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تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

تقرير المقرر الخاص المعني بتعزيز وحماية حقوق الإنسان والحريات الأساسية في سياق مكافحة الإرهاب، السيد مارتين شاينين

إضافة

البعثة التي قام بها إلى جنوب أفريقيا*

* يُعمـــم موجز تقرير هذه البعثة بجميع اللغات الرسمية. أما التقرير نفسه فيرد في مرفق هذا الموجز فيُعمم باللغة التي قدم بها فقط.

موجز

قـــام المقرر الخاص المعني بتعزيز وحماية حقوق الإنسان والحريات الأساسية في سياق مكافحة الإرهاب بـــزيارة إلى جنوب أفريقيا في الفترة من ١٦ إلى ٢٦ أبريل/نيسان ٢٠٠٧ بناءً على دعوة من حكومتها. وكان الغرضـــان الرئيســـيان من هذه الزيارة هما جمع معلومات بصورة مباشرة عن المبادرات المتخذة في مجال مكافحة الإرهـــاب وعـــن مدى تأثير هذه التدابير على حقوق الإنسان، والشروع في عملية تعاون مع الحكومة. والمقرر الخاص ممتن للغاية لحكومة جنوب أفريقيا على تعاونها معه.

ويسلم المقرر الخاص بما حققته جنوب أفريقيا من إنجازات ملحوظة خلال السنوات الخمس عشرة الماضية وذلك بـــتأســـيس مجـــتمع قائم على الديمقراطية والتعددية ووضع دستور قوي قائم على الاحترام التام لحقوق الإنسان. وهذا يشمل وضع نظام قضائي متين، وإنشاء جهاز شرطة في جنوب أفريقيا يشمل الجميع، وبذل جهود قوية لتحسين الوضع الاجتماعي والاقتصادي لقطاعات واسعة من السكان المحرومين في السابق من الحقوق المدنية.

وفي مجـــال مكافحـــة الإرهـــاب، فإن جنوب أفريقيا لم تشهد وقوع أعمال إرهابية في الفترة التي تلت الهجمـــات الإرهابـــية التي وقعت في شهر سبتمبر/أيلول ٢٠٠١. وأما الحكومة فملتزمة بالتدابير العالمية لمكافحة الإرهاب وستظل متيقظة.

ويسعى المقرر الخاص في هذا التقرير إلى تسليط الأضواء على القضايا المركزية للنهوض بحقوق الإنسان وحمايتها في سياق مكافحة الإرهاب وإلى الإشارة إلى مجالات الاهتمام والانشغال الخاصة في معرض استنتاجاته وتوصياته.

وقد اعتمد البلد تشريعاً جديداً لمكافحة الإرهاب (قانون حماية الديمقراطية الدستورية لمكافحة الإرهاب والأنشطة ذات الصلة لسنة ٢٠٠٤) على أساس مشاورات موسعة. ويثني المقرر الخاص على جنوب أفريقيا بشأن هذه العملية وما تبذلـــه من جهود لضمان تطبيق حماية حقوق الإنسان والضمانات الواردة عادة في الإجراءات الجنائية خلال التحقيق في الجرائم المتعلقة بالإرهاب ومقاضاتها. ويشير إلى أن تعريف الأعمال الإرهابية في القانون يضع، إذا ما أخذ جملة واحدة، عدة عتبات صارمة لكي يشكل الفعل إرهاباً بالمعنى الوارد به في القانون. وهناك مـــع ذلـــك عناصر في هذا التعريف قد تحمل على الاعتقاد بأنه حتى الأفعال الأقل صرامة يمكن أن تصل إلى حد الإرهاب. ويوصي المقرر الحكومة بمراقبة تطبيق القانون الجديد عن كثب والاستعداد لتعديله إذا كان في تأويله ما يوحي بتهديد لحقوق الإنسان.

وقـــد تناول قانون جنوب أفريقيا لمكافحة الإرهاب كذلك مسألة نظام العقوبات بناء على قرار مجلس الأمـــن ١٢٦٧(١٩٩٩). ومن المقرر نشر أسماء الأفراد والكيانات الواردة في قائمة مجلس الأمن بمقتضى الإعلان الرئاسي في الجريدة الرسمية وستبلغ هذه القائمة إلى البرلمان. ولئن كان تحديد الإجراءات بشكل مفصل في القانون يمثل خطوة إيجابية في نظر المقرر الخاص فإنه يرى ضرورة توضيح الآثار العملية لهذا الإجراء، ومن بينها إمكانية القيام بمراجعة قضائية.

وقـــد وجـــد المقرر الخاص أن التحقيقات والملاحقات القضائية والمحاكمات الجنائية عادة ما تقع ضمن الأحكـــام العادية للإجراءات الجنائية في جنوب أفريقيا. ويثني على جنوب أفريقيا لمحافظتها على هذا الموقف وحذرها من اللجوء إلى استعمال إجراءات خاصة أثناء المحاكمات المتعلقة بالإرهاب أو الأمن مثل المحاكمات السرية.

وقـــد نمت الجالية المهاجرة في جنوب أفريقيا بشكل ملحوظ خلال فترة تطبيق الديمقراطية في البلد وهي تعـــد، مـــن جهة، مصدراً هاماً للعمالة ولكنها تعد أيضاً، من جهة أخرى، مشكلة ولربما مصدر تهديد للأمن. وتوجد في البلد مشاعر كراهية تجاه الأجانب وبالرغم من الحماية القوية التي يمنحها الدستور عموماً لكل المقيمين في جنوب أفريقيا، فقد تلقى المقرر الخاص من السلطات ردوداً مختلفة ومتشككة بشأن حقوق المهاجرين في البلد. وعـــلى وجـــه الخصوص، فإن القلق يساوره بشأن مجالين مرتبطين بحقوق الإنسان للمهاجرين في سياق مكافحة الإرهاب وهما: احتجاز المهاجرين وتطبيق مبدأ عدم الإبعاد القسري.

ففـــي حين أن قانون مكافحة الإرهاب في جنوب أفريقيا لا يجيز الاحتجاز الإداري، ينص قانون الهجرة على إمكانية الاحتجاز لمدة ٣٠ يوماً دون مراجعة قضائية إلزامية. وفي حالات الاحتجاز المرتبطة بشواغل أمنية أو للاشـــتباه في وجود روابط بالإرهاب، ينفذ الاحتجاز عادة في مراكز الشرطة العادية التي تفتقد إلى المراقبة وإلى إمكانية الاتصال بالمستشار القانوني. ويوصي المقرر الخاص بوضع نظام شامل لمراقبة احتجاز المهاجرين وبالتشريع الذي يقضي بالمراجعة القضائية الإلزامية في غضون ٤٨ ساعة والحق في مستشار قانوني منذ لحظة الاعتقال.

وقد ورد مبدأ عدم الإبعاد القسري الذي يمنع التسليم أو النفي أو أي شكل آخر من أشكال نقل شخص إلى بلد قد يتعرض فيه للتعذيب أو المعاملة أو العقوبة القاسية أو اللاإنسانية أو المهينة، صراحة في سوابق قضائية مهمـــة صـــدرت عـــن المحكمة العليا في جنوب أفريقيا: في قضية *الدولة ضد ماكونايان وآخرون* وعن المحكمة الدســـتورية في قضية *محمد*. ومع ذلك، فقد وجد المقرر الخاص خلال البعثة التي قام بها، أن محتوى مبدأ القانون العرفي هذا وطابعه الإلزامي أيضاً ليسا واضحين بالنسبة لكل الموظفين الحكوميين. وحيث إن عمليات الإبعاد تتم عادة في سياق مكافحة الإرهاب، فإن هذه المسألة تعد ملحة بشكل خاص بالنسبة للولاية. ويوصي المقرر الخاص جنوب أفريقيا بتضمين تشريعها صراحة مبدأ عدم الإبعاد القسري.

وتعترف جنوب أفريقيا بالطابع الدولي لتدابير مكافحة الإرهاب ولذلك فهي تدعم بنشاط أيضاً الجهود الإقليمـــية ودون الإقليمـــية المبذولة في هذا الصدد. ويشجع المقرر الخاص جنوب أفريقيا على دعم هذا التعاون ولا سيما على ضمان إدراج النهوض بحقوق الإنسان وحمايتها في كل الجهود المبذولة لمكافحة الإرهاب سواء كان ذلك في القارة الإفريقية بشكل عام أو في سياق الجنوب الأفريقي.

Annex

REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM ON HIS VISIT TO SOUTH AFRICA (16-26 APRIL 2007)

CONTENTS

Introduction

1. Pursuant to his mandate, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism visited South Africa from 16 to 26 April 2007 at the invitation of the Government.[1]

2. After the repression of apartheid, South Africa, in the early 1990s, made its transition from apartheid into a full-fledged parliamentary democracy, marked particularly by the adoption of the Constitution in 1995. The transition process was in many ways exceptional through its non-violent and inclusive approach. The strong constitutional foundation on which South Africa rests today is evident and enjoys broad support within society. South Africa has also taken upon itself the responsibility of a leadership role on both the African continent and internationally, which includes holding a seat on the Security Council until the end of 2008.

3. In the context of global measures to counter terrorism, South Africa has expressed its commitment. Measures to counter terrorism, in the context of South Africa's particular history, exist against a background of extremely harsh anti-terrorism legislation of the apartheid era, which was used as a vehicle of gross and widespread violations of human rights. In the period following the September 2001 terrorist attacks in the United States, South Africa has not been a significant target of terrorist attacks. In the late 1990s, the Western Cape was plagued by attacks by PAGAD (People Against Gangsterism and Drugs), a Muslim-based organization with no apparent ties to international terrorism. In the early 2000s, the extreme right-wing group Boeremag carried out some violent attacks. The Government of South Africa does not today see terrorism as a major threat, but remains vigilant. The country adopted counter-terrorism legislation, the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (POCDATARA), after lengthy consultations.

4. The mission to South Africa was the Special Rapporteur's second country visit after he accepted his appointment as mandate-holder on 8 August 2005. Its main purpose was to gather first-hand information about past, current and future initiatives in the area of counter-terrorism in South Africa and how such measures affect the protection and promotion of human rights. The Special Rapporteur is very grateful to the Government of South Africa for its invitation and its assistance in facilitating the mission. He hopes that the recommendations will be useful for all those within the Government, the Parliament, the judiciary and civil society who strive to promote and protect human rights while countering terrorism.

5. During his visit, the Special Rapporteur visited Pretoria, Johannesburg, Midrand and Cape Town. In Pretoria, he had high-level meetings with Ministers or officials in the following government bodies: the Ministry for Foreign Affairs, the Ministry of National Intelligence, the Ministry of Defence, the Ministry of Justice, including the National Prosecuting Agency and the South African Law Reform Commission, the Ministry of Safety and Security as well as the South African Police Service (SAPS) and the SAPS College, and the Ministry of Home Affairs. In relation to an ongoing major trial, he also visited the C-Max Prison, privately interviewed detainees and briefly attended the trial in the Pretoria High Court. He also met with the South African Human Rights Commission. In Johannesburg, he met with a current justice and a retired Chief Justice of the Constitutional Court and several non-governmental organizations, including the Freedom of Expression Institute, the Wits Law Clinic, the National Coalition on Refugee Affairs, and the Southern Africa Migration Project (SAMP). In Midrand, he had a joint

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[1] The Special Rapporteur conducted his mission assisted by the Office of the United Nations High Commissioner for Human Rights and Ms. Kristina Stenman of the Institute for Human Rights at Åbo Akademi University. A draft mission report was sent to the Government on 28 June 2007.

meeting with parliamentarians in the Security Cluster of Parliament's portfolio committees. In Cape Town, he met with civil society representatives. During the visit, he also had discussions with numerous legal practitioners and academics, and gave two public lectures organized, respectively, by the Centre for Human Rights at the University of Pretoria and the Institute for Security Studies. He also had consultations with the local office of the Office of the United Nations High Commissioner for Refugees (UNHCR). The Special Rapporteur was not able to complete the full agenda envisaged due to Parliament and many of the courts being in recess. He also regrets that requests made during the mission to visit, in particular, police detention facilities were not met. In light of the Terms of Reference for Fact-Finding Missions by Special Rapporteurs, such visit requests ought to be accommodated by the host Government,[2] and they would have contributed in an important way to a greater insight into South Africa's counter-terrorism measures.

I. MAIN FINDINGS

A. General political and legal background

6. South Africa evolved from an apartheid system into a democracy in 1994, in a transition which in many ways remains unparalleled in its level of ambition and commitment by all actors in society and the international community. The new South African Constitution was adopted in 1996, hailed for its inclusiveness and reflection of international human rights standards. South Africa is party to most international human rights instruments, but has not yet acceded to the International Covenant on Economic, Social and Cultural Rights.[3]

7. Today, South Africa is a multi-ethnic, multilingual and multi-religious society. The total population in 2006 was approximately 45 million. According to the 2001 census, the population of South Africa was constituted as follows: Black African, 79 per cent; White, 9.6 per cent; Coloured, 8.9 per cent; and Indian/Asian, 2.5 per cent.

8. The distribution of religions, according to the 2001 census, is: Zion Christian 11.1 per cent, Pentecostal/Charismatic 8.2 per cent, Catholic 7.1 per cent, Methodist 6.8 per cent, Dutch Reformed 6.7 per cent, Anglican 3.8 per cent, other Christian 36 per cent, Muslim 1.5 per cent, other 2.3 per cent, unspecified 1.4 per cent and none 15.1 per cent.

9. The South African Parliament is bicameral, with the National Assembly and the National Council of Provinces. The National Assembly is to have 350 to 500 Members, elected every five years, and currently has 400 Members. The National Council of Provinces has 10 members from each of the 9 provinces.[4] Elections are held every five years. The last parliamentary elections were held in 2004, and gave yet another overwhelming victory to the African National Congress (ANC), which took 69.7 per cent of the votes, and holds 279 seats in the National Assembly, followed by the Democratic Alliance (50 seats), the Inkatha Freedom Party (IFP, 28 seats), the United Democratic Movement (UDM, 9 seats), the New National Party (NNP, 7 seats), and the African Christian Democratic Party (ACDP, 6 seats); 21 seats are held by smaller groups. Thabo

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[2] Terms of Reference for Fact-Finding Missions by Special Rapporteurs/Representatives of the Commission on Human Rights (E/CN.4/1998/45, appendix V).

[3] South Africa has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

[4] See www.parliament.gov.za/.

Mbeki has been President since 1999. The President is elected by the National Assembly, and appoints the Cabinet.

10. Since its democratization in 1994, South Africa's political focus has centred on the eradication of the extreme poverty and disenfranchisement of the vast majority of the population, which was the legacy of apartheid. Although progress has been made, the white minority population still retains considerable concentrations of power in business and many areas of public life.

11. A key area of focus in the field of justice and law enforcement has largely been crime, organized crime and corruption. South Africa has, and continues to struggle with an extremely high crime rate, and therefore, much effort has been put both into strengthening law enforcement, but also into social reform to combat poverty. However, there is ongoing criticism against the measures taken. Also, trust in the system of law enforcement is undermined by allegations of corruption and police brutality.[5]

12. The high prevalence of HIV/AIDS also has socio-economic repercussions, and life expectancy in South Africa today is low, at 42.73 years, despite the relative affluence of the country.[6]

13. Democratic South Africa has also become a major host country for immigrants. South Africa maintains, and has in recent years tried to strengthen, an immigration policy which furthers immigration of skilled labour. At the same time, some of the Special Rapporteur's interlocutors estimated there were up to 2 million undocumented migrants in the country. South Africa was one of the first countries on the African continent to set up an individual asylum procedure, with the number of applications rising to 53,361 in 2006.[7]

14. Despite the high rate of crime, terrorism has not been seen as a major problem in South Africa. Two main organizations have emerged in the last 10 years which have carried out politically motivated acts of violence against members of the general population: the Islamic-based PAGAD, and the right-extremist group Boeremag.

15. PAGAD was set up in 1996. A rise in crime, the police's inability to tackle this trend and frustration within the Muslim communities, particularly in the Western Cape, has been seen as the motivation for its establishment. PAGAD's G-Force (Gun Force) was considered responsible for committing terrorist acts. Organizations such as MAGO (Muslims Against Global Oppression) and MAIL (Muslims Against Illegitimate Leaders) were apparently also offshoots or fronts for PAGAD. During 1996-2000, PAGAD carried out a large number of violent attacks, first mainly against drug dealers, then academics and State structures; later, restaurants and public places were targeted. From 1998 onward, PAGAD is described as having become more violent and

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[5] See e.g. the concluding observations of the Committee Against Torture (CAT/C/ZAF/CO/1) of 7 December 2006.

[6] Estimate in 2006, CIA World Factbook.

[7] UNHCR, "Flow of asylum seekers to South Africa grows in 2006", 2 February 2007 (see www.unhcr.org).

indiscriminate.[8] Altogether, 189 bomb attacks were carried out either by PAGAD or related factions of this group.[9]

16. During 2001 and 2002, the authorities started to uncover a series of planned bombings and violent attacks, traced to a new far-right, white-power group called Boeremag. It also managed to carry out eight bomb blasts in Soweto, killing two persons, and the bombing of a bridge on the border of the Eastern Cape and KwaZulu-Natal. The National Intelligence Agency (NIA) and the South African Police Service during that time managed to uncover several planned attacks. Some 20 suspected Boeremag members are currently on trial.[10] Two suspects escaped from police custody in May 2006. They were caught in January 2007. The court case against the Boeremag members resumed in February 2007 and the Special Rapporteur was able to monitor one session. Separate charges under the new anti-terror act will likely be brought against a couple who aided the two fugitives.[11]

17. In recent years, there has been discussion about the possibility of recruitment to international terrorist organizations in South Africa. There is also the possibility that international terrorist organizations may be using South Africa, due to its well developed infrastructure and banking system, its porous borders and alleged corruption in the civil service, as a basis for recruitment operations. It is therefore natural that South Africa supports regional and subregional efforts on the African continent to counter terrorism and encourage coordination in the field of law enforcement and judicial cooperation, both within the context of the African Union (AU) and the Southern African Development Conference (SADC).

B. Priority issues

1. The definition of terrorism and related issues

The Protection of Constitutional Democracy against Terrorist and Related Activities Act

18. The definition of terrorist acts is one of the central issues in the Special Rapporteur's mandate. The lack of a universal, comprehensive and precise definition partly explains why States have adopted varying legislation, often in a piecemeal manner, copying other countries' counter-terrorism laws. This situation may lead to vague definitions and flawed procedures that do not meet the requirements of legality and judicial guarantees set out, particularly, in the International Covenant on Civil and Political Rights. Broad definitions of terrorism may also lead to violations of human rights such as the freedom of expression and freedom of association. It is in this international context that the Special Rapporteur also assesses the counter-terrorism legislation of South Africa.

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[8] Anneli Botha, "PAGAD: A case study of radical Islam in South Africa", *Terrorism Monitor*, III (15), 28 July 2005, p. 9.

[9] Abdelk'erim Ousman, "The potential of Islamic terrorism in sub-Saharan Africa", *International Journal of Politics, Culture and Society*, vol. 18, No. 1, Fall 2004, p. 83.

[10] Martin Schönteich and Henri Boshoff, "Rise of the Boeremag: a case study. 'Volk', faith and Fatherland: The security threat posed by the White Right",
http://www.iss.co.za/Pubs/ Monographs/No81/Chap4.html.

[11] "Boeremag fugitives back in C-Max", *Mail and Guardian*, 20 January 2007
(http://www.mg.co.za/articlePage.aspx?articleid=296327&area=/breaking_news/breaking_news__national/).

19. The main piece of legislation, POCDATARA, was passed in Parliament in 2004, and entered into force following presidential signature in 2005.[12]

20. The law is the result of a lengthy process, which began in 1995 after the democratic transition in the country, with a call by the Minister of Safety and Security for a review of security legislation. The Internal Security Act of the time had an outdated definition of terrorism, focused only on acts committed in and against South Africa. Internal violence during the 1990s further heightened the perceived need for new legislation. A first draft proposal was submitted by the South African Law Reform Commission in 2000. The Government presented a bill to Parliament in November 2002. The bill was then subject to comments and criticism from numerous civil-society actors, including the Congress of South African Labour Unions (COSATU), who feared that the law might criminalize labour actions and social movements. The bill was then subject to broad consultations in Parliament and extensive redrafting in the Committee on Justice, headed by the Chair of the Committee, the present Deputy Minister of Justice, Johnny de Lange.

21. The 2005 counter-terrorism law now provides the overall legal framework for counter-terrorism in South Africa. The Ministry of Safety and Security has the main responsibility for its implementation.

22. To date, no jurisprudence is available regarding the implementation of the new terrorism law. However, there is a pending prosecution, related to an associated crime in the so-called Boeremag trial that is scheduled to commence in coming months pursuant to the new law.

23. Article 1 of POCDATARA contains the relevant definitions in relation to the law. Section 1, subsection 1 (xxv) (a) to (c), contains a three-pronged definition of terrorism. Subsection (a) defines terrorist activity through a fairly long list of crimes. Subsection (b) then defines terrorist intent, and subsection (c) the requirement of a political or analogous aim. Subsections (a) to (c) are to be read as a cumulative definition, so that an act constitutes terrorism only if all three conditions are met. Consequently, the application of the clause as a whole must meet several evidentiary thresholds, including those related to intent and aim. In the assessment of the Special Rapporteur the clause, if properly applied, is not likely to have an overly broad scope.

24. However, subsection (a) of the clause, read in isolation, enumerates a broad scope of acts which by their level of harm cannot justifiably be seen as terrorist acts. On the face of it, article 1, section 1, subsection 1 (xxv) (a) of the definition of terrorist activity appears overly broad, covering several offences that do not necessarily include deadly or otherwise serious violence against members of the general population or segments of it. While subsections (b) and (c) mitigate this concern, subsection (a) nonetheless conveys to domestic and international readers a view of a broad scope of acts potentially amounting to terrorism. Many of the Special Rapporteur's interlocutors from the Government of South Africa underlined the cumulative nature of the definition. Yet, several civil society actors voiced concern about the broad scope of the definition, and the possibility that the law might be used for instance against social movements working for the improvement of social and economic rights of the population.

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[12] Act No. 33 of 2004.

25. Article 12 of the law sets out a reporting duty for the public in respect of all crimes under the Act. This raises issues related to the freedom of expression generally and, in particular, journalists' ability to protect their sources. Concern about this feature of the law was expressed to the Special Rapporteur, while the article was also seen as protection and encouragement for the population to contact the law enforcement agencies when possessing knowledge of suspicious action.

Law enforcement and criminal proceedings in terrorism cases

26. In terms of procedures related to the investigation and prosecution of terrorist acts, the Act went through some important changes in the parliamentary debate and decision-making process. In particular, the Act contains only very few additional powers for law enforcement agencies and prosecution in the case of suspected terrorist crimes. The Act does not, for instance, provide for administrative detention, as did the first drafts of the law.

27. In the investigation of terrorist crimes, the authorities clearly stated to the Special Rapporteur that profiling or data-mining on the basis of racial/ethnic/religious characteristics are neither a part of the collection of intelligence nor used in investigations. Profiling on the basis of personal behaviour is seen as both more efficient and more compatible with South African legislation and the Constitution.

28. In counter-terrorism investigations, the South African Police Service has a key role in addition to the security services in the country. The Special Rapporteur was encouraged by assurances of SAPS' strict adherence to human rights standards, inter alia, the human rights manual in use by SAPS. He was also familiarized with the training of police in counter-terrorism. His overall impression was that there is a significant human rights component in the training of police officers, albeit some specific issues such as the human rights of undocumented aliens may not be adequately covered. Law enforcement agencies naturally play a crucial role in counter-terrorism, and a consistent record of professional conduct and adherence to human rights standards is a central pillar in their ability to collect intelligence and conduct investigations in relation to terrorist acts.

29. The history of South African law enforcement during the apartheid era is grim, and therefore, it has been an enormous task to create a South African Police Service that has the trust of the community. However, allegations of police brutality persist in South Africa. The establishment of an Independent Complaints Directorate (ICD) is an important step, but transparent information on reports and decisions by ICD are not easily available.

30. The Special Rapporteur visited the C-Max high security prison in Pretoria, where 13 of the 22 accused in the Boeremag trial are being held in detention during trial. He found the physical conditions of the prisoners to be of adequate standard and the limitations placed on them in terms of freedom of movement, visitation rights and communication with counsel to be in conformity with international standards concerning the treatment of accused in remand, including being proportionate in respect of the classification of the detainees as high-security detainees. The Special Rapporteur conducted confidential interviews with a number of the detainees and takes the view that their complaints mainly relate to the consequences of their classification as high-security detainees.

31. The Special Rapporteur also attended a brief hearing in the High Court in Pretoria in the Boeremag trial. He was unable to identify any particular concerns in respect of fair trial protections but notes that the trial has already taken several years and could at some point give rise to concerns of undue delay. If the issue of undue delay is raised at a future stage, an assessment of the complexity of the case and the conduct by the court, the prosecution and the defence in causing possible delays will need to be examined.

32. During the mission, it came to the Special Rapporteur's attention that in a criminal case related to national security, although not under the counter-terrorism law, the prosecution has applied for that the full court proceedings are to be held in camera. This is troublesome, since a public trial is one of the central pillars of a fair trial under article 14 of the International Covenant on Civil and Political Rights (ICCPR), which stipulates that only in some situations it may be justifiable to hold parts of a trial in camera.

Listing of individuals and entities under the Security Council sanctions list

33. The counter-terrorism act POCDATARA also contains provisions related to the listing of individuals on the basis of the Security Council list of individuals and entities being placed under sanctions pursuant to Security Council resolution 1267 (1999), due to their affiliation with Al-Qaeda or the Taleban.

34. According to section 25 of the Act, the listings when completed are to be published by presidential proclamation in the Government Gazette. According to section 26, the lists are then submitted to Parliament, which may take any action that it deems appropriate.

35. At the time of the Special Rapporteur's mission, the listing had gained acuteness as the United States had initiated proceedings in the Security Council for the placing of two South African nationals on the list. South Africa had blocked the listing in the Security Council. Many of the Special Rapporteur's interlocutors voiced their concern over the shortcomings in the Security Council listing procedures, the lack of transparency and of procedures for de-listing. At the same time, however, the interpretations of parliamentary action foreseen in article 26 of POCDATARA varied widely. Some stated that the only course of action possible for Parliament to pursue was to insist that the Government initiate de-listing in the Security Council. Others saw a stronger potential role for Parliament or one of its Committees, including hearing from the persons subject to the Security Council listing or the quashing of an executive decision to implement such listing on the national level.

36. It was clear from discussions both with Government and civil society interlocutors that, owing to their role in the community, of these persons subject to the United Nations listing procedure, the Government has sought an active dialogue with the South African Muslim population concerning the sanctions regime. The same interlocutors also voiced their broader concerns about the possibilities for Muslims to fulfil their religious duty of charity by means of legal and acceptable channels of funding.

2. Immigration policies in the context of counter-terrorism

37. Since its democratization, South Africa has again opened up its international contacts and has also become a country of destination for immigrants, mostly from the African continent, but also from other countries. South Africa entered into an agreement with the Office of the United Nations High Commissioner for Refugees (UNHCR) in 1993 on setting up a national system for the determination of refugee status. Legislation in this area has been renewed, and is currently based on the Immigration Act of 2002 and the Refugees Act of 1998.[13]

38. South Africa has a determined policy of non-discrimination and promotion of equality, enshrined in both its Constitution and legislation. Most rights in the Constitution apply to every person in South Africa, including the right to housing and the right to emergency health care. Despite the clarity of the Constitution, the Special Rapporteur was surprised by statements by

[13] Immigration Act, Act No. 13, 2002; Immigration Amendment Act, Act No. 19, 2004; Refugees Act, Act No. 130, 1998.

persons, even in high-level government positions, to the effect that irregular aliens would not enjoy rights in South Africa. Through discussions with numerous government and non-government interlocutors, it became clear that in South Africa many see the risk of terrorism primarily as coming from foreigners and that among authorities there is a temptation to bypass procedural and substantive human rights standards when dealing with foreigners unlawfully in the country.

39. In the international debate on terrorism, foreigners are often perceived as a threat of terrorism. South African authorities and NGOs generally do not perceive immigrants as a risk for potential terrorist acts. However, there is a persistent and troubling view, in terms of human rights, that irregular migration is rampant and that immigrants may be a source of crime and violence.

40. At the same time, allegations or rumours were frequently raised concerning huge backlogs and corruption in the practices of the Department of Home Affairs. These trends raise concerns both in terms of the rights of foreigners and the risk of South Africa becoming a safe haven for organized crime or terrorist activities.

41. In the context of counter-terrorism, the Special Rapporteur noted particularly two areas of concern: detention of immigrants and the application of the principle of non-refoulement.

Immigration detention

42. Detention of immigrants is possible under article 34 of the Immigration Act of 2002, when it is found that an immigrant is illegally in the country and, hence, deportable. The initial decision is taken by immigration officers, and detention without mandatory judicial review is possible for up to 30 days. A detainee can in principle file a request for habeas corpus review.

43. Important safeguards for detainees are set out in article 35 (2) of the Constitution.[14] Hence, an informed reason for detention, the ability to obtain legal counsel and the opportunity to challenge the lawfulness of detention ought to be available to all detainees. However, it was the Special Rapporteur's clear impression from discussions with numerous interlocutors and from his

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[14] "(2) Everyone who is detained, including every sentenced prisoner, has the right:

(a) To be informed promptly of the reason for being detained;

(b) To choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) To have a legal practitioner assigned to the detained person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) To challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) To conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) To communicate with, and be visited by, that person's:

(i) Spouse or partner;

(ii) Next of kin;

(iii) Chosen religious counsellor; and

(iv) Chosen medical practitioner."

visit to the detention facilities of Johannesburg airport that, in practice, these safeguards are not known or respected. Unfortunately, the authorities were not willing to facilitate ad hoc visits by the Special Rapporteur to police detention facilities, through which he would have wished to interview both detained foreigners and policemen about their awareness of the legal safeguards in place for persons detained pending deportation. These visits were requested during the mission, in part because of changes to the programme which unexpectedly permitted additional time and in part because it transpired in the course of various meetings that the issue required the Special Rapporteur's attention.

44. As stated elsewhere, South Africa does not have provisions for administrative detention in its counter-terrorism law. However, it did come to the attention of the Special Rapporteur that even large-scale arrests of foreigners have taken place on the basis of security-related issues and that the detention was a result of law enforcement officials disregarding immigration rules and regulations. Also, in discussions with legal practitioners and officials, the Special Rapporteur learned that in the case of security-related cases of immigration detention (including persons suspected of links to terrorism), detention would often take place in police stations in and around Johannesburg and Pretoria. This was also the case in the matter of Khalfan Khamis Mohamed, a suspect in the 1998 bombings of the United States of America embassies in Nairobi and Dar-es-Salaam, whose case was dealt with by the Constitutional Court of South Africa in 2000.[15] Taken together with the apparent shortcomings in the application of legal safeguards for persons in immigration detention, this situation gives rise to concern.

The principle of non-refoulement

45. One of the most important human rights protections of foreigners is the principle of non-refoulement. In the international debate on counter-terrorism, this principle has been called into question by many Governments, and has been diluted for instance by the practices of diplomatic assurances and extraordinary renditions. During his mission, thanks to extremely frank discussions with high-ranking government spokespersons, including the Deputy Minister of Justice, it became obvious to the Special Rapporteur that there is a lack of clarity as to the scope and nature of this international legal obligation upon South Africa.

46. The principle of non-refoulement arises out of the prohibition against torture and cruel or degrading treatment or punishment, and is generally founded in article 7 of ICCPR, and more explicitly in the specific provisions of article 3 of CAT, and article 33 of the Convention relating to the Status of Refugees of 1951. The Special Rapporteur underscores the customary law nature of this prohibition, which is therefore unconditionally binding also upon South Africa.

47. Before and during the visit, the case of Khalid Rashid, a Pakistani national who left South Africa on 6 November 2005, allegedly on a chartered airplane and escorted by Pakistani authorities, was brought to the Special Rapporteur's attention. Until April 2007, the whereabouts of Mr. Rashid were unknown. Numerous court submissions have been filed on his behalf, and the case is ongoing. Without assessing the merits of the case, the Special Rapporteur notes that the discussion around it gives rise to concerns related to the distinction between extradition and deportation and the respective provisions to be followed, and the application of the principle of non-refoulement in South African law and practice.

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[15] *Khalfan Khamis Mohamed and Abdurahman Dalvie v. the President of the Republic of South Africa and six others*, Constitutional Court of South Africa, 28 May 2001, CCT 17/01.

48. In the Extradition Act of 1962, as amended by the Amendment Act of 1996, there is in article 11 a list of reasons for refusing extradition. These include, according to paragraph (b) (iv), situations in which "the Minister is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion".

49. However, the principle of non-refoulement is not explicitly included in the Constitution. In the Refugees Act of 1998, the principle is expressed in section 2.[16] The wording of the provision is based upon article 2 (3) of the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa,[17] which reads: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in article I, paragraphs 1 and 2."

50. The placing and wording of this provision appear problematic. First, the wording of the provision appears to limit the scope of the protection of the principle of non-refoulement to persons covered by the refugee definition in the Refugees Act. This is not in congruence with the principle set out by article 7 of ICCPR and article 3 of CAT , which is universal in its application, inclusive of all individuals. Secondly, the provision does not mention the types of ill-treatment which hinder removal, although it may be deduced from the wording related to "persecution" that capital punishment, torture and all forms of ill-treatment would be included. Finally, while the provision is a general one, referring to all types of removal, its being placed in the Refugees Act may contribute to the apparent confusion as to the binding nature of the prohibition in relation to all individuals, be they asylum-seekers or not.

51. Torture or ill-treatment as grounds for refusing extradition are not mentioned in the above provision of the Extradition Act, nor in the Refugees Act. The same is true for the Immigration Act. However, on the basis of the *Mohamed* judgement, it is now established that neither extradition nor deportation can take place where there is a risk of execution of the death penalty. More importantly, the Constitutional Court ruling, read in the light of the earlier case of *S. v. Makwanyane and Another*, indicates that removal under the risk of capital punishment was understood as an application of a broader obligation of non-refoulement in respect of torture or any form of inhuman treatment or punishment.

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[16] "2. General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances. Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measures, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where:

(a) He or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group;

(b) His or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."

[17] Adopted on 10 September 1969.

52. A recent judgement of the High Court of South Africa in an asylum case concerning a Libyan national also makes explicit and unambiguous reference to the principle of non-refoulement in international law as binding upon South Africa, and with reference to section 2 of the Refugees Act.[18]

3. Mercenaries in the context of countering insurgencies or terrorism

53. It is commonly known that persons and companies acting as private military or security contractors or mercenaries have been involved in armed operations carried out in the context of countering insurgencies or terrorism. This is true also in the invasion of Iraq, where South African nationals have also allegedly been involved. The Special Rapporteur was encouraged by the clear stance against such involvement expressed by South African officials.

54. The South African Parliament recently passed an Act on the Basis of the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill.[19] The new Act is to replace the Regulation of Foreign Military Assistance Act,[20] and to render clarity to South Africa's position concerning the participation of its nationals as private security or military contractors in armed conflicts. Under the new provisions, it is required that companies or individuals wanting to render military assistance or security services to any party to an armed conflict obtain permission from the National Conventional Arms Control Committee (NCACC). South Africans are banned from enlisting in foreign armed forces, unless authorized by NCACC. Humanitarian assistance organizations will also need to register with NCACC. Critics of the law have argued that the legislation hinders, for example, South African organizations from rendering humanitarian assistance in armed conflicts.

4. Community relations

55. South Africa has throughout its history been a multi-ethnic, multi-religious society, and has become more so in the period of democracy and the ensuing immigration. In the prevention of terrorism, tolerance and the promotion of good ethnic relations amongst all the population is key in any society. Non-discrimination and inclusiveness are important strands in the South African Constitution, as the Special Rapporteur has noted above. The rise of immigration has, however, also brought in an element of xenophobia against the immigrant community of South Africa. This led to a campaign, Roll Back Xenophobia, as a coordinated operation between the South African Human Rights Commission, the Office of the United Nations High Commissioner for Refugees and the South African NGO community. The campaign was launched in 1998, and has been seen as making some gains.[21]

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[18] *Ibrahim Ali Abubaker Tantoush v. the Refugee Appeal Board and others*, High Court of South Africa (Transvaal Division), Case no: 13182/06, 14 August 2007, particularly paras. 61-65, 134-136.

[19] See Sabelo Gumedze's comment of 11 April at

http://www.issafrica.org/static/templates/tmpl_html.php?node_id=2139&link_id=5.

[20] Act No. 15 of 1998.

[21] UNHCR, Global Report 2001, p. 247.

56. During the mission, the Special Rapporteur raised with the authorities the issue of violence, particularly against Somali immigrants, which occurred in the Western Cape particularly in 2006 and lead to the death of dozens of individuals. The response given was that the violence was not founded on xenophobia, but rather on disputes between owners of small-scale businesses, and based partly upon the Somali community's isolation. However, the authorities drew attention to the Unit for Counter-Xenophobia established within the National Immigration Branch of the Department of Home Affairs.

5. Regional role

57. South Africa has made important contributions to the strengthening of political and economic cooperation and integration on the African continent. The African Union and the New Partnership for Africa's Development (NEPAD) form the basis for cooperation on the whole continent, while the SADC (Southern African Development Conference) is the subregional framework for South African cooperation.

58. SADC established an Organ on Politics, Defense and Security Cooperation through a protocol in 2001. The Strategic Indicative Plan for the Organ on Politics, Defense and Security Cooperation (SIPO) clearly sets out modalities of practical cooperation in the field of counter-terrorism, and also strategies for the protection and promotion of human rights.[22]

59. While not formally a part of SADC, the Southern African countries established in 1994 the Southern African Regional Police Chiefs Cooperation Organization (SARPCCO). While the Special Rapporteur was not able to meet with officials working within the SARPCCO cooperation, it is clear from documentation that the Government of South Africa sees the cooperation within SARPCCO as an important element of its counter-terrorism strategies.[23]

II. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

60. South Africa has undergone a remarkable transition from the apartheid regime to a pluralistic democracy, founded firmly on the 1995 Constitution. South Africa is party to most major international human rights treaties, and has sought to build its society firmly on the foundation of human rights, enshrined in the Bill of Rights in the Constitution. Also in its counter-terrorism policies and legislation, it has sought an overall framework for addressing security concerns related to terrorism without undermining the protections of the Constitution. The Special Rapporteur rests assured that this foundation will help to ensure that counter-terrorism measures will be used properly, and not as previously applied during the apartheid regime, as a vehicle of repression and for the suppression of dissent.

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[22] Southern African Development Conference, Strategic Indicative Plan for the Organ on Politics, Defense and Security Cooperation, 2004.

[23] Report of South Africa to the Security Council Counter-Terrorism Committee (S/2006/281) of 19 May 2006.

61. The Special Rapporteur commends South Africa for the thorough consultative process, including in Parliament, preceding the adoption of the Act on Protecting Constitutional Democracy against Terrorist and Related Activities Act (POCDATARA). In this process, legitimate concerns were taken into account inter alia concerning the right to labour action, and to the risks of human rights violations involved in administrative detention.

62. The definition of terrorism in the counter-terrorism law, when read cumulatively, is relatively narrow in scope. However, many of the acts listed as potentially constituting terrorist acts do not, as to their level of severity or the harm caused, reach the threshold of what legitimately can be considered terrorist acts. Hence, this part of the definition may give the wrong impression of the definition being broader than it is when properly applied.

63. The criminal proceedings pursuant to the counter-terrorism act basically fall under general South African criminal law and all its safeguards. However, in the context of countering terrorism, national legislation is often borrowed and copied by other countries in a piecemeal way, and if sections of this Act are inserted into a national framework with less developed legal safeguards, a situation may arise where human rights are threatened. Given the important role South Africa has on the African continent, this is a matter of concern.

64. The authorities clearly state that racial/ethnic/religious profiling are neither a part of the collection of intelligence or used in investigations, but rather any profiling is based on individual behaviour.

65. There are no provisions of administrative detention in the South African counter-terrorism law. Nevertheless, immigration detention, in particular of illegal immigrants facing deportation and seen as a security threat, may in fact face detention without trial in South Africa despite the broadly shared sentiment against such practices.

66. The Special Rapporteur notes the enormous task in the post-apartheid era of creating law enforcement agencies which have legitimacy through the adherence to laws and to human rights standards. Important improvements have taken place, but reports of police brutality still surface, which may also hamper effective investigations in terrorism-related cases. The Independent Complaints Directorate has an important role in investigating and issuing decisions concerning police misconduct.

67. South Africa is an important destination of immigrants and asylum-seekers. The Constitution of South Africa to a great extent gives human rights protections to all persons in South Africa, which in the Special Rapporteur's view is the correct approach in the light of international human rights law, and is commendable. However, in practice, immigrants and asylum-seekers face serious difficulties, inter alia, in the fields of housing and health care. A special concern is the lack of legal safeguards for detained immigrants, and the protections against refoulement in immigration and extradition legislation.

68. The recently passed Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Act provides an important framework for addressing the involvement of South African nationals and companies and residents of South Africa as private security or military contractors. This is an important step for improving South Africa's accountability for human rights violations in the context of countering insurgence or terrorism by means of armed intervention.

69. The issue of xenophobia against the immigrant community of South Africa was discussed in a number of the Special Rapporteur's meetings. The Special Rapporteur finds that, as part of a preventive approach to counter-terrorism, firmer action is needed to address violence and other expressions of xenophobia towards immigrants, both from private individuals and any government actors.

70. South Africa plays an important role in regional and subregional efforts to counter terrorism on the African continent. In particular, the strategic and operative cooperation within the framework of the Southern African Regional Police Chiefs Cooperation Organisation appears to be of practical importance for all the countries involved. The mainstreaming of the promotion and protection of human rights in these cooperation measures ought to be a priority of the Government of South Africa.

B. Recommendations

71. **The Special Rapporteur recommends that the Government carefully monitor the implementation in jurisprudence of the definition of terrorist acts under POCDATARA, and remain prepared to amend the law, should the interpretation of it suggest a threat to human rights.**

72. **The practical content of the national procedures for listing individuals subjected to sanctions pursuant to Security Council resolution 1267 (1999), including the availability and modalities of judicial review, ought to be elaborated more clearly by the Government.**

73. **The Special Rapporteur notes with satisfaction that for the most part, the normal criminal procedure is in place also in terrorism cases. He recommends that South Africa maintain this stance, and also that any special proceedings, for example, in-camera trials in terrorism or other security-related cases, be used very restrictively.**

74. **For clarity and transparency on the issue of unjustified or disproportionate use of force by the police, the Special Rapporteur draws attention to the concluding observations of the Committee against Torture, which include the recommendation to prohibit in law all forms of torture and ill-treatment, and to incorporate in the law a specific criminalization of torture.**

75. **The Special Rapporteur also encourages South Africa to put into place a system of reliable statistics related to police brutality with clear parameters and benchmarks for improvement. Such statistics can be one helpful and transparent component in assessing advances and setbacks in the protection of human rights in law enforcement.**

76. **The Special Rapporteur recommends the establishment of a general system of independent oversight for the detention of immigrants. This need is particularly urgent in respect of the use of police detention facilities for immigration detention of persons subject to deportation proceedings.**

77. **The Special Rapporteur recommends re-examining the provisions on immigration detention so that judicial review would be mandatory within, say, 48 hours and that effective access to counsel is guaranteed from the moment of apprehension.**

78. **The Special Rapporteur recommends amending section 2 of the Refugees Act so as to prohibit the removal of any person, either by extradition, deportation or any other form of removal, to face a real risk of persecution, capital punishment, torture or any form of inhuman, cruel or degrading treatment or punishment, and the inclusion of a provision concerning the prohibition of refoulement in the Extradition and Immigration Acts.**

79. **The Special Rapporteur recommends that Government and Parliament closely monitor the implementation of the recently adopted Act prohibiting mercenary activities, so that the law prevents the participation of South African individuals or entities as private military and security contractors in counter-insurgency or counter-terrorism operations where human rights may be undermined. He cautions, however, against the law being applied to hinder humanitarian assistance, as such assistance is necessary in the context of armed conflicts in order to protect the right to life.**

80. **The Special Rapporteur urges the Government of South Africa, as part also of preventative action to counter terrorism, to firmly and promptly implement the recommendations of the Committee on the Elimination of Racial Discrimination of 19 October 2006.**[24]

81. **The Special Rapporteur commends the Government of South Africa for its efforts to strengthen cooperation and integration on the African continent and in the subregion of Southern Africa. He urges South Africa to ensure the promotion and protection of human rights in all regional and subregional efforts to counter terrorism, be they legislative, strategic or operational in nature.**

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[24] Concluding observations of the Committee on the Elimination of Racial Discrimination on South Africa (CERD/C/ZAF/CO/3), 19 October 2006.
http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/5e2f95e54fc20794c1257228005ac69b/$FILE/G0644771.pdf.