irrespective of the nationality of the perpetrator or the victim, and thereby to fill an existing protection gap.

54. There are sound reasons of principle in favour of recognizing that States should now accept a special obligation to victims of terrorism. It is inherent in the nature of terrorism that it involves the use or threat of force aimed at influencing a State or group of States or an international organization.<sup>86</sup> The Special Rapporteur concurs with description put forward by the United Nations Office on Drugs and Crime (UNODC) of victims of terrorism as human beings who have made an involuntary sacrifice “on behalf of the State.”<sup>87</sup> There is almost always a direct or indirect motivational connection (however misguided) between acts of terrorism and policies of state. A terrorist killing is thus different in character from a purely private murder.

55. There are additional practical reasons for adopting the approach advocated in this report. Where bystanders or hostages are killed in the course of counter-terrorism operations, it may be impossible to determine whether the acts of a public official were both causative and culpable. Similarly, the determination of State responsibility for an alleged failure to take positive operational steps to prevent an act of terrorism can be fraught with evidential difficulties. If the approach advocated by the Special Rapporteur is followed, States will be under an obligation to provide reparation without imposing an additional burden on the victims or their next-of-kin to prove conclusively that public officials were at fault.

56. Perhaps the most fundamental point is that the direct perpetrator of a terrorist act is unlikely ever to be in a position to compensate the victims. The perpetrator will usually have been sentenced to a long term of imprisonment (if they have not been killed or evaded capture). A victim-centred approach does not permit reliance on an indigent, deceased or untraceable individual to provide reparation for death or serious injury.

57. Many States have voluntarily accepted an international law obligation to establish schemes to provide State-funded compensation to the victims of all crimes of violence resulting in death or serious physical or psychological injury.<sup>88</sup> Such schemes already make

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<sup>86</sup> See A/HRC/16/51, para. 28, practice 7, para. 2.

<sup>87</sup> UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism* (New York, 2011).

<sup>88</sup> See Council of Europe, Committee of Ministers Guidelines on the Protection of Victims of Terrorist Acts; see also European Convention on the Compensation of Victims of Violent Crimes (1983), art. 3, which imposes an obligation on States to compensate the victims of violent crimes resulting in bodily injury or death, where the offence was committed on the territory of the State concerned, regardless of the nationality of the victim. The Convention entered into force on 1 February 1988; as at 30 April 2012, 25 European States had ratified the Convention and implemented its provisions.

provision for the payment of State-funded compensation to the human victims of terrorism. The Special Rapporteur recommends that all States now accept an obligation to establish such a scheme for the victims of terrorism. In the context of transitional justice, broader reparation programmes have been established to provide additional forms of reparation for gross and systematic human rights violations committed in conflict situations.<sup>89</sup> The Special Rapporteur believes that such schemes provide an appropriate model for affording full reparation to the victims of terrorism, particularly where large scale or repeated terrorist acts have resulted in large numbers of victims. Several States have adopted a model for compensating victims of terrorism that closely resembles existing compensation schemes for military and civilian victims of war. Such programmes are specifically tailored to meet the needs of the victims and designed in a manner that encourages their participation.<sup>90</sup>

58. While the primary responsibility for compensating the victims of terrorism rests on the State, dependants of deceased victims are sometimes able to make claims under a life insurance policy. However, such claims have often been refused under policy exclusions for deaths resulting from an act of terrorism. States should actively consider whether to legislate to prohibit the sale or marketing of life insurance policies that contain such an exclusion.<sup>91</sup>

59. In the report on his mission to Turkey, the previous mandate holder commended the Act on Compensation for Victims of Terrorism (A/HRC/4/26/Add.2, paras. 40, 44, 92 (a) and (b)). During his visit to the United States, he underlined the importance of addressing the situation of victims of terrorism with appropriate compensation and access to health care and rehabilitation (A/HRC/6/17/Add.3, para. 43), and during his visit to Peru, he welcomed the reparations plan established under Law No. 28592 (A/HRC/16/51/Add.3, para. 7).

60. The Special Rapporteur commends the legislation recently adopted in Spain as a model for the recognition of the rights of victims of terrorism in a single normative framework. Under Law No. 29/2011 on the Recognition and Integral Protection of the Victims of Acts of Terrorism, Spain has enacted a unified scheme setting out the assistance, support and protection to which victims of terrorism are entitled. The Law expressly recognizes all victims of terrorism as being victims of human rights violations, irrespective of questions of State responsibility.

61. The contemporary recognition that acts of terrorism involve grave human rights violations; the State's duty to protect and secure the right to life; the emerging international consensus in favour of a victim-centred approach; the absence of any alternative source of compensation or reparation; and the inexorable connection between the misguided motivation of the terrorist and the policies of the State that is the terrorists' ultimate target, together provide a sound rationale for recognizing an obligation on the State to provide compensation and reparation to the victims of all acts of terrorism occurring on their territory, without imposing on the victims the added burden of proving State responsibility.<sup>92</sup>

62. The previous mandate holder identified an obligation on States to provide victims of terrorism with "legal, medical, psychological and other assistance required for their social

<sup>89</sup> See Rianne Letschert, Ines Staiger and Anthony Pemberton (eds.) (footnote 11 above), pp. 254-259.

<sup>90</sup> UNODC, *The Criminal Justice Response* (see footnote 87 above), para. 68; for national practice and legislation, see paras. 306-372.

<sup>91</sup> See Council of Europe, Committee of Ministers' Guidelines on the Protection of Victims of Terrorist Acts; also Rianne Letschert and Antony Pemberton, "Addressing the needs of victims of terrorism in the OSCE region," *Security and Human Rights*, vol. 19, No. 4, November 2008, pp. 298-310.

<sup>92</sup> UNODC, *The Criminal Justice Response* (see footnote 90 above), para. 293.

rehabilitation” (A/HRC/16/51, para. 25). The Special Rapporteur adopts this recommendation. To promote prompt and effective action at the United Nations level, the recommendations in the present report are restricted to the obligations owed by States to natural persons who have suffered death or serious injury or to their next-of-kin. The distribution of financial responsibility for compensating the purely commercial interests of legal persons and the provision of compensation for damage to property raise complex questions of social policy and insurance where national practices vary widely. These differences should not be allowed to obscure or delay effective international action to protect the human victims of terrorism through the adoption of a single normative scheme declaring and protecting their rights. Furthermore, in recognition of the special status of victims of terrorism, the Special Rapporteur recommends that States establish reparation programmes that are independent of any remedies available for alleged violations of the rights of persons suspected or accused of involvement in acts of terrorism.

## **IV. Conclusions and recommendations**

### **A. Conclusions**

63. **The Special Rapporteur considers that the victims of terrorism share certain common characteristics which distinguish them from the victims of other crimes of violence. Those shared characteristics call for international recognition through a specific normative framework developed under the auspices of the United Nations.**

64. **The Special Rapporteur considers deliberate infliction of lethal or potentially lethal violence by non-State actors in the course of an act of terrorism amounts, in all cases where death or serious physical or psychological injury results, to a grave violation of the human rights of the victim, irrespective of the question of direct or indirect State responsibility. He notes, however, that acceptance of this principle is not essential for acceptance of the recommendations made in this report.**

65. **The following persons are to be considered as victims of terrorism: (a) natural persons who have been killed or suffered serious physical or psychological injury through the commission of an act of terrorism (direct victims); (b) the next-of-kin or dependants of a direct victim (secondary victims); (c) innocent individuals who have been killed or suffered serious injury indirectly attributable to an act of terrorism (indirect victims); and (d) potential future victims of terrorism.**

### **B. Recommendations**

66. **The Special Rapporteur recommends that States take effective international action to protect the human victims of terrorism through the adoption of a specific normative framework declaring and protecting their rights. The international community, acting under the auspices of the United Nations, should therefore take steps towards enshrining the human rights set out in this report and the corresponding obligations on States in a specific international instrument.**

67. **Pending the adoption of such an instrument, States should review their national legislation, procedures and practice and make all necessary amendments to bring them into line with the following Framework principles for securing the human rights of victims of terrorism:**

**(a) The State’s obligation to protect and secure the right to life includes the duty to take appropriate steps to safeguard the lives of individuals within its**

jurisdiction. Consequently, (i) the State has a duty under international law to put in place effective criminal law provisions to deter the incitement, preparation and commission of terrorist offences, supported by law-enforcement machinery for the prevention, suppression and sanctioning of breaches; (ii) relevant public officials come under a positive operational duty to take preventative action where they know, or ought to know, of the existence, at the relevant time, of a real and immediate risk to the life of an identified individual or group of individuals, and yet fail to take measures, within the scope of their legal powers and available resources, and in conformity with the State's international obligations, which judged reasonably, might be expected to avoid that risk.

(b) Individuals suspected of having engaged in the incitement, preparation, instigation or commission of acts of terrorism should be duly investigated, and if appropriate, prosecuted, convicted and punished, according to the ordinary rules of criminal law and procedure, or else extradited to face trial in another jurisdiction. This implies a fair and public hearing before an independent and impartial civilian court. States are under a duty to provide mutual legal assistance in the investigation and prosecution of terrorist offences and to cooperate, as far as they consider reasonable, in the exchange of intelligence with other States. These duties, however, take effect subject to the a priori obligation of all States to refuse such assistance where it would entail the commission of, complicity in, or any form of direct or indirect assistance to, an internationally wrongful act, including any violation of international human rights law.

(c) The State is obliged to conduct an effective official investigation whenever individuals have been killed or seriously injured as the direct or indirect result of an act of terrorism, with a view to securing accountability and learning lessons for the future. The key features of such an investigation are that (i) the authorities must act *ex officio*; (ii) the investigation should always begin promptly and be carried out with reasonable expedition; (iii) the authorities must ensure that the victim or his/her next-of-kin are kept fully informed of the progress of the investigation, and are provided with an adequate opportunity to participate in the process; (iv) investigators must be genuinely impartial; (v) the investigation must be capable of leading to the identification, accountability and, where appropriate, the punishment of those responsible for any act or omission which has caused or contributed to the death or serious physical or psychological injury of a victim of terrorism, including any public official implicated in the events; (vi) there must be a sufficient element of public scrutiny of the investigation and its results to secure accountability; (vii) the authorities must have taken all reasonable steps to secure the relevant evidence; and (viii) any conclusions must be based on a complete, objective and impartial analysis of all relevant elements, including an examination of the authorities' own actions. Where State responsibility is at issue the investigative authorities must be independent from those potentially implicated.

(d) Making due allowance for the differences in national systems, the Special Rapporteur strongly recommends that States which currently have no possibility for a victim of terrorism or his/her next-of-kin to play an active part in criminal proceedings (other than as witnesses of fact) should give serious and urgent consideration to implementing a system for effective victim participation.

(e) The victim or the victim's family must in all cases be provided with the information necessary to exercise any rights they may have in domestic law to participate in judicial proceedings. In this connection, (i) States should establish a support service to assist the victim in the process; (ii) legal aid or assistance should be accorded so as to ensure that victims can participate effectively; (iii) provision should

be made, where appropriate, for joint legal presentation; (iv) victims and their families should enjoy the right to free interpretation.

(f) Where a decision is taken not to initiate a criminal prosecution the competent prosecuting authority should give reasons for its decision, and States should allow victims of terrorism the opportunity to challenge the decision before an independent court or tribunal, or other comparable authority.

(g) Where victims of terrorism have given information to the authorities, or are called upon to provide testimony during a prosecution, their rights to life, physical security and privacy must be fully protected, subject to safeguards to ensure that any protective measures adopted are compatible with the accused person's right to a fair and public hearing under article 14 of the International Covenant on Civil and Political Rights.

(h) Criminal proceedings, including the exhaustion of any ordinary appeal procedures, should be conducted with reasonable expedition.

(i) The right of victims of terrorism to privacy and respect for their family life should be protected against unjustified intrusion by the media. Personal information must also be protected against unnecessary disclosure to the public in the course of judicial proceedings.

(j) Victims of terrorism have the right to form representative organizations whose rights to freedom of association and expression must be fully guaranteed. Where any restriction is imposed, such organizations should have unimpeded access to an independent and impartial court or tribunal with power to overturn the restriction. In addition, States are under a positive duty to secure the rights of such organizations against reprisals or other forms of unlawful interference by non-State actors.

(k) Where a public official is directly or indirectly responsible for a violation of the right to life in the context of an act or threatened act of terrorism, the State is already bound as a matter of international law to make reparation to the victim.

(l) The Special Rapporteur urges *all* States to recognize an international obligation (already recognized by many States) to provide reparation where death or serious injury results from an act of terrorism committed on their territory. Full and effective reparation should include, as appropriate, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparation schemes should make provision for financial compensation and a considered programme of medical and social rehabilitation.

(m) States should actively consider whether to legislate to prohibit the sale or marketing of life insurance policies that contain an exclusion for deaths resulting from acts of terrorism.

(n) The Special Rapporteur urges States involved in unresolved conflicts in which one or more parties to the conflict are designated as a terrorist organization, and where acts of violence are committed against the civilian population, to make greater use of the United Nations mechanisms for conflict prevention, negotiation, mediation, conciliation, peacekeeping and peacebuilding.

68. The Special Rapporteur recommends that the Counter-Terrorism Implementation Task Force (CTITF) commission empirical research into the question of whether and to what extent economic, social, political and educational exclusion should be recognized by the General Assembly as conditions conducive to the spread

of terrorism, with a view to tackling such problems as part of an integrated counter-terrorism strategy.

69. This report should be brought to the attention of the General Assembly for the purposes of its upcoming review of the United Nations Global Counter-Terrorism Strategy on 28 and 29 June 2012.

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