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### **IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL”**

**Report of the Special Rapporteur on the promotion and protection of  
human rights and fundamental freedoms while countering terrorism,  
Martin Scheinin**

#### **Summary**

Section I provides a summary of the activities of the Special Rapporteur on the promotion and protection of human rights while countering terrorism undertaken since 15 December 2005. The next two sections focus on two thematic issues that are of special interest to the mandate. Section II contains an analysis of “profiling” in the context of countering terrorism. The Special Rapporteur provides an explanation of the concept of terrorist profiling and an overview of the different contexts in which law-enforcement agencies have employed terrorist-profiling practices. He assesses the compliance of so-called terrorist-profiling practices with human rights standards and sets out permissible forms of terrorist profiling and possible alternatives to the reliance on terrorist profiles. Section III examines the issue of suicide attacks as a form of terrorism. The Special Rapporteur provides a survey of existing research on the phenomenon of suicide terrorism. He addresses “shoot-to-kill” policies and other similar attempts to evade existing international standards on the use of firearms by law-enforcement officials. The conclusions and recommendations regarding terrorist profiling and responses to suicide attacks as a form of terrorism are contained in section IV.

## CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Introduction .....	1 - 4	3
I. ACTIVITIES OF THE SPECIAL RAPPORTEUR .....	5 - 31	3
II. “PROFILING” IN THE CONTEXT OF COUNTERING TERRORISM .....	32 - 62	6
A. Introduction .....	32 - 37	6
B. Compliance with human rights standards .....	38 - 58	9
C. Best practices and alternatives to profiling .....	59 - 62	16
III. SUICIDE ATTACKS AS A FORM OF TERRORISM .....	63 - 82	17
A. Introduction .....	63 - 73	17
B. Shoot-to-kill policies .....	74 - 78	21
C. Considerations by the Special Rapporteur .....	79 - 82	23
IV. CONCLUSIONS AND RECOMMENDATIONS .....	83 - 97	24
A. Profiling .....	83 - 89	24
B. Suicide attacks .....	90 - 97	25

## **Introduction**

1. This report is submitted to the Human Rights Council by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Commission on Human Rights resolution 2005/80 and Human Rights Council decision 1/102. It includes an overview of his activities since 15 December 2005 and his views on two thematic issues, “profiling” in the context of counter terrorism and suicide attacks as a form of terrorism.
2. Communications sent by the Special Rapporteur and the replies of Governments thereto and press releases issued under the mandate for the period 1 January to 31 December 2006 are reflected in addendum 1 to the present report (A/HRC/4/26/Add.1).
3. The final report on the fact-finding mission that the Special Rapporteur undertook to Turkey from 16 to 23 February 2006 is contained in addendum 2 (A/HRC/4/26/Add.2).
4. A study on human rights compliance while countering terrorism in Australia is contained in addendum 3 (A/HRC/4/26/Add.3).

### **1. ACTIVITIES OF THE SPECIAL RAPPORTEUR**

5. At the time of the submission of this report the Special Rapporteur can indicate the following developments regarding upcoming country visits. The Special Rapporteur plans to visit South Africa in mid-April 2007. He has also received a formal invitation by the Government of the United States of America to visit in the spring of 2007; the Special Rapporteur has proposed dates for May 2007. The Government of Israel has given a positive verbal response to the Special Rapporteur’s request for a visit and he hopes to undertake this visit in 2007. The Philippines has indicated in writing that a mission may be possible in 2007 or later; the Special Rapporteur has written to the Government suggesting dates for 2007 but he has yet to receive a reply. There are also outstanding visit requests to Algeria, Egypt, Malaysia, Pakistan, Spain and Tunisia. Finally, the Special Rapporteur thanks the Government of the Republic of the Maldives for extending an invitation to undertake a country visit.
6. In accordance with paragraph 14 (d) of resolution 2005/80, the Special Rapporteur worked in close cooperation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights, the Human Rights Council and other relevant United Nations bodies. He also met with various branches of the Office of the High Commissioner for Human Rights (OHCHR) to ensure complementarity with regard to the High Commissioner’s mandate on human rights in the fight against terrorism.
7. On 16 December 2005 the Special Rapporteur held a meeting with the International Committee of the Red Cross to discuss issues such as the relationship between human rights and humanitarian law.
8. On 19 December 2005 the Special Rapporteur met in Vienna with the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime and with the Action against Terrorism Unit of the Organization for Security and Cooperation in Europe.

9. On 30 and 31 January 2006 the Special Rapporteur participated in a meeting of the United Nations Counter-Terrorism Implementation Task Force (CTITF), where the draft working paper on strengthening United Nations capacity and coordination to assist States in combating terrorism was finalized. The Special Rapporteur provided written input in a meeting of the CTITF held on 13 and 14 July 2006 to follow up on the Secretary-General's report "Uniting against terrorism: recommendations for a global counter-terrorism strategy" (A/60/825) of 27 April 2006. Following the adoption on 8 September 2006 of the United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288), the Special Rapporteur has provided input and will participate in the working groups which will be tasked with the implementation of the strategy.
10. From 8 to 13 February 2006 the Special Rapporteur visited Addis Ababa and consulted with various officials of the African Union. He met with the Deputy Chairperson of the African Union Commission, the Commissioner for Peace and Security, the Director of the Peace and Security Directorate, the acting Director of the Gender Directorate, Legal Counsel and the Director of the Chairperson's Cabinet. The discussions related to the role and instruments of the African Union in protecting and promoting human rights while combating terrorism, the work towards an African model law on counter-terrorism and the establishment of the African Centre for Study and Research on Terrorism.
11. On 9 March and on 26 September 2006 the Special Rapporteur met with the Permanent Representative of Egypt to the United Nations to discuss the mandate of the Special Rapporteur and to reiterate his request for an invitation for a country visit.
12. On 24 March 2006 the Special Rapporteur visited Strasbourg to meet with the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI) to give a presentation on the relationship between human rights law and international law, including in the context of countering terrorism. He also met with the Deputy Secretary General of the Council of Europe.
13. On 4 April 2006 the Special Rapporteur visited Strasbourg to meet with the Council of Europe's Steering Committee on Human Rights (CDDH) to give a presentation on his mandate and issues arising in the fight against terrorism. He also met with the Council of Europe's Commissioner on Human Rights and discussed issues of concern related to his mandate and areas for possible cooperation.
14. On 18 and 19 April 2006 the Special Rapporteur met with OHCHR's regional office for South Africa and held consultations with several Government of South Africa agencies in Pretoria, such as the Department of Foreign Affairs, the South African Police Service, the South African Law Reform Commission and the Department of Justice and Constitutional Development.
15. On 24 April 2006 the Special Rapporteur met with the Permanent Representatives of Tunisia and the Philippines (and again on 25 September) to reiterate his request for invitations to these countries.

16. On 11 and 12 May 2006 the Special Rapporteur visited Astana, Kazakhstan, and held discussions with various State authorities (Prokuratura, Parliament, Committee for National Security) and civil society actors. The discussions focused on human rights and national responses to terrorism and “extremism”, including their definitions and the procedure for proscribing organizations.
17. On 16 May 2006, the Special Rapporteur gave a presentation to COTER (the European Union Working Committee on Terrorism) on the methodology of identifying best practices in the field of counter-terrorism, including illustrative examples. He also met with the EU counter-terrorism coordinator and relevant EU Commission representatives. Furthermore, he visited the United Nations Regional Information Centre and briefed NGO and media representatives on his mandate and his activities.
18. From 19 to 24 June 2006, the Special Rapporteur attended the thirteenth annual meeting of the special procedures mandates in Geneva. The meeting focused on how special procedures operate within the newly established Human Rights Council.
19. On 20 June 2006 the Special Rapporteur met with representatives of the Government of the Maldives. Topics of discussion were the counter-terrorism legislation in force and several cases of individuals who had been charged under the law and the impact on freedom of assembly.
20. On 21 June 2006 the Special Rapporteur addressed a delegation of the European Parliament, regarding issues arising in the context of his mandate.
21. On 22 June 2006 an informal meeting was held with representatives of a number of countries, including Denmark, Finland, Iceland, Jordan, Norway, Sweden, South Africa, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America, to discuss the evolution of the mandate and future perspectives.
22. On 23 June 2006 the Special Rapporteur met with some members and the secretariat of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights created at the initiative of the International Commission of Jurists to exchange information on past activities and discuss issues of common concern, such as the use of intelligence before courts, the definition of terrorism and control orders as a means to combat terrorism.
23. From 25 to 28 September 2006 the Special Rapporteur was in Geneva to present his report (E/CN.4/2006/98) to the second session of the Human Rights Council. He met with representatives of the Permanent Missions of Algeria, Israel, Pakistan, South Africa, the United States of America, and the Arab League. He also met with the African Group.
24. On 3 October 2006 the Special Rapporteur was in Brussels and delivered a statement to the European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners. The Special Rapporteur also spoke at a joint parliamentary meeting between the European Parliament and national parliaments of the European Union and its accession countries on how to improve the efficiency of counter-terrorism measures while at the same time respecting fundamental rights.

25. On 16 October 2006 the Special Rapporteur was represented at a Euro-Med ad hoc meeting on counter terrorism in Brussels.

26. On 24 to 26 October the Special Rapporteur was in New York to present his report (A/61/267) to the Third Committee of the General Assembly. The Special Rapporteur had a formal meeting with the Counter-Terrorism Committee (CTC) and met with the Counter-Terrorism Executive Directorate. These meetings focused on future cooperation, including in the joint identification of best practices while countering terrorism. He also met with the CTITF Chair, the Coordinator of the Al-Qaida and Taliban Monitoring Team, and a number of non-governmental organizations.

27. On 15 to 17 November the Special Rapporteur was represented at a Technical Workshop on Human Rights and International Cooperation in Counter-Terrorism in Liechtenstein, and presented a joint paper on “Procedural guarantees and due process in the context of the transfer of persons in the fight against terrorism”.

28. On 29 November the Special Rapporteur attended a meeting of the Working Group on Human Rights (COHOM) of the Council of the European Union to present his mandate and activities.

29. On 30 November to 1 December the Special Rapporteur convened an expert group meeting in Berlin to examine the promotion and protection of human rights while countering terrorism. He also met with the Human Rights Commissioner of the Federal Foreign Office of Germany.

30. On 6 to 7 December the Special Rapporteur visited Israel to deliver a keynote address on human rights and terrorism at the Minerva Biennial Conference on Human Rights. He held consultations with representatives of the Ministry for Foreign Affairs of Israel, with a view to preparing a country visit in 2007.

31. On 8 December the Special Rapporteur attended the European Union Human Rights Forum in Helsinki and spoke about current human rights concerns in the fight against terrorism.

## **II. “PROFILING” IN THE CONTEXT OF COUNTERING TERRORISM**

### **A. Introduction**

32. The Special Rapporteur notes that, in recent years, so-called terrorist profiling has become an increasingly significant component of States’ counter-terrorism efforts.<sup>1</sup> The

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<sup>1</sup> Daniel Moeckli, “Terrorist profiling and the importance of a proactive approach to human rights protection” (16 December 2006), available at the Social Science Research Network (SSRN): <http://ssrn.com/abstract=952163>; Moeckli, “Discriminatory profiles: law enforcement after 9/11 and 7/7” (2005) (5) *European Human Rights Law Review*, 517.

European Union (EU) has explicitly asked its member States to cooperate with one another and with Europol (the European police office) to develop “terrorist profiles”, defined as “a set of physical, psychological or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect”.<sup>2</sup> A group of experts from Europol and several EU member States has been established for this purpose.<sup>3</sup> Terrorist profiling also occurs in less explicit forms. For example, law-enforcement agents often rely on sets of physical or behavioural characteristics when deciding whom to stop and search for counter-terrorism purposes.

33. “Profiling” is generally defined as the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law-enforcement decisions. Profiles can be either *descriptive*, i.e. designed to identify those likely to have committed a particular criminal act and thus reflecting the evidence the investigators have gathered concerning this act; or they may be *predictive*, i.e. designed to identify those who may be involved in some future, or as-yet-undiscovered, crime. In the view of the Special Rapporteur, profiling is, in principle, a permissible means of law-enforcement activity. Detailed profiles based on factors that are statistically proven to correlate with certain criminal conduct may be effective tools better to target limited law-enforcement resources.

34. However, when law-enforcement agents use broad profiles that reflect unexamined generalizations, their practices may constitute disproportionate interferences with human rights. In particular, profiling based on stereotypical assumptions that persons of a certain “race”, national or ethnic origin or religion are particularly likely to commit crime may lead to practices that are incompatible with the principle of non-discrimination. It is therefore of grave concern to the Special Rapporteur that, since 11 September 2001, law-enforcement authorities of different States have adopted counter-terrorism practices that are based on terrorist profiles that include characteristics such as a person’s presumed “race”, ethnicity, national origin or religion.

35. The Special Rapporteur notes that terrorist profiles have been employed, for example, in the context of data-mining initiatives, i.e. searches of personal data sets according to presumed characteristics of suspects. An illustrative case is the so-called *Rasterfahndung* programme, initiated by the German authorities in the wake of 11 September 2001 to identify terrorist “sleepers”. The German police forces collected personal records of several million persons from

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<sup>2</sup> Council of the European Union, Draft Council Recommendation on the development of terrorist profiles, 18 November 2002 (document 11858/3/02 REV 3).

<sup>3</sup> Council of the European Union, “Terrorist profiling (Draft reply to written question by Sarah Ludford)”, 30 March 2004 (document 7846/04).

public and private databases.<sup>4</sup> The criteria for the search included: being male; age 18-40; current or former student; Muslim denomination; link through birth or nationality to one of several specified countries with a predominantly Muslim population. Approximately 32,000 persons were identified as potential terrorist sleepers and more closely examined. In *none* of these cases did the *Rasterfahndung* lead to the bringing of criminal charges for terrorism-related offences.<sup>5</sup>

36. Terrorist profiling based on national or ethnic origin and religion has also been used in the context of immigration controls. In the United States, the immigration authorities have adopted a series of policies and practices designed to counter terrorism that single out certain groups of immigrants based on their country of origin or nationality and, indirectly through the choice of the targeted countries, their ethnicity and religion. Under the Voluntary Interview Program, male immigrants, who were not suspected of any criminal activity, were selected for questioning solely because they were of a certain age, had entered the United States after January 2000 and originated from countries “in which intelligence indicated that there was an Al-Qaida terrorist presence or activity”.<sup>6</sup> Although the authorities did not identify these countries, almost all the 8,000 men eventually interviewed were Arab and/or Muslim.<sup>7</sup> The National Security Entry-Exit Registration System imposed fingerprinting, photographing and registration requirements for all males who are citizens of, or were born in, certain designated countries;<sup>8</sup> all of these countries - except for the Democratic People’s Republic of Korea - have predominantly Arab and/or Muslim populations.<sup>9</sup>

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<sup>4</sup> See the decision of the *Bundesverfassungsgericht* (the Federal Constitutional Court) of Germany in decision BVerfG, 1 BvR 518/02, 4 April 2006, available at [http://www.bverfg.de/entscheidungen/rs20060404\\_1bvr051802.html](http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html), para. 28 (explaining that in the Federal State) of Nordrhein-Westfalen, 5.2 million personal data sets were collected).

<sup>5</sup> Ibid., paras. 8-10.

<sup>6</sup> U.S. General Accounting Office, *Homeland Security: Justice Department’s Project to Interview Aliens after September 11, 2001* (document GAO-03-459), April 2003, pp. 7-8.

<sup>7</sup> Migration Policy Institute, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (2003), p. 41.

<sup>8</sup> Attorney General John Ashcroft, “Attorney General’s prepared remarks on the National Security Entry-Exit Registration System”, 6 June 2002.

<sup>9</sup> The list includes: Afghanistan, Algeria, Bahrain, Bangladesh, Democratic People’s Republic of Korea, Egypt, Eritrea, Indonesia, Iran (Islamic Republic of), Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Lebanon, Morocco, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen (68 Fed. Reg. 2363 (16 January 2003); 67 Fed. Reg. 77136 (16 December 2002); 67 Fed. Reg. 70526 (22 November 2002); 67 Fed. Reg. 67766 (6 November 2002)). See U.S. Immigration and Customs Enforcement, “Special registration groups and procedures”, available at <http://www.ice.gov/graphics/specialregistration/archive.htm>.



Finally, the Absconder Apprehension Initiative prioritized the enforcement of deportation orders against those 2 per cent of deportable persons who originate from Arab and/or Muslim countries.<sup>10</sup>

37. In some cases, police forces have relied on profiles based on a person's ethnic and/or religious appearance when conducting stops, document checks or searches for counter-terrorism purposes. In the United Kingdom of Great Britain and Northern Ireland, government officials have openly acknowledged that law-enforcement efforts in the counter-terrorism context focus on particular ethnic or religious groups.<sup>11</sup> Accordingly, stops and searches under section 44 of the Terrorism Act 2000, which authorizes the police in designated areas to stop and search people without having to show reasonable suspicion, have affected ethnic minorities. Between 2001-2002 and 2002-2003, for example, the number of persons of Asian ethnicity subjected to section 44 searches rose by 302 per cent as compared to a rise of 118 per cent for white people. By 2003-2004, Asian people were about 3.6 times more likely, and black people about 4.3 times more likely, to be stopped and searched under counter-terrorism legislation than white people.<sup>12</sup> Similarly, police forces in the Russian Federation have subjected ethnic minorities to stops and document checks, which are often carried out in response to terrorist threats. A study of police practices on the Moscow metro system in 2005 found that persons of non-Slavic appearance were, on average, 21.8 times more likely to be stopped than Slavs.<sup>13</sup>

## **B. Compliance with human rights standards**

### **Non-discrimination and other human rights norms**

38. Terrorist-profiling practices raise concerns with regard to a number of human rights guarantees. In the view of the Special Rapporteur, data-mining initiatives based on broad terrorist profiles that include group characteristics such as religion and national origin may constitute a disproportionate and thus arbitrary interference with the right to privacy,

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<sup>10</sup> Deputy Attorney General, Memorandum for the INS Commissioner, the FBI Director, the Director of the US Marshals Service and US Attorneys re Guidance for Absconder Apprehension Initiative, 25 January 2002, available at <http://news.findlaw.com/hdocs/docs/doj/absconder012502mem.pdf>; K. Lapp, "Pressing public necessity: The unconstitutionality of the Absconder Apprehension Initiative" (2005) 29 *New York University Review of Law and Social Change* 573, pp. 575-584.

<sup>11</sup> V. Dodd, "Asian men targeted in stop and search", *The Guardian*, 17 August 2005 (quoting the Chief Constable of the British Transport Police as follows: "We should not waste time searching old white ladies. It is going to be disproportionate. It is going to be young men, not exclusively, but it may be disproportionate when it comes to ethnic groups").

<sup>12</sup> Home Office, *Statistics on Race and the Criminal Justice System - 2003* (2004), p. 28 and *ibid.* 2004 (2005), p. 33.

<sup>13</sup> Open Society Justice Initiative and JURIX, *Ethnic Profiling in the Moscow Metro* (2006).

guaranteed by article 17 of the International Covenant on Civil and Political Rights (ICCPR). It is on this ground that the German Constitutional Court ruled that the *Rasterfahndung* initiative, described above, violates the constitutional right to privacy. The Court held that the preventive use of this profiling method would only be compatible with the proportionality requirement if it were shown that there was a “concrete danger” to national security or human life, rather than a general threat situation as it existed since 11 September 2001.<sup>14</sup>

39. Similarly, the Special Rapporteur takes the view that stops and searches of persons that are based on stereotypical assumptions that certain religious or ethnic groups are more likely to pose a terrorist threat than others may amount to a disproportionate and arbitrary interference with the freedom of movement, guaranteed by article 12 of ICCPR, the right to privacy, guaranteed by article 17 and/or the right to personal liberty, guaranteed by article 9.

40. In addition, the Special Rapporteur observes that any terrorist-profiling practices that are based on distinctions according to a person’s presumed “race”, ethnicity, national origin or religion raise the question as to their conformity with the principle of non-discrimination. Because of its relevance to different forms of terrorist profiling, the Special Rapporteur believes that the issue of discrimination deserves particular attention. The Special Rapporteur is concerned that profiling based on stereotypical assumptions may bolster sentiments of hostility and xenophobia in the general public towards persons of certain ethnic or religious background.

41. The guarantees of non-discrimination of articles 2 and 26 of ICCPR prohibit discrimination on grounds such as race, national origin and religion. Discrimination on the basis of race and national or ethnic origin is also prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 5 of ICERD explicitly prohibits racial discrimination with respect to the “right to equal treatment before [...] all [...] organs administering justice” and to “freedom of movement”.<sup>15</sup> Furthermore, the prohibition against discrimination on the grounds of race and religion is generally accepted as a peremptory norm of international law, which cannot be set aside by treaty or acquiescence.<sup>16</sup> This view is supported by article 4, paragraph 1, of the ICCPR, which makes clear that the right to non-discrimination on the grounds of race and religion can never be derogated from, not even in times of an officially proclaimed public emergency. These binding obligations of non-discrimination have been reinforced and supplemented by a range of other international and regional standards. The Code of Conduct for Law Enforcement Officials, for example, provides that such officials must “maintain and uphold the human rights of all persons”, including the right to non-discrimination.<sup>17</sup> Similarly, the European Code of Police Ethics of the Council of Europe recommends that “[t]he police shall carry out their tasks in a fair manner, guided, in

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<sup>14</sup> BVerfG, 1 BvR 518/02; see note 4 above.

<sup>15</sup> ICERD, article 5 (a) and (d) (i); see also articles 1 (1), 2 (1) (a).

<sup>16</sup> See Vienna Convention on the Law of Treaties, article 53.

<sup>17</sup> Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169, 17 December 1979, article 2 and its Commentary (a).

particular, by the principles of impartiality and non-discrimination”.<sup>18</sup> A provision specifically directed against the use of profiles that are based on racial characteristics is to be found in the Programme of Action adopted at the World Conference against Racism in 2000, urging States “to design, implement and enforce effective measures to eliminate the phenomenon popularly known as ‘racial profiling’”.<sup>19</sup>

42. The Special Rapporteur notes that several international and regional human rights bodies have highlighted the risk of discrimination presented by law-enforcement efforts to counter terrorism. The Committee on the Elimination of Racial Discrimination has called on States to “ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping”.<sup>20</sup> The Special Rapporteur agrees with this view and believes that this is equally applicable to the profiling of persons based upon their religion. At the regional level, the Inter-American Commission on Human Rights, in its Report on Terrorism and Human Rights, has cautioned that “any use of profiling or similar devices by a state must comply strictly with international principles governing necessity, proportionality, and non-discrimination and must be subject to close judicial scrutiny”.<sup>21</sup> The European Commission against Racism and Intolerance (ECRI), in its Policy Recommendation No. 8 on combating racism while fighting terrorism, has asked Governments to ensure that no discrimination ensues from legislation and regulations, or their implementation, in the field of law-enforcement checks.<sup>22</sup> Finally, the EU Network of independent experts on fundamental rights has expressed serious concerns about the development of terrorist profiles; profiling on the basis of characteristics such as nationality, age or birthplace, the experts have cautioned, “presents a major risk of discrimination”.<sup>23</sup>

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<sup>18</sup> Recommendation Rec (2001)10 of the Committee of Ministers to member States on the European Code of Police Ethics, 19 September 2001, Appendix, Explanatory Memorandum, article 40.

<sup>19</sup> Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (A/CONF.189/12), Programme of Action, para. 72.

<sup>20</sup> United Nations Committee on the Elimination of Racial Discrimination, general recommendation 30 on discrimination against non-citizens (2004) (see HRI/GEN/1/Rev.8) para. 10.

<sup>21</sup> Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (OEA/Ser.L/V/II.116), 22 October 2002, para. 353.

<sup>22</sup> ECRI, General Policy Recommendation No. 8 on combating racism while fighting terrorism, 17 March 2004, document CRI (2004) 26.

<sup>23</sup> EU Network of independent experts on fundamental rights, “The balance between freedom and security in the response by the European Union and its member States to the Terrorist Threats” (2003), p. 21.

43. The Special Rapporteur finds these pronouncements consistent with the established jurisprudence of international human rights bodies interpreting the non-discrimination guarantees of the ICCPR and the ICERD, as well as with that of regional bodies on the respective norms contained in regional human rights treaties. According to this jurisprudence, a difference in treatment on the basis of a criterion such as race, ethnicity, national origin or religion will only be compatible with the principle of non-discrimination if it is supported by objective and reasonable grounds.<sup>24</sup>

44. The Special Rapporteur takes the view that terrorist-profiling practices that involve distinctions according to a person's presumed "race" cannot be supported by objective and reasonable grounds, because they are based on the wrongful assumption that there are different human races and, therefore, inevitably involve unfounded stereotyping through a crude categorization of assumed races, such as "white", "black" and "Asian".

### **Test of legitimate aim and proportionality**

45. As far as distinctions according to national or ethnic origin and religion are concerned, the following two sub-tests are generally applicable to determine the existence of an objective and reasonable justification. First, the difference in treatment must pursue a legitimate aim. Second, there has to be a reasonable relationship of proportionality between the difference in treatment and the legitimate aim sought to be realized.

46. As far as the first requirement is concerned, the aim of law-enforcement practices that are based on terrorist profiling is the prevention of terrorist attacks. In the view of the Special Rapporteur, this constitutes a legitimate and compelling social need.

47. The decisive question is therefore whether terrorist-profiling practices, and the differential treatment they involve, are a proportionate means of achieving this aim. In assessing proportionality, the Special Rapporteur believes that it is important to consider, first, whether terrorist-profiling practices are a suitable and effective means of countering terrorism and, second, what kind of negative effects these practices may produce.

48. In order to serve as a suitable and effective tool of counter-terrorism, a profile would need to be narrow enough to exclude those persons who do not present a terrorist threat and, at the same time, broad enough to include those who do. However, terrorist profiles that are based on characteristics such as ethnicity, national origin and religion are regularly inaccurate and both over- and under-inclusive.

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<sup>24</sup> Human Rights Committee, general comment No. 18: Non-discrimination (1989), para. 13; Human Rights Committee, *Broeks v. The Netherlands*, communication No. 172/1984 (CCPR/C/OP/2), para. 13 (1990); *Belgian Linguistics Case (No. 2)* (1968) 1 EHRR (European Human Rights Reports) 252, para. 10; *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-American Court of Human Rights (Ser. A) No. 4 (19 January 1984), para. 57.

49. The Special Rapporteur is of the view that ethnicity, national origin and religion are inaccurate indicators because the initial premise on which they are based, namely that Muslims and persons of Middle Eastern and South Asian appearance or origin are particularly likely to be involved in terrorist activities, is highly doubtful. A recent study of Islamist terrorists arrested or killed in Western States showed that less than half of them were born in Middle Eastern countries.<sup>25</sup> Similarly, the Report of the Official Account of the London Bombings has concluded that, as far the national, ethnic, religious and social background of potential terrorists is concerned, “there is not a consistent profile to help identify who may be vulnerable to radicalization”.<sup>26</sup>

50. The Special Rapporteur observes that, in practice, most terrorist profiles use ethnic appearance and national origin as proxies for religion, as religious affiliation is normally not readily identifiable (and in any case easy to conceal). Yet ethnicity and national origin are very poor proxies for religion. For example, only 24 per cent of all Arab Americans are Muslims.<sup>27</sup> In the United Kingdom, where Muslim religion is often associated with “Asian” appearance, only half of those belonging to this ethnic group are in fact Muslims.<sup>28</sup> Thus, profiles based on ethnic appearance or national origin are over-inclusive in two respects. First, many of those matching these elements will not be, for example, Muslims. Second, the overwhelming majority of those who *are* Muslims, for example, have of course nothing to do with terrorism. As a consequence, terrorist-profiling practices that rely on these stereotypical characteristics affect a great number of individuals who are in no way linked to terrorism.

51. The Special Rapporteur is also concerned that over-inclusive terrorist profiles may overwhelm the law-enforcement system. The broader the profiles, the greater becomes the number of people whom the police treat as suspects, even though the vast majority of them will turn out to present no risk. As a consequence, important law-enforcement resources may be diverted away from more beneficial work.

52. At the same time, the Special Rapporteur believes that profiles based on ethnicity, national origin and religion are also under-inclusive in that they will lead law-enforcement agents to miss a range of potential terrorists who do not fit the respective profile. Several of

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<sup>25</sup> R.S. Leiken and S. Brooke, “The quantitative analysis of terrorism and immigration: an initial exploration” (2006), 18 *Terrorism and Political Violence* 503.

<sup>26</sup> Report of the Official Account of the Bombings in London on 7th July 2005, 11 May 2006, HC 1087, London, The Stationery Office, p. 31.

<sup>27</sup> Arab American Institute, *Arab American Demographics*, available at <http://www.aaiusa.org/demographics.htm>.

<sup>28</sup> House of Commons Home Affairs Committee, *Sixth Report of Session 2004-05: Terrorism and Community Relations*, 6 April 2005, HC 165-I, p. 21.

recent years' high profile terrorism suspects would not have been covered by the profile used for the German *Rasterfahndung*.<sup>29</sup> This shows that profiles based on ethnicity, national origin or religion are easy to evade. Terrorist groups have regularly proved their ability to adapt their strategies, with the use of female and child suicide bombers, to avoid the stereotype of the male terrorist as just one example.<sup>30</sup> Thus, as law-enforcement specialists acknowledge, any kind of terrorist profile based on physical characteristics can easily become self-defeating.<sup>31</sup>

53. The Special Rapporteur observes that, accordingly, profiling practices based on ethnicity, national origin and religion have proved to be largely unsuccessful. The German *Rasterfahndung* did not result in a single criminal charge for terrorism-related offences.<sup>32</sup> Instead, the few successes achieved by the German police forces in detecting alleged Islamist terrorists were all due to traditional, intelligence-led methods.<sup>33</sup> In the United Kingdom, the widespread, and ethnically disproportionate, use of stop-and-search powers has produced hardly any results. In 2003-2004, for example, 8,120 pedestrians were stopped under section 44 (2) of the Terrorism Act 2000. Yet these stops led to only five arrests in connection with terrorism - a "success" rate of 0.06 per cent. Incidentally, all of those arrested were white.<sup>34</sup> Similarly, the disproportionate targeting of ethnic minorities for stops and document checks in the Moscow metro system has proved to be ineffective in detecting and preventing serious crime.<sup>35</sup> Finally, in the United States, the strategy of mainly targeting immigrants of Middle Eastern descent has not produced any significant results in the form of arrests or investigative leads.<sup>36</sup>

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<sup>29</sup> See Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, 18 December 2003, para. 88; R.S. Leiken, "Fair Game: Al Qaeda's New Soldiers", *The New Republic*, 26 April 2004.

<sup>30</sup> See, e.g. D.D. Zedalis, *Female Suicide Bombers*, Strategic Studies Institute (2004), available at <http://www.strategicstudiesinstitute.army.mil/pdf/PUB408.pdf>.

<sup>31</sup> D. Leppard, "Watch for women and child bombers, says Met", *Sunday Times*, 7 August 2005.

<sup>32</sup> BVerfG, 1 BvR 518/02; see note 4 above, para. 10.

<sup>33</sup> See, e.g. Hessischer Landtag, *Kleine Anfrage des Abg. Hahn (FDP) vom 10.03.2004 betreffend Ergebnisse der Rasterfahndung und Antwort des Ministers des Innern und für Sport*, Drucksache 16/2042, 18 May 2004.

<sup>34</sup> Home Office, *supra*, note 13, 2004 (2005), p. 35.

<sup>35</sup> Open Society Justice Initiative and JURIX, see note 13 above, p. 34.

<sup>36</sup> U.S. General Accounting Office, see note 6 above, pp. 6 and 16; Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*, September 2003, p. 39.

54. The available evidence suggests that profiling practices based on ethnicity, national origin or religion are an unsuitable and ineffective, and therefore a disproportionate, means of countering terrorism: they affect thousands of innocent people, without producing concrete results.

55. Moreover, even if the classifications underlying these methods did correspond to a higher risk posed by some categories of persons, this would still not mean that their use is justified. For terrorist-profiling practices entail considerable negative effects that must also be factored into the proportionality assessment.

### **Adverse effects**

56. Profiling practices based on ethnicity, national origin or religion can take a profound emotional toll on those subjected to them. The Special Rapporteur believes that profiling practices have a more serious impact than “neutral” law-enforcement methods. While anyone stopped, searched or questioned by the police may feel intimidated or degraded to a certain extent, the encounter has a particularly humiliating effect when characteristics such as ethnicity or religion played a role in the law-enforcement officer’s decision.

57. The Special Rapporteur is concerned that these individual experiences may translate into negative group effects. Terrorist-profiling practices single out persons for enhanced law-enforcement attention simply because they match a set of group characteristics, thus contributing to the social construction of all those who share these characteristics as inherently suspect. This stigmatization may, in turn, result in a feeling of alienation among the targeted groups.

58. The Special Rapporteur takes the view that the victimization and alienation of certain ethnic and religious groups may have significant negative implications for law-enforcement efforts, as it involves a deep mistrust of the police. For the United Kingdom, the Metropolitan Police Authority has highlighted “the huge negative impact” on community relations of the use of stop-and-search powers: “It has increased the level of distrust of our police; it has created deeper racial and ethnic tensions against the police; ... it has cut off valuable sources of community information and intelligence.”<sup>37</sup> The lack of trust between the police and communities may be especially disastrous in the counter-terrorism context. The gathering of intelligence is the key to success in largely preventive law-enforcement operations. Therefore, if, as some Governments claim, terrorist “sleepers” in their countries are likely to be Muslim, Middle Eastern and South Asian men, then it would be crucial for law-enforcement agencies to enjoy the cooperation of the respective communities. To be successful, counter-terrorism law-enforcement policies would have to strengthen the trust between the police and communities.

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<sup>37</sup> House of Commons Home Affairs Committee, *Written Evidence: Memorandum submitted by the Metropolitan Police Authority*, 8 July 2004.

### C. Best practices and alternatives to profiling

59. Despite the human rights concerns outlined above, the use of terrorist profiles that include criteria such as ethnicity, national origin and religion is, in the view of the Special Rapporteur, not always forbidden. If, in the context of an investigation into a terrorist crime already committed, there are reasonable grounds to assume that the suspect fits a certain descriptive profile, then the reliance on characteristics such as ethnic appearance, national origin or religion is justified. Similarly, these factors can be employed to target search efforts where there is specific intelligence suggesting that someone fulfilling these characteristics is preparing a terrorist act. The situation is different, however, in the case of preventive counter-terrorism efforts that are not intelligence-led. While profiles used for such efforts may include behavioural or psychological characteristics, the Special Rapporteur is of the view that they may not be based on stereotypical generalizations that certain ethnic or religious groups pose a greater terrorist risk than others.

60. The Special Rapporteur takes the view that, in any event, profiling based on behavioural patterns is significantly more efficient than reliance on ethnicity, national origin or religion. The importance of focusing on behaviour is highlighted, for example, by the experiences of the United States Customs Service. In the late 1990's, the Customs Service stopped using a profile that was based, among other factors, on ethnicity and gender in deciding whom to search for drugs.<sup>38</sup> Instead, the customs agents were instructed to rely on observational techniques, behavioural analysis and intelligence.<sup>39</sup> This policy change resulted in a rise in the proportion of searches leading to the discovery of drugs of more than 300 per cent.<sup>40</sup> The Special Rapporteur believes that behaviour is an equally significant indicator in the terrorism context. He therefore urges States to ensure that law-enforcement authorities, when engaging in preventive counter-terrorism efforts, use profiles that are based on behavioural, rather than ethnic or religious, characteristics. At the same time, the Special Rapporteur reminds States that behavioural indicators must be implemented in a neutral manner and must not be used as mere proxies for ethnicity, national origin or religion.

61. However, it may not always be possible for law-enforcement agencies to rely on specific intelligence or useful behavioural indicators in the context of preventive counter-terrorism efforts. The Special Rapporteur is of the view that in such situations controls should be universal, affecting everyone equally. Where the costs for blanket searches are deemed to be

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<sup>38</sup> U.S. General Accounting Office, *U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results* (2000), GAO/GGD-00-38, pp. 10-15.

<sup>39</sup> *Ibid.*, pp. 5-6 and 16.

<sup>40</sup> Lamberth Consulting, "Racial profiling doesn't work", available at <http://www.lamberthconsulting.com/about-racial-profiling/racial-profiling-doesnt-work.asp>.



too high, the targets for heightened scrutiny must be selected on a random rather than on an ethnic or religious basis. In fact, this is what airlines are already routinely doing. As opposed to profiling, random searches are impossible for terrorists to evade and may thus be more effective than profiling.<sup>41</sup>

62. The Special Rapporteur reminds States of the crucial importance of good community relations for effective measures against terrorism. Successful counter-terrorism operations depend on the cooperation of the communities where the suspects live. The Special Rapporteur therefore calls on States to foster community policing initiatives that build partnerships of trust between law-enforcement agencies and ethnic and other communities. Profiling based on ethnicity, national origin and religion may have the contrary effect of alienating communities from cooperating with law-enforcement authorities and may thus hamper effective gathering of intelligence.

### III. SUICIDE ATTACKS AS A FORM OF TERRORISM

#### A. Introduction

63. The Special Rapporteur is mindful of the duty of States to protect the life and security of all their inhabitants against terrorist acts. Preventive action such as profiling addressed in the previous chapter of this report is increasingly at the fore of these efforts, both nationally and on the international level. Suicide attacks as a form of terrorism pose a particular challenge to counter-terrorism measures that are both effective and compatible with human rights.<sup>42</sup>

64. Suicide attacks since 11 September 2001 have received increased attention, both by the security systems of States, and in the public debate on terrorism. States in their counter-terrorism efforts have simultaneously opened new ways to interpret old laws, as well as enacted new laws which seek to increase the possibilities of State and other security personnel to act in identifying and preventing suicide attacks.<sup>43</sup> The Special Rapporteur is concerned about the increasing discrepancy between the actions taken by many States and the empirical evidence of what kind of a danger suicide attacks actually pose and which methods can indeed be defined as appropriate.

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<sup>41</sup> See J.L. Rhee, "Rational and constitutional approaches to airline safety in the face of terrorist threats" (2000) 49 *DePaul Law Review* 847, p. 870; National Research Council, *Measuring Racial Discrimination* (2004), p. 200.

<sup>42</sup> Reetta Toivanen, "Legal anthropological perspectives on international human rights and the war on terror", paper presented at the Conference of the European Association for Social Anthropology, Bristol, United Kingdom, 18 to 21 September 2006.

<sup>43</sup> See, Stefanie Schmal, "The prosecution of terrorists in national law", in Harald C. Scheu (ed.), *Legal Aspects of Counter-Terrorism*, Prague, 2005, pp. 155-175; and John Collins, Ross Glover (eds.), *Collateral Language*, New York, 2002.

65. Suicide attacks are a form of terrorism in which the perpetrator is expected to die. However, the actual purpose of suicide attacks is not to commit suicide but to kill and injure the maximum number of persons.<sup>44</sup> Politically motivated suicides may be committed as a form of protest, without endangering the lives of others. Giving up one's own life can also happen as an intentionally chosen method of warfare between the parties to an armed conflict. Depending on the circumstances, such a method may be lawful or in breach of international humanitarian law. As a form of terrorism, however, suicide attacks target "civilians" i.e. innocent bystanders or members of the general population or segments of it. Suicide attacks as a form of terrorism aim, through a high number of civilian casualties and full media coverage, at the production of a negative psychological effect on an entire population and beyond.<sup>45</sup> Suicide attacks as a form of terrorism are always morally inexcusable.

66. The Special Rapporteur notes that language related to warfare is commonly used in the context of counter-terrorism, and cautions against this practice, as it frequently leads to uncertainty as to the human rights obligations of States in the context of counter-terrorism. This caution is necessary also in respect of suicide attacks as a specific form of terrorism.

67. Suicide terrorism often has a political aim.<sup>46</sup> It has been used as a method to respond to foreign occupation or heavy military action. Suicide attacks are used to pressure the target society to demand that its Government change its policies.<sup>47</sup> It is used more generally as a method to change current power relationships and, ultimately, to change the world order.<sup>48</sup> Even though suicide bombers may use religious elements in their rhetoric about killing, the main goal is usually secular and political.<sup>49</sup>

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<sup>44</sup> "The logic of suicide terrorism", an interview with Robert Pape in *The American Conservative*, 18 July 2005.

<sup>45</sup> Yoram Schweitzer, "Suicide terrorism: developments and characteristics", 21 April 2000, <http://www.ict.org.il/articles/articledet.cfm?articleid=112>.

<sup>46</sup> As Peter Waldmann has pointed out, see *Terrorismus - Provokation der Macht*, München, 1998.

<sup>47</sup> Martha Crenshaw, "Suicide Terrorism in Comparative Perspective", in *Countering Suicide Terrorism*, I. Herzilya, The International Policy Institute for Counter-Terrorism, 2002; Rohan Gunaratna, "The LLTE and suicide terrorism", *Frontline*, vol. 17, issue 3, February 2000. See online at [www.flonnet.com/fl1703/17031060.htm](http://www.flonnet.com/fl1703/17031060.htm).

<sup>48</sup> See, Schweitzer, op. cit., p. 49.

<sup>49</sup> Some authors stress however that the analysis of Al-Qaida must be understood in the framework of Islam. See e.g. Tilman Seidensticker, "Der religiöse und historische Hintergrund des Selbstmordattentats im Islam", in Hans Kippenberg/Tilman Seidensticker (eds.). *Terror im Dienste Gottes*, Frankfurt a.M., 2004.

68. A distinction can be made between internal and external use of suicide bombings. Internally, suicide bombings may be used as means for the perpetrators to actively seek a political solution in their own country or region. Typical examples are Palestinian suicide bombers in Israel and the Tamil Tigers in Sri Lanka. External terrorism by means of suicide attacks comprises attacks in which the perpetrators act outside of their home territories, such as the massive attacks of 11 September 2001. External suicide terrorism attempts to change dominant power relationships in the world and - ultimately - to change the world order.

69. Suicide bombings also often occur in the context of armed conflict. Historical examples of warfare using suicide attacks as a method were the Japanese kamikaze bombers at the end of the Second World War, and more recently Sri Lanka's Tamil Tigers.<sup>50</sup> Many Palestinian bombers consider Palestine as a country which is forced to exist in circumstances amounting to a war; they describe their actions as military defence.<sup>51</sup> However, the Special Rapporteur again emphasizes that what turns a suicide attack into terrorism, even during an armed conflict, is the targeting of civilians as victims.

70. Hence, the Special Rapporteur notes that suicide bombings take place in a number of political and religious settings. However, the role of religion, and particularly of Islam, in suicide bombings has been the subject of much attention in recent years. Some researchers have pointed out that Islamic suicide bombers argue that their ideology and actions are based on religion. Looking more carefully at the individual cases gives evidence that a typical terrorist organization resorting to suicide attacks is rather nourished by national liberation ideologies of the nineteenth century than by any Islamic tradition.<sup>52</sup> Irrespective of the justification for the suicide attacks, their ideologies, symbolism, language and organizational structures resemble the anti-colonial struggles.<sup>53</sup>

71. Some studies link the support for and acceptance of suicide bombings clearly with political Islamism.<sup>54</sup> According to this research, the greater the commitment to the Islamist

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<sup>50</sup> Joseph Croituru, *Der Märtyrer als Waffe*, Frankfurt a.M.: dtv, 2003.

<sup>51</sup> Mark Juergensmeyer, *Terror in the Mind of God: The global rise of religious violence*, Berkeley, University of California Press, 2000. See also Raid Sabbah, *Der Tod ist ein Geschenk - Die Geschichte eines Selbstmordattentäters*, München, Dromer, 2002.

<sup>52</sup> Anne Marie Oliver and Paul Steinberg, *The Road to Martyrs' Square: A journey into the world of the suicide bomber*, Oxford University Press, 2005.

<sup>53</sup> Mali Soibelman, "Palestinian suicide bombers", in *Journal of Investigative Psychology and Offender Profiling*, No. 1/2004.

<sup>54</sup> Simon Haddad, "A comparative study of Lebanese and Palestinian perception of suicide bombing: The role of militant Islam and socio-economic status", in *International Journal of Comparative Sociology*, vol. 45 (5), pp. 337-363.

world order the more likely people are to endorse suicide terrorism, while their economic status or levels of education are marginal determiners.<sup>55</sup> Other researchers point in the opposite direction, observing that religious beliefs can both encourage and discourage suicide attacks.<sup>56</sup> Some other researchers have explained the personal motivations behind the terrorist suicide bombings by the experience of childhood traumas, when children have experienced their fathers being humiliated by military personnel, or themselves being raped by State representatives, and not being able to direct their own action so that it could make the feeling of humiliation disappear. In these situations religious or quasi-religious martyrdom can be experienced as a chance to reclaim family honour.<sup>57</sup> In such circumstances, recruitment of young future suicide bombers may become easy, as a perceived way out of the desperate position.<sup>58</sup>

72. According to available sources, a fairly large proportion, 15 to 30 per cent, of suicide bombers, are female. They are active in all organizations, even though in some organizations their status is contentious.<sup>59</sup> Security measures which ignored women as potential terrorists have failed dramatically. One further challenge has been that female bombers often pretend to be pregnant: this makes them to look vulnerable and helps them to pass security checks.<sup>60</sup>

73. As with other counter-terrorism measures, preventive action and intelligence-gathering forms a significant part of States' responses to terrorism. In the context of suicide bombings, the issue of a "sleeper" has gained considerable attention. The imagery of persons living just like anyone else, who are educated and well integrated into modern society, and who would suddenly transform into terrorists, has been broadly projected in the debate.<sup>61</sup> These sleepers,

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<sup>55</sup> Ibid.

<sup>56</sup> Diego Gambetta, ed., *Making Sense of Suicide Missions*, Oxford University Press, 2005.

<sup>57</sup> Michael Bond, "The making of a suicide bomber", *New Scientist*, 15 May 2004, quoted in Mia Bloom, "Mother.Sister.Daughter.Bomber: Why women become suicide bombers" *Bulletin of the Atomic Scientists*, November/December 2005, vol. 61, issue 6, pp. 54-62, here at p. 57.

<sup>58</sup> Nasra Hassan writings, e.g. *The New Yorker*, 19 November 2001.

<sup>59</sup> Mia Bloom, op. cit., footnote 57; Rosemarie Skaine, *Female Suicide Bombers*, McFarland, Jefferson, N.C., 2006; Julia Jusik, *Die Bräute Allahs: Selbstmordattentäterinnen aus Tschetschenien*, St. Pölten, 2005.

<sup>60</sup> Audrey Kurth Cronin, "Terrorist and suicide attacks", Congressional Research Service (CRS) Report for Congress, 28 August 2003 p. 12-15.

<sup>61</sup> Sabina Magliocco, "The opposite of right society: Witches, terrorist and the discourse of evil", in R. Bendix and J. Bendix, eds., *Ethnologia Europaea*, "Sleepers, moles and martyrs", vol. 33:2, pp. 13-22, here p. 13; see also the discussion of the concept in Marianne Gullestad, "Mohammed Atta and I: Identification, discrimination and the formation of sleepers", in *European Journal of Cultural Studies*, vol. 6 (4), 2003, pp. 529-548.

as strangers and “the other” and as potential suicide bombers, are subject to broad speculations as to their identity and the motives behind their actions. However, research is still scarce as to the underlying factors which lead individuals to resort to terrorism and particularly suicide bombings. As was demonstrated with respect to profiling, neither social, national, ethnic nor religious background present a basis for predictions of an individual being drawn into terrorism.

### **B. Shoot-to-kill policies**

74. The Special Rapporteur notes that suicide bombings present a particular challenge to counter-terrorism measures, in that they may cause the loss of many human lives and are extremely difficult to predict and prevent. In addition, suicide bombings are an inexpensive form of terrorism, and they may enjoy considerable community support. The organizations behind suicide attacks could not recruit and sustain themselves without acquiescence within the larger society.<sup>62</sup> Whereas recruitment to terrorist organizations can be very aggressive, suicide attackers are mostly volunteers.<sup>63</sup>

75. The Special Rapporteur observes that many States are trying to carve out considerable space for restrictions to internationally recognized human rights and have allowed exceptional measures in their fight against suicide bombings as a particularly difficult form of terrorism. Surveillance techniques, databanks and data collection, tightened refugee and immigration laws and procedures, screening and profiling are some of the counter-terrorism techniques which are also motivated on the basis of preventing suicide bombings. As a fairly large proportion of perpetrators of suicide bombings are women, women have also become the focus of attention in the measures to counter these attacks. The human rights guarantees related to gender in the context of preventing suicide bombings ought to be a source of particular attention of States.

76. The Special Rapporteur is concerned about legal strategies employed by many States, such as Nigeria, Myanmar, Turkey, the United Kingdom and the United States of America to extend the powers of policemen to take action against potential suicide bombers.<sup>64</sup> Several innocent persons have in fact been killed. He reiterates that the use of lethal force by law-enforcement officers must be regulated within the framework of human rights law and its strict standard of necessity.

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<sup>62</sup> See Kurth Cronin, op. cit., p. 8.

<sup>63</sup> Wolfgang Schmidbauer elaborates on this from a psychoanalytical perspective in *Der Mensch als Bombe*, Rowohlt, 2003. See also Cronin, op. cit., p. 6.

<sup>64</sup> Terrorism Act 2006, received Royal Assent on 30 March 2006; USA Patriot Act, of 24 October 2001 (Pub.L.No. 107-56, H.R. 3162), 107th Congress.

77. The Special Rapporteur on extrajudicial, summary or arbitrary executions has, in several of his communications with Governments, drawn attention to the increasing reluctance to respect the right to life as a non-derogable human right.<sup>65</sup> Several Governments have created their own interpretation of what the use of utmost force means. Such invocations as “targeted killing”, or “shoot-to-kill” are used in order to demarcate a new - officially sanctioned - approach to countering terrorism.<sup>66</sup> As noted in 2006 by the Special Rapporteur on extrajudicial, summary or arbitrary executions, human rights law permits the use of lethal force when it is indispensable to save human life. In his communication with Nigeria, this Special Rapporteur stressed that the resulting emphasis should be on proportionality, on the use of lethal force as an absolute last resort, and only “when strictly unavoidable in order to protect life” (see A/HRC/4/20/Add.1). The Government of Myanmar was reminded that “shoot-on-sight policies” are a deep and enduring threat to human rights-based law-enforcement approaches and that law-enforcement officials should “as far as possible apply non-violent means” before resorting to the use of force and firearms.

78. It is the view of the Special Rapporteur on extrajudicial, summary or arbitrary executions that the rhetoric of “shoot-to-kill” should never be used. It risks conveying the message that existing legal standards have been replaced with a vaguely defined licence to kill (E/CN.4/2006/53, paras. 45 and 48). The Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990): succinctly stress the limited role for lethal force in all enforcement operations. These instruments are adequate also in respect of suicide attacks as a form of terrorism. There is no need for new standards in respect of the use of firearms to prevent suicide terrorism. The rhetoric of shoot-to-kill serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law-enforcement officers, endangering innocent persons and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat (*ibid.*, para. 45). Regarding the question of proportionate use of force by law-enforcement officials, see also the report to the General Assembly of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/61/311, paras. 33-45).

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<sup>65</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9: “In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.” Regarding shoot-to-kill policies, see also the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2006/53), paras. 44-54.

<sup>66</sup> See Myanmar’s supposed use of a shoot-on-sight policy in Kayin State against the opposition, or Nigeria’s such policy against the supposed armed robbers in Umahaia in Abia State. After the London metro bombing, the British police shot down an innocent person and reported it as a regrettable security measure error.

### C. Considerations by the Special Rapporteur

79. Upon review of existing research, the Special Rapporteur finds a lack of accurate information on the phenomenon of suicide terrorism. There is a need for Governments to carefully assess both the human rights implications and the effectiveness of their measures to prevent suicide bombings. Profiling of potential suicide bombers on the basis of stereotypical images of marginalized and fanatic persons prone to manipulation creates a risk of discrimination, but may also misdirect efforts to prevent suicide attacks. Research suggests that a typical suicide terrorist does not resemble a murderer or a religious cult member, but is similar to an individual who is politically conscious and could join a grass-roots movement in order to advance something he or she believes in.<sup>67</sup>

80. Terrorist groupings will continue to find recruits as long as they can offer marginalized individuals an illusion of a way out of their desperate situation. Both the countries concerned and other Governments engaged in development cooperation need to enhance the role of women and children, addressing their needs and protecting and promoting their human rights: “The best way to fight the war on terror is to make the terrorist organizations less appealing - to men and to women.”<sup>68</sup> Other means for looking for political and social change have to be made available by the countries concerned and through a human rights-based approach to development.<sup>69</sup>

81. The available evidence suggests that restrictive asylum and immigration laws, profiling practices based on religion, nationality or ethnicity, increased military presence, outsized surveillance of public places, surveillance of telephones, text messages (SMS) and e-mails are inapt and not productive and thus easily disproportionate means of countering terrorism. Suicide bombings appear to be more politically and socio-economically motivated than religiously or ethnically motivated. The situations in which Governments fear attacks, has prompted reactions which clearly do not fulfil the criteria of proportionality. These reactions must be considered as questionable under international human rights law.

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<sup>67</sup> Robert Pape has collected 462 profiles of suicide bombers since the 1980s. See Pape, *Dying to Win*, Random House, New York, 2005 and “The strategic logic of suicide terrorism”, *American Political Science Review*, 97, 343-361.

<sup>68</sup> See Bloom, op. cit., note 57. See also Mia Bloom, “Devising a theory of suicide terror”, in Pape, *Dying to Kill*.

<sup>69</sup> The Council of Europe Committee of Ministers instructed its Committee of Experts for the “European Year of Citizenship through Education” (CAHCIT) to discuss how human rights education could contribute to international action against terrorism. The response was that young people must be equipped with means of playing an active role in democratic life and in the exercise of their rights and responsibilities in the society (paragraph 12 v (e) of the recommendation). See “Combating terrorism through culture”, recommendation 1687 (2004) (Parliamentary Assembly Doc. 10689, 30 September 2005).

82. The United Nations Global Counter-Terrorism Strategy adopted by the General Assembly in its resolution 60/288 of 8 September 2006 includes the following list of conditions conducive to the spread of terrorism: prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance. The strategy calls for action to combat these conditions while it makes clear that none of these conditions can excuse or justify terrorism. The Special Rapporteur echoes these statements and underlines the need to address the conditions mentioned also in order to prevent suicide terrorism.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

##### A. Profiling

83. **Terrorist-profiling practices that are based on “race” are incompatible with human rights. Profiling based on ethnicity, national origin and/or religion involves differential treatment of comparable groups of people. Such differential treatment is only compatible with the principle of non-discrimination if it is a proportionate means of countering terrorism. Profiling practices based on ethnicity, national origin and/or religion regularly fail to meet this demanding proportionality requirement: not only are they unsuitable and ineffective means of identifying potential terrorists, but they also entail considerable negative consequences that may render these measures counterproductive in the fight against terrorism.**

84. **The Special Rapporteur recommends either universal or random security checks as preferred alternatives, instead of measures based on profiling. Universal or random checks are non-discriminatory and at the same time impossible for terrorists to evade, and hence more effective than measures based on profiling.**

85. **To the extent that States are to rely on counter-terrorism efforts based on profiling, the Special Rapporteur recommends they be based on individual conduct, that is, behaviour rather than ethnic or religious characteristics.**

86. **The Special Rapporteur recommends that States establish clear and strict standards as to what factors law-enforcement agents may or may not employ for their search efforts in the counter-terrorism context. These guidelines should make clear that criteria such as ethnicity, national origin and religion may only be used in very limited circumstances: namely, for *descriptive* profiles or where there is specific intelligence suggesting that someone fulfilling these characteristics is preparing a terrorist act. Furthermore, these standards should make clear that any terrorist-profiling practices that involve interference with the freedom of movement, the right to liberty or the right to privacy - regardless of the criteria on which they are based - must strictly comply with the principle of proportionality.**

87. **The Special Rapporteur calls on States to ensure that the use of terrorist-profiling practices by law-enforcement agencies is clearly documented and monitored. Thus, law-enforcement officers should be required to record the stops and searches they carry out for counter-terrorism purposes, including the outcomes of the stops. This data is not**



only crucial in ensuring an effective independent supervision of the counter-terrorism practices employed by law-enforcement agencies but may also be helpful for the internal analysis of the efficiency of these practices. Factors such as ethnicity or religion may be included in these records but only subject to safeguards such as collecting this data from the persons concerned and separately from the original interference.

88. The Special Rapporteur urges States to establish systems of transparent and independent oversight of law-enforcement agencies to monitor and ensure compliance of counter-terrorism practices with human rights standards and operational guidelines. States must also provide effective means of holding law-enforcement agents accountable for any violations of human rights, including when committed in the context of countering terrorism.

89. The Special Rapporteur calls on States to develop and implement a system of training of law-enforcement officials that includes clear instructions as to what factors they may legitimately employ for terrorist profiles as well as a substantial training component on human rights and non-discrimination. Importantly, such training of law-enforcement agents should make clear that profiling based on stereotypical generalizations that certain ethnic or religious groups pose a greater terrorist risk than others is not only impermissible but also ineffective and even counterproductive.

#### **B. Suicide attacks**

90. Suicide attacks as a specific form of terrorism pose significant challenges to counter-terrorism measures that are at the same time effective and compatible with human rights. State responses to the risk of suicide attacks demonstrate in a dramatic way the risks inherent in “profiling”. Combined with shoot-to-kill policies or other forms of relaxing the standards related to the use of firearms, “profiling” can have lethal consequences for totally innocent individuals.

91. The Special Rapporteur recommends scrupulous adherence to and systematic training in existing international standards on the use of firearms by law-enforcement officials. Further, also in the context of preventing suicide attacks, the Special Rapporteur reiterates his recommendation to apply either universal or random security checks, instead of measures based on profiling.

92. The Special Rapporteur stresses that the counter-terrorism measures need to be continuously and carefully evaluated in order to ensure that they do not breach human rights. Further, in the context of preventing suicide terrorism, special attention should be paid to the treatment of women and especially pregnant women and their security and integrity in counter-terrorism measures, as there is a risk that women and especially pregnant women may become targeted by a new wave of counter-terrorism measures.

93. States should develop adequate training for all law-enforcement personnel, including private security agencies, and in this way ensure that human rights guide counter-terrorism measures and not vice versa. Intelligence agencies need urgently to address the complex cultural and socio-economic issues around suicide attacks and terrorism in general.

94. The Special Rapporteur also notes that scientific research on explaining the phenomenon of suicide terrorism is unsatisfactory. More resources should be invested in research on both the conditions conducive to the spread of suicide bombings as well as methods employed by States and other actors to combat this form of terrorism.

95. The Special Rapporteur encourages the attempts by non-governmental organizations that are involved in narrowing the gap between groups that may be tempted to resort to terrorism and majority populations, e.g. in Afghanistan, Israel and Sri Lanka.

96. The Special Rapporteur urges States to engage in global peacebuilding efforts and raise awareness among their populations about existing human rights standards and legitimate methods to react to human rights violations. These efforts include widespread human rights education to all parts of the populations in their territories.

97. Finally, the Special Rapporteur calls upon States to develop their methods of combating the conditions conducive of suicide bombings. This evidently includes measures to ensure that the human rights of all persons are respected, without discrimination.

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