

ADVANCE VERSION

**PRELIMINARY FINDINGS ON VISIT TO UNITED STATES
BY UN SPECIAL RAPPORTEUR
ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM**

25 May 2007

The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr Martin Scheinin, highlights some, but not all, of his preliminary findings during a press conference held in Washington DC.

The Special Rapporteur conducted a 10 day visit to the United States, at the invitation of the Government, from 16 to 25 May 2007. The purpose of the mission was to undertake a fact-finding exercise, and a legal assessment of US law and practice in the fight against terrorism, measured against international law. His conduct of country visits, including that in the United States, is also aimed at identifying and disseminating best practice in the countering of terrorism. Following this visit, a more thorough report, which will become publicly available, will be prepared and submitted to the Human Rights Council, a subsidiary body of the UN General Assembly.

In Washington DC, the Special Rapporteur had meaningful meetings on a specialist level with the Department of State, Department of Homeland Security, Department of Defence, and Department of Justice. He also met with members of Congress and their staff, academics and non-governmental organizations. Mr Scheinin traveled to Miami to observe a day of the trial against Jose Padilla and others. It was disappointing that the Special Rapporteur was not provided with access to places of detention, including at Guantánamo Bay, with guarantees permitting private interviews of detainees. It is a part of the Standard Terms of Reference for all UN Special Rapporteurs that any visits to detention centers involve unmonitored interviews with detained persons. This is a universally applied term of reference which in many parts of the world is essential for protecting individuals against abuse. It would give a wrong message to the world if the Special Rapporteur were to deviate from this standard condition in respect of the United States. The Special Rapporteur therefore hopes that he can soon visit the United States again for the purpose of visiting places of detention, including Guantánamo Bay, prior to the consideration by the UN Human Rights Council of his report on this country visit. That visit should also include observing military commission hearings at Guantánamo Bay.

The Special Rapporteur is deeply mindful of the tragic events of September 11, 2001, as well as preceding acts of international terrorism against the United States, including the bombing of its Embassies in Kenya and Tanzania. He is also mindful of domestic acts of terrorism, including the Oklahoma City bombing. Addressing the situation of victims of terrorism with appropriate compensation and access to healthcare and rehabilitation is an important aspect of a comprehensive strategy against terrorism, and should be seen as a matter of best practice. The Special Rapporteur notes with encouragement the establishment by the United States Government of a process by which the victims of the terrorist attacks of September 11 have been able to seek compensation.

In a world community which has adopted global measures to counter terrorism, the United States is a leader. This position carries with it a special responsibility also to take leadership in

the protection of human rights while countering terrorism. The example of the United States will have its followers, in good and in bad. The Special Rapporteur has a deep respect for the long traditions in the United States of respect for individual rights, the rule of law, and a strong level of judicial protection. Despite the existence of a tradition in the United States of respect for the rule of law, and the presence of self-correcting mechanisms under the US Constitution, it is most regretful that a number of important mechanisms for the protection of rights have been removed or obfuscated under law and practice since the events of September 11, including under the USA PATRIOT Act of 2001, Detainee Treatment Act of 2005, Military Commissions Act of 2006, and under Executive Orders and classified programs.

The Special Rapporteur thus sees his visit as one step in the process of restoring the role of the United States as a positive example for respecting human rights, including in the context of the fight against terrorism. He dismisses the perception that the United States has become an enemy of human rights. It is a country which still has a great deal to be proud of.

The framework of public international law

The Special Rapporteur does not consider the international fight against terrorism as a "war", at least not in other than rhetorical terms. During high-level meetings with Government officials, it has been repeated that the United States sees itself as being engaged in an armed conflict with Al Qaeda and the Taliban, commencing prior to the events of September 11 and continuing today; until the capabilities of Al Qaeda can be so degraded that their conduct can be dealt with through regular law enforcement mechanisms. The United States consequently identifies humanitarian law as the applicable international law to the apprehension, detention and trial of persons detained at Guantánamo Bay. The Special Rapporteur reminds the United States of the well-established principle that, even during an armed conflict triggering the application of international humanitarian law, international human rights law continues to apply. This is a point made clear, for example, by the Human Rights Committee in its General Comment 29, and has been confirmed by the International Court of Justice. The conduct of the United States must therefore comply not only with the Geneva Conventions, but also with applicable international human rights law.

The same bodies, the Human Rights Committee and the International Court of Justice, have also confirmed that human rights, including those enshrined in the International Covenant on Civil and Political Rights (ICCPR), are also legally binding upon a State when it acts outside its internationally recognized territory. The fact that the United States more than 50 years ago, when the ICCPR was being drafted, expressed that it could not be expected to "legislate" for occupied countries, cannot constitute a valid justification to engage extraterritorially in outright human rights violations such as arbitrary detention, torture, or other cruel, inhuman or degrading treatment.

The Special Rapporteur accepts that the United States was engaged in an international armed conflict from the commencement of *Operation Enduring Freedom*, proclaimed as an exercise of self-defense under Article 51 of the Charter of the United Nations, and until the fall of the Taliban regime as the de facto government of Afghanistan. He further accepts in principle that an international terrorist organization, if organized hierarchically as an armed force within the meaning of Common Article 3 of the Geneva Conventions, could be engaged in a trans-border, albeit technically non-international (as not between two States), armed conflict. However, this does not mean that any act of terrorism, or of international terrorism, would constitute an armed conflict.

The Special Rapporteur is aware of the reservations and declarations entered by the United States upon its ratification of the ICCPR and the Convention Against Torture (CAT). Under international law, reservations that are contrary to the object and purpose of a treaty are impermissible. The relevant treaty bodies, the Human Rights Committee and the Committee Against Torture, have requested that the United States withdraw its reservations and declarations relevant to this context. In light of this, the Special Rapporteur sees his mandate as requiring him to address the law and practice of the United States with reference to international treaty standards, without making an assessment of whether its reservations and declarations are permissible.

Guantánamo Bay detainees

The persons detained at the US military facility at Guantánamo Bay have been categorized by the United States as alien unlawful enemy combatants. It must be made clear that this is a description of convenience only without legal effect, since there is no such third category of persons under international law. Those that participate in hostilities are either "combatants", or "civilians" who have participated in hostilities and are thus subject to detention and prosecution. Although combatants who are apprehended during the course of an international armed conflict and detained as prisoners of war will be released at the end of hostilities, this will not be the case for persons who are held as persons suspected of war crimes. The international community has recognized the need to ensure that there is no impunity for those that commit war crimes. While acknowledging this principle, it should also be recognized that the chance of ensuring a fair trial diminishes over time.

In the case of those who have been captured during armed hostilities in an international or non-international armed conflict, but in respect of which there is no allegation of offending against the laws of war, such individuals should be released, or tried by civilian courts for their suspected other crimes. The Special Rapporteur considers that the detention of this group of persons for a period of several years without charge undermines the right of fair trial, and that the United States has thereby placed itself in a position of having to release many of these persons without charge.

There are serious concerns about the ability of detainees at Guantánamo Bay to seek a judicial determination of their status, and of their continuing detention. Upon the arrival of a detainee at Guantánamo Bay, a Combatant Status Review Tribunal is convened to determine whether the detainee is an "unlawful enemy combatant" and whether that person should continue to be detained. This occurs once only, unless new evidence about the person's status becomes available. Added to this, an Administrative Review Board undertakes annual reviews of each detainee's status to confirm whether continued detention is required. As confirmed by the Department of Defense, these are administrative processes, rather than judicial ones. Detainees are not provided with a lawyer during the course of the Combatant Status Review Tribunal hearing. Even more problematic is the fact that decisions of the Combatant Status Review Tribunal and Administrative Review Board are subject to limited judicial review only, meaning that any reference to ordinary courts is limited to the question of whether these bodies acted in accordance with applicable rules of procedure. The most that a reviewing court may do is to order reconsideration of a decision, not release. These restrictions result in non-compliance with the ICCPR which prohibits arbitrary detention (Article 9(1)), requires court review of any form of detention and entailing a possibility of release (Article 9(4)), and provides a right to a fair trial within reasonable time for anyone held as a criminal suspect (Article 9(3) and Article 14(3)). Article 9(4) is also relevant to the removal of *habeas corpus* rights under section 7 of the Military Commissions Act 2006, which purports to expressly deny the jurisdiction of ordinary courts to hear an application for *habeas corpus*.

Closure of Guantánamo Bay

The Special Rapporteur is encouraged by the announcement of the President of the United States that he wishes to move towards the closure of Guantánamo Bay, and urges continued and determined action to that end. The Special Rapporteur has been advised that between 40 and 80 Guantánamo Bay detainees are expected to be tried by military commissions, and that the United States wishes to return the balance of detainees to their countries of origin or, where necessary, to a surrogate country, and that it is conducting negotiations with countries for this purpose. He supports initiatives to return detainees to their countries of origin, but also concludes that although the United States has advised that it will not do so in breach of the principle of *non-refoulement*, the current US standard applied under this principle fails to comply with international law. While international law (primarily ICCPR Article 7) requires that a person not be returned to a country where there is a risk of torture, or any form of cruel, inhuman or degrading treatment, the United States applies a lower threshold of non-return where it is "more likely than not" that a person will be subject to torture as narrowly defined by the US itself. Despite the fact that the United States has not yet abolished the death penalty, the Special Rapporteur emphasizes that the principle of *non-refoulement* is also applicable where a person is liable to the imposition of the death penalty in a jurisdiction where the standards of trial fall short of rigorous compliance with Article 14 of the ICCPR on the right to a fair trial.

The Special Rapporteur emphasizes that the United States has the primary responsibility to resettle any individuals among those detained in Guantánamo Bay who are in need of international protection. He further recommends that other States be willing to receive persons currently detained at Guantánamo Bay. The United States and the UN High Commissioner for Refugees (UNHCR) should work together to establish a joint process by which detainees can be resettled in accordance with international law, including refugee law and the principle of *non-refoulement*. In particular, the Special Rapporteur urges the United States to invite the UNHCR to conduct confidential individual interviews with the detainees in order to determine their qualification as refugees and to recommend to other countries their resettlement. He also urges the United States not to require from receiving countries the detention or monitoring of those returned in cases where such measures would not have basis in international and domestic law.

Detainees in Afghanistan and Iraq

The Special Rapporteur is mindful of the fact that there are in Afghanistan some 700 and in Iraq around 18,000 persons detained by the US. Some of these detainees appear to be held for reasons related to the fight against terrorism, under a legal status analogous to that at Guantánamo Bay. He reminds the United States and other States responsible for the detention of persons in Afghanistan and Iraq that these detainees also have a right to a fair trial within a reasonable time if suspected of a crime or, failing this, to release.

The use of military commissions to try terrorist suspects

By Military Order in 2001, the President of the United States established military commissions for the purpose of trying enemy combatants. The US Supreme Court ruled in 2006, in *Hamdan v Rumsfeld*, that military commissions established under the Military Order were unconstitutional, since they were not established under the express authority of Congress, and that the structure and procedures of the commissions violated both the US Uniform Code of

Military Justice and the four Geneva Conventions. Congress subsequently enacted the Military Commissions Act 2006, which largely reflects the military commission structure under the 2001 Order. The establishment of military commissions is not restricted geographically, permitting any non-US citizen, including those holding permanent resident status, to be subject to trial by military commission if designated as an enemy combatant. Various aspects relating to the jurisdiction and operation of military commissions raise significant human rights concerns, including the jurisdiction and composition of military commissions, the potential use of evidence obtained by coercion, and the potential for the imposition of the death penalty.

One of the principal reasons given by the Government for the establishment of military commissions, rather than the use of courts martial or ordinary courts, has been that those courts do not have jurisdiction over certain crimes which some detainees are suspected to have committed. Three matters of concern are raised by this position. First, the Military Commissions Act of 2006 purports to be a piece of legislation which codifies the laws of war and establishes the jurisdiction of military commissions over war crimes. However, the offences listed in section 950v(24)-(28) of the Act (terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) go beyond offences under the laws of war. The establishment of these offences, and the way in which they are described, therefore means that the military commissions have been given jurisdiction over offences which do not in fact form part of the laws of war and thus may result in civilians being tried by military tribunals, in breach of the established interpretation of ICCPR Article 14. The second problem, concerning these same offences, is that to the extent they were not covered by the law applicable at the time of the commission of the actual acts, the military commissions will be applying criminal law retroactively, in breach of ICCPR Article 15 and universally acknowledged general principles of law. Finally, it appears that the Government's justification for military commissions is incorrect as a matter of fact because ordinary courts martial have had the jurisdiction to try violations of the laws of armed conflict since 1916 under the Uniform Code of Military Justice, and that the nexus between the events of September 11 and US citizens would allow ordinary courts to try other offences such as conspiracy and terrorism. This is borne out by the fact that the 1998 Embassy bombings were prosecuted by ordinary courts, and that Osama bin Laden was indicted for his action in the attacks on the USS Cole by a Grand Jury in 2000. The ability of ordinary courts to hear charges of conspiracy and material support for terrorism is further borne out by the fact that those being prosecuted in *United States v Padilla et al* in the US District Court at Miami are charged with such offences. In contrast, a suspected co-conspirator, who is an alien and currently detained at Guantánamo Bay, is likely to face these charges before a military commission.

As to the composition of military commissions, the Special Rapporteur has serious concerns about the independence and impartiality of the commissions, their potential use to try civilians, and the lack of appearance of impartiality. Whereas military judges in courts martial are appointed from a panel of judges by lottery, judges in a military commission are selected for each trial by the convening authority of military commissions. Although the current convening authority is a civilian and former judge, she is employed by the Department of Defence so that the appearance of impartial selection of military judges and members of individual commissions is undermined. Furthermore, there is no prohibition against the selection of members of a commission who fall within the same chain of command so that more junior members of a military commission, despite any advice to the contrary, may be directly or indirectly influenced in their consideration of the facts. The ability of the convening authority to intervene in the conduct of trials before a military commission is also troubling. The plea agreement in the trial of David Hicks, for example, was negotiated between the convening authority and counsel for David Hicks, without any reference to the prosecuting trial counsel. The involvement of the executive in such matters is troubling.

The Special Rapporteur is concerned that, although evidence which has been obtained by torture is inadmissible, evidence obtained by other forms of coercion may, by determination of the military judge, be admitted into evidence. Two problems arise in this context. The first is that an accused may not become aware of the fact that evidence has been obtained by torture or coercion since the interrogation techniques used to obtain evidence subsequently presented at trial may themselves be classified and thereby outside the knowledge of the accused. The next problem is that the definition of torture for the purpose of proceedings before a military commission is restricted so that it does not catch all forms of coercion that amount to torture or cruel, inhuman or degrading treatment, equally prohibited in non-derogable terms by ICCPR Article 7. It is a clear and established principle of international law that no evidence obtained by torture or cruel, inhuman or degrading treatment may be used for the purpose of trying and punishing a person

The Special Rapporteur is furthermore concerned with the ability of a military commission to determine charges in respect of which the death penalty may be imposed. It is well established that Article 6 of the ICCPR requires that, where a State seeks to impose the death penalty, it is obliged to ensure that fair trial rights under Article 14 of the ICCPR are rigorously guaranteed. Given that any appeal rights subsequent to conviction are limited to matters of law, coupled with the concerns outlined, at the lack of fair trial guarantees in proceedings before military commissions, the Special Rapporteur concludes that any imposition of the death penalty as a result of a conviction by a military commission is likely to be in violation of Article 6.

Finally, the Special Rapporteur notes with concern that the acquittal of a person by a military commission, or the completion of a term of imprisonment following conviction, does not result in a right of release. This further undermines the principles of fair trial and would, if immediate release was not provided in an individual case, involve an arbitrary detention in contravention of Article 9(1) of the ICCPR.

Interrogation of terrorist suspects

As a result of an apparent internal leak from the Central Intelligence Agency (CIA), the media in the United States learnt and published information about "enhanced interrogation techniques" used by the CIA in its interrogation of terrorist suspects and possibly other persons held because of their links with such suspects. Various sources have spoken of such techniques involving physical and psychological means of coercion, including stress positions, extreme temperature changes, sleep deprivation, and "waterboarding" (means by which an interrogated person is made to feel as if they are drowning). With reference to the well-established practice of bodies such as the Human Rights Committee and the Committee Against Torture, the Special Rapporteur concludes that these techniques involve conduct that amounts to a breach of the non-derogable right to be free from torture and any form of cruel, inhuman or degrading treatment. In a meeting with the Special Rapporteur, the Acting General Counsel for the CIA refused to engage in any meaningful interaction aimed at clarifying the means of compliance with international standards of methods of interrogation and accountability in respect of possible abuses. Despite repeated requests on the part of the Special Rapporteur, the CIA did not make themselves available to meet again with him. In light of this lack of cooperation and corroborating evidence from multiple sources, the Special Rapporteur can only conclude that the conduct of his country visit gives further support to the suspicion that the CIA has indeed been involved, and continues to be involved, in the use of enhanced interrogation techniques that violate international law. He urges the United States to ensure that all its officials and agencies comply with international standards, including the ICCPR Article 7 and, in the context of an armed conflict, Common Article 3 of the Geneva Conventions.

The Special Rapporteur welcomes the revision of the United States Army Field Manual in September 2006. Although this Manual clearly states that acts of violence or intimidation against detainees is prohibited, and that interrogation techniques must not expose a person to inhumane treatment, there are nevertheless aspects of the revised Manual (when compared to the earlier version of the Manual) that cause concern. On the positive side, the revised Manual explicitly prohibits the use of waterboarding, something not expressly prohibited before. Nevertheless, a comparison of the two recent versions of the Army Field Manual could leave the impression that it is not prohibited during the conduct of an interrogation to slap a person being questioned, subject a person to extreme changes in temperature falling short of the medical state of hypothermia, isolate a detainee for prolonged periods, make use of stress positions, and subject a person to questioning for periods of up to 40 hours without sleep. The Special Rapporteur concludes that the Manual should be revised to expressly exclude such techniques.

Rendition, and detention in "classified locations"

The Special Rapporteur refers to various sources pointing to the rendition by the CIA of terrorist suspects or other persons to "classified locations" (also known as places of secret detention) and/or to a territory in which the detained person may be subjected to indefinite detention and/or interrogation techniques that amount to a violation of the prohibition against torture, or cruel, inhuman or degrading treatment. These reports suggest that such interrogation techniques may have been used either directly by CIA agents or in their presence. The existence of classified locations was confirmed by the President of the United States on 6 September 2006 when he announced the transfer of 14 "high value detainees" from these locations to Guantánamo Bay. Although the President announced that at that time the CIA no longer held any persons in classified locations, he reserved the possibility of resuming this program. Since that time, one further high value detainee has been transferred to Guantánamo Bay and the whereabouts of many others are unaccounted.

The Special Rapporteur emphasizes that there is a difference between "rendition to justice" (whereby a person is outside formal extradition arrangements handed to another State for the purpose of standing trial in that State, and so long as there is no risk of the person being subjected to torture, or being faced with an unfair trial where the death penalty might be imposed), versus "extraordinary rendition" to another State for the purpose of interrogation or detention without charge. Rendition in the latter circumstances runs the risk of the detained person being made subject to torture, or cruel, inhuman or degrading treatment. Furthermore, the removal of a person outside the legally prescribed procedures of extradition or deportation amounts to an unlawful detention in violation of Article 9(1) of the ICCPR. In addition, the use by the CIA of civil aircraft for the transportation of persons subjected to extraordinary rendition, whether by contract or by the establishment of airlines controlled by the Agency, is in violation of the Chicago Convention on Civil Aviation. Again due to the refusal of the Acting General Counsel for the CIA to engage in any meaningful interaction, and in light of corroborating evidence, the Special Rapporteur concludes that his visit supports the suspicion that the CIA has been involved in the extraordinary rendition of terrorism suspects and possibly other persons. This conclusion is corroborated by the recent findings of the Human Rights Committee and Committee Against Torture in the cases of *Agiza v Sweden* and *Alzery v Sweden* in which Sweden was found to violate its human rights treaty obligations by handing over Mr Agiza and Mr Alzery to CIA agents in the course of their rendition to Egypt.

Immigration and refugee issues

A number of troubling developments in the law and practice of the United States concerns the treatment of immigrants, those applying for visas, and those claiming refugee status. The PATRIOT Act of 2001 amended provisions of the Immigration and Nationality Act, expanding the definition of terrorist activity beyond the bounds of conduct which is truly terrorist in nature, particularly in respect of the provision of "material support to terrorist organizations". The definition captures, for example, the provision by a person of a ransom to have a family member released by a terrorist organization or providing funds to a charity organization that was not then classified as a terrorist organization. The PATRIOT Act provides for the mandatory detention of those suspected of such conduct and a refusal of refugee status for such persons, albeit that the Secretary of Homeland Security has announced a policy of "duress waiver". The Special Rapporteur is troubled by the lack of transparency and judicial remedies in the application of such a waiver to persons some of whom may effectively be victims of terrorist conduct.

Furthermore, the REAL ID Act of 2005, an enactment which ostensibly works to prevent the use of false identification and eliminate identity theft, contains provisions concerning the prevention of "terrorists" from obtaining relief from removal. The Act raises the threshold concerning the credibility of asylum claims, and limits appeal rights for asylum seekers, which is inconsistent with the general principle of providing a claimant with the benefit of the doubt as espoused by the UN High Commissioner for Refugees and applied by many national jurisdictions in asylum cases.

Profiling and community outreach

The Special Rapporteur notes with encouragement and as an element of best practice that the Secretary of Homeland Security has openly stated that the application of law and practice by his department is not to involve racial or religious profiling. The Special Rapporteur nevertheless notes claims that country of origin has been, or may be, used as a proxy for such profiling. It is a significant problem in certain regions of the world that the religious status of persons is wrongly confused with the identification of such persons as potential terrorists. This is a troubling pattern that must be reversed, and the Special Rapporteur recommends that all States, including the United States, ensure that they do not act in a manner which might be seen as advocating this development.

The Special Rapporteur is very much encouraged by the initiation of community outreach programs by various governmental agencies including the Department of Homeland Security (DHS). Both on its own initiative, and in conjunction with civil society, the DHS has initiated a number of programs aimed both at creating a constructive dialogue with communities, including Muslims, and at explaining Islamic faith and practice to members of the public and state employees. The alienation of sections of society, and the treatment of groups in violation of their human rights, has been recognized by the international community as constituting conditions conducive to the emergence of terrorism, or recruitment into terrorist organizations. The Special Rapporteur therefore identifies the efforts to reach out to the community as a best practice in the fight against terrorism.

Surveillance measures

The Fourth Amendment to the US Constitution guarantees the right of US citizens to privacy, albeit that international human rights law accommodates interference with privacy where

necessary for legitimate purposes and implemented in a proportionate manner. The US Supreme Court has held, in the 1972 decision *United States v United States District Court*, that the Fourth Amendment prohibits the surveillance without a warrant of US persons, even where this is carried out for national security reasons. Under US law, the surveillance of US persons (citizens or permanent residents of the United States) can only occur when authorized by the Wiretap Act of 1968, or the Foreign Intelligence Surveillance Act of 1978 (FISA). The PATRIOT Act of 2001 expanded the provisions of FISA so that applications for a surveillance warrant need only establish that foreign intelligence gathering is a significant purpose of the proposed surveillance rather than "the purpose" of surveillance, as previously required under FISA. This regime raises a number of concerns. First is the low threshold in the availability of surveillance warrants, which leaves open the possibility for interference with privacy where this is not necessary for legitimate purposes. Next is the fact that the Attorney General's guidelines on the availability of surveillance warrants for the investigation of terrorist and related offences, or the gathering of related intelligence, is classified. Although the Special Rapporteur has been advised by the Department of Justice that these guidelines comply with international human rights law, there is no way of assessing the accuracy of this position, nor is there any transparency to guarantee compliance with the dual requirements of Article 17 of the ICCPR to not interfere with privacy and to protect against the arbitrary interference with privacy. It is also relevant that the ICCPR obliges States parties to comply with these requirements not only in respect of citizens and permanent residents, but also in respect of all persons within the jurisdiction of the State. It is furthermore troubling that the use of FISA warrants, which have traditionally been treated as an exception to surveillance conducted under the Wiretap Act of 1968, has increased substantially since September 11.

Operating outside the scope of the Foreign Intelligence Surveillance Act was a National Security Agency (NSA) program of secret surveillance without warrant, authorized by an Executive Order of the President. The existence of this program apparently came to light as a result of an internal leak. Whereas it is a crime under US law to undertake surveillance without a court order, the NSA surveillance program was said to be authorized under an inherent right of the President to authorize warrantless surveillance under Article II of the US Constitution. Whether or not that is the case, the use of surveillance techniques without a warrant amounts to an interference with privacy that is not authorized by a prescription by law. The Special Rapporteur therefore concludes that such surveillance is unlawful within the terms of Article 17 of the ICCPR. Following media reports in 2005 exposing the existence of the NSA program, the US President acknowledged the existence of the program and stated that NSA surveillance would in the future be carried out under FISA.

A further development impacting upon privacy rights has been the expanded use of National Security Letters, a form of administrative subpoena facilitating expedited access to records by the Federal Bureau of Investigation and other intelligence agencies. Prior to the PATRIOT Act of 2001, the availability of National Security Letters was restricted to financial records, customer call records, and consumer reports, with the requirement that a certifying officer was satisfied that the subject of investigation was acting on behalf of a foreign power. The Act broadened the type of records accessible under National Security Letters and extended the authority to counter-terrorism investigations. The Special Rapporteur is concerned with the lack of checks and balances in this authority, a matter that fails to properly ensure that there is no arbitrary interference with privacy.

Freedom of the press

The Special Rapporteur takes the view that although the criminalization of incitement to terrorism and other serious crime may fall within the scope of lawful restrictions upon freedom

of expression as guaranteed by ICCPR Article 19, States should be careful not to use vague terms such as "glorifying" or "promoting" terrorism when restricting expression.

The exercise of freedom of expression is a cornerstone of democratic society, and in ensuring accountable governance. It is evident that the freedom of the press, and its ability to bring executive action to light, has been a significant factor in the raising of public awareness and debate on issues central to the promotion and protection of human rights and fundamental freedoms within the United States. The Special Rapporteur is encouraged, in that regard, by the fact that the Government of the United States has not acted to restrain media interest or publication. The free media of the United States itself has in the years following September 11 operated as a device for ensuring transparency and accountability in respect of the adverse consequences upon human rights of counter-terrorism measures undertaken by the Government. This is a feature of best practice which all countries should aspire to.

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