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

## **Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez\***

### *Summary*

This is the first report submitted by the incumbent Special Rapporteur to the Human Rights Council. The Special Rapporteur took up his appointment on 1 November 2010, replacing Manfred Nowak who had served two terms as Special Rapporteur.

The report gives an overview of the activities of the mandate over the reporting cycle, including the activities carried out by the former Special Rapporteur up to the end of his mandate on 31 October 2010. The Special Rapporteur outlines his working methods and vision, and notes, in relation to follow-up country visits, that invitations from States to conduct follow-up visits constitute a good practice that should be disseminated.

The Special Rapporteur advocates a victim-centred approach to the work of his mandate. He believes that all human rights standards are subject to the norm of “progressive development,” in that they evolve in accordance with new repressive actions and features. In this regard, it is important to consolidate current interpretations of what constitutes torture and cruel, inhuman and degrading treatment or punishment, and to insist on effective implementation of States’ obligations to prevent and to punish violations. In keeping with the progressive development of international jurisprudence, the Special Rapporteur believes that expansive interpretations of norms are possible as long as they better protect individuals from torture and cruel, inhuman or degrading treatment or punishment. At the same time, such expansive interpretations should evolve from agreements among all stakeholders reached after frank and open debate. It is the role of the Special Rapporteur to generate such discussion as appropriate.

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\* Late submission.

The Special Rapporteur intends to engage constructively with States with a view to ensuring enhanced respect for, and adherence to, the Convention, in particular, the exclusionary rule enshrined in article 15, and the necessity for States to ensure that torture is a criminal offence in domestic legislation, punishable by appropriate penalties and thereby necessitating effective investigation and prosecution of each instance of torture, as provided for in article 4 of the Convention. Noting with deep regret the long-term physical and psychological trauma that victims of torture experience, he intends to promote actions leading to the rehabilitation and other forms of reparation for victims of torture. He believes that, without undermining the rights of defendants to all guarantees of fair trial, victims should be allowed to participate actively in attempts to hold torturers accountable.

The Special Rapporteur acknowledges that there are credible and human rights-friendly forensic and other scientific alternatives which have been proven to achieve the desired results in law enforcement and crime prevention than torture and cruel, inhuman and degrading treatment. Scientific advances have made possible the provision of evidence to corroborate evidence that torture has been administered; hence these new techniques are important tools for achieving accountability. The Special Rapporteur wishes to further develop linkages between science and forensics as an effective alternative to be employed in law enforcement, countering terrorism and effective criminal prosecution.

Lastly, the report re-emphasizes the mandate's position on pretrial detention, non-refoulement and diplomatic assurances, conditions in detention and torture in secret detention. It also highlights important issues requiring longer term consideration and engagement with States.

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## **I. Introduction**

1. This is the first report submitted to the Human Rights Council in accordance with Council resolution 8/8 by the incumbent Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment who was took office on 1 November 2010.

2. The summary of communications transmitted to Governments by the Special Rapporteur between 19 December 2009 and 30 June 2010, and the replies received by 30 June 2010 are contained in document A/HRC/16/52/Add.1, while document A/HRC/16/52/Add.2 contains a summary of the information provided by Governments and non-governmental sources on the implementation of recommendations formulated by the previous mandate holder following country visits under the mandate. Reports of country visits to Jamaica, Papua New Guinea and Greece are contained in documents A/HRC/16/52/Add.3, 4 and 5 respectively.

## **II. Activities of the Special Rapporteur**

3. The Special Rapporteur draws the attention of the Council to the interim report submitted to the General Assembly<sup>1</sup> in accordance with resolution 64/153, and covering the mandate's activities for the period January to July 2010. The present report covers the key activities undertaken by the mandate holders since the submission of the interim report to the General Assembly on 10 August 2010.

### **A. Communications concerning human rights violations**

4. During the period from 19 December 2009 to 30 November 2010, the Special Rapporteur sent 64 letters of allegations of torture to 35 Governments, and 137 urgent appeals on behalf of persons who might be at risk of torture or other forms of cruel, inhuman or degrading treatment or punishment to 53 Governments.

### **B. Country visits**

5. In 2010, the Special Rapporteur undertook visits to Jamaica, Papua New Guinea and Greece (see A/HRC/16/52/Add.3, 4 and 5 respectively), as well as a follow-up mission to Kazakhstan. On 1 December 2010, the Special Rapporteur received a formal invitation to visit the Kyrgyz Republic, which he hopes to undertake in the first half of 2011.

### **C. Pending requests**

6. In November and December 2010, the Special Rapporteur sent requests for invitations to a number of States, including Eritrea (request first made in 2005); Ethiopia (2005); India (1993); Islamic Republic of Iran (2005); Iraq (2005); Russian Federation (2000); Saudi Arabia (2005); Syrian Arab Republic (2005) and Uzbekistan (2006). He reiterated requests to Cuba, Iraq and Zimbabwe whose respective Governments had extended invitations to visit their countries, but dates have yet to be agreed. The Special

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<sup>1</sup> See A/65/273.

Rapporteur initiated engagement with Guyana, Kenya, Pakistan and Venezuela, respectively, by requesting official country visits.

#### **D. Highlights of key presentations and consultations**

7. During the reporting period, the Special Rapporteur attended various events at the international level.

8. On 2 September 2010, the Special Rapporteur delivered, in the presence of Secretary-General Ban Ki-moon, a keynote speech on corruption and human rights at the inaugural conference of the International Anti-Corruption Academy (IACA) in Vienna, Austria.

9. From 9 to 11 September, the Special Rapporteur participated in a round table celebrating the 40th anniversary of the International Institute of Humanitarian Law (IIHL) in San Remo, Italy, on the theme “Global Violence: Consequences and Responses”, and gave a lecture on “Deprivation of liberty in armed conflict and other situations of violence – Legal Aspects - the Crime of Torture”.

10. On 13 and 14 September, the Special Rapporteur chaired a Working Group on “Reform of UN Human Rights Mechanisms” at the Annual Conference of the Association of Human Rights Institutes (AHRI): “Reforming Human Rights Institutions: Progress and Status”, organised by the Icelandic Human Rights Centre/Norwegian Centre for Human Rights in Reykjavik, Iceland.

11. On 21 September, the Special Rapporteur gave a lecture on “Torture in the 21st Century - Experiences of the UN Special Rapporteur on Torture” in Kampala, Uganda. He also met with the Human Rights Commission of Uganda, the Speaker of the Parliament, the Minister of Interior and the Acting Minister of Foreign Affairs.

12. On 22 September, the Special Rapporteur gave a lecture on “Torture – Brutal Means of Power” at the Austrian Science Fund (FWF) in Vienna, Austria.

13. From 29 September to 1 October, the Special Rapporteur participated in a follow-up visit to Astana, Kazakhstan, organized by the OHCHR Regional Office for Central Asia. On 29 September, he took part in consultative training for NGOs and State officials on public monitoring of closed institutions, conducted by Penal Reform International (PRI) and the OHCHR Regional Office, with support from the Open Society Institute, the British Embassy in Astana and the Coalition of NGOs of Kazakhstan against Torture.

14. On 30 September, he met with Kazakhstan ministries of Foreign Affairs, Internal Affairs, Justice and Health, Supreme Court Judges and the General Prosecutor’s Office. On 1 October, he spoke at a round table organized jointly by the OHCHR Regional Office, the Office of the General Prosecutor, the Ministry of Justice, PRI, the NGO Coalition against Torture and the Open Society Justice Initiative to follow up with State officials and civil society the implementation of his recommendations since his initial visit in 2009.

15. On 5 October, the Special Rapporteur gave a lecture on his experience as Special Rapporteur at the Danish Institute for Human Rights, Copenhagen, Denmark. On 6 October, he gave two lectures on his experience as Special Rapporteur in the context of a symposium on “Human Rights and Science” at Leopoldina National Academy of Science in Berlin, Germany, and in a symposium entitled “Comparison of Torture Preventive Mechanisms” at the University of Potsdam, Germany.

16. On 8 October, the Special Rapporteur presented the findings of his visit to Kazakhstan at a Panel Discussion on “Human Rights and Elite Corruption in Georgia,

Kazakhstan and Uzbekistan” organized by the Academic Council on the United Nations System (ACUNS) in Vienna, Austria.

17. On 19 October, the Special Rapporteur gave a lecture on the work of a United Nations Special Rapporteur at the Panteion University, Athens, Greece, where he also received an award for his fight for human rights. Between 25 and 29 October, the Special Rapporteur participated in a panel discussion on “Future Challenges for the UN Special Rapporteur on Torture”, organized by the Permanent Mission of Denmark and the Association for the Prevention of Torture (APT), together with incumbent mandate holder, Juan E. Méndez, and met with representatives of the Permanent Missions of Austria, Greece, Jamaica, Papua New Guinea and Switzerland to the United Nations. He also met with the Assistant Secretary-General for Human Rights, Ivan Simonovic.

18. On 28 October, the Special Rapporteur addressed the event “Reckoning with Torture”, organized by Amnesty International in the context of its Torture Awareness Campaign at John Jay College of Law, New York. On 29 October, the Special Rapporteur led a discussion on “Addressing Torture in Places of Detention and Health Care” at Human Rights Watch, New York.

19. During the month of November 2010, the Special Rapporteur delivered speeches in several countries in response to invitations he had been unable to accept before the end of his mandate on 31 October 2010.

20. On 8 and 9 November, the incumbent Special Rapporteur participated in a meeting organised by the Open Society Institute in Budapest, Hungary, to discuss prison conditions with several Russian and Ukrainian NGOs. He also met with representatives of the London-based Penal Reform International who had arranged meetings with human rights activists from Belarus and Moldova. In Budapest, he also met with a member of the United Nations Committee on the Rights of Persons with Disabilities and a representative of the Mental Disability Advocacy Centre to discuss issues of deprivation of liberty and treatment of mentally disabled patients.

21. On 12 November, and on 2 December, the Special Rapporteur met with representatives of Human Rights Watch in Washington, D.C. Within that period, he had met with a delegation of Venezuelan NGOs working on prison conditions in that country, and civil society representatives involved in work on pre-trial detention worldwide.

22. On 15 and 16 November, the Special Rapporteur attended a joint meeting of the Committee against Torture and the Subcommittee on the Prevention of Torture in Geneva, Switzerland. He also met with representatives of the Permanent Missions of Brazil, Thailand and Zimbabwe, and participated in a working lunch hosted by the Permanent Missions of Argentina and Denmark. The Special Rapporteur met with NGO representatives to discuss thematic and geographic issues concerning his mandate.

23. On 9 and 10 December, the Special Rapporteur participated in a round table organized by the International Rehabilitation Council for Torture Victims (IRCT), in Copenhagen, Denmark. Among other experts, Sir Nigel Rodley, a previous mandate holder, also participated in the panel. He also met with senior officials of the Danish Ministry of Foreign Affairs.

## **E. Key press statements**

24. On 21 July 2010, the Special Rapporteur issued a joint statement with the Special Rapporteur on the promotion and protection of human rights while countering terrorism, expressing concern about the fate of Guantánamo detainees from Algeria to be returned to their country.

25. On 16 September, the Special Rapporteur, together with 25 other special procedures mandate holders, issued a joint press release on the occasion of the High-Level Summit on the Millennium Development Goals, reiterating that without human rights, the implementation of the Millennium Goals would not be successful.
26. On 20 October, the Special Rapporteur issued a press release on his preliminary observations and conclusions of his mission to Greece.
27. On 4 November, it was announced that Juan E. Méndez had taken up his duties as Special Rapporteur as of 1 November 2010, replacing Manfred Nowak who had served as Special Rapporteur for six years.
28. On 11 November, the Special Rapporteur issued a joint press release with five other experts concerning the brutal human rights violations in Somalia, where civilians are the victims of executions, torture, stoning, decapitation, amputation and floggings carried out by insurgents.
29. On 9 December, the Special Rapporteur issued a joint statement on International Human Rights Day through the International Coordinating Committee.

## **F. Follow-up mission to the Republic of Kazakhstan**

30. The Special Rapporteur conducted a fact-finding mission to Kazakhstan<sup>2</sup> from 5 to 13 May 2009 and formulated a number of recommendations to improve the situation of torture and ill-treatment in that country. In April 2010, the Government of Kazakhstan officially invited the Special Rapporteur for a follow-up visit to the country to discuss the implementation of his recommendations with the Government, civil society organizations and the Central Asia Regional Office of the Office of the High Commissioner for Human Rights (OHCHR).
31. Over the past six years, the Special Rapporteur has only been able to carry out limited follow-up of his missions. The official practice is to send questionnaires to Governments and civil society organizations in the respective States requesting information on the measures taken since the Special Rapporteur's last visit. The information is then incorporated into a follow-up report that is published annually. However, with the exception of a follow-up visit to Moldova in September 2009, which focused specifically on the National Preventive Mechanism (NPM), the Special Rapporteur is rarely officially invited by Governments to revisit their country to discuss the implementation of his recommendations. Consequently, the Special Rapporteur commends the Government of Kazakhstan for its official invitation to pay a follow-up visit, which indicates a serious commitment to combating torture and improving the conditions of detention, and constitutes a best practice example. The Special Rapporteur carried out the follow-up mission<sup>3</sup> to Kazakhstan from 29 September to 1 October 2010.
32. The Special Rapporteur was impressed by the wide range of measures taken by the Government to improve the situation of torture and ill-treatment in the country since his initial visit. He acknowledged the statement by the Deputy General Prosecutor which highlights Kazakhstan's commitment to a policy of zero tolerance of torture, and welcomed the Action Plan for 2010-2012 that was launched in February 2010 to implement the concluding observations and recommendations formulated by the Committee against

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<sup>2</sup> See A/HRC/13/39/Add.3.

<sup>3</sup> See A/HRC/16/52/Add.2 for a detailed report on the follow-up country visit to Kazakhstan.

Torture in November 2008. Among other measures, President Nazarbayev's Decree of August 2010, "Measures to improve law enforcement and the judicial system in the Republic of Kazakhstan", endorsing several systemic reforms intended to humanize the prison system and reduce overcrowding in all places of detention, was presented by the authorities as a major breakthrough that would transform Kazakhstan's criminal justice system. The current criminal justice system is still punitive, however, the Government expects that the planned reforms will produce a shift towards a more restorative justice system. In an effort to reduce the prison population, the decree includes a bill decriminalizing 19 offences which do not present a danger to society and converting them into administrative offences. However, while such decriminalization is aimed at humanization, it should be implemented with care since existing procedures under the Code on Administrative Offences offer fewer safeguards compared to the Criminal Procedure Code. As such, shifting 19 offences out of the Criminal Code means that future offenders will be deprived of basic human rights guarantees normally available under the Criminal Procedure Code. The Government informed the Special Rapporteur that alternative measures of punishment and prevention will also be developed to reduce overcrowding, together with a reduced sentence term for eleven crimes.

33. While welcoming the measures taken since his initial visit, the Special Rapporteur emphasized that there is still an acute need for ongoing reform of the criminal justice system. Furthermore, he pointed out that many legislative measures still needed to be taken to combat torture. Safeguards against torture, such as immediate registration upon arrest or apprehension, information about the detainee's rights, prompt access to legal counsel, or the right to inform relatives, need to be developed or reinforced. Moreover, the Special Rapporteur and the participants in the consultations urged that all victims of torture be provided with effective remedies, adequate reparation and access to professional rehabilitation. Finally, the Special Rapporteur observed that there was need for improvement in the treatment of prisoners, especially with regard to medical treatment, education of penitentiary staff, and rehabilitation into society of former detainees. Ensuring the effectiveness of complaint mechanisms in closed institutions was considered a critical area requiring further improvement.

34. The incumbent Special Rapporteur, Juan E. Méndez, emphasizes the importance of follow-up country visits as an important way to continue the process of reform and other measures aimed at eradicating torture and ill-treatment. The Special Rapporteur encourages States that had been visited by previous mandate holders to conduct follow-up activities. To this end, he welcomes the opportunity to engage with States on following up conclusions and recommendations formulated by the Special Rapporteur based on country visits, as well as by the Universal Periodic Review and Treaty Body States reviews.

### **III. Methodology of the Special Rapporteur on the question of torture**

35. The Special Rapporteur wishes to acknowledge and thank his predecessors for their contribution to the mandate over its twenty-five year history. He intends to continue and build on the momentum set by them.

36. The Special Rapporteur intends to engage in constructive dialogue with Member States, and place emphasis on identifying areas of cooperation with a view to addressing issues of concern. In addition to responding to allegations of torture or ill-treatment, the Special Rapporteur hopes to engage proactively with States to prevent torture, as this is one of the most effective ways to achieve compliance with absolute prohibition of torture as provided for under international law.

37. The Special Rapporteur proposes a victim-centred approach to his mandate, while at the same time seeking to strengthen existing international standards and norms. Cognisant of the frequently changing and evolving nature of torture, he intends to work towards ensuring the extension of those standards and norms to cover new areas of concern. The Special Rapporteur believes that all human rights standards are subject to the norm of “progressive development,” in that they evolve in accordance with emerging new features of repression. In that sense, it is important to consolidate current interpretations of what constitutes torture and cruel, inhuman and degrading treatment or punishment, as well as insist that States effectively implement their obligations to prevent and punish violations. He considers that his mission includes formulating proposals to expand protection to situations that have not been previously envisioned. This should be guided by experience and thoughtful consideration of the values involved and the adoption of “best practices” by all States. In this connection, he considers it his duty to promote open and frank discussion with States and other stakeholders on areas where reality demands a progressive interpretation of existing norms and their expansion to situations not previously contemplated. Such development should proceed through a broad consensus that emerges after careful consideration and open discussion. The Special Rapporteur intends to place special emphasis on strengthening the application and implementation of existing standards. He advocates a straight-forward and effective approach to allegations of torture or ill-treatment. In his view, the State has a responsibility to investigate every allegation of torture, and to prosecute and punish perpetrators if the allegations are proven. This feature, which is unique to the prohibition of torture as a human rights standard, requires States to apply due diligence to every allegation of ill-treatment in order to determine whether the act indeed contravenes the law and, if so, to mobilize its institutions to prosecute and punish the perpetrators, and offer reparation to the victims.

#### **A. Cooperation and coordination with other mechanisms**

38. The Special Rapporteur places great importance on coordination with other mechanisms. He intends to work closely with other mandate holders, in particular those addressing extra-judicial executions, disappearances, arbitrary detention, counter-terrorism, health, migrants and violence against women, to ensure that cross-cutting issues are approached in a holistic manner.

39. The Special Rapporteur welcomes the already established good practice of collaboration with the Committee against Torture, the Subcommittee on the Prevention of Torture (SPT) and other relevant United Nations mechanisms and bodies concerned with protection against torture and other cruel, inhuman or degrading treatment or punishment. He also looks forward to collaborating, as appropriate, with regional organizations and mechanisms, national human rights institutions, national preventive mechanisms and civil society, including non-governmental organizations. He will continue to work with them to ensure appropriate follow-up of their conclusions, recommendations and outcomes, and will provide input into individual communications of the relevant treaty bodies, including the Committee against Torture and the Subcommittee on the Prevention of Torture.

40. The Special Rapporteur believes that in order to achieve optimal results, it is essential to coordinate efforts and working methods with the Committee against Torture and the Subcommittee on the Prevention of Torture, especially with regard to upcoming country visits, monitoring conditions in places where persons are deprived of their liberty, and following up recommendations. The Special Rapporteur looks forward to discussing working methods with the treaty body mechanisms in order to further develop modalities for addressing issues of mutual concern.

41. The Special Rapporteur will also engage with the United Nations Office on Drugs and Crime and the World Health Organization to help facilitate the integration of a human-rights approach into drug-use prevention, treatment and managed care, not only in detention centres, but also with regard to vulnerable groups in which persons may be deprived of their liberty, including in relation to the physically challenged, persons with intellectual disability and the terminally ill.

42. The Special Rapporteur looks forward to working with regional bodies, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT); the Committee for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa; the Inter-American Commission on Human Rights (IACHR) and other relevant bodies, to further strengthen international and regional standards on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

43. The methods of work<sup>4</sup> of the Special Rapporteur on Torture require that the Special Rapporteur maintain contact and, where appropriate, engage in consultation with related bodies and mechanisms of the United Nations human rights machinery, including the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the Commission on Crime Prevention and Criminal Justice (E/CN.4/1997/7, Annex, paragraph 10). The Special Rapporteur considers the Fund of great importance to the work of non-governmental organizations that provide humanitarian assistance to victims of torture and members of their family. In that respect, the Special Rapporteur will continue to work closely with the Fund with a view to complementing his victim-centred approach and ensuring victims are included in judicial processes and have access to appropriate remedies and reparation.

44. The Special Rapporteur, as did his predecessors, urges Governments and other donor organisations to support the work of the United Nations Voluntary Fund for Victims of Torture through financial and other means so as to enable it to continue providing appropriate assistance to organizations working to meet the psychological, medical, social, legal and economic needs of victims and survivors of torture.

45. Given the special emphasis that international law places on prosecuting crimes of torture, the Special Rapporteur looks forward to working closely with the International Criminal Court and other international tribunals of criminal justice, while respecting the respective spheres of those bodies. He also hopes to encourage States to ensure that torture is enshrined as a criminal offence in domestic legislation and hence subject to prosecution, as provided for under article 4 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “the Convention”), and to disseminate such actions as “best practices” where they are effective and respect fair trial guarantees. The Special Rapporteur strongly believes that, in this context, the threat of prosecution and punishment can serve a very effective preventive purpose.

## **B. Country visit methodology**

46. The Special Rapporteur wholly embraces, and reiterates the importance of, strict adherence to the methods of work established and refined under previous mandate holders<sup>5</sup>.

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<sup>4</sup> See E/CN.4/1997/7, Annex, approved by the Commission in resolution 2001/62 (E/CN.4/RES/2001/62), paragraph 30.

<sup>5</sup> See E/CN.4/2006/6, paragraphs 20-27.

He considers it an essential prerequisite for him to effectively carry out his mandate of assessing the situation of torture worldwide, through country visits, and formulating relevant recommendations to eradicate torture and ill-treatment.

## **IV. Thematic issues**

### **A. Victim-centred approach to torture**

47. The Special Rapporteur notes, with deep regret, the long-term physical and psychological damage that torture inflicts on its victims. Such long-term physical and psychological trauma requires concerted efforts by States, civil society and other actors to address the need for justice and rehabilitation of victims of torture.

48. The Special Rapporteur is encouraged by the efforts of various organizations to ensure appropriate remedies and reparation for victims. He commends the adoption of the “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” by the General Assembly as an important step towards fulfilling minimum standards for victims. However, he remains dissatisfied by the lack of progress in institutionalizing these basic principles and guidelines in most States. He notes that victims have only been awarded formal rights, including at the national level, but that these rights are often modest and peripheral to the justice systems.

49. The Special Rapporteur reiterates that efforts to combat torture require a more victim-centred perspective that seeks an integrated long-term approach to adequate redress and reparation, including compensation and rehabilitation for victims of torture and their families. He recommends that the perspectives of victims of torture be included in the development of programmes and policies aimed at addressing torture. In that respect, the Special Rapporteur reiterates the importance of a victim-centred approach to dealing with victims and survivors of torture. Similarly, he believes that victims have an important role to play as interested parties in holding torturers accountable for their actions. Indeed, the criminal procedures of some States are more hospitable than others to this engagement by victims; nevertheless, without undermining defendants’ rights to all guarantees of a fair trial, victims should be allowed to participate actively in attempts to hold torturers accountable. Efforts to provide assistance to victims must seek to recognize and validate the traumatising experience of torture they have suffered, prevent further isolation by reintegrating them into society, and address the fundamental aim of torture which is, often, to isolate and engender fear in victims in order to break their will.

### **B. Expanding the exclusionary rule**

50. The Special Rapporteur observes that acts of torture and ill-treatment remain a widespread phenomenon in today’s world. In the last decade, State practices and approaches to torture, particularly in view of the ongoing security threats associated with the war on terror, responses to immigration concerns, citizen security and organized crime have tended to weaken or reinterpret the absolute prohibition on torture. While civil society organizations and members of the judiciaries of those countries where such practices have taken place have condemned them, a net effect in some sectors of public opinion has been a tendency to countenance torture as a “necessary evil.” The Special Rapporteur believes it is his duty to confront this debate in all its legal, political, ethical and practical dimensions, and demonstrate that embarking on a path that permits torture and cruel, inhuman or degrading treatment or punishment is not only immoral and illegal, but also counter-

productive to law-enforcement efforts. He hopes, in this context, to join many others who wish to counter this worrying trend towards a severe erosion of some of the gains of the last four decades.

51. Under the rubric of fighting the war on terror, confronting organized crime and insecurity in the streets or maintaining an effective immigration policy, States have, regrettably, attempted to dilute cardinal principles necessary to preventing and suppressing torture and ill-treatment. Of particular concern are attempts to justify restrictions or limitations to the applicability of article 15 of the Convention, citing, as primary arguments, a supposed “necessity to avert serious imminent harm” or the “ticking bomb scenario” or, where the State is not complicit in the torture, that information provided by third parties, even if obtained under torture, is admissible.

52. The Special Rapporteur recalls that international customary law and treaty law require States to “ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”<sup>6</sup> This exclusionary rule is fundamental for upholding the absolute and non-derogable nature of the prohibition of torture by providing a disincentive to use torture. Its essential preventive function is also crucial to fair trial guarantees. The Special Rapporteur calls for strict adherence to the international prohibitions established under international treaties and developed through the Convention, as well as regional and national judicial processes.

53. Attempts to restrict the applicability of the exclusionary rule represent a serious threat to international efforts to eradicate torture. It is of deep concern that States regularly receive and rely on information – either as intelligence or evidence for proceedings – whose sources present a real risk of having been acquired as a result of torture and ill-treatment from third party States. Receiving or relying on information from third parties which may be compromised by the use of torture does not only implicitly validate the use of torture and ill-treatment as an acceptable tool to gain information, but creates a market for information acquired through torture, which in the long term undermines the goal of preventing and eradicating torture.

54. While article 15 of the Convention covers judicial and administrative proceedings, it is silent on the question of the applicability of its provisions to intelligence or other executive decisions not directly arising from judicial or administrative proceedings. This is rendered more troublesome by difficulties in delineating purely “non-formal preventative” action by executive decisions arising from formal administrative proceedings. For instance, a State may rely on information provided by a third party, and which may have been obtained through torture, to arrest and detain an individual for the purpose of investigating his alleged suspicious activities. In such a case, aspects of administrative proceedings such as a deportation order may be used in the process of arresting the suspect. Thus, by virtue of article 15, it is argued that State institutions must take appropriate measures to ascertain whether or not the information on which a decision is based has been obtained as a result of torture. However, does the fact that the information was obtained through torture prevent the State from arresting the individual in the first place? Can it be used as intelligence or as the subject of an executive decision? Are diplomatic assurances relating to the origins of the information provided by third parties sufficient? We should be mindful of the real possibility that a policy of using such information for purposes other than trials, could provide an incentive to State agents to forego prosecutions altogether, and instead engage in

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<sup>6</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 15.

disappearances, extra-judicial executions, and other illegal repressive measures that could lead to a total breakdown in the rule of law. These and other equally important questions relating to the applicability of the exclusionary rule to executive decisions and intelligence gathering merit further consideration in future reports of this mandate.

55. In his report<sup>7</sup> to the 13th session of the Human Rights Council, the Special Rapporteur on the promotion and protection of human rights while countering terrorism takes the view that “reliance on information from torture in another country, even if the information is obtained only for operational purposes, inevitably implies the “recognition of lawfulness” of such practices and therefore triggers the application of principles of State responsibility. Hence, States that receive information obtained through torture or inhuman and degrading treatment are complicit in the commission of internationally wrongful acts. Such involvement is also irreconcilable with the obligation *erga omnes* of States to cooperate in the eradication of torture.” The Special Rapporteur shares this view and believes that this is a good starting point for future deliberation on the subject.

56. In the considered opinion of the Special Rapporteur, in order for the “exclusionary rule” to work as a preventative measure and create a disincentive for would-be abusers to deploy ill-treatment as a tool for extracting confessions or corroborating information, its applicability must be extended to cover intelligence and executive decisions. In other words, it can only remain effective if it is applicable to all and any information which may form the basis of a judicial or administrative process or decisions by the executive and its agencies. The Special Rapporteur intends to ensure enhanced respect for, and adherence to, the principle set out in article 15 of the Convention one of the central themes for his engagement with States and other actors during his tenure. Questions relating to the applicability of the exclusionary rule to executive decisions and intelligence gathering will be the subject of further consideration in future reports of the mandate.

57. The Special Rapporteur also intends to explore the possibility of a teleological interpretation of the exclusionary rule contained in article 15 of the Convention, as he believes that this norm is both a fundamental due process standard as well as a tool to discourage investigators and security agents from practicing torture and ill-treatment. In this regard, it would be important to consider whether the exclusion of evidence should be extended not only to confessions and statements obtained under torture, but also to all other pieces of evidence obtained through legal means but whose leads originate in an act of torture. In some jurisdictions, this approach has been called the “fruit of the poisonous tree” doctrine. While acknowledging that the international standard does not go so far, the Special Rapporteur would certainly recommend that States, as a matter of their own internal practices, voluntarily adopt a similar rule in their domestic criminal procedures.

### **C. Forensic science and torture**

58. The Special Rapporteur reiterates his conviction that torture and ill-treatment are and always will be ineffective means or tools for intelligence or information gathering and law enforcement. Confessions and statements obtained under torture are inherently unreliable, and often disorient and disperse the efforts of law enforcement and investigations personnel. It is therefore crucial to recognize that alternatives to brutality are available and, indeed, effective in addressing the needs of States in fighting crime in all its forms. The Special Rapporteur feels that it is important to counter the attitude that is prevalent in many

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<sup>7</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/10/3), February 4, 2009, paragraph 55.

States and societies that the use of torture and ill-treatment is practically inevitable. In this connection, advances in forensic and other sciences present a more promising answer to these questions than so called “enhanced interrogation techniques” or torture and cruel, inhuman or degrading treatment or punishment.

59. The mandate holder believes that his role as Special Rapporteur does not only give him an opportunity to assess the situation with regard to torture, but also to provide credible and human rights-friendly forensic and other scientific alternatives which have been proven to achieve better results than the use of torture. During his tenure, the Special Rapporteur intends to identify and further develop the linkages between forensic and other sciences, not only with a view to eradicating torture and providing corroborating evidence of torture, but also to offer States credible forensic and other scientific alternatives to employ in law enforcement, counter-terrorism and effective criminal prosecution.

#### **D. Non-refoulement and diplomatic assurances**

60. Council resolution 13/19 urges States “not to expel, return (*refouler*), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture, and stresses the importance of effective legal and procedural safeguards in this regard”.<sup>8</sup>

61. Non-refoulement, as an important principle of international treaty law and international customary law, is provided for in international and regional human rights mechanisms,<sup>9</sup> and the jurisprudence of international and regional human rights bodies, such as the Human Rights Committee and the European Court of Human Rights.

62. The Special Rapporteur observes that the principle of non-refoulement has been at the core of discussions both in light of immigration laws, and in the context of countering terrorism. The Special Rapporteur recognizes that diplomatic assurances do not release States from their non-refoulement obligations nor are they necessarily the best way to prevent torture and refoulement. Indeed, diplomatic assurance has been proven to be unreliable, and cannot be considered an effective safeguard against torture and ill-treatment, particularly in States where there are reasonable grounds to believe that a person would face the danger of being subjected to torture or ill-treatment.

63. Like his predecessor, the Special Rapporteur regards the practice of diplomatic assurances “as an attempt to circumvent the absolute prohibition of torture and non-refoulement”.<sup>10</sup>

#### **E. Pretrial detention**

64. The Special Rapporteur emphasizes the importance of monitoring places of pretrial detention and developing effective measures to prevent the perpetration of torture and other cruel, inhuman or degrading treatment or punishment, including in police custody and pretrial detention centres. Like his predecessors, the Special Rapporteur is of the opinion that legally arrested persons should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pretrial detention which, in any case, should not exceed 48 hours. He further

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<sup>8</sup> A/HRC/RES/13/19, paragraph 8.

<sup>9</sup> See CAT, article 3; Refugee Convention, article 33; ICCPR, article 7; ECHR, article 3.

<sup>10</sup> See E/CN.4/2006/6, paragraph 32; A/HRC/10/44/Add.2, paragraph 68.

notes that pretrial detention is often carried out for the purpose of extracting a confession under torture. Experience shows that most acts of torture, and certainly the most cruel and egregious, happen in the first few hours or days after a person's arrest, and while he/she is technically under preventive detention. In this respect, he recalls article 15 of the Convention, and like his predecessors, recommends that no statement of confession made by a person deprived of liberty, other than that made before a court, should be admissible or be afforded probative value in any judicial proceeding.

65. In order to identify structural methods of assisting States in developing, adopting and fulfilling the above-mentioned obligations, the Special Rapporteur will encourage Governments to reinforce their legislative norms through protocols, instruments and methodological guides targeted at ensuring effective guarantees for persons deprived of their liberty. These measures include effective realization of the right of detainees in custody to challenge the lawfulness of their detention before an independent court (e.g., the right to habeas corpus). Further, States should promote and apply non-custodial measures such as bail and probation, respect medical inspection upon admission and compulsory medical inspection during transfer, and introduce video and audio recordings of proceedings in interrogation rooms. There must be formal procedures by which a detainee is informed of his/her rights, including the right to remain silent and to consult a lawyer, as well as effective sanctions for failure to respect these rights. The Special Rapporteur recognizes the importance of continuing dialogue with States with a view to strengthening legislative mechanisms aimed at preventing torture and ill-treatment in pretrial detention. He notes that various mandate holders have expressed concerns about pretrial detention, and undertakes to hold further discussions with them in order to identify and promote best practices on measures to prevent, punish and eradicate torture and other ill-treatment in pretrial detention. This will also be done by using fact-finding country visits and information provided by reliable sources to identify challenges and illustrate good practices.

## **F. Conditions in detention**

66. In previous reports<sup>11</sup>, conditions of detention have been documented extensively based on information received from various sources, in particular, factual observations made as a result of fact-finding missions. The Special Rapporteur is deeply concerned by the large number of places of detention that do not meet minimum international standards. He plans to engage with States that permit such conditions as well as with those that lack the ability or resources to institute minimum standards. He will seek to address the systematic deprivation of the most basic human rights standards relating to conditions of detention, including those related to food, water, clothing, health care and minimum space, as well as hygiene, privacy and security necessary for a humane and dignified existence, as conditions that in and of themselves can constitute cruel, inhuman or degrading treatment.

## **G. Torture in secret detention**

67. The Special Rapporteur recalls General Assembly resolution 60/148, and Council resolution 8/8, both stating that prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment, and could in themselves constitute a form of such treatment.

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<sup>11</sup> A/HRC/13/39/Add.5

68. The Special Rapporteur considers the issues of torture and ill-treatment of victims in secret detention as a key concern that falls squarely within his mandate. He intends to follow up on any new and credible allegations concerning the ongoing use of places of secret detention by States or their complicity regarding their existence. Eradicating such practices is central to the prevention of torture and the Special Rapporteur believes that engagement in this issue cannot be seen as an unwarranted expansion of the definition of torture set forth in article 1 of the Convention or of the treaty's establishment of responsibility for its occurrence.

69. The Special Rapporteur believes that frequent and unannounced visits, including timely and unlimited internal monitoring by independent mechanisms in all places of deprivation of liberty, are crucial for the prevention of torture. The Special Rapporteur further recalls the recommendations made by the experts of the joint study on global practices in relation to secret detention in the context of countering terrorism to, inter alia, fully respecting safeguards for persons deprived of their liberty and providing victims with judicial remedies and adequate, effective and prompt reparation.

## **H. Issues for longer-term consideration**

70. The Special Rapporteur recognizes that the question as to whether the death penalty, as well as some health and drug policies, prolonged solitary confinement, some treatments for mental disability, and domestic violence constitute *per se* cruel, inhuman or degrading treatment or punishment has given rise to much debate and discussion in the Human Rights Council. He recognizes the sensitive nature of these issues and believes that the international community as a whole would greatly benefit from a dispassionate and rational discussion of the issues. The Special Rapporteur will look more deeply into these issues and also suggests that they be the subject of further research by the Human Rights Council and its mechanisms.

## **V. Conclusions and recommendations**

71. **The Special Rapporteur thanks the Human Rights Council for the confidence bestowed upon him by appointing him Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. He looks forward to constructive and open dialogue with the Council with the aim of furthering the universally shared interest in eradicating torture and ill-treatment worldwide. He calls for a redoubling of efforts by the mandate of Special Rapporteur, States, civil society and treaty bodies to achieve this goal. It is the view of the Special Rapporteur that it will also require, at times, some difficult and hard choices. Similarly, the implementation of his mandate will, inevitably, raise differences of opinion with regard to the substance, interpretation and approach, all of which may cause some discomfort for some States; however, the brutal nature of torture requires that all parties work quickly and constructively to address these mutual concerns. The Special Rapporteur intends to point out challenges fairly and objectively, and to acknowledge progress where it exists while working diligently with stakeholders to achieve a world without torture. He urges States to approach this difficult issue in a spirit of openness and good faith as he himself will do.**

72. **In view of this, the Special Rapporteur reiterates that the basic good faith measure that States can undertake to show their commitment to addressing torture remains the ratification, without reservation, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol (the "Protocol"). The Convention and its Protocol are**

important first steps towards eradicating this serious international crime. This notwithstanding, ratification is not a substitute for States to take effective measures as necessary to prevent and suppress torture and ill-treatment.

73. The Special Rapporteur recalls conclusions and recommendations made by previous mandate holders in their reports<sup>12</sup> to the Human Rights Council and to the General Assembly, in particular those related to preventing torture, combating impunity for torture, providing victims of torture with an effective remedy and adequate reparation, as well as conditions of detention. He believes that they are integral to the global efforts to prevent and suppress torture and ill-treatment.

74. The Special Rapporteur urges States to ratify the Protocol and promptly designate or establish a truly independent and effective National Preventive Mechanism (NPM) in accordance with the Protocol. He also urges enhanced cooperation with relevant treaty body mechanisms, including the Committee against Torture, the Subcommittee on Prevention of Torture and the Human Rights Committee.

75. The Special Rapporteur recognizes the work of the United Nations Voluntary Fund for Victims of Torture and the various non-governmental organisations working for the rehabilitation of victims of torture. He recalls the obligation of States to ensure the right of torture victims to obtain reparation, including redress, fair and adequate compensation and the means for as full rehabilitation as possible.<sup>13</sup> In this regard, he calls upon Governments to make voluntary contributions to the Voluntary Fund for Victims of Torture so as to enable it to continue providing organizations with funds for psychological, medical, social, legal and economic assistance. He also entreats States to support the work of the organizations through financial and other means, as well as create an enabling environment for the organisations to provide redress and rehabilitation for torture victims.

76. The Special Rapporteur reiterates the importance of the “exclusionary rule” in preventing and suppressing torture, and recalls the obligations of States to ensure that any statement established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. To this end, he recommends strict adherence to this most fundamental of rules. He stresses that the exclusionary rule should not only apply to judicial and administrative proceedings, but also interpreted to include intelligence and decisions by the executive and its agencies.

77. The Special Rapporteur recognizes the important role that forensic and other sciences play in eradicating the use of torture. To this effect, he calls for a concerted effort to further improve forensic and other scientific tools and mechanisms used in law enforcement, counter-terrorism and effective criminal prosecution in order to ensure that torture is not practiced. He acknowledges that there is need for further capacity building and technology transfer to those States that do not possess adequate capacities or technologies. He urges States to continue working with the relevant international organisations to ensure such capacity building and technology transfers.

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<sup>12</sup> For more information on conclusions and recommendations made by previous mandate holders, see reports at [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=103](http://ap.ohchr.org/documents/dpage_e.aspx?m=103).

<sup>13</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 14.